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n starting my year as Chair of the Section, I want, first of all, to note some of the significant accomplishments that capped the last few months of Russ Frisby’s tenure. Those included a very successful 5th Annual Administrative Law and Regulatory Practice Institute held in June, wonderful panel discussions (including a Presidential Showcase program) and Section dinner at the ABA’s Annual Meeting in Chicago, and a detailed compilation of research projects recommended to OMB for work by the now-funded Administrative Conference of the United States (funding for which Russ and various other Section leaders worked so assiduously to secure). In mentioning these accomplishments I have also to thank Jon Rusch, who as Vice-Chair put the Institute together, Chris Franklin and Janet Belkin who were co-chairs of the Chicago extravaganza, and Jamie Conrad and Jeff Lubbers, who, with the help of many others’ suggestions, took responsibility for formulating the final list of ACUS projects.

Meanwhile, three Section publications—Michael Asimow’s Lawyers in Your Living Room! Law on Television, Joe Whitney’s and Lynne Zusman’s Homeland Security: Legal and Policy Issues, and the 4th edition of The Lobbying Manual (now enlarged in subject matter coverage to cover both lobbying law and practice)—all appeared in print within the last few months. And Jim O’Reilly started the process of bringing another book to print, this one aimed at law students and young lawyers to give them a sense of what a career in administrative law can be like and how to pursue it.

And this listing does not exhaust all of the achievements in recent months of Russ’s service as Chair of the Section. To mention one other, there is a new Task Force on Federal Lobbying Reform, co-chaired by Trevor Potter, Joseph Sandler, Charles Fried (of Harvard), and Rebecca H. Gordon, that is now starting to examine various constitutional and other issues that are likely to be the focus of attention the next time Congress turns to review the need for changing the lobbying and election laws.

When I was being interviewed for this job, one of the questions often raised related to the “theme” for my year as Chair. I could at least articulate several potential themes at that time. But in many ways the world in which the Section operates is far different today than when the Section met in Miami in February 2007. On the domestic front alone, the issues of governmental organization and policy to which the Section may offer its expertise and services are manifold: expansion of medical insurance, economic stimulus initiatives, financial regulatory reform, to name only a few of the ones that daily capture headlines. Among all the areas where the Section should be active, no substantive theme readily appears. At the same time, the ABA and our Section (like others) are grappling with resource limitations like none in recent memory. Maintaining membership in the face of diminishing profits and incomes is a real challenge, particularly when other Sections of the ABA are also competing for membership with us.

Accordingly, if there is a “theme” for my year, it has to be this: ensuring that our Section offers our members and prospective members the services and other value that they expect in return for their membership dues—to maintain what we currently offer and significantly improve and expand, within current resources, those services and values. In doing so, we must focus in part on the short term, but we cannot overlook the longer term and the Section’s ability over future years robustly to continue its tradition of service to its members, the profession, government, and the public at large. Accordingly, we will undertake a strategic planning process this year to formulate initiatives that can be implemented quickly as well as those that may take a longer period to unfold.

In terms of specific Section activities in the coming months, you have all by now no doubt received e-mail blasts with regard to the Fall Conference to be held in the Washington Convention Center on October 22-23. Co-chairs of that event, Warren Belmar and Linda Lasley Ford, have put together a superlative menu of programs that should draw large audiences. Other than the traditional winter, spring, and summer meetings of the Section, we are also planning three Institutes, the two traditional ones dealing with Homeland Security and the Rulemaking Process along with a new one focusing on important issues confronting the federal lobbying community. Two webinars are already scheduled for the Fall, one dealing with lobbying the executive branch offered by LOBBYING MANUAL co-editor Rebecca H. Gordon on September 17 at 1:00 p.m. (ET) and the other by Jim O’Reilly and Law Student Division representative Lyn Stewart-Hunter at 4:00 p.m. (ET) on September 24 dealing with Careers in Government and Administrative Law. Hopefully, these are the first of many webinars and teleconferences that we can offer this year to showcase the Section’s expertise and interests.

I could not end this brief summary of Section accomplishments and plans for the future without mentioning our Staff Director, Anne Kiefer, who has done a superlative job over the last year in keeping the Section running on a day-to-day basis as well as providing the detail work that is essential to successful programming and future planning.

I am looking forward to working with all of you in the upcoming months. And, please, if you have suggestions for issues on which the Section should take action or to which it should offer thought-provoking programs, please let me know.
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# Administrative & Regulatory Law News

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The First Amendment is in the spotlight this fall at the Supreme Court, and constitutional lawyers and scholars are paying close attention to the Court's indication that it may reconsider its ruling in a 20-year-old campaign finance case, *Austin v. Michigan Chamber of Commerce*, which upheld the regulation of independent corporate spending in elections. Last spring, the Court ordered briefing and argument on whether Austin should be overruled in a re-hearing of *Citizens United v. Federal Election Commission*, a challenge to a provision of the Bipartisan Campaign Reform Act that prohibits corporate spending for communications that reference a clearly identified federal candidate in the days leading up to an election.

I recently had the opportunity to chat with Ted Olson, former Solicitor General of the United States under President George W. Bush, and counsel to Citizens United, the non-profit organization that brought the case. Throughout his career, Mr. Olson has found himself at the center of high profile and controversial cases arguing the finer points of constitutional law. With the *Citizens United* argument approaching, we discussed his general constitutional practice, his approach to cases that he has argued recently, and the significance of the Court asking that the issues decided in *Austin* be reconsidered.

In your constitutional practice, what cases do you find most interesting? Are you drawn to certain types of cases, such as those that implicate the First Amendment or any other particular issue?

Every constitutional case is fascinating in its own way. Just this year, I’ve argued the *Citizens United* case, which impacts campaign finance and First Amendment rights, as well as *Caperton v. Massey*, which examined the appearance of judicial bias in the context of a constitutional right to a neutral tribunal. I also worked on a case involving an obscure provision of the Constitution, the Tonnage Clause, which limits the ability of port communities to tax the ships that use those ports according to their cargo.

In cases before the Supreme Court, you have the opportunity to make law, so that makes this practice that much more interesting.

How do you identify the federal constitutional claims in the federal administrative area, as in the *Citizens United* case?

In *Citizens United*, we had to consider existing case law, statutes, and the federal administrative regulations in developing the case. We had to balance the considerations of whether to press an issue narrowly or to attack it in toto. If we chose the narrower course, then we could end up in court again in a few years. If we took a broader approach, that makes it harder to win five votes. And you don’t want to risk losing if you can help it.

The Court took an unexpected turn in requesting that the issues decided in the *Austin* case be briefed before it would issue its decision in *Citizens United*. In your years of practice, have you experienced this before, and what is the significance of this request?

This situation does happen once in while. I have worked on two or three cases in which the Court asked for further briefing of an issue before it issued a decision, but it is relatively unusual. When the Court is looking at the possibility of overturning a major precedent, especially regarding a potentially unconstitutional statute, it takes steps to ensure that it hears all sides of an issue so that it can issue a decision intelligently. By requesting briefing of the
Recently you successfully argued and won the Caperton v. Massey case before the Supreme Court. Does the case have any relationship to campaign finance jurisprudence?

Under the facts of that particular case, Caperton was not strictly a campaign finance case, but one involving judges and the potential of bias. The Court has agreed that everyone has a right under the Constitution to a neutral arbiter. This is different than campaign contributions and expenditures on behalf of a Member of Congress, whom voters elect to vote in their interests. Caperton did not question whether a judge could receive political contributions or the benefit of independent political spending and still maintain neutrality, but whether she or he could then sit as an arbiter in a case involving the donor. The Court determined that a judge could not avoid the appearance of bias in that situation.

You have been credited with crafting the arguments that held the day in Bush v. Gore. Can you explain how you and your team developed the constitutional claim?

In Bush v. Gore, we approached the case by asking if the rules regarding how to vote properly changed from when the vote was cast to when the vote was counted, did that constitute a violation of the Equal Protection and Due Process clauses? Using common sense, it seemed obvious that such an outcome just wasn’t right. For example, in a football game, what counts as a touchdown at the beginning of the game should count as a touchdown at the end of the game, with the same number of points awarded. By analogy, rules regarding vote counting should be enforced, not changed halfway through the process. We analyzed what the Equal Protection and Due Process clauses actually meant in their practical application, and we framed the constitutional argument in similar terms.

Recently, you joined forces with your former Bush v. Gore opponent, David Boies, to challenge California’s Amendment 8. Can you tell us about that experience?

The California challenge to Proposition 8 raises Due Process concerns, and I felt that it was wrong for California to declare that it was required to treat its citizens equally with regard to sexual orientation [in the California Supreme Court’s decision of In re Marriage Cases], and then to withdraw that declaration with the passage of Proposition 8 in the 2008 election. I thought it would be helpful to the issue if David Boies and I collaborated so that people wouldn’t think of the issue as Republican vs. Democrat but as lawyers arguing a constitutional issue on behalf of a client. This is an issue of peoples’ rights, and all people should be treated with dignity and respect. I wanted to send a signal that this is a constitutional, and not partisan, issue.

How did your career in appellate litigation prepare you for your role as Solicitor General?

My position as Solicitor General became an extension of my previous appellate experience, with the added responsibility of managing the scope of appellate work across the federal government. In any particular case, potential conflicts could arise between the positions of the U.S. Trade Commission on an issue, as compared to the interests of the Federal Communications Commission. My job was to reconcile the interests of the various government agencies and decide which course of action was in the best interest of the United States. That determination might be consistent with an agency’s position, or it might not.

What advice do you have for law students and young lawyers who are interested in a career in appellate litigation?

I can only speak from my own experience, but I believe that working for a law firm with a significant client base offers great opportunities for young lawyers to be exposed to trial work and appellate litigation. It’s ideal to have solid trial experience to develop as an appellate lawyer, with a focus on trial technique and motions practice, and especially a familiarity with filing motions to dismiss. Being in the right place when appellate work arises is also important. Working at a larger law firm affords those types of opportunities.

In developing a constitutional practice, lawyers should seek cases involving a variety of constitutional issues, such as property rights, the First Amendment, freedom of speech, and freedom to assemble, among others. I’ve worked on a number of interesting media cases involving outdoor advertising, such as billboards, that involved property rights and the First Amendment.

Attorneys should also keep an eye on opportunities in the government, such as the United States Attorneys’ office and the Department of Justice, where there are lots of opportunities to do appellate work.

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The Term of Federalism

By John F. Cooney

The Supreme Court recently issued four decisions that addressed the authority of the states in our political system. Two cases held that states were not preempted from applying their laws to provide consumers with a greater degree of protection than the federal agency with jurisdiction was prepared to give. Two other cases considered the proper duration of a federal remedy to cure prior violations of federal law and the circumstances under which federal controls over core state functions must be discontinued due to changes in the underlying facts.

The novel feature of this term was that in three of the cases, the Court’s liberal members invoked federalism principles in a manner that respected the rights of the states. At the same time, the Obama Administration showed concern with recognizing the authority will not result in denial of minority rights.

The Preemption Decisions

*Wyeth v. Levine,* 129 S. Ct. 1187 (2009), involved a state products liability action brought by a consumer who lost her forearm due to administration of a drug through a technique whose risks were not disclosed on its label, which had been approved by the Food and Drug Administration. The manufacturer argued that the Food and Drug Act preempted the lawsuit. It relied heavily on the FDA’s position that Congress had granted it exclusive authority to determine the risks that must be disclosed on a drug’s label and that state courts could not consider damages actions based on other risks not addressed on the label. Justice Kennedy joined the four liberal members of the Court in rejecting the preemption claim and holding that state courts may entertain failure-to-warn claims that the FDA sought to preclude. The majority found that Congress had long been aware that injured consumers sought redress through state court damages actions and that it had intended to prevent them from relying on state law causes of action, it would have done so explicitly.

In *Cuomo v. Clearing House Association,* 129 S. Ct. 2710 (2009), the Attorney General of New York sought to investigate possible racial discrimination in mortgage lending by several national banks. The state law was identical to the federal fair lending statute, so the issue of conflict preemption was not presented. The National Bank Act provides that “[n]o national bank shall be subject to any visitorial powers except as authorized by federal law.” The Comptroller of the Currency argued that in adopting this provision in 1864, Congress had categorically prohibited the states from enforcing their consumer protection laws against national banks. The four liberal Justices joined Justice Scalia in holding that by granting the Comptroller exclusive “visitorial powers,” Congress had not expressly preempted the states from reviewing documents that the Comptroller might review in assessing the banks’ safety and soundness or from enforcing their anti-discrimination laws. The majority distinguished between the “sovereign-as-supervisor,” where the government exercises administrative powers to inspect bank records without obtaining a court order; and the “sovereign-as-law-enforcer,” where the government exercises compulsory process through formal court procedures. Based on this difference, the majority held that New York could obtain compulsory process and enforce its fair lending law against the national banks in its capacity as “sovereign-as-law-enforcer” provided that it acted through a lawsuit and not through the administrative subpoena that the New York Attorney General had employed.

The Federal Remedy Cases

Vigorous disagreements about application of federalism principles often have arisen in the context of federal remedies that control functions of state and local governments to ensure their compliance with federal constitutional or statutory prohibitions against discrimination. In the last week of June, the Supreme Court issued two decisions that addressed whether federal restrictions over core state functions had outlived their justification and the time had arrived to return control to the states’ normal political processes.

In *Home v. Flores,* 129 S. Ct. 2579 (2009), the Court considered when changes in circumstances justify reexamination of federal injunctions entered in “institutional reform litigation,” cases that challenge a state’s failure to comply with federal laws governing delivery of public services such as education or health care. For nine years, federal district court decrees have governed the English language-learner program in Arizona public schools, thereby dictating the state’s budget priorities and restricting its ability to set educational policy. One group of Arizona officials, including leaders of the legislative branch, sought relief from those orders on the ground that circumstances had changed and that their continued enforcement was now detrimental to the public interest. Other State officials, including the governor, defended the decrees. By a vote of 5 to 4 with the four liberal Justices dissenting, the Court held that the lower courts should consider whether the injunctions should be modified. The majority opinion drew a roadmap for state governments to follow in seeking relief from federal court orders in institutional reform cases.

The majority emphasized that ongoing enforcement of an injunction must be supported by a continuing violation of federal law. It recognized that a federal

continued on next page
court order mandating increased appropriations for one program results in a forced allocation of resources away from others. The majority also emphasized the risk that an injunction could be used by program supporters to lock their policy preferences into law and bind their successors and that a court’s failure to consider changed circumstances could inadvertently insulate those policy choices from review by their successors in office, thus frustrating the democratic process. This concern was manifested by the division among current Arizona officials concerning whether the provisions of the court orders should remain in force.

The concern with continued imposition of a federal remedy after the underlying facts had changed also animated the most significant federalism decision of the Term, Northwest Austin Municipal Utility District No. One v. Holder, 129 S. Ct. 2504 (2009). The case addressed the continuing constitutionality of Section 5 of the Voting Rights Act, a statutory remedy to prevent further violations of the Fifteenth Amendment. Section 5 requires federal preclearance for all changes in election procedures by every jurisdiction in a covered state with a history of racial discrimination in voting. In reauthorizing the law for 25 years in 2006, Congress provided that a state is covered by Section 5 if it had used a forbidden test or device to disenfranchise voters in 1972 or had less than 50% voter registration or turnout in the Nixon-McGovern election. This standard makes nine states, primarily in the south, and parts of five other states subject to special federal controls over the core function of voting.

Eight Justices, including the four liberals, agreed that the current burdens imposed by Section 5 must be justified by current needs, and not by past successes. They recognized the historic role the Voting Rights Act had played in combatting racial discrimination. At the same time, the eight were concerned that the coverage formula in Section 5 is based on facts that are 37 years old. It does not account for the significant changes in conditions that have occurred since 1972, especially in the southern states, or consider that the evils addressed by Section 5 may no longer be concentrated in the jurisdictions singled out for special federal controls. Since the Court could not change the trigger date established by Congress in the coverage formula, it faced an unattractive choice between holding Section 5 unconstitutional or sustaining a prophylactic federal remedy that is supported by relatively little evidence of current discrimination in many covered jurisdictions.

The majority ultimately decided not to address the constitutionality of Section 5, but rather to interpret broadly a statutory bailout mechanism that allows individual jurisdictions to petition for relief from the preclearance obligation. The significance of the decision, however, is that eight Justices put Congress on notice that this pillar of the civil rights revolution might subsequently be found unconstitutional if the coverage formula is not updated to fit more closely with current facts that might justify continuing federal control over voting in the covered states.

**Parallel Executive Branch Actions**

The Obama Administration has invoked federalism principles to protect states’ independent authority to enforce their consumer protection laws in the face of rules issued by the cognizant federal agency that purport to prohibit state involvement in an area. In May, the President issued a Memorandum to agency heads which recognized that “[t]hroughout our history, State and local governments have frequently protected health, safety, and the environment more aggressively than has the national Government.” “Preemption,” Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 24,693 (May 22, 2009). He instructed his appointees that they should not adopt rules purporting to preempt State actions to protect their residents absent clear statutory authority and should review all rules with preemptive effects issued in the last 10 years to ensure that they were lawful.

In late June, as part of its financial reform plan, the Administration released a proposal to create a Consumer Financial Protection Agency. One part of its bill would repeal existing laws under which federal bank supervisory agencies claim that states are expressly preempted from enforcing their consumer protection laws against federally-chartered institutions. Another provision would eliminate conflict preemption claims, by providing that a state law would not be preempted merely because it affords consumers a greater degree of protection than was provided under the counterpart federal law. The Administration thus has supported independent state enforcement authority, at least as long as its level of protection exceeds the federal minimum. It thereby endorsed the principle that “a single courageous state may . . . try novel social and economic experiments without risk to the rest of the country,” id., and identified conflict preemption as a potential barrier to accomplishment of that goal.

**Implications for State Authority**

This cluster of Supreme Court decisions in 2009 represents an important step toward recognition of a broader state authority in their relations with the federal government. None of the cases reflects a significant doctrinal development; the majority in each case quoted from prior decisions that articulated the same points. The novel feature was that all members of the Court, conservative and liberal alike, were comfortable in drawing xenofederalism considerations to justify their conclusions. Moreover, the Executive Branch was moving in the same direction at the same time.

Throughout the era of Jim Crow laws, the civil rights movement, and the expansion of anti-discrimination principles beyond race, consideration of the role of the states in our political system has been saddled with concerns that recognition of their authority might in practice result in renewed discrimination. Taken together, however, these events in the spring of 2009 suggest that federalism is in practice silently receiving broader acceptance as a neutral principle of government, even from parts of the political spectrum that historically have been suspicious of state authority. This development offers the tantalizing possibility that in the future, it may be possible to address the proper role of the states without the shadow cast by the legacy of racial and ethnic discrimination. ☑
A Chance for a Second Look: Judicial Review of Rulemaking Petition Denials

By Jeffrey A. Rosen*

Introduction
Two years ago the Supreme Court created a potentially new opportunity to use petitions for rulemaking, including petitions to deregulate or for regulatory simplification, to induce desirable agency action when existing federal statutes would support the requested action. Filing a persuasive petition for rulemaking requires a substantial commitment of time and money, and the incentive to file has historically been hampered by the leeway administrative agencies have had to deny such petitions for almost any reason. Although some courts have traditionally recognized a limited formal right to judicial review of agency decisions not to institute rulemaking proceedings, that right had been largely illusory because of the extreme deference courts were giving agencies. However, the Supreme Court’s decision in Massachusetts v. EPA, 549 U.S. 497 (2007), rejected assertions of non-reviewability and made the right to judicial review under the Administrative Procedure Act (“APA”) much more than a mere formality. The Massachusetts decision represents a potentially powerful tool for individuals and organizations trying to shape the administrative rulemaking process. However, in the two years since the decision was handed down, only a handful of challenges to agency denials of petitions for rulemaking have been filed. Most of these infrequent judicial challenges were brought by environmental advocacy groups, and none were filed by businesses. The potential of the Massachusetts decision for increasing private sector participation in the regulatory process remains largely untapped.

History and Context
Historically, rulemaking petitions have been filed by advocacy groups and NGOs, and occasionally by state governments and business groups, but they have been relatively infrequent in the aggregate. Filing a petition for rulemaking has often been viewed as a symbolic or futile endeavor. Section 553(e) of the Administrative Procedure Act (APA) requires that every agency adopt a process by which individuals and organizations can petition for the issuance, amendment, or repeal of a rule. However, the APA only requires that the agencies receive rulemaking petitions. Each agency is free to adopt its own procedure for processing these petitions. It can take an agency months and even years to reach a final decision on a petition for rulemaking. Often, when the petition is denied, there is no appeals process within the agency. Initially, it was not clear that denied petitioners had any right to judicial recourse. Before Massachusetts, the Supreme Court had not decided whether or to what extent it was appropriate for a court to review an agency’s decision to deny a rulemaking petition. Immediately after the APA was adopted, some commentators assumed such review was completely precluded. In the 1980s, the D.C. Circuit rejected this position and held that an agency’s decision to deny a rulemaking petition was subject to limited judicial review under the default standard of the APA: arbitrary and capricious review. WWHT, Inc. v. FCC, 656 E2d 807 (D.C. Cir. 1981).

However, the next 25 years demonstrated that in practice lower courts would use an especially lenient form of arbitrary and capricious review, overturning an agency’s decision not to institute a rulemaking proceeding “only in the rarest and most compelling of circumstances.” EMR Network v. FCC, 391 F. 3d 269, 273 (D.C. Cir. 2004). Courts said review must be very limited because decisions not to regulate are often made based upon factors that are not susceptible to judicial review. Rulemaking proceedings require agencies to spend resources, resources are scarce, and agencies rather than courts should be making prudential decisions about resource allocation. There were only rare cases where lower courts actually overturned an agency’s decision not to institute rulemaking proceedings. These cases generally fell into two narrow categories: those where there was a clear error of law and those where there was a fundamental change in the factual premises previously considered by the agency.

Although the Supreme Court had not weighed in on the D.C. Circuit’s approach before Massachusetts, its decisions in related areas suggested the Court would adopt a similarly deferential, or perhaps wholly preclusive approach to judicial review. First, in Heckler v. Chaney, 470 U.S. 821 (1985), the Supreme Court held that agency non-enforcement decisions are presumptively nonreviewable. Two of the central rationales for the decision in Heckler— that a decision not to act may reflect a judgment call about the allocation of resources and that judicial review is less necessary when an agency has not acted coercively— seemed equally applicable to agency decisions not to institute rulemaking proceedings. Second, in Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842–45 (1984), the Supreme Court held that, to the extent that the intent of Congress is not clear, courts must accept an agency’s reasonable interpretation of the statute it is charged to administer.

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It seemed reasonable that, because the Court was giving agencies considerable deference when determining what kind of action a statute’s language required the agency to take, it would give the agency comparable or greater deference in determining whether a statute required the agency to act at all.

Massachusetts v. EPA: Reining in Agency Discretion over Rulemaking Petitions

It was not until 2007 that the Supreme Court finally weighed in on the issue. Contrary to the expectations of those who believed it would adopt a deferential approach, in Massachusetts the Supreme Court overturned the EPA’s decision to deny a petition for rulemaking. Despite undertaking a searching and aggressive review of the agency’s rationales, Justice Stevens’ 5–4 majority opinion referenced the language of D.C. Circuit precedent, rhetorically stressing that the available review was constrained. However, in practice, the Court carefully parsed the agency’s reasoning, engaged in probing judicial review, and rejected rationales that had been commonly used by agencies and accepted by courts in the context of agency decisions not to regulate.

In 1999, a coalition of 19 groups had filed a petition for rulemaking with EPA, asking the agency to regulate greenhouse gases from motor vehicles under section 202(a) of the Clean Air Act (CAA). EPA published a notice in the Federal Register soliciting comments. After receiving over 50,000 comments, EPA denied the petition. 68 Fed.Reg. 52922 (Sept.8, 2003). EPA gave two reasons for denying the petition. First, EPA stated it had no authority to regulate greenhouse gas emissions under the CAA. Second, EPA said that, even if it did have such authority, it would exercise its discretion not to regulate for a number of reasons. Notably, this second reason had been developed across two separate administrations. Although EPA Administrator Carol Browner during the Clinton Administration had claimed that EPA had authority to adopt greenhouse gas regulations under the CAA, the Browner EPA had declined to initiate regulatory rulemaking proceedings and had assured Congress that as a matter of policy discretion it did not plan to regulate such carbon dioxide. This policy discretion was invoked by both the Clinton and Bush Administrations in succession as grounds not to commence rulemaking proceedings under the CAA.

In response to the EPA denial, environmental advocacy groups, joined by twelve states and several cities, sought judicial review in the Court of Appeals. The D.C. Circuit upheld EPA’s denial of the petition. 415 F.3d 50 (D.C. Cir. 2005). But the Supreme Court granted certiorari and reversed by a 5–4 majority. 549 U.S. 497 (2007).

The Supreme Court gave two reasons for overturning EPA’s decision to deny the rulemaking petition. First, the Court said that the EPA was not statutorily prohibited from regulating greenhouse gas emissions. The Court decided that the EPA’s contrary conclusion had simply been wrong as a matter of statutory interpretation. This part of the opinion has garnered wide attention because it represents a significant intervention by the Court into global warming public policy, but it did not involve any new limits on agency discretion.

Second, the Supreme Court said the reasons the agency had given for declining to regulate—including its policy discretion—were inadequate. This aspect of the decision represents a significant departure from the traditional lower court approach. EPA had justified the denial by relying on a long list of policy considerations—ranging from a desire to avoid piecemeal regulation to concerns about interfering with the President’s foreign policy initiatives—that led the agency to believe it would be unwise to regulate at that time, even if it did have the statutory authority to do so. The Court proceeded to parse these justifications in great detail and ultimately rejected each of them. Relying on an aggressive interpretation of the CAA, the Court presented a very narrow view of what the agency could consider in response to a petition for rulemaking: insisting that an agency must “ground its reasons for action or inaction in the statute”. Here, the Court said any EPA decision to deny a petition for rulemaking must be based exclusively on statutory factors that “relate to whether an air pollutant causes, or contributes to, air pollution which may reasonably be anticipated to endanger public health or welfare.” Policy, resource, and other discretionary considerations invoked by the agency were deemed inappropriate. Because the policy reasons that EPA had offered did not relate to the statutory text, the Court said EPA’s rejection of the rulemaking petition was inconsistent with the APA.

What is remarkable about this second aspect of the Massachusetts decision is that agencies had routinely relied on prudential factors akin to those relied on by EPA when denying petitions for rulemaking. While the majority argued that its approach was based on the language of the CAA, Justice Scalia’s dissent forcefully argued that result was not dictated by a traditional approach to statutory interpretation. Justice Scalia conceded that the CAA required that, once the agency instituted rulemaking proceedings to decide whether to regulate a particular substance, it could only consider factors relevant to the statutory “endangerment” standard. However, Justice Scalia pointed out that the CAA says nothing about the reasons for which the agency may decline to make a judgment. In Massachusetts the Court took the standard the EPA was required to use during rulemaking proceedings and required it to use that standard to decide whether to institute rulemaking proceedings in the first place.

The Supreme Court did leave open the possibility that the EPA could provide some “reasonable explanation” for why it did not want to make an endangerment determination. But the Court suggested that EPA would need to present a reason it could not make a statutory endangerment finding, rather than the prudential and resource-based policy reasons why it would prefer not to do so. The Court’s willingness to apply a statutory standard aggressively to rein in an agency’s ability to rely on policy considerations in denying a petition for rulemaking was novel, and, if adhered to in the future, it provides a potentially significant argument for parties hoping to compel agency action.
New Opportunities for Review

Read for all it is worth, Massachusetts means that parties can now argue that courts must look carefully at the reason agencies give for declining to institute rulemaking proceedings to see if they are consistent with standards agencies are required to apply once rulemaking begins. See Kathryn A. Watts & Amy J. Wildermuth, Massachusetts v. EPA: Breaking New Ground on Issues Other Than Global Warming, 102 NW. U. L. REV. COLLOQUIY 1, 11 (2007) (predicting this aspect of the decision would have “long-term implications for administrative law”). Some have questioned whether the majority in Massachusetts simply embarked on a “one-off” act of judicial activism because of the particular policy issues involved, and will not provide similarly searching judicial review when other rulemaking petition denials are challenged, but there is not yet sufficient reason to take such a cynical view of the Court’s work.

Since the Massachusetts ruling in April 2007, there have been only a few cases where any courts have reviewed agency decisions to deny a rulemaking petition. See, Defenders of Wildlife v. Guitierrez, 532 F.3d 913 532 (D.C. Cir. 2008); Spano et al. v. Nuclear Regulatory Commission et al., 2008 WL 4280329 (2d Cir. Sept. 19, 2008); DiGiovanni v. FAA, 249 Fed. Appx. 842 (2d Cir. October 2, 2007); Fund for Animals v. Norton, 512 F. Supp. 2d 49 (D.D.C. 2007). In light of Massachusetts, this very small number of cases is somewhat surprising. On the other hand, the filing of rulemaking petitions appears to have been relatively infrequent, and parties appear not to be aggressively arguing for heightened scrutiny. However, none of the scant cases decided thus far has presented a good vehicle for exploring the boundaries of the Supreme Court decision. Thus, the willingness of lower courts to mimic the Supreme Court’s aggressive scrutiny of an agency’s rationales for declining a rulemaking petition fundamentally remains to be explored, as does the Supreme Court’s own consistency in applying the same level of scrutiny.

Have agencies adjusted their own approaches to responding to rulemaking petitions? It is difficult to determine. There is a lack of governmental transparency about the number of petitions for rulemaking denied each year and the precise reasons why those petitions are denied. Perhaps because of the wide procedural discretion afforded by section 553(e), no uniform system for publication has been adopted. Some agencies publish denials in the Federal Register, some make them available on their websites, and some appear not to publish them at all. This lack of comprehensive and readily accessible information perpetuates the conventional wisdom that agencies have plenary control over rulemaking petitions.

Nonetheless, a casual examination of the available data makes at least one thing clear: many organizations could take greater advantage of this new tool established in Massachusetts to challenge the reasons their rulemaking petitions were denied. Since Massachusetts was decided, there have been twenty-seven (27) notices published in the Federal Register announcing denials of rulemaking petitions. Private parties sometimes perceive rulemaking petitions as a tool mostly for Washington advocacy groups and NGOs, which exist largely for the purpose of influencing government action and have relatively large resources for that purpose. That perception may not be completely erroneous, as two-thirds of the 27 Federal Register denials involved petitions from such groups. What is remarkable, however, is that even as to the one-third of the petitions that came from trade groups and similar petitioners, not one of those challenged the denial of the rulemaking petition in court.

Conclusion

Massachusetts may present a way for petitioners, who invest the resources to file thoughtful petitions for rulemaking only to have them casually denied, to get their petitions a second look in court. Although a few lower court decisions have not yet embraced the aggressive scrutiny applied by the Supreme Court in Massachusetts, this may be because litigants have not yet created suitable opportunities to test the impact of that decision. Rejected petitioners should look carefully to see whether the reasons an agency gives for denying their petitions are consistent with relevant statutes. This tactic need not be monopolized by advocacy organizations attempting to add new regulatory requirements. Massachusetts also creates an opportunity for judicial review of petitions to simplify rules, or petitions to achieve regulatory objectives in less costly ways, for example, if supported by statutory text. If Massachusetts is applied in a manner similar to the Supreme Court’s own exacting review, petitions regarding rulemaking could become a significantly more important tool for parties trying to shape the regulatory environment, with the ability to obtain judicial review when appropriate.
James Madison Would Not Litigate FOIA Disputes: Fixing FOIA through ADR

By Michael Bekesha*

In 1822, James Madison wrote, “A popular Government without popular information or the means of acquiring it is but a Prologue to a Farce or a Tragedy or perhaps both. Knowledge will forever govern ignorance, and a people who mean to be their own Governors, must arm themselves with the power knowledge gives.” Almost two-hundred years later, the federal Freedom of Information Act (“FOIA”) attempts to arm the American people with the means to avoid such tragedy. However, FOIA falls short. Estimates indicate that government agencies, as a whole, grant less than forty percent of all requests during a given year. Although there is a presumption that agency records are accessible to the people, Americans generally believe that the federal government is secretive.

As currently written, FOIA enables unsatisfied requesters access to the courts to remedy their disappointment. However, litigation often results in nothing more than long delays and high costs for the requester because courts, more likely than not, defer to an agency’s determination. The reality of the current situation is that the American people do not have the means to acquire the information necessary to avoid Madison’s concern. However, a solution may exist. This article analyzes whether alternative dispute resolution could efficiently and effectively resolve FOIA disputes by cutting delay, preventing significant cost, and improving decision-making quality found in the current system.

The Flaws of FOIA

Although flaws exist in how agencies act upon receiving a FOIA request, this article solely addresses those disputes arising after final agency action. Once the head of the agency makes a determination on an administrative appeal, an unsatisfied requester may file suit in federal district court to compel the agency to produce any record improperly withheld. In doing so, the requester is subject to the traditional, institutional concerns of delay, cost, and decision-making quality.

Similar to any federal lawsuit, FOIA litigation usually takes longer than the requester desires. The delay may result from a variety of reasons. Regardless of the reason, delays are problematic because all information is time-sensitive. Although some requests may be more time-sensitive than others, most individuals request records with the intention of using the records for a specific immediate need.

Whether the requester is a journalist with a filing deadline or an individual curious to discover how the government spends tax dollars, the requester has a statutory right to promptly receive such information. If an agency denies the request, the requester may exhaust all administrative remedies, file a civil action, and perhaps eventually succeed at gaining access to the records. However it is more than likely that the requesters desired time frame will elapse. More bluntly, the requester often will no longer care about the content of the documents.

Because of the length of the process as well as general court costs, FOIA litigation forces requesters to incur extensive legal expenses to pursue their claims. Such fees and costs will not be recoverable if the government succeeds at defending its action. The mere possibility of high expenditures without reimbursement deters many requesters from pursuing their claims. FOIA litigation, as is the norm with most judicial proceedings, is a highly expensive way to resolve a dispute.

The court will reach a resolution because it has to, but the quality of the decision may not be the strongest possible for a variety of reasons such as generalist judges or the specificity of the subject matter. Although there is no one reason for such complaints, many requesters are unhappy with the judicially-imposed resolution. One reason for such sentiment probably stems from the nature of the dispute and not necessarily the findings of the court. Unlike most litigation, one party always remains in the dark: the agency knows the content of the requested records; the requester does not. Because of this, a requester never really has an opportunity to present a case based on all the facts; a requester can only argue what the requester thinks is in the documents and why the requester thinks the agency should produce those documents. However, there is a possibility that what is actually in the documents may be different from what the requester believes is in the documents. Even if the court makes the proper decision, the requester may be unsatisfied because the requester may never know the content of the documents or what went into the judge’s decision-making.

Administrative Alternatives for Handling FOIA Disputes

Contrary to the litigation-only Federal FOIA, the Connecticut and New York legislatures have established two distinct administrative alternatives for handling FOIA disputes. Connecticut has created an administrative agency with adjudicatory and enforcement powers. New York, on the other hand, has designed a system in which an agency has advisory powers.

The Connecticut Freedom of Information Commission (“the Commission”) possesses powers that include substantial adjudicatory and enforcement authority. Once an agency denies a request, a requester has thirty days to appeal the denial. The appeal consists of a hearing before the Commission, and the agency has the burden of persuasion to demon-

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In the end, the Committee does not have enforcement or adjudicatory authority and can only suggest how an agency or a requester should proceed.

Fixing Federal FOIA

Based on the belief that the status quo was not getting the job done, Congress passed the Openness Promotes Effectiveness in Our National Government Act of 2007. The legislation created the Office of Government Information Services within the National Archives and Records Administration. Pursuant to statute, the Office must take a more active role in monitoring administrative agencies by reviewing their policies and procedures, conducting audits, and recommending policy changes. Moreover, the Office may offer mediation services to resolve disputes as well as issue advisory opinions. However, the Office is barely up and running as its first head was not appointed until June 10, 2009. Although it appears as though the Office will be very similar to the New York Committee on Open Government, it remains to be seen how it will affect federal FOIA practices.

Regardless of when the Office becomes actively functioning, the question remains: should FOIA related disputes be resolved by a binding, adjudicative body, or should participants receive guidance from an advisory board? With the creation of an adjudicative board, FOIA disputes would be removed from the jurisdiction of the courts and placed in the hands of a FOIA-dispute specialist. Adjudication maintains the necessary and important third-party neutral. Besides the third-party neutral, the rest of the process would be flexible and determined by the parties. Although the dispute resolution process would be mandatory, the parties would have to agree to the specifics. The complexity of the case would dictate whether one member of the adjudicative board or the entire board would hear the dispute. All parties would have the opportunity to present information, and the Federal Rules of Civil Procedure would not apply. Instead, the parties would be able to confer and decide between themselves what rules will govern their specific dispute. The neutral – whether a panel or an individual – would hear testimony, arguments, review the relevant documents, and act as fact-finder and law-applier. Moreover, if the requested records are time sensitive, the neutral would be able to hear a dispute more speedily than a court. The neutral, after such proceedings, would render a decision and provide the parties with specific facts and findings. These findings would be binding on the parties. If the parties disagreed with the adjudicative board’s findings, a party would be able to seek review in a United States Court of Appeals. Therefore, the ultimate threat of litigation would remain.

Such a procedure would allow for more efficient and effective decision-making. The neutral would have the requisite knowledge and expertise to efficiently handle the fact-finding and law-applying aspects of the dispute. The adjudicative body would be an independent pair of eyes and would not create policy. Whereas a requester often does not trust the litigation process, in a less formal proceeding, the neutral would explain the process and how a decision will be reached.

On the other hand, the adjudicative dispute resolution model maintains the major FOIA flaw of being an after-the-fact, adversarial process. Since a FOIA dispute is a discrete contest in which the outcome is either an agency unwillingly provides documents or a requester does not receive desired documents – one party will win and the other will lose. For this reason, a FOIA dispute may not be the most ideal conflict for adjudicative dispute resolution. The relationship – or more realistically the divide – between the parties, by the time of final administrative action, is beyond repair. Parties have exerted time, money, and energy, and they have most likely developed an “us versus them” mentality. It appears as though there would be very little room for the adjudicator to reach a solution with the out-of-the-box ideas that alternative dispute resolution encourages.

Although a non-judicial, adjudicative process would be an improvement on the status quo, an advisory board could potentially prevent FOIA disputes from reaching the above-described “no-return” stage. In examining the New York system, continued on page 14
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The advisory body would have two functions: 1) assist an agency with deciding what needs to be produced; and 2) assist a requester with narrowing a request or explain why the requester does not have a right to a specific document. Moreover, the board would be able to audit the agency to see how well it is complying with FOIA and assist the agency in improving its internal procedures.

The concerns that the federal government is too large and handles too much sensitive material for either State's system are in the author's opinion overblown. Although federal agencies are larger than state agencies in number and size, the independent federal commission would simply have to be larger than those commissioned in the states and need time to develop. However, over time such an agency would mature. Moreover, that the federal government deals with more sensitive documents than the states is but one more reason why an advisory board is desirable. Agency employees who review documents to determine potential exemption status may not know exactly what the document is or whether the agency should produce it. Having access to an expert body would lead to better initial decision-making.

Conclusion

Unfortunately, neither the New York nor the Connecticut system alone is sufficient to fix FOIA. Real change can only come from a combination of the above-described processes. In other words, a two-tiered FOIA agency is necessary. The first tier would act in an advisory role, and the second tier, only available after the requester took full advantage of the advisory board, would be an adjudicative board with binding enforcement power. If unsatisfied after adjudication, a requester could seek a remedy from the courts. A system that tames the adversarial nature of a FOIA dispute would create a more efficient and effective method for the American public to enjoy a Madisonian open government.

In theory, the knowledgeable would no longer be governing the ignorant, but the informed.
Discrimination Cases

While not (at least not this quarter) mediated by federal agencies, the federal civil rights statutes provided fertile ground for the Supreme Court this quarter to discuss the implementation of statutory regimes. For example, in AT&T Corporation v. Hulteen, --- U.S. ----, 129 S. Ct. 1962 (May 18, 2009), the Court determined, in a 7-2 opinion by Justice Souter (Justices Ginsburg and Breyer dissented), that the current payment of pension benefits, based on a calculation that includes a discounting of pregnancy leave that was legal at the time but later prohibited by the Pregnancy Discrimination Act (PDA), 42 U.S.C. § 2000e(k), does not itself violate the PDA if the pension benefits are part of a bona fide seniority system under § 703(h) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h).

Hulteen, 129 S. Ct. at 1966. In the Supreme Court's view, Title VII “insulates” such bona fide seniority systems from PDA challenges. Id.

In the 1960s and 1970s, AT&T employees on disability leave received full credit for the entire period of absence from work, while employees on personal leave could receive a maximum credit of 30 days. Maternity leave was counted as personal leave. In 1977, AT&T altered its previous policy, “entitling pregnant employees to disability benefits and service credit for up to six weeks of leave.” Id. at 1967. Both policies were legal at the times that AT&T implemented them, but in 1978 Congress enacted the PDA to amend Title VII, making it illegally “discriminatory to treat pregnancy-related conditions less favorably than other medical conditions.” Id. (quoting Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669,684 (1983)). In response, in 1979, AT&T amended its seniority and leave policies to conform to the PDA, and there was no contention that those amended policies violated the Act.

Instead, in Hulteen, the issue was whether the current implementation of those past seniority policies, through the payment of pension benefits, was itself discriminatory in violation of the PDA. The EEOC concluded in 1998 that there was reasonable cause to believe that AT&T had discriminated against the plaintiffs in violation of the PDA and issued them a notice of right to sue. The district court and the U.S. Court of Appeals for the Ninth Circuit concluded that a violation had occurred, creating a split with the Sixth and Seventh Circuits.

The Supreme Court reversed the Ninth Circuit, emphasizing that “[a]lthough adopting a service credit rule unfavorable to those out on pregnancy leave would violate Title VII today, a seniority system does not necessarily violate the statute when it gives current effect to such rules that operated before the PDA.” Id. at 1968. Noting that Title VII affords seniority systems special treatment, id. at 1969, the Court concluded that AT&T’s had to be viewed as bona fide under § 703(h) and as having no discriminatory terms. Id. at 1970. The Court followed its reasoning from Teamsters v. United States, in which it had concluded that “this ‘disproportionate distribution of advantages does in a very real sense operate to freeze the status quo of prior discriminatory employment practices[,]’ but both the literal terms of § 703(h) and the legislative history of Title VII demonstrate that Congress considered this very effect of many seniority systems and extended a measure of immunity to them.” Id. (quoting Teamsters v. United States, 431 U.S. 324, 350 (1977)).

Finally, the Court refused to give the PDA retroactive effect so as “to recharacterize the acts as having been illegal when done . . . .” Id. at 1971. Noting that retroactive application of statutes is disfavored, the Hulteen Court noted that there was no clear congressional intent for retroactive application of the PDA—“indeed, no indication at all that Congress had retroactive application in mind; the evidence points the other way. Congress provided for the PDA to take effect on the date of enactment,” and its language “is the language of prospective intent, not retroactive revision.” Id. Moreover, as a policy matter, “[b]ona fide seniority systems allow, among other things, for predictable financial consequences, both for the employer who pays the bill and for the employee who gets the benefit.” Id. at 1973.

Thus, for the majority, the Court’s prior views of the PDA and Title VII, as well as its general policy against retroactive application of statutes, dominated its view of how the PDA should apply, despite the EEOC’s view that discrimination had possibly occurred. Justice Ginsburg’s dissent, in contrast, emphasized that Congress enacted the PDA to “overrule” the Supreme Court’s decision in General Electric Co. v. Gilbert, 429 U.S. 125 (1976), “and make plain the legislators’ clear understanding that discrimination based on pregnancy is discrimination against women.” Hulteen, 129 S. Ct. at 1974-75 (J. Ginsburg, dissenting). In contrast to Congress’s intent, under the majority’s interpretation, “[t]he plaintiffs (now respondents) in this action will receive, for the rest of their lives, lower

continued on next page
pension benefits than colleagues who worked for AT&T no longer than they did.” Id. at 1975 (J. Ginsburg, dissenting). Instead, Justices Ginsburg and Breyer would have given full effect not just to Congress’s intent in the PDA to “protect women, from and after April 1979, when the Act became fully effective, against repetition or continuation of pregnancy-based disadvantageous treatment,” id., but also to Congress’s “view that Gilbert was not simply wrong” and that “[i]n disregarding the opinions of other courts, of the agency that superintends enforcement of Title VII, and, most fundamentally, the root cause of discrimination against women in the paid labor force, this Court erred egregiously.” Id. at 1977 (J. Ginsburg, dissenting) (citations omitted).

A narrower majority produced a similar balancing approach to Title VII’s statutory goals at the end of the term. In Ricci v. DeStefano, --- U.S. ---, 129 S. Ct. 2658 (June 29, 2009), in an opinion by Justice Kennedy, the 5-4 majority concluded that the fire department of the City of New Haven, Connecticut, engaged in reverse race discrimination in violation of Title VII when it threw out promotion examinations when “the examination results showed that white candidates had outperformed minority candidates … .” Id. at 2664. According to the Court, “race-based action like the City’s in this case is impermissible under Title VII unless the employer can demonstrate a strong basis in evidence that, had it not undertaken the action, it would have been liable under the disparate-impact statute,” and the City could not meet that standard. Id.

The Court emphasized that, “[a]s enacted in 1964, Title VII’s principal antidiscrimination provision held employers liable only for disparate treatment,” which requires the plaintiff to show a discriminatory intent or motive. Id. at 2673 (emphasis added). In contrast, in the Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(k)(1)(A)(i), Congress codified disparate impact liability. Under this provision, a plaintiff establishes a prima facie violation of Title VII by showing that an employer uses “a particular employment practice that causes a disparate impact on the basis of race, color, sex or national origin,” id., shifting the burden to the employer to prove that the practice is job-related and consistent with a business necessity. Ricci, 129 S. Ct. at 2673.

The problem for the Court, as the majority framed it, was how to evaluate a situation in which an employer engages in race-based disparate treatment in order to avoid liability for race-based disparate impacts. The majority emphasized that “the City made its employment decision because of race. The City rejected the test results solely because the higher scoring candidates were white.” Id. at 2674. Underscoring its view that the prohibition on disparate treatment was the core prohibi-tion in Title VII, the Court held that the employer’s good faith fear of disparate impact liability was an improper standard for avoiding disparate treatment liability, because it would “encourage race-based action at the slightest hint of disparate impact,” allowing for de facto quota systems. Id. at 2675. At the same time, however, the Court noted that the white firefighters went too far in arguing that “under Title VII, avoiding unintentional discrimination cannot justify intentional discrimination. That assertion … ignores the fact that, by codifying the disparate-impact provision in 1991, Congress has expressly prohibited both types of discrimination. We must interpret the statute to give effect to both provisions where possible.” Id. at 2674. As a result, it adopted the “strong-basis-in-evidence” test to “give[] effect to both the disparate-treatment and disparate-impact provisions, allowing violations of one in the name of compliance with the other only in certain narrow circumstances. The standard leaves ample room for employers’ voluntary compliance efforts, which are essential to the statutory scheme and to Congress’s efforts to eradicate workplace discrimination.” Id. at 2676.

While the majority thus focused on reconciling apparently conflicting statutory provisions in order to give effect to both and to Congress’s intent, the dissenters engaged in a detailed review of the facts and context to conclude that no real statutory “conflict” existed and that interpretive reconciliation of the two Title VII provisions meant that avoiding disparate impacts could not itself qualify as disparate treatment. Justices Stevens, Souter, and Breyer joined Justice Ginsburg’s dissent, emphasizing that “[t]he white firefighters who scored high on New Haven’s promotional exams … had no vested right to promotion[,] [n]or have other persons received promotions in preference to them,” id. at 2690 (J. Ginsburg, dissenting); that New Haven’s tests were multiply flawed, id.; and that firefighting, including in New Haven, “is a profession in which the legacy of racial discrimination casts an especially long shadow.” Id. Legally, moreover, the dissenters argued that “[n]either Congress’ enactments nor this Court’s Title VII precedents … offer even a hint of ‘conflict’ between an employer’s obligations under the statute’s disparate-treatment and disparate-impact provisions. Standing on an equal footing, these twin pillars of Title VII advance the same objectives; ending workplace discrimination and promoting genuinely equal opportunity.” Id. at 2699 (J. Ginsburg, dissenting) (citations omitted). The majority improperly “sets at odds the statute’s core directives”; instead, “Congress declared unambiguously that selection criteria operating to the disadvantage of minority group members can be retained only if justified by business necessity.” Id. As a result, an employer acting to prevent race-based disparate impacts “does not [engage in] race-based discrimination in violation of Title VII.” Id. at 2710 (J. Ginsburg, dissenting).

The Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 et seq., was the subject of the Court’s
5-4 decision in *Gross v. FBL Financial Services, Inc.*, --- U.S. ---, 129 S. Ct. 2343 (June 18, 2009). This case raised the issue of whether and how courts should engage in parallel interpretations of the ADEA and Title VII, addressing the specific issue of whether a plaintiff in an ADEA case “must present direct evidence of age discrimination in order to obtain a mixed-motives jury instruction . . . .” *Id.* at 2346. In an opinion by Justice Thomas, the majority concluded that, unlike for Title VII, such an instruction is *never* appropriate under the ADEA. Specifically, the Court concluded that “[b]ecause Title VII is materially different with respect to the relevant burden of persuasion, [the Court’s Title VII] decisions do not control our construction of the ADEA.” *Id.* at 2348.

*Gross* raised the issue of what happens when Congress “ratifies” a Supreme Court interpretation through amendments to one statute but does not similarly amend a related statute. In the majority’s view, Congress’s failure to amend both statutes eliminates the applicability of the Court’s prior interpretation to the unamended statute. Specifically, in *Price Waterhouse v. Hopkins*, a splintered Supreme Court determined that in a Title VII case, the burden of persuasion shifts to the employer after a plaintiff shows that discrimination was a “motivating” or “substantial” factor in the employer’s decision. 490 U.S. 228, 258 (1989). The *Gross* Court noted that “Congress has since amended Title VII by explicitly authorizing discrimination claims in which an improper consideration was ‘a motivating factor’ for an adverse employment decision.” *Id.* at 2349 (quoting 42 U.S.C. § 2000e-2(m)). In contrast, according to the majority:

> *This Court has never held that this burdenshifting framework applies to ADEA claims. And we decline to do so now. When conducting statutory interpretation, we ‘must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination. Unlike Title VII, the ADEA’s text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor. Moreover, Congress neglected to add such a provision to the ADEA when it amended Title VII to add §§ 2000e–2(m) and 2000e–5(g)(2)(B), even though it contemporaneously amended the ADEA in several ways . . . .’*

*Id.* (quoting *Federal Express Corp. v. Holowecki*, 552 U.S. ---, ---, 128 S. Ct. 1147, 1153 (2008), and citing Civil Rights Act of 1991, §§ 115, 302 105 Stat. 1079, 1088). According to the Court, “[w]e cannot ignore Congress’ decision to amend Title VII’s relevant provisions but not make similar changes to the ADEA. When Congress amends one statutory provision but not another, it is presumed to have acted intentionally.” *Id.* (citing *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 256 (1991)). “As a result, the Court’s interpretation of the ADEA is not governed by Title VII decisions . . . .” *Id.*

Instead, the Court held that an ADEA plaintiff “must prove, by a preponderance of the evidence, that age was the ‘but-for’ cause of the challenged adverse employment action. The burden of persuasion does not shift to the employer . . . .” *Id.* at 2252.

Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, dissented. They noted that the ADEA “makes it unlawful for an employer to discriminate against any employee ‘because of’ that individual’s age” and that “[t]he most natural reading of this statutory text prohibits adverse employment actions motivated in whole or in part by the age of the employee.” *Id.* at 2353 (J. Stevens, dissenting). Noting that the Supreme Court had rejected the majority’s “but for” causation test for Title VII in 1991, the dissenters also emphasized that simply because

> *the Court is construing the ADEA rather than Title VII does not justify this departure from precedent. The relevant language in the two statutes is identical, and we have long recognized that our interpretations of Title VII’s language apply ‘with equal force in the context of age discrimination, for the substantive provisions of the ADEA ‘were derived in haec verba from Title VIII.’’*

*Id.* at 2354 (J. Stevens, dissenting) (quoting *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) (quoting *Larillard v. Pons*, 434 U.S. 575, 584 (1978))). The 1991 amendments to Title VII had no bearing on these pre-amendment interpretations of the ADEA: “*Price Waterhouse*’s construction of ‘because of’ remains the governing law for ADEA claims.” *Id.* at 2356 (J. Stevens, dissenting). Indeed, “the fact that Congress endorsed this Court’s interpretation of the ‘because of’ language in *Price Waterhouse* (even as it rejected the employer’s affirmative defense to liability) provides all the more reason to adhere to that decision’s motivating-factor test.” *Id.*

Finally, in *Northwest Austin Municipal Utility District Number One v. Holder*, --- U.S. ---, 129 S. Ct. 2504 (June 22, 2009), the Supreme Court decided 8-1/9-0 (Justice Thomas concurred in part and dissented in part) to avoid a constitutional evaluation of § 5 of the Voting Rights Act, 42 U.S.C. § 1973c(a), deciding instead on statutory grounds that a Texas municipal utility district was a “political subdivision” eligible to file suit to bailout the Act’s preclearance requirements. The utility district has an elected board, and § 5 requires it to preclear any changes in its election rules with federal authorities. The Voting Rights Act’s “bailout” provision allows courts to release a State or “political subdivision” from the preclearance requirement if the political subdivision meets a list of requirements. However, the Act defines “political subdivision” to be “any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting.” 42 U.S.C. § 1973c(c)(2). Because the utility district did not conduct its own registration for voting, the

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lower courts concluded that it was not a “political subdivision” eligible for bailout.

The Supreme Court was very concerned about the federalism implications of § 5, “which authorizes federal intrusion into sensitive areas of state and local policymaking, [and hence] imposes substantial federalism costs.” Holder, 129 S. Ct. at 2511 (quoting Lopez v. Monterey County, 525 U.S. 266, 282 (1999)) (quoting Miller v. Johnson, 515 U.S. 900, 926 (1995)). “The Act also differentiates between the States, despite our historic tradition that all the States enjoy ‘equal sovereignty.’” Id. at 2512 (quoting United States v. Louisiana, 363 U.S. 1, 16 (1960)). “These federalism concerns are underscored by the argument that the preclearance requirements in one State would be unconstitutional in another.” Id.

Nevertheless, the Court opted for constitutional avoidance, deferring both to Congress and its own rules of decisional preferences. As for Congress, the Court noted that:

In assessing those questions [of the constitutionality of the Voting Rights Act], we are keenly mindful of our institutional role. We fully appreciate that judging the constitutionality of an Act of Congress is “the gravest and most delicate duty that this Court is called on to perform.” Blodgett v. Holden, 275 U.S. 142, 147-148 . . . (1927) (Holmes, J., concurring). “The Congress is a coequal branch of government whose Members take the same oath we do to uphold the Constitution of the United States.” Rostker v. Goldberg, 453 U.S. 57, 64 . . . (1981). The Fifteenth Amendment empowers “Congress,” not the Court, to determine in the first instance what legislation is needed to enforce it. Congress amassed a sizable record in support of its decision to extend the preclearance requirements . . . .

Id. at 2513. In addition to respecting Congress’s decisions, “[i]t is a well-established principle governing the prudent exercise of this Court’s jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.” Id. (quoting Escambia County v. McMillan, 466 U.S. 48, 51 (1984) (per curiam)).

In addressing the statutory issue of whether the utility district could qualify as a “political subdivision,” the Supreme Court began by announcing that “[s]tatutory definitions control the meaning of statutory words, of course, in the usual case. But this is an unusual case.” Id. at 2514 (quoting Lawson v. Sauvage Fruit & S.S. Co., 336 U.S. 198, 201 (1949)). The Court’s prior decisions had already established that the statutory definition of “political subdivision” did not govern every use of that term in the Voting Rights Act, id. at 2514-15, and a restrictive interpretation of “political subdivision” “has helped to render the bailout provision all but a nullity. Since 1982, only 17 jurisdictions – out of the more than 12,000 covered political subdivisions – have successfully bailed out of the Act.” Id. at 2516. As a result, the Court concluded “that all political subdivision – not only those described in § 14(c)(2) – are eligible to file a bailout suit.” Id.

Education Cases

Education-related statutes also provided the Supreme Court with opportunities to engage in statutory interpretation. For example, in Forest Grove School District v. T.A.,— U.S. —, 129 S. Ct. 2484 (June 22, 2009), in an opinion by Justice Stevens, the Court held 6-3 that the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 et seq., allows for reimbursement of private-school education costs even if the child has not previously received special education services from the school district, despite the fact that Congress amended the statute in 1997 to state that a “court or hearing officer may require [a public] agency to reimburse the parents for the cost of [private school] enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available” and the child has “previously received special education and related services under the authority of [the] agency.” 20 U.S.C. § 1412(a)(10)(C)(i) (“clause (ii)”).

In this case, the Forest Grove School District failed to acknowledge the severity of plaintiff student’s attention deficit hyperactivity disorder (ADHD), concluding instead that he did not qualify for special education services and hence failing to provide him with any individualized education program (IEP) or other services, as IDEA requires. The student’s parents enrolled him in private school for his senior year. In the resulting administrative hearing, the hearing officer found that the student’s ADHD adversely affected his educational performance, that the school district had violated IDEA in not providing special education services, and that the district had to reimburse the parents for the costs of private school. On appeal, the district court set aside the award, finding that the 1997 amendments to IDEA categorically bar reimbursement awards if the student has not previously received special education services. The U.S. Court of Appeals reversed and remanded, finding that no categorical bar on reimbursement existed but requiring a reexamination of the equities.

The Supreme Court affirmed the Ninth Circuit. It first noted that, in its own cases interpreting IDEA, the Court had determined that reimbursement of private-school costs could be an appropriate remedy for IDEA violations. Forest Grove, 129 S. Ct. at 2490-92 (emphasizing School Commissioners of Burlington v. Department of Education of Massachusetts, 471 U.S. 359 (1985), and Florence County School District Four v. Carter, 510 U.S. 7 (1993)). Moreover, the specific factual situation of the student was largely irrelevant in those cases, “because our analysis in the earlier cases depended on the language and purpose of the Act and not the particular facts involved” and “a school district’s failure to propose an IEP of any kind is at
least as serious a violation of its responsibilities under IDEA as a failure to provide an adequate IEP.” Id. at 2491. Thus, unless in the 1997 amendments Congress expressed a clear intent to eliminate reimbursement as a remedy, the background case law allowed it. Id. at 2492.

The majority found no such clear intent. In particular, the Court concluded that because clause (ii) “is phrased permissively, stating only that courts ‘may require’ reimbursement in those circumstances, it does not foreclose reimbursement in other circumstances.” Id. at 2493. In the general context of IDEA, moreover, “clause (ii) is best read as elaborating on the general rule that courts may order reimbursement when a school district fails to provide a [free appropriate public education] by listing factors that may affect a reimbursement award in the common situation in which a school district has provided a child with some special-education services and the child’s parents believe those services are inadequate.” Id. This reading is also “necessary to avoid the conclusion that Congress abrogated sub silentio our decisions in Burlington and Carter” – indeed, “[i]t would take more than Congress’ failure to comment on the category of cases in which a child has not previously received special-education services for us to conclude that the Amendments substantially superseded our decisions” and repealed operative provisions of the Act. Id. at 2493–94. Finally, “[a] reading of the Act that left parents without an adequate remedy when a school district unreasonably failed to identify a child with disabilities would not comport with Congress’ acknowledgment of the paramount importance of properly identifying each child eligible for services.” Id. at 2495.

The Court also rejected the school district’s federalism-based argument that Congress must unambiguously state the conditions imposed on states when accepting funds that Congress makes available through its Spending Clause authority. Id. In expressly agreeing to provide free appropriate public education to students with disabilities, states agree to take on extra costs, and the reimbursement award encapsulates those expenses, albeit belatedly. Id. Moreover, “States have in any event notice at least since our decision in Burlington that IDEA authorizes courts to order reimbursement of the costs of private special-education services in appropriate circumstances.” Id.

Justice Souter dissented, joined by Justices Scalia and Thomas. They argued that Congress had superseded the Court’s decisions in Burlington and Carter in the 1997 amendments to IDEA, that “the assessment of congressional policy aims falls short of trumping” the plain meaning of clause (ii), and that the majority improperly adopted “a heightened standard before Congress can alter a prior judicial interpretation of a statute . . . .” Id. at 2498 (J. Souter, dissenting). According to the dissenters, the majority’s “clear statement rule” misstated the law. “If Congress does not suggest otherwise, reenacted statutory language retains its old meaning; but when a new enactment includes language undermining the prior reading, there is no presumption favoring the old, and the only course open is simply to read the revised statute as a whole.” Id. at 2501 (J. Souter, dissenting).

Federalism was far more relevant to the Supreme Court’s 5–4 decision in Home v. Flores, --- U.S. ----, 129 S. Ct. 2579 (June 25, 2009), which involved the Nogales Unified School District’s implementation of § 204(f) of the Equal Educational Opportunities Act of 1974 (EEOA), 20 U.S.C. § 1703(f). This provision requires states “to take appropriate action to overcome language barriers that impede equal participation by its students in instructional programs.” Id. Since 2000, the school district had been under a district court order to comply with the Act, which the district court extended to the entire State of Arizona in 2001.

In 2006, after the state enacted legislation to increase state funding for English Language–Learner (ELL) students, the state and the school district moved for relief from the district court’s order pursuant to Federal Rule of Civil Procedure 60(b)(5), arguing that changed circumstances warranted relief from the judgment. The district court denied the motion, concluding that the increased funding was not rationally related to effective ELL programming, that the included two-year limit on the increased funding was irrational, and that the state statute violated federal law by using federal funds to supplant rather than supplement state funding. The Ninth Circuit affirmed, but the Supreme Court reversed.

In an opinion by Justice Alito, the majority in Home v. Flores concluded that the lower courts had not applied Rule 60(b)(5) flexibly enough in this situation and instead had fixated improperly on the state funding provided for ELL programs. Before reaching that discussion, however, the majority briefly considered whether the school district superintendent had standing to bring the action. Relying on the three-part constitutional standing test – injury-in-fact, causation, and redressability – as enunciated in Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992), and Summers v. Earth Island Institute, 555 U.S. ----, ----, 129 S. Ct. 1142, 1148–49 (2009), the Court agreed with the Ninth Circuit that the superintendent had standing “because he ‘is a named defendant in the case[,] the Declaratory Judgment held him to be in violation of the EEOA, and the current injunction runs against him.’” Home, 129 S. Ct. at 2592 (quoting the Ninth Circuit’s opinion). The Supreme Court ducked a chain-of-command argument, noting that the Governor of Arizona had, in fact, directed an appeal. Id. Moreover, “[b]ecause the superintendent clearly has standing to challenge the lower courts’ decisions, we need not consider whether the Legislators also have standing to do so.” Id.

On the merits, the majority classified the case as “institutional reform litigation” and underscored the importance of Rule 60(b)(5) relief in such cases. Id. at 2593. In particular, “institutional reform injunctions often raise sensitive federalism concerns. Such litigation commonly involves areas of core state...
responsibility, such as public education.” *Id.* Moreover, “[f]ederalism concerns are heightened when, as in these cases, a federal court decree has the effect of dictating state or local budget priorities” and can constrain state and local officials in the exercise of their elected offices. *Id.* at 2593–94. Finally, when state officials themselves disagree as to how to comply with the federal order, federalism concerns are also increased: “Precisely because different state actors have taken contrary positions in this litigation, federalism concerns are elevated. And precisely because federalism concerns are heightened, a flexible approach to Rule 60(b)(5) relief is critical.” *Id.* at 2596.

The district court and the Ninth Circuit, in contrast, improperly confined their analyses to the scope of the original order, disallowing the school district from demonstrating compliance with the EEOA in any way except through increased state ELL funding. As a result, the case had to be remanded “for a proper examination of at least four important factual and legal changes that may warrant the granting of relief from judgment: the State’s adoption of a new ELL instructional methodology, Congress’s enactment of [No Child Left Behind], structural and management reforms in Nogales, and increased overall educational funding.” *Id.* at 2600.

Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, dissented. They argued that the lower courts had thoroughly considered all of the changed circumstances that the majority mentioned and that were presented in the litigation; moreover, they objected to the “institutional reform case” label that the majority relied on. *Id.* at 2608 (J. Breyer, dissenting). In particular, they argued that the majority’s main criticism of the lower courts—that they focused too much on education funding—was misplaced, because “the State’s provision of adequate resources to its English-learning students . . . has always been the basic contested issue in this case.” *Id.* at 2609.

**Chevron**  
Only two of the Supreme Court’s statutory interpretation cases this quarter were truly agency-mediated in ways that implicated the *Chevron* doctrine, and both came at the very end of the term, producing divided opinions. Justice Kennedy authored the majority opinion for the Court’s 6–3 decision in *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council, --- U.S. ----, 129 S. Ct. 2458* (June 22, 2009), which involved the issue of which permit program under the federal Clean Water Act (CWA), 33 U.S.C. §§ 1251 et seq. applied to Coeur Alaska’s discharge of a slurry of gold mining wastes (“tailings”) into Lower Slate Lake in Alaska. The U.S. Army Corps of Engineers issued the permit at issue pursuant to its authority under § 404 of the Act to permit discharges of “dredged” or “fill” material. 33 U.S.C. § 1344. The environmental challengers argued that the slurry was not fill material and hence was subject to the EPA’s permitting authority under § 402 for all other “discharges of a pollutant,” 33 U.S.C. § 1342, in which case it would be illegal under an EPA regulation, known as a new source performance standard, that prohibits all discharges of process wastewater from new froth flotation gold mines like Coeur Alaska’s. 40 C.F.R. § 440.104(b)(1). Alternatively, the challengers argued that EPA’s new source performance standard applied to § 404 permits as well, rendering the Army Corps permit illegal in violation of the federal Administrative Procedure Act (APA). All parties agreed that if Coeur Alaska was allowed to discharge its slurry into the lake, those discharges over time would fill the lake, killing almost all life within it—although Coeur Alaska would have to restore the lake when it was done mining.

The Supreme Court began by establishing that the Act’s two permit programs are mutually exclusive, because the EPA may issue permits only “except as provided” in § 404. *Coeur Alaska*, 129 S. Ct. at 2467 (citing 33 U.S.C. § 1342(a)). With respect to § 404 permits, the EPA has only two functions—to write guidelines for the Army Corps, and to veto any § 404 permit that causes too much environmental damage. *Id.* (citing 33 U.S.C. § 1344(b), (c)).

The Court then turned to the agencies’ joint regulation defining “fill material” to be any “material [that] has the effect of . . . [c]hanging the bottom elevation” of a water body. 40 C.F.R. § 232.2. “As all parties concede, the slurry meets the definition of fill material agreed upon by the agencies in a joint regulation promulgated in 2002.” *Coeur Alaska*, 129 S. Ct. 2468. Thus, the discharge of the slurry was a discharge of fill material subject to Army Corps permitting under § 404.

That left the issue of whether the Army Corps’ permits were subject to the EPA’s new source performance standards, which in turn created a muddled issue of *Chevron*/Mead/Skidmore deference. The majority first concluded that “Congress has not ‘directly spoken’ to the ‘precise question’ of whether an EPA performance standard applies to discharges of fill material, and hence ‘the statute alone does not resolve the case.’ ” *Id.* at 2469 (quoting *Chevron U.S.A., Inc v. Natural Resources Defense Council,* 467 U.S. 837, 842 (1984)). Under § 306(e) of the Act, “it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source,” 33 U.S.C. § 1316(e), suggesting that all dischargers have to comply with new source performance standards, regardless of what permit program governs their discharge. *Coeur Alaska*, 129 S. Ct. at 2470–71. On the other hand, § 402 explicitly requires EPA permits to comply with the new source performance standards and § 402 protects permit holders from enforcement actions involving new source performance standards, while § 404 does neither, suggesting that new source performance standards are not relevant to § 404 permits. *Id.* at 2471 (citing 33 U.S.C. §§ 1342(a), 1342(k), 1344(a), 1344(p)). As a result, “[t]he CWA is ambiguous on the question whether § 306 applies to discharges of fill material regulated under § 404.” *Id.*
As a result, under *Chevron*, the Court turned to the agencies’ regulations. However, “[t]he regulations, like the statutes, do not address the question whether § 306, and the EPA new source performance standards promulgated under it, apply to § 404 permits.” *Id.* at 2472.

Nevertheless, while “[t]he regulations do not give a definitive answer to the question,” “we do find that agency interpretation and agency application of the regulations are instructive and to the point.” *Id.* at 2472-73 (citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997)). Specifically:

“The question is addressed and resolved in a reasonable and coherent way by the practice and policy of the two agencies, all as recited in a memorandum written in May 2004 by Diane Regas, then the Director of the EPA’s Office of Wetlands, Oceans and Watersheds, to Randy Smith, the Director of the EPA’s regional Office of Water with responsibility over the mine. The Memorandum, although not subject to sufficiently formal procedures to merit Chevron deference, is entitled to a measure of deference because it interprets the agencies’ own regulatory scheme.” *Id.* at 2473 (citations omitted). The Memorandum explained that the new source performance standards do not apply to discharges permitted under § 404.

Citing to *Auer v. Robbins*, the Court deferred to the Memorandum’s interpretation for five reasons. “First, the Memorandum preserves a role for the EPA’s performance standard” because “[i]t confines the Memorandum’s scope to closed bodies of water, like the lake here.” *Id.* “Second, the Memorandum acknowledges that this is not an instance in which the discharger attempts to evade the requirements of the EPA’s performance standard.” *Id.* “Third, the Memorandum’s interpretation preserves the Corps’ authority to determine whether a discharge is in the public interest.” *Id.* “Fourth, the Regas Memorandum’s interpretation does not allow toxic pollutants . . . to enter the navigable waters.” *Id.* at 2474. Finally, “we find [the interpretation] a sensible and rational construction that reconciles §§ 306, 402, and 404, and the regulations implementing them, which the alternatives put forward by the parties do not.” *Id.*

Justice Scalia concurred specifically to address the Chevron issue. He joined “the opinion of the Court, except for its protestation that it is not according Chevron deference to” the Regas Memorandum. *Id.* at 2479 (J. Scalia, concurring) (citation omitted). Auer deference was inapplicable, because the Memorandum interpreted the statutory scheme and Auer deference applies only “to an agency’s interpretation of its own ambiguous regulation.” *Id.* As a result, Justice Scalia accused the Court of making Chevron deference even more complicated than Mead had already managed:

> Surely the Court is not adding to our already inscrutable opinion in *United States v. Mead Corp.*, 533 U.S. 218 . . . (2001), the irrational fillip that an agency position which otherwise does not qualify for Chevron deference does receive Chevron deference if it clarifies not just an ambiguous statute but also an ambiguous regulation. One must conclude, then, that if today’s opinion is not according the agencies’ reasonable and authoritative interpretation of the Clean Water Act Chevron deference, it is according some new type of deference – perhaps to be called in the future Coeur Alaska deference – which is identical to Chevron deference except for the name.

*Id.* Justice Scalia also noted the appearance in lower courts of “the phenomenon of Chevron avoidance – the practice of declining to opine whether Chevron applies or not” – and advocated the overruling of Mead. *Id.* at 2479-80 (J. Scalia, concurring).

With Justices Stevens and Souter, Justice Ginsburg dissented. Instead of starting, as the majority did, with the question of which permit program applies to Coeur Alaska’s discharge, the dissenters started with the Clean Water Act’s basic prohibition: “the discharge of any pollutant by any person shall be unlawful,” except as in compliance with the Act. *Id.* at 2481 (J. Ginsburg, dissenting). To that they added the fact that “Coeur Alaska’s proposal is prohibited by the Environmental Protection Agency (EPA) performance standard forbidding any discharge of process wastewater from new ‘froth flotation’ mills into the waters of the United States.” *Id.* at 2480 (J. Ginsburg, dissenting). At that point, the issue became whether “a pollutant discharge prohibited under § 306 of the Act [is] eligible for a § 404 permit as a discharge of fill material,” which the dissenters concluded should be answered in the negative. *Id.* “No part of the statutory scheme . . . calls into question the governance of EPA’s performance standard,” and § 306(e) clearly requires all discharges to comply with it. *Id.* at 2482 (J. Ginsburg, dissenting). “The Court’s reading, in contrast, strains credulity. A discharge of a pollutant, otherwise prohibited by firm statutory command, becomes lawful if it contains sufficient solid matter to raise the bottom of a water body, transformed into a waste disposal facility. Whole categories of regulated industries can thereby gain immunity from a variety of pollution-control standards.” *Id.* at 2483 (J. Ginsburg, dissenting). Because the dissenters viewed the statutory provisions as clearly resolving the issue, Chevron deference played no role in their analysis.

The Supreme Court’s other Chevron case this quarter, *Cuomo v. The Clearinghouse Association*, --- U.S. ---, 129 S. Ct. 2710 (Jue 29, 2009), produced a 5-4 decision, an opinion by Justice Scalia, and the unusual alignment of Justices Scalia, Stevens, Souter, Ginsburg, and Breyer in the majority. In this case, the Attorney General for the State of New York sent letters to several national banks in the state, “in lieu of subpoena,” asking for certain non-public information in order to ascertain whether

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the banks were complying with the state’s fair lending laws. The federal Office of the Comptroller of the Currency (OCC) and the Clearing House Association brought suit to enjoin the request, claiming that the OCC’s National Bank Act regulations preempt state law enforcement against national banks.

The National Bank Act states that “[n]o national bank shall be subject to any visitatorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress [or] by either House thereof or by any committee or Congress, or of either House duly authorized.” 12 U.S.C. § 484(a). The OCC’s regulation implementing this provision, adopted through notice-and-comment rulemaking, states that “visitorial powers” include, inter alia, “[i]nspection of a bank’s books and records” and “[e]nsuring compliance with any applicable federal or state laws concerning…activities authorized or permitted pursuant to federal banking law.” 12 C.F.R. § 7.4000(a)(2)(ii), (iv) (2009).

The question for the Supreme Court was whether the OCC regulation preempted state enforcement against national banks. The majority acknowledged that the Chevron doctrine provided the framework for evaluating the OCC’s regulation and that “[i]n the majority’s interpretation, ‘[v]isitorial powers’ in the National Bank Act refers to a sovereign’s supervisory powers over corporations, quite separate from the power to oversee corporate affairs, quite separate from the power to enforce the law.” Id. at 2716 (citing Trustees of Dartmouth College v. Woodward, 4 Wheat. 518, 676, 681 (1819) (concurring opinion); Guthrie v. Harkness, 199 U.S. 148, 159 (1905); First National Bank in St. Louis v. Missouri, 263 U.S. 640, 660 (1924); Watters v. Wachovia Bank, N.A., 550 U.S. 1, 8, 21 (2007)). “No one denies that the National Bank Act leaves in place some existing powers to enforce the law.” Id. at 2717-18, and “reading ‘visitorial powers’ as limiting only sovereign oversight and supervision would produce an entirely commonplace interpretation of its regulation, which differs from the text and must be discussed separately.” Id. In the OCC’s statement of basis and purpose in the Federal Register announcement of the regulation, the agency attempted to limit the scope of the regulation to state enforcement of state laws directly related to banking and to exempt states’ enforcement of their laws related to, for example, contracts, debt collection, acquisition and transfer of property, taxation, zoning, criminal law, and tort law. 69 Fed. Reg. 1896 (2004). This interpretation did not square with the regulation’s text, and, “[a] nyway, the National Bank Act does specifically authorize and permit activities that fall within what the statement of basis and purpose calls ‘the legal infrastructure that surrounds and supports the ability of national banks . . . to do business.’” Id. at 2719-20. As a result, the OCC’s interpretation of its own regulation could not save that regulation.

In the majority’s interpretation, “[v]isitorial powers in the National Bank Act refer to a sovereign’s supervisory powers over corporations.” Id. at 2721. “When, however, a state attorney general brings suit to enforce state law against a national bank, he is not acting in the role of sovereign-as-supervisor, but rather in the role of sovereign-as-law-enforcer. Such a suit is not an exercise of ‘visitorial powers’ and thus the Comptroller erred by extending the definition of ‘visitorial powers’ to include ‘prosecuting enforcement actions’ in state courts, § 7.4000.” Id.

Nevertheless, state enforcement must be in court in order for the state power to be “vested in the courts of justice,” as the National Bank Act itself requires. Because the New York Attorney General relied on his executive enforcement authority – not the power of the state courts – his attempted enforcement action was preempted by the National Bank Act. Id. at 2721-22.

Justice Thomas dissented, joined by Chief Justice Roberts and Justices Kennedy and Alito. They agreed that the term “visitorial powers” was ambiguous but, in light of historical ambiguities in the common law governing corporations, would have upheld the OCC’s regulatory interpretation as reasonable in light of those historical as well as statutory ambiguities. Id. at 2722, 2723-27 (J. Thomas, concurring in part and dissenting in part). The dissenters also dismissed the majority’s concern that the OCC’s interpretation was at odds with several of the Supreme Court’s decisions, emphasizing that the New York Attorney General “cannot prevail by simply showing that this Court previously adopted a construction of § 484 that differs from the interpretation later chosen by the agency.” Id. at 2728-29 (J. Thomas, concurring in part and dissenting in part).
By William S. Jordan III*

Agency Structure, Appointments, and Chevron
Deference

Three recent decisions from two circuits touch on the volatile mix of agency structure, appointments, and Chevron deference. The most interesting and extensive is Snell Island SNF LLC v. NLRB, 568 F3d 410 (2d Cir. 2009), in which employers challenged an NLRB order on the ground that the agency violated the three-member quorum requirement when it issued its order. The NLRA provides that “three members of the Board shall, at all times, constitute a quorum of the Board,” but it also explicitly authorizes the Board to delegate its powers “to any group of three or more members.” The Act also provides that a vacancy on the Board shall not prevent the remaining members from exercising the Board’s power and that “two members shall constitute a quorum of any” three-member group.

Recognizing that it was about to lose its quorum as terms ended, the Board (with a quorum of four members) delegated its powers to a three-member panel. Eight days later, two member terms ended, leaving only two members in the three-member panel that issued the final order at issue in *Snell Island*. The First and Seventh Circuits had previously upheld the actions of such two-member panels as consistent with the plain meaning of the statute, but the D.C. Circuit had reached the opposite conclusion, terner the effort a “sham” effort to avoid the requirement for a quorum of the Board “at all times.” The D.C. Circuit also relied upon the private law principle of principal-agent to hold that once the principal lost authority, that agent did as well.

The Second Circuit injected Chevron deference, which some might consider out of place in this context because it effectively allows the agency to determine not only its own jurisdiction, but its very existence. This is consistent, however, with Connecticut Dept of Public Utility Control v FERC, 569 F3d 477 (D.C. Cir. 2009), in which the D.C. Circuit recently deferred to a FERC interpretation determining the agency’s own jurisdiction. Beyond citing a few cases, neither court explained at any length why Chevron deference was appropriate in these circumstances.

Applying Chevron, the Second Circuit relied in part upon the conflicting outcomes of its sister circuits to conclude that the statute was ambiguous as to the precise question at issue — what to do when a two-member panel quorum acts in the absence of a three-member Board quorum. This seemingly obvious proposition conflicts with the various Supreme Court decisions finding statutory clarity for Chevron purposes by a 5-4 vote. The court also rejected the D.C. Circuit’s reliance on the private agency law analogy, turning instead to extensive examination of the legislative history, which did not provide a definitive answer. Turning to Chevron Step 2, the court emphasized that the legislative history indicated that Congress had been concerned with increasing the NLRB’s ability to reach decisions. Thus, the agency’s interpretation authorizing the two-member panels without a three-member Board was reasonable.

The third decision of interest addressed agency structure in a very different way and only in a concurring opinion. Sound Exchange, Inc. v. Librarian of Congress, 2009 WL 1930180 (D.C. Cir. 2009), involved a statutory arrangement under which Copyright Royalty Judges appointed by the Librarian of Congress (and removable by the Librarian only for cause) set the royalty rate that satellite radio services must pay copyright owners to play their music. Judge Kavanaugh noted that Copyright Royalty Judges appear to be principal officers under the Appointments Clause of Article II of the Constitution. Since they are appointed only by the Librarian, removable only by the Librarian and only for cause, and not supervised by any other Executive Branch official, Judge Kavanaugh found a likely violation of the Appointments Clause. The parties not having raised the issue, however, he was able to concur in the court’s decision.

D.C. Circuit Clarifies Reach of Alaska Professional Hunters

Those upset with agency attempts to change interpretations stated in informal guidance documents have found comfort in Alaska Professional Hunters Ass’n, Inc. v. FAA, 177 F3d 1030 (D.C.Cir.1999), in which the D.C. Circuit required the FAA to go through notice and comment before changing such an informally stated interpretation. The court’s decision in MetWest, Inc. v. Secretary of Labor, 560 F3d 506 (D.C. Cir. 2009), clarifies that the comfort level is not as high as challengers might have hoped.

In 1991, OSHA issued standards governing the all too familiar activity of drawing blood for clinical testing. Originally, phlebotomists (the folks who stick those needles in our arms) would use two hands to withdraw the needle, cap the front of the needle, unscrew the needle manually from the blood tube holder, and then discard the needle. By 1991, the industry had developed a reusable blood tube holder that from which the needle could be discarded in a one-handed process by the push of a button. This was safer, but there was still a risk of harm from the back end of the needle. At that point, OSHA issued a standard prohibiting the removal of contaminated needles unless the employer could demonstrate that there was no feasible alternative to removal or that the action could be done mechanically.

Initially, OSHA did not enforce the standard against employers using reusable blood tube holders. In 2003, however, the agency issued an informal guidance document stating that the use of reusable blood tube holders probably violated the 1991 regulation. A year later, OSHA cited MidWest, which used reusable blood tube holders at some 1600 facilities. MidWest challenged OSHA’s action on the ground that it was contrary to various OSHA statements allowing the removal of needles from reusable blood tube holders in all circumstances.

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The D.C. Circuit could have summarily dismissed this claim on the ground that OSHA had simply never made any such statement. Instead, the court provided useful guidance on the nature of statements that qualify under Alaska Professional Hunters, and it emphasized the limitations on the doctrine articulated in that case.

As to the nature of the qualifying statements, MetWest had relied upon OSHA statements to the effect that one-handed removal was permitted “when it is medically required or when no feasible alternative exists.” This sort of statement does not qualify under Alaska Professional Hunters because “conditional or qualified statements, including statements that something ‘may be’ permitted, do not establish definitive and authoritative interpretations.” Moreover, so long as a new guidance document “can reasonably be interpreted” as consistent with prior documents, it does not significantly revise a previous authoritative interpretation.” On these facts, the various statements were consistent with each other and with the requirement to show there was no feasible alternative. Since the newly developed single-use blood tube holders now provided a feasible alternative to needle removal, MetWest could not meet the regulatory test.

Perhaps more important, the court emphasized that Alaska Professional Hunters had involved a prior interpretation applied in a prior adjudication and consistently stated over a 30-year period. Moreover, those various statements had given rise to the “fundamental rationale of Alaska Professional Hunters,” the parties’ “substantial and justifiable reliance on a well-established agency interpretation.” Many people had pulled up stakes and moved to Alaska to start new businesses. And the pilots affected in Alaska Professional Hunters had not had any opportunity to affect the new interpretation. This seemingly high threshold is consistent with the court’s statement that it is a misunderstanding of Alaska Professional Hunters to assert that an informally adopted statement “freezes the state of agency law, which cannot subsequently be altered without notice-and-comment rulemaking.” To the contrary, agencies remain able to develop and change interpretations without notice-and-comment unless prior statements have created the sort of justifiable reliance found in Alaska Professional Hunters. The MetLife facts came nowhere close.

D.C. Circuit Says White House Office of Administration not an “Agency” Under FOIA.

In 2005, White House Office of Administration (OA) discovered that various entities in the Executive Office of the President had lost millions of e-mail messages. In 2007, a citizen group filed an FOIA request with the Office of Administration for records of the e-mail management system, reports on the system, other records relating to the loss and efforts to find the e-mails. After negotiations, the OA took the position that it was not covered by the FOIA. The District Court allowed discovery on the jurisdictional issue of the scope of the OA’s authority and ultimately denied relief on the ground that the OA is not an agency for FOIA purposes.

D.C. Circuit, in Citizens for Responsibility and Ethics in Washington v. Office of Administration, 566 F.3d 219 (D.C. Cir., 2009), upheld the denial because the OA “performs only operational and administrative tasks in support of the President and his staff” and therefore “lacks substantial independent authority.” Assessing various tests that had been articulated to determine when a White House entity is exempt from FOIA, the court found that “common to every case in which we have held that an EOP unit is subject to FOIA has been a finding that the entity in question ‘wielded substantial authority independently of the President.’” Thus, the Office of Science and Technology is an agency for FOIA purposes because it “has independent authority to ‘evaluate federal scientific research programs, initiate and fund research projects, and award scholarships.’” Even OMB is an agency for this purpose because “it has a statutory duty to prepare the annual federal budget, which aids both Congress and the President.” The requirement for Senatorial confirmation of the OMB Director supported this conclusion.

By contrast, the Council of Economic Advisors is not a FOIA agency because it has no independent authority to do such things as issue regulations or fund projects based on its appraisals. Neither is the National Security Council, which “plays no substantive role apart from that of the President, as opposed to a coordinating role on behalf of the President.”

Although the OA at one point considered itself subject to FOIA, the court held it was exempt because its tasks are entirely administrative and operational in nature. Its services include personnel management; financial management; data processing; library, records, and information services; and office services and operations, including: mail, messenger, printing and duplication, graphics, word processing, procurement, and supply services.” On that basis, the court upheld both the denial of the FOIA claim and the limitation of discovery to matters related to OA’s authority and operations.

D.C. Circuit Refuses to Apply Massachusetts v. EPA to Individuals.

In Massachusetts v. EPA, 549 U.S. 497 (2007), the Supreme Court held that Massachusetts had standing to challenge EPA’s failure to regulate greenhouse gases that contribute to global warming. Despite the long causal change between EPA’s lack of action and the ultimate effects of global warming, the Commonwealth’s allegation of threats to its own coastline was enough to keep it in court. No such luck for individuals challenging global warming unless they can show particularized harm, according to the D.C. Circuit in Center for Biological Diversity v. United States Department of the Interior, 563 F.3d 466 (D.C. Cir. 2009).

The Department of the Interior initiated an administrative process for issuing oil and gas leases on the outer continental shelf by preparing a five-year program for such leasing. This was the first of four stages in the leasing process. It resulted in no commitments to issue leases and no actual development or production,
all of which would come at later stages. The Center for Biological Diversity challenged Interior’s action on the ground that it violated the Outer Continental Shelf Lands Act and the National Environmental Policy Act because Interior did not adequately consider the effects of climate change that would occur as a result of the activities that would be authorized by the leases.

The court denied standing as to what it termed a “substantive theory of standing,” but it accepted a “procedural theory of standing.” As to the former, the court held that general assertions concerning the climate change-related effects on various lands were too generalized to sustain standing for individual claimants. The court interpreted Massachusetts v. EPA has having recognized the alleged harm to Massachusetts’ coastline as particularized harm to Massachusetts as sovereign and owner of much of its own shoreline. The state was harmed in a manner that was “wholly apart from the alleged general harm.” The same could not be said of the individual challengers in Center for Biological Diversity because their harm is not only uncertain, it is “shared by humanity at large.” Even Point Hope, an Alaska village, did not qualify for standing despite its arguable status as a sovereign entity. Unlike Massachusetts, Point Hope relied upon the general effects of climate change, rather than a particularized effect comparable to loss of the state’s own shoreline.

Although the generalized claims of harm from climate change were not enough, the court found standing for claimants who complained that the failure to consider climate change threatened their enjoyment of indigenous Alaskan animals in the leasing area. Terming this a “procedural theory of standing,” the court held that these interests were sufficiently particularized. By contrast to the claims in Defenders of Wildlife v. Lujan, these claims were also sufficiently concrete because the claimants had provided affidavits detailing the dates of planned future visits. The omission of the required procedural step of considering climate change could adversely affect the animals in question, as would reliance upon an allegedly irrational study of the leasing program. It seems a stretch to consider this to be a distinct procedural harm, but the important point seems to be that particularizing one’s claims in some way might overcome apparent difficulties with the chain of causation.

Having kept open the standing door, the court then closed the ripeness door on some claims because the first stage of the leasing process did not result in irreversible and irretrievable commitments. It held, however, that claims concerning the use of an irrationally based study were ripe at that stage of the process.


Having lost a disability discrimination claim before the Montana Human Rights Commission, BNSF Railway, a Delaware corporation, sought review in Federal District Court under diversity jurisdiction. Relying upon City of Chicago v. Int’l College of Surgeons, 522 U.S. 156 (1997), which had involved federal question supplemental jurisdiction, the Ninth Circuit considered its own precedent to have been so undermined that it had to recognize diversity jurisdiction in this situation. The fact that this case involved review on the record rather than on a newly developed record did not change that outcome.

The court also noted that a Montana statute requiring review to be sought in state court in particular locations could not affect federal jurisdiction otherwise available under federal law. The result here is considerable distance between the state entities, policies, and politics, and the ultimate federal decisionmaker. This is inconsistent with federalism principles, particularly where diversity is based upon the fiction of the corporation residing in another state, rather than upon the physical reality of residence in another state, as would be true of the individual human parties who originally inspired the concept of diversity jurisdiction.

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ARTICLES

Jerry L. Mashaw and Avi Perry, Administrative Statutory Interpretation In The Antebellum Republic, MICH. ST. L. REV. ___ (forthcoming 2009). Available in Draft: http://ssrn.com/abstract=1431615. The author argues that antebellum America had a much more robust federal administrative state than conventional wisdom acknowledges. Antebellum Congresses delegated broad authority to agencies, including extrajudicial coercive powers, systems for administrative adjudication, and substantial rulemaking authority. Moreover, because judicial review was largely limited to mandamus actions to enforce clear legal duties, there was virtually no judicial review of agency discretion, except when the administrator’s action would be tortious if not properly authorized. The author discusses 1) structural and procedural issues, and 2) the interpretive methodology of antebellum administrative statutory interpretation.

Elizabeth Magill, Standing For The Public: A Lost History, 95 VA. L. REV. 101 (forthcoming 2009), Available in Draft: http://ssrn.com/abstract=1417936. This article discusses the Supreme Court’s mid-twentieth century, several decades long flirtation with the concept of “standing for the public.” This doctrine permitted Congress to authorize individuals with no personal stake in the controversy to bring “private attorney general” lawsuits against the government to bring the government’s “legal error” to the attention of the federal courts. The author hypothesizes (cautiously) that the Supreme Court abandoned this private attorney general theory in the 60s and 70s because of the Court’s discomfort with the shift in the lawsuits’ subject matter to civil rights litigation, as opposed to the previous challenges to economic regulation.

Pratheepan Gulasekaram, Sub-National Immigration Regulation And The Pursuit Of Cultural Cohesion, 77 U. CIN. L. REV. 1441 (2009). The author critiques subnational (state and local) regulation of undocumented immigrants. The author argues that since such regulation cannot exclude immigrants, national and subnational communities should focus on how to create and maintain culturally distinct, stable communities without building physical or legal walls.

Melissa Guy and Melanie Oberlin, Assessing The Health Of FOIA After 2000 Through The Lens Of The National Security Archive And Federal Government Audits, 101 LAW LIBR. J. 331 (2009). This article discusses the impact on the Freedom of Information Act (FOIA) of the war on terror. The authors conclude that government agencies have a strong general commitment to FOIA. However, administration guidelines, procedural challenges (e.g., backlogs), and the increased use of alternative restrictive designations (such as Sensitive but Unclassified (SBU) significantly threaten FOIA’s effectiveness.

Daniel R. Ernst, The Politics Of Administrative Law: New York’s Anti-Bureaucracy Clause And The O’Brien-Wagner Campaign Of 1938, 27 LAW & HIST. REV. 331 (2009). Using the 1938 New York State United States Senatorial campaign as a case study, the author argues that the development of the modern administrative state cannot be explained as merely a battle of ideologies or political interests. Instead, institutional interests such as political parties and the legal profession, also played a significant role.

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Due Process

At the beginning of June, the Supreme Court decided an unusual due process case, involving a judge’s refusal to recuse himself. *Caperton v. A.T. Massey Coal Co.*, --- U.S. ---, 129 S. Ct. 2252 (June 8, 2009). In this 5–4 decision authored by Justice Kennedy, the Court concluded that Justice Benjamin of the West Virginia Supreme Court violated the Due Process Clause of the Fourteenth Amendment by refusing to recuse himself when: (1) the five-justice West Virginia Supreme Court voted 3–2 to reverse a trial court judgment against A.T. Massey Coal Company on a jury verdict of $50 million; (2) Justice Benjamin was part of the three-justice majority; (3) after the verdict but before the appeal, the company’s chairman, chief executive officer, and president Don Blankenship contributed $1,000 to Benjamin’s campaign committee, $2.5 million to a political organization that supported Benjamin, and $500,000 for independent expenditures such as direct mailings in support of Benjamin’s election to the Supreme Court; (4) Blankenship’s contributions “were more than the total amount spent by all other Benjamin supporters and three times the amount spent by Benjamin’s own committee,” id. at 2257; (5) Benjamin won the election for Chief Justice with 53.3% of the vote; and (6) the coal company’s appeal came before now-Justice Benjamin about two years later, with the reversal decision issuing about three years after the election. Going beyond the Supreme Court’s earlier rulings “that the Due Process Clause incorporated the common-law rule that a judge must recuse himself when he has a direct, personal, substantial, pecuniary interest in a case,” id. at 2659 (quoting *Tumey v. Ohio*, 273 U.S. 510, 523 (1927)), the majority concluded that a Due Process violation can also arise when there “are circumstances in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.” *Id.* (quoting *Winthrow v. Larkin*, 421 U.S. 35, 47 (1975)). It concluded “that there is a serious risk of actual bias — based on objective and reasonable perceptions — when a person with a personal stake in a particular case had a significant and disproportionate influence on placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent.” *Id.* at 2263–64.

Justices Scalia, Thomas, and Alito joined Chief Justice Roberts’ dissenting opinion. The dissenters protested the majority’s expansion of the Due Process Clause to cover a judge’s failure to recuse himself because of a “probability of bias,” *id.*, at 2267 (C.J. Roberts, dissenting), which the dissenters viewed as an undefinable test that provided no guidance to lower courts. According to Justice Roberts, “opening the door to recusal claims under the Due Process Clause, for an amorphous ‘probability of bias,’ will itself bring our judicial system into undeserved disrepute, and diminish the confidence of the American people in the fairness and integrity of their courts.” *Id.* at 2274 (C.J. Roberts, dissenting).

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**Lawyers in Your Living Room! Law on Television**

*Michael Asimow, Editor*

From Perry Mason and The Defenders in the 1960s to L.A. Law in the 80s, The Practice and Ally McBeal in the 90s, to Boston Legal, Shark and Law & Order today, the television industry has generated an endless stream of dramatic series involving law and lawyers. The way lawyers are perceived depends on how they are portrayed on television series and in the media. A new guide, *Lawyers in Your Living Room! Law on Television* examines television series from the past and present, domestic and foreign, that are devoted to the law.

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Oregon Supreme Court Applies *Chevron* and *Auer* to Interstate Compact Agency

**Jeffrey B. Litvak***

In *Friends of the Columbia Gorge v. Columbia River Gorge Comm’n*, 346 Or 366, ___ P.3d ___ (2009), the Oregon Supreme Court considered whether to apply federal methods for review of an agency’s statutory and regulatory interpretation to the Columbia River Gorge Commission, a regional agency created by an interstate compact between Oregon and Washington. This lengthy opinion authored by Justice Gillette concerns the Commission’s land use management plan for the Columbia River Gorge National Scenic and is remarkable in that it is only the second instance a state court expressly applied *Chevron* to a compact agency and the first time a state court expressly applied *Auer* to a compact agency.

The petitioners argued that *Chevron* was not applicable to the Commission because it is not a federal agency. The Oregon court rejected that argument, noting that none of the cases that apply *Chevron* focus on the agency’s status as a federal agency. Citing *Mead*, the court stated that the important question is whether Congress expected the Commission would speak with the force of law when addressing ambiguities and gaps in the statute.

The Oregon court stated that the federal act approving the Compact provided for the formation of an interstate Commission to administer that compact, described in detail the structure of that body and how its members will be appointed, required the Commission to adopt a management plan, described the process the Commission must use for developing the plan, and established standards to which the plan must adhere. The court thus found the compact “a compact of Congress’s design.” This design, the court concluded, implied a congressional expectation that the Commission would speak with the force of law when it addresses ambiguities and gaps in the statutory scheme.

The Commission argued to the court that applying *Chevron* would bring some measure of uniformity to judicial review of Commission actions, which may be sought in the courts of either state, because Washington state courts already apply *Chevron* to the Commission. The Oregon court rejected that argument, noting that the compact may contemplate differing judicial review standards depending on which state’s courts are available.

The Oregon court gave much less attention to the application of *Auer*. It simply observed that Oregon courts are similarly deferential to Oregon agencies interpreting their own rules under *Don’t Waste Oregon v. Energy Facility Siting*, 320 Or. 132, 142, 881 P.2d 119 (1994).

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**The Invisible Toothless Tiger**

**By William S. Morrow, Jr.**

On June 22, 2009, several riders on the Washington Metropolitan Area’s subway system lost their lives and many were injured when one train rammed another train between stations. Under 50 U.S.C. 5330, the states have primary safety oversight responsibility for federally subsidized stand-alone subway systems like the one operated by the Washington Metropolitan Area Transit Authority (WMATA).

Under the statute, states operating such systems are each required to establish a safety program plan and to designate a state authority with responsibility to require, review, approve, and monitor the carrying out of each plan; to investigate hazardous conditions and accidents on the systems; and to require corrective action to correct or eliminate those conditions.

WMATA is an interstate compact agency, and the compact signatories, Maryland, Virginia, and the District of Columbia, have designated the Tri State Oversight Committee (TOC) as the agency responsible for overseeing the safety of WMATA’s operations. Since its inception in 1997, the TOC has been criticized by the GAO, NTSB, and FTA for significant shortcomings. The TOC has generally responded with positive corrections, but two rather large weaknesses remain: lack of enforcement authority and lack of transparency.

Despite the clear statutory requirement that the designated oversight agency have responsibility to “require corrective action”, the WMATA signatories did not invest the TOC with any enforcement powers. The most the TOC can do is recommend that the FTA withhold funds. But that is no remedy for a transit agency whose safety problems are in part fueled by a serious funding shortage. Obviously, the signatories need to reformulate the TOC’s charter to give the agency some teeth. Or Congress needs to take a fresh look at the safety oversight model contemplated by the statute, as the FTA has suggested.

Effecting some transparency, on the other hand, is well within the TOC’s capabilities. The TOC has been operating outside the public spotlight since 1997. The time has come for opening up the agency to public scrutiny. Establishing a low-cost web site would help for starters. A little bit of sunshine would go a long way in creating accountability, improving agency performance, and building public trust.

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