Also In This Issue

Regulatory Uncertainty and Getting What You Pray For
Designing Information Disclosure
Considering Impacts of Regulations on Jobs
Let the Fun Begin!

As I write this flying back from the Annual Meeting in Chicago, my ears still ring with all the “you’re really in for it now” kinds of ironic congratulations I received from just about everyone who attended the Council meeting or who saw the “Chair-Elect” ribbon on my name tag. I enjoy schadenfreude-derived humor as much as the next person, but to be honest, I am not completely alarmed at the prospect of being your Chair for the coming year.

For one thing, I am really excited about the range of projects that are already on the Section’s to-do list. For me, the most important and ultimately gratifying role the Section can play is to be a respected, authoritative, consensus voice on what is (or is not) good policy in the administrative realm. And there is no shortage of opportunities for that voice to be heard, some arising externally, some generated by volunteers like you, and at least one of my own invention:

- **The STOCK Act.** Even outside the Beltway, you have probably heard about this recent law and its added-at-the-last-minute provision that requires the financial disclosures of Senior Executive Service members to be posted online, for easy perusal by would-be burglars, neighbors, etc. More ominously, it could result in U.S. intelligence personnel’s cover being blown. I expect to have a draft report and recommendation for us to consider at the Council’s Fall Meeting on October 27—but we may need to move sooner with a blanket authority letter, likely joined by many other ABA sections.

- **The Independent Agency Regulatory Analysis Act.** Senators Portman, Collins, and Warner have just introduced S. 3468, a bill that would authorize the president to extend OMB review to major rules issued by independent regulatory agencies. This is consistent with ABA policy that arose from this Section, and I expect we will be filing blanket authority comments on the bill with the Senate in the near term.

- **Disclosure of political contributions funneled through nonprofit groups.** The Section had previously approved a report and recommendation urging the IRS to require uniform, useful disclosure of contributions to 501(c)(4) “social welfare” nonprofits and some “527” political organizations, several of which are now channeling hundreds of millions of dollars of anonymous contributions to “Super PACs.” We chose to defer this issue from this summer’s House of Delegates meeting due to concerns from the Standing Committee on Election Law about considering what has become an unfortunately politicized issue so close to the election. We also received comments from the Tax Section that we believe can be worked out by our Fall Meeting—so that we can get this important resolution approved by the House of Delegates in February.

- **Government Contractor Ethics.** We also just deferred another report and recommendation that we approved in April—in this case, supporting an ACUS recommendation that would apply federal ethics requirements to certain government contractors but also extending it to apply to expert peer review panels run by government contractors. We will work in the coming months to address general concerns from the Public Contract Law Section but again expect to approve this resolution in October so it can go to the House in February.

- **Incorporation by Reference.** We have received praise and heat for the principled but slightly radical position we took this summer in comments to the Office of the Federal Register (OFR): that privately generated standards should be available for free, electronically, if they are to be considered “readily available” and hence eligible for incorporation by reference into the C.F.R. If the OFR actually proposes something on this topic, we will be working with the Intellectual Property Section on comments that address this issue and that also address their concerns about protecting copyright interests.

Those of you who would like to help on any of these undertakings may contact me at jamie@conradcounsel.com.

I have one other invitation for you—the “theme” for my year, if you will. In my view (though it is hardly an original idea), the single greatest flaw in the American political system is the partisan redistricting process that results, with increasing effectiveness, in elected representatives choosing their voters instead of the other way around. In 2008, the ABA adopted a resolution, developed by this Section, urging states to use independent commissions to redistrict. I will be writing to you separately about this, but in a nutshell my primary goal this year is to inspire and assist Section members to promote adoption by their home states of statutes or constitutional amendments that would implement the ABA’s 2008 resolution (and to defend those few that have been adopted). If a few dozen of you are as alarmed as I am about the level of dysfunction in Congress, we can work together to chip away at its single greatest cause.

Decisions about these kinds of policy topics are made by your Council, comprising about two dozen members. We also have a broader, “ALCOUNCILPLUS” email list that includes almost a hundred committee chairs and vice chairs and has two functions: serving as a sounding board for the Council and allowing participants to learn what the Council is considering so that they might speak up or get more involved. But there are continued on page 32
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Administrative & Regulatory Law News

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long before National Federation of Independent Business v. Sebelius, 567 U.S. — (2012), the Supreme Court held in South Dakota v. Dole, 483 U.S. 203 (1987), that by using conditional grants to the states, Congress could achieve ends that it could not achieve via direct regulation under its commerce power or its other enumerated powers. In Sebelius, the Supreme Court held that although Congress did not have the power to enact the individual mandate under the commerce power, the mandate was nevertheless valid as a tax. This article considers the impact on federalism values of giving the taxing power as broad a construction as the spending power.

State Right of Refusal

Federal tax incentives hold out their enticements to private taxpayers; they do not bind states as conditional grants do. As a result, federal tax incentives may leave states freer than do conditional grants to pursue policies that differ from or conflict with federal policy. Conditional grants generally require states to adopt legislation consistent with the federal policies proposed in the grant, and states generally agree under grants not to engage in activities that undermine those federal policies. Thus, conditional grants have the effect of both prescribing and circumscribing state government action. While states have some ability to negotiate the terms of federal grant conditions, the primary remedy available to states that do not wish to accede to federal grant conditions is to refuse the grant.

In contrast, states are not contractually bound to implement federal tax incentives. Thus, compared with grants, federal tax incentives do not expend limited state legislative and regulatory resources. This could be particularly useful in areas where, although state residents generally approve of the goal behind a federal tax incentive, they do not regard it as a sufficiently high priority upon which to concentrate limited state resources. Congress’s pursuit of federal policies through taxes, rather than conditional grants administered by the states, therefore may leave more room for the accomplishment of local goals. Thus, where state voters approve the goals behind federal tax incentives, but do not prioritize them as highly as do national voters, federal tax incentives may complement, rather than supplant, local policy objectives. In this way, federal tax incentives may be federalism-preserving compared to grants.

Unlike with grants, however, when state voters and their representatives disapprove of the federal aim embodied by a federal tax incentive, they have no right of refusal, because states cannot exempt their residents from federal tax provisions. The importance of this difference between conditional federal grants and federal tax incentives depends on whether states possess other effective means—short of a right of refusal—to resist unwanted federal policies implemented through federal tax incentives.

One way for states to dampen the effect of federal tax policies would be to simply refuse to conform their own tax bases with that of the federal government. For example, by refusing to allow its residents to exclude fringebenefits from state-taxable income, a state could raise the overall tax cost of such benefits for its residents. Similarly, in the past several years, as the federal government has raised the exemption amount for the estate tax, many states failed to follow suit, which has meant that certain federally exempt estates of taxpayers residing in non-conforming states remained subject to state-level estate taxation. In this way, the estate tax policy of some states diverges from that of the federal government.

States could go further. For example, by characterizing federal tax expenditures as generating state-taxable income, states could use their own tax systems to “claw back” the benefit of federal tax expenditures from state residents. States could define the federal tax savings due to the federal mortgage interest deduction as constituting income for state tax purposes. By setting the state tax rate on this item of income high enough, states theoretically could completely repeal the federal home mortgage interest deduction for their own residents. States also could use their direct spending programs to claw back federal benefits. Although failure of the states to offer the exact same tax incentives as the federal government generally will not create a direct conflict with federal tax law, the Supremacy Clause may preclude state “claw backs” of federal tax benefits.

Complex Benefits

Compared to grants, the regulatory objects of federal tax incentives are limited as a practical matter. Tax incentives are most appropriate for regulatory goals that can be accomplished by the actions of private taxpayers. Thus, it makes sense to use tax incentives to encourage private taxpayers to, for example, contribute to charities. But it would be difficult or impossible to structure a tax incentive program that would result in the federal highway system or Medicare. Such benefits, which we might label “complex benefits,” require state cooperation. The need for state cooperation affords states protection from federal attempts to use taxes to deliver complex benefits.

In contrast, conditioning grant funding upon state assistance in carrying out federal policy priorities allows Congress to harness the entire state regulatory
apparatus, including legislatures, courts, and administrative agencies. Congress can even condition grants on states' consent to be sued by private citizens, which further promotes enforcement and implementation of federal regulatory goals.

Personal Scope of Tax Incentives

In addition to their inability to achieve complex benefits without state cooperation, federal tax incentives are limited in another important way: most federal tax incentives do not reach private parties who have no federal income tax liability. Since people without tax liability receive no benefit from nonrefundable tax expenditures, the regulatory influence of such expenditures is incomplete. In a given year, as many as one-third of American households have no (or negative) federal income tax liability. Although tax penalties and refundable tax credits reach people without federal tax liability, the large majority of federal tax incentives take the form of nonrefundable tax expenditures. In contrast, because almost all U.S. residents are subject to the jurisdiction of one or more state governments, Congress can reach almost all U.S. residents when it uses grants to act through the states. Compared with grants, the relative incompleteness of federal regulation through tax incentives leaves more room for autonomous state regulation. This limitation on the personal reach of federal tax incentives represents a practical safeguard against federal aggrandizement through taxation.

Political Accountability

Tax incentives present political accountability problems. For example, because they are not part of the outlay budget, tax expenditures are said to receive less scrutiny from voters and legislators than do direct spending measures, including conditional grants. Moreover, once enacted, tax expenditures are generally permanent; that is, they do not have to be renewed each year but instead continue unless repealed. Like tax expenditures, tax penalties are generally permanent.

In contrast, conditional grants generally take the form of appropriations; they appear on the budget, and they must periodically compete with each other and with other direct spending programs for limited federal funds. Thus, grants arguably receive more careful (and certainly more frequent) review from members of Congress, state legislators, and state and national voters than do tax provisions.

In addition, because it can be hard to predict how many and to what extent taxpayers will take advantage of tax incentives, it also may be difficult to predict the degree to which proposed federal tax incentives will crowd out competing state legislation. As a result, voters and lawmakers may not have the information they need to evaluate the federalism impact of tax incentives.

Although the tax expenditure budget mandated by the Congressional Budget Act of 1974 has done much to cure this accountability problem by bringing tax expenditures to light and providing cost estimates and information about their content, accurately estimating tax expenditures is a notoriously difficult endeavor. Moreover, the Budget Act does not require identification of tax penalties or estimations of the revenue they raise. Without such information, voters and policymakers lack important information needed to evaluate tax penalties.

Despite their budgetary obscurity, however, there is reason to believe that tax penalties are nevertheless highly politically salient. As compared to regulations or tax expenditures, voters pay more attention to tax increases. As a result, politics may be a particularly effective check on the ability of Congress to overreach using tax penalties. For example, the desire to avoid the accusation that they “raised taxes” led politicians to change the label on the individual mandate of the healthcare reform act from “tax” to “penalty.” Empirical evidence suggests that such labels make a difference for how people react to policies. If tax increases are more politically salient than tax expenditures, conditional grants, or other kinds of regulation, then perhaps politics can serve as a meaningful check on tax penalties, vitiating the need for extensive judicial review of federal tax penalties. The relative scarcity of federal tax penalties compared to tax expenditures may reflect the greater political obstacles tax penalties face.

To the extent that the higher political salience of tax penalties makes them harder to enact, it serves as a political safeguard against federal overreaching through tax penalties, thereby reducing the need for a narrow interpretation of the taxing power.

Another difference between tax incentives and grants involves the role of state officials. Advocates of active judicial intervention to protect state autonomy against federal incursion argue that such intervention is especially needed in the case of conditional grants because the political safeguards of federalism break down when state officials, anxious to receive federal grant money, fail to check federal overreach. This confluence of state officials’ interest in receiving grants and federal officials’ desire to expand areas of federal policy lacks a clear analog in the tax context. Specifically, since federal tax incentives provide states no additional direct funding, state officials might more readily oppose federal tax provisions that encroach upon state autonomy than conditional grants that do so.

Of course, even if state officials oppose neither Congress’s use of conditional grants nor Congress’s use of tax incentives to regulate areas of traditional state concern, state residents nevertheless may use their right to vote in national elections to curb such federal expansion. For votes in national elections to serve as an effective check, however, voters must understand which level of government is responsible for the offending policy. But critics have argued that conditional grants undermine political accountability by confusing voters as to which level of government to reward or punish for policy choices. The federal government exacerbates this problem by exercising differing degrees of control and supervision over different grants. Although a certain degree of voter confusion may be inherent in federal forms of government, grants arguably compound such confusion.

In contrast, federal tax incentives avoid such confusion. Since taxpayers must affirmatively claim most federal tax

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Negotiating Federalism Past the Zero-Sum Game

By Erin Ryan*

Opponents of the new Medicaid expansion decried the move as a “gross federal overreach,” invoking familiar tropes about the bitter contest between state and federal authority in contexts of jurisdictional overlap. But regulators in the trenches of health care law know that the truth is more nuanced—that the Medicaid program really represents a site of extensive negotiation between state and federal actors about the specifics of each state plan, set within purposefully broad federal boundaries. Those who opposed the 2009 Stimulus Bill on federalism grounds similarly discounted the substantial role of state actors in negotiating the terms of the federal law. And those who challenged the Clean Water Act’s Phase II Stormwater regulations on federalism grounds missed the pivotal role state and municipal actors played in negotiating the terms of the rule—which itself became a forum for ongoing negotiation between state and federal regulators about how each municipality would ultimately comply within the open-ended permitting program they designed.

These instances of intergovernmental bargaining offer a means of understanding the relationship between state and federal power that differs from the stylized model of zero-sum federalism that has come to dominate political discourse. The zero-sum model sees winner-takes-all jurisdictional competition between the federal and state governments for power, emphasizing sovereign antagonism within the federal system. Yet countless real-world examples of interjurisdictional governance show that the boundary between state and federal authority is really an ongoing project of negotiation, taking place on levels both large and small.

Working in a dizzying array of regulatory contexts, state and federal actors negotiate over both the allocation of policymaking authority and the substantive terms of the mandates that policymaking will impose. Bargaining takes place both in policy realms plagued by legal uncertainty about which side has the final say, and in realms unsettled by uncertainty over whose decision should trump, regardless of legal supremacy. Reconceptualizing the relationship between state and federal power as one heavily mediated by negotiation reveals just how far federalism practice has departed from the zero-sum rhetoric. Better still, it offers hope for moving beyond the more paralyzing features of the federalism discourse and toward the kinds of good governance that Americans of all political stripes hope for.

As I describe in Federalism and the Tug of War Within (Oxford, 2012), federalism is the Constitution’s mechanism for dividing regulatory authority between the national and local levels. At its most basic, federalism assesses which kinds of policy questions should be decided nationally—yielding the same answer throughout the country—and which should be decided locally—enabling different answers in different states. Accordingly, the basic inquiry in all federalism controversies is always the same: Who should get to decide? Is it the state or federal government that should make these kinds of policy choices? But just as important is the meta-question of who gets to decide that—the political branches or the judiciary? When federalism issues are debated by Congress in lawmaking, it is the federal legislature that decides. When they are adjudicated in court, the federal judiciary decides.

But when they become the subject of appropriate intergovernmental bargaining, state and federal actors in all branches of government participate valuably in different elements of decision making. Indeed, even as federalism scholars remain mired in debate over questions about “who should decide” in the abstract, the regulators who actually work in contested contexts manage federalism uncertainty by simply negotiating through it—working directly or indirectly with their counterparts across state-federal lines to build consensus about sharing and dividing authority as needed to move forward with interjurisdictional governance. In this way, executive and legislative actors engage in various forms of state-federal bargaining subject to different levels of judicial review, balancing both local and national input and the distinctive functional capacities of the three branches. When they do so through principled processes, they are negotiating answers to federalism’s core questions in a manner that vindicates constitutional goals.

State-federal bargaining is thus endemic in areas of concurrent regulatory jurisdiction or those policy realms in which both state and federal actors hold legitimate regulatory interests or obligations simultaneously. Negotiation theorists broadly understand bargaining as an iterative process of joint decision-making—that is to say, any outcome that is the result of more than one mind after some back-and-forth process of communication. This broad definition encompasses many aspects of interjurisdictional governance, ranging from conventional political haggling (as over the terms of the Stimulus Bill), formalized methods of collaborative policymaking (as the Medicaid partnership does within individual state programs), and even the more remote signaling processes by which state and

* Associate Professor, Lewis & Clark Law School. The author recently returned from a Fulbright year in China. This essay is drawn from portions of Federalism and the Tug of War Within (Oxford, 2012) and Negotiating Federalism, 52 B.C. L. Rev. 1 (2011).
federal actors share responsibility for evolving public decision making over time (as they have, for example, over medical marijuana enforcement).

Together with the research that preceded it, Federalism and the Tug of War Within begins the process of cataloging the largely unchartered regulatory landscape of state-federal bargaining. Highlighting categories of conventional bargaining, negotiations to reallocate authority, and joint policymaking bargaining, its taxonomy traces at least ten different types of opportunities for intergovernmental bargaining that are available within various constitutional and statutory frameworks.

Among the most common varieties is state-federal bargaining under the constitutional spending power (see inset). In spending power bargaining, Congress uses federal funds to persuade states to partner with federal policymakers in implementing collaborative regulatory programs such as Medicaid, the national highway system, or the Coastal Zone Management Act. State actors just as commonly initiate negotiations with Congress during federal lawmaking of special interest to the states, as they did in lobbying for preferred terms in the 2008 Stimulus. State-federal negotiation is also an ordinary means of managing enforcement matters in which both sovereigns have a stake, as is frequent in the many areas of overlapping state and federal criminal law.

More sophisticated forms of federalism bargaining include negotiated federal rulemaking with state stakeholders, as was used to create the Clean Water Act’s Phase II Stormwater Rule. Some federal statutes explicitly share policy design with states, such as the No Child Left Behind and Race to the Top education laws. Others create staggered programs of “iterative” shared policymaking, as does the Clean Air Act’s mechanism for regulating vehicular emissions. This program enables each state to choose between a federal regulatory standard and a California alternative—creating a limited dynamic of regulatory competition by which federal policies affect state choices that in turn eventually impact evolving federal policies, as states “vote” with their proverbial feet about regulatory preferences.

Most subtly, all three branches of government—even state and federal courts—engage in processes of iterative joint decision-making through intersystemic signaling, by which independently operating state and federal actors trade influence over the direction of evolving public policies over time. The dialectic between state and federal regulatory preferences regarding medical marijuana enforcement and immigration law reflects this indirect form of negotiation, as have various judicial and legislative innovations in eminent domain law after the Supreme Court’s decision in Kelo v. City of New London, 545 U.S. 469 (2005).

The breadth of examples reviewed in the taxonomy reveals just how deeply intergovernmental bargaining permeates American governance, from familiar spending power examples to subtler varieties that have previously escaped scholarly notice as forms of negotiation at all.

All negotiations take place because each side has something the other side wants, and intergovernmental bargaining is no exception. Negotiators usually trade on the various aspects of governing capacity available to each side, including available financing, implementation or enforcement resources, and the relevant expertise required to accomplish specific regulatory goals. They will occasionally bargain for release from inhibiting legal obligations that each side may hold over the other. Sometimes they negotiate over the credit expected for regulatory successes (and by implication, blame for regulatory failures). Although federal negotiators usually possess superior financial resources and often act in the powerful shadow of federal supremacy, federal leverage is often effectively counterbalanced by the state’s broader police power authority and superior capacity for implementation of specific regulatory tasks. Moreover, interviews with practicing negotiators confirm that the normative force of federalism ideals can itself form important leverage at the bargaining table, constraining the results of negotiations in which participants are also motivated by more immediate substantive interests.

In the end, it should not be surprising that so much federalism-sensitive governance is accomplished through negotiation—notwithstanding the zero-sum discourse—given the negotiation features built into the very structure of American government. The bicameral nature of the legislature, the presidential veto, and even the subtle invitation to iterative policymaking afforded by judicial review—prompting Congress to try again to meet constitutional muster or signaling the concerns that future legislators must heed—all speak to the way American governance is, by design, an iterative process of joint decision making.

The interest-group representation model of democratic governance itself anticipates how lawmaking will reflect the results of bargaining between competing interest groups.

Given the foundational role that negotiated federalism plays in American governance, lawyers and judges would be wise to better understand it: where and how it happens, what works well and what does not, and what legal constraints should apply. Most importantly, we should understand how procedural tools available within “federalism bargaining” can assist the navigation of difficult federalism terrain that other means of constitutional interpretation have failed to clarify. Intergovernmental bargaining regularly facilitates needed interjurisdictional governance in controversial arenas where it otherwise falters—for reasons of political gridlock, regulatory abdication, or fear of litigation in the face of judicial uncertainty. Through negotiated consent, bargainers substitute procedural consensus for substantive consensus about abstract jurisdictional boundaries.

Yet we can also understand the robust recourse to regulatory bargaining as more than a mere de facto response to interpretive uncertainty on the part of the Supreme Court or Congress. Although this argument goes beyond the scope of this short essay, I close by highlighting the book’s theory of how federalism bargaining can itself be a

continued on next page
Spending Power Bargaining
After Sebelius

In the wake of the Supreme Court’s Affordable Care Act (ACA) decision in National Federation of Independent Business v. Sebelius, 567 U.S. — (2012), it is easy to get lost in debate over the various arguments about how the commerce and tax powers do or do not vindicate the individual mandate. But the most immediately significant portion of the ruling—and one with far more significance for most actual governance—is the part of the decision limiting the federal spending power that authorizes Medicaid. It is the first time the Court has ever struck down congressional decision-making on this ground, and it has important implications for the way that many state-federal regulatory partnerships work.

The Spending Clause authorizes Congress to spend money for the general welfare. Congress can fund programs advancing constitutionally specified federal responsibilities (like post offices), and it can also fund state programs regulating beyond specifically delegated federal authority (like education). Sometimes, Congress just funds state programs that it likes. But it can also offer money conditionally—say, to any state willing to adopt a particular rule or program that Congress wants. In these examples, Congress is effectively saying, “here is some money, but for use only with this great program we think you should have” (like health-insuring poor children).

In this way, the spending power enables Congress to bargain with the states for access to policymaking arenas otherwise beyond its reach. A lot of interjurisdictional governance takes place within such “spending power deals”—addressing matters of mixed state and federal interest in realms from environmental to public health to national security. Congress cannot just compel the states to enact its preferred policies, but spending partnerships are premised on negotiation rather than compulsion, because states remain free to reject the federally proffered deal. (If they do not like the strings attached, they do not have to take the money.) In South Dakota v. Dole, 483 U.S. 203 (1987), the Court famously upheld spending power bargaining, so long as the conditions are unambiguous, reasonably related to the federal interest, promote general welfare, and do not induce Constitutional violations. No law has ever run afoul of these broad limits, which have not since been revisited—until now.

In challenging the ACA, about half the states argued that Congress had overstepped its bounds by effectively forcing them to accept a significant expansion of the state-administered Medicaid program, even though Congress would fund most of it. All states participate in the existing Medicaid program, and many feared losing that federal funding (now constituting over 10% of their annual budgets) if they rejected Congress’s new terms. Congress had included a provision in the original law stating that it could modify the program from one year to the next, as it had done nearly fifty times previously. But the plaintiff states argued that this time was different because the changes were much bigger and because they could not realistically divorce themselves from the programs in which they had become so entangled.

The Court’s decision set forth a new rule limiting the scope of Congress’s spending power in the context of an ongoing partnership. Chief Justice Roberts began by upholding the presumption underlying spending bargaining—that the states are not coerced because they can always walk away if they do not like the terms of the deal. In a choice rhetorical moment, he offered: “The States are separate and independent sovereigns. Sometimes they have to act like it.” The Medicaid expansion was accordingly constitutional in isolation because states that do not want to participate need not do so.

But then the decision takes a key turn. What would be unconstitutional, he explained, would be if Congress were to penalize states opting out of the Medicaid expansion by canceling their existing programs. Given how dependent states have grown on federal funds in administering these entrenched programs, this would be unfairly coercive. By his analysis, plaintiffs chose the original program willingly, but were dragooned into the expansion. But to make his analysis work, he had to construe Medicaid as two separate programs: the current model and the expansion. Congress can condition funding for the expansion on acceptance of its terms, but it may not procure that acceptance by threatening to defund existing programs. The upshot: Congress must allow states to opt out of the expansion while remaining in the current program.

Justice Ginsburg excoriated this logic in dissent, arguing that there was only one program before the Court: Medicaid. For her, the expansion simply adds beneficiaries to what is otherwise the same partnership, purpose, and means: “a single program with a constant aim—to enable poor persons to receive basic health care when they need it.” She criticized the Chief Justice for enforcing new limitations on coercion without clarifying when permissible persuasion gives way to undue coercion, and she pointed to myriad ways his inquiry requires “political judgments that defy judicial calculation.”

On these points, Justice Ginsburg is right. The decision offers no limiting principle for evaluating coercive offers. “I-know-it-when-I-see-it” reasoning will not do when assessing the labyrinthine dimensions of intergovernmental bargaining, but the decision provides little else. Moreover, the rule is utterly unworkable. No

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present Congress can bind future congressional choices, so every spending power deal is necessarily limited to its budgetary year. But now, Congress can never modify a spending partnership without potentially creating two tracks—one for states that like the change and another for those preferring the original (and with further modifications, three tracks, ad infinitum). The decision fails to distinguish permissible modifications from new-program amendments, leaving every bargain improved by experience vulnerable to litigation. And it is highly dubious for the Court to assume responsibility for determining the overall structure of complex regulatory programs—an enterprise in which legislative capacity apexes while judicial capacity hits its nadir.

Nevertheless, the decision exposes an important problem in spending power bargaining that warrants attention: that is, how the analysis shifts when the states are not opting in or out of a cooperative federalism program from scratch but after having developed substantial infrastructure around a long-term regulatory partnership. It is true that the states, like all of us, sometimes have to make uncomfortable choices between two undesirable alternatives, and this alone should not undermine genuine consent. But most of us build the infrastructure of our lives around agreements that will hopefully last longer than one fiscal year (lay-offs notwithstanding). Chief Justice Roberts’ analysis should provoke at least a little sympathy for the occasionally vulnerable position of states that have seriously invested in an ongoing federal partnership that suddenly changes. (Indeed, those sympathetic to the ACA but frustrated with No Child Left Behind’s impositions on dissenting states should consider how to distinguish them.)

It is important to get these things right, because as I show in FEDERALISM AND THE TUG OF WAR WITHIN (Oxford, 2012), an awful lot of American governance really is negotiated between state and federal actors this way. Federalism champions often mistakenly assume a zero-sum model of American federalism that emphasizes winner-takes-all competition between state and federal actors for power. But countless real-world examples show that the boundary between state and federal authority is really a project of ongoing negotiation, one that effectively harnesses the regulatory innovation and interjurisdictional synergy that is the hallmark of our federal system. Understanding state-federal relations as heavily mediated by negotiation betrays the growing gap between the rhetoric and reality of American federalism—and it offers hope for moving beyond the paralyzing features of the zero-sum discourse. Still, a core feature making the overall system work is that intergovernmental bargaining must be fairly secured by genuine consent.

Supplanting appropriately legislative judgment with unworkable judicial rules does not seem like the best response, but the political branches can also do more to address the problem. To ensure meaningful consent in long-term spending bargains, perhaps Congress could provide disentangling states a phase-out period to ramp down from a previous partnership without having to simultaneously ramp up to new requirements—effectively creating a COBRA (Consolidated Omnibus Budget Reconciliation Act) policy for states voluntarily leaving a state-federal partnership. Surely, this beats the thicket of confusion the Court creates in endorsing judicial declarations of new congressional programs for the express purpose of judicial federalism review. But in the constitutional dialogue between all three branches in interpreting our federal system, the Court has at least prompted a valuable conversation about taking consent seriously within ongoing intergovernmental bargaining.

A legitimate way of interpreting federalism, when federalism interpretation is understood as a way of constraining public behavior to be consistent with constitutional values. At least when performed well, some forms of federalism bargaining provide legitimate means for answering who gets to decide? by procedurally incorporating not only the consent principles that legitimize bargaining in general, but also the fundamental values that should guide federalism interpretation in any forum.

After all, federalism’s core values—the good-governance principles that constitutional federalism is designed to ensure—are essentially realized through good governance procedure: (1) the maintenance of checks and balances to protect individual rights against government excess; (2) the protection of accountability and transparency to ensure meaningful democratic participation; (3) the preference for process that fosters local innovation, variation, and competition; and (4) the cultivation of regulatory space for harnessing the synergy between local and national capacity for coping with different parts of interjurisdictional problems. Ensuring that the bargaining process is faithful to these values enables negotiators to interpret federalism directives procedurally when consensus on the substance is unavailable, filling interpretive gaps inevitably left by judicial and legislative mandates.

In a nutshell, the more the bargaining process incorporates legitimizing procedures founded on genuine mutual consent and these federalism values, the more its results warrant deference when challenged in court on federalism grounds. Bargained-for results do not warrant deference if mutual consent is questionable (for example, if bargainers cannot freely opt out, cannot be trusted to understand their own interests, or cannot be trusted to faithfully represent their principals), or if the bargaining process impermissibly contravenes core federalism values of checks, transparency, localism, or synergy. At a minimum, courts adjudicating federalism-based challenges to the results of intergovernmental bargaining should consider procedural factors when deciding the appropriate level of deference to extend.

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Congress, Public Values, and the Taxing Power

By Mary L. Heen*

In an article published several years ago, I examined the financing dimension of private choice and proposed a framework for analyzing Congress’s taxing and spending decision-making processes. Although issues other than health care reform provided the impetus for the article, the framework developed there provides a broader perspective from which to consider the taxing power portion of Chief Justice Roberts’ opinion in National Federation of Independent Business v. Sebelius, 567 U.S. — (2012).

The article’s abstract stated in part as follows:

Congress coordinates its taxing and spending decisions through the budget process, collectively determining what will be financed and performed through government and what will be left to private choice. The courts generally defer to the taxing and spending decisions made by Congress. Nevertheless, in the process of developing this highly deferential approach, the U.S. Supreme Court historically has drawn distinctions between taxes and other means of paying for or regulating the production of goods and services. Although it can be quite difficult to distinguish “taxes” or “revenue raising” from “user fees,” “prices,” or “penalties,” they are not constitutionally interchangeable. When the Court has interpreted express limitations on Congress’s taxing power, the Supreme Court historically has analyzed the government’s taxing power in relation to its financing function. Differences between collective and individual financing thus underlie certain distinctions important in constitutional analysis. The cases suggest, for example, that express constitutional limitations on the taxing power are enforced when Congress is engaged in general “revenue raising” as opposed to collecting fees in exchange for goods or services. That is, an imposition may be a “tax” when funds are collected from private parties for a “public” purpose.

Defining Public Values: Congress’s Taxing and Spending Powers

In interpreting express constitutional limits on the taxing power, the Supreme Court historically has analyzed the government’s taxing power in relation to its financing function. Differences between collective and individual financing thus underlie certain distinctions important in constitutional analysis. The cases suggest, for example, that express constitutional limitations on the taxing power are enforced when Congress is engaged in general “revenue raising” as opposed to collecting fees in exchange for goods or services. That is, an imposition may be a “tax” when funds are collected from private parties for a “public” purpose.

In addition, the Court has drawn historically significant distinctions between “taxes” and “penalties” for regulatory violations. In the early part of the last century, taxes were upheld as valid revenue measures rather than prohibited regulatory “penalties” if they were unconditional taxes, achieving their regulatory effects through their rate structure; or if their regulatory provisions bore a “reasonable relation” to their enforcement as a revenue measure.

When this doctrinal distinction became less salient after the Court’s view of the commerce power expanded during the New Deal period, the Court generally tended to treat tax provisions producing revenue as constituting valid “revenue” measures. After adopting a more expansive view of national legislative powers, the Court never again held a federal tax to be an impermissible effort by Congress to impose regulatory standards outside the scope of its other enumerated powers. Because taxes imposed as regulatory penalties in the past had been upheld as sufficiently necessary and proper under the Commerce Clause, the relationship between the taxing power and other legislative powers received no serious discussion or reconsideration until the Court’s decision last June in Sebelius.

A Functional Approach to the Taxing Power

The portion of Chief Justice Roberts’ opinion applying a “functional” approach to the taxing power is fully consistent with those earlier cases. The Chief Justice wrote for the Court that regardless of the label applied by Congress, the “shared responsibility” exaction imposed on the uninsured is a valid “tax” for constitutional purposes as opposed to an impermissible regulatory “penalty.” In reaching that conclusion, Chief Justice Roberts applied three “practical” factors considered by the Court in 1922 when it invalidated the “Child Labor Tax” in Drexel Furniture. Decided when the Commerce Clause...
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was thought not to permit federal regulation of child labor, Drexel Furniture held that an excise tax imposed on employers for noncompliance with child labor restrictions was an improper regulatory device rather than a valid revenue measure.

In distinguishing the statute at issue in Drexel Furniture from the individual mandate, Chief Justice Roberts pointed out that unlike the “penalty” of ten percent of the company’s net income for employing children, the shared responsibility exaction imposes a relatively low level of burden on those without insurance (usually less than the cost of insurance and, by statute, never more than that cost). Sebelius, slip op. at 35. In addition, although the Child Labor Tax was imposed on only those who knowingly broke the law, the individual mandate of the health care legislation contains no scienter or mens rea requirement, a feature typical of punitive statutes. Id. Finally, he observed that although the Child Labor Tax was enforced in part by the Department of Labor, the shared responsibility “payment is collected solely by the IRS through the normal means of taxation—except that the Service is not allowed to use those means most suggestive of a punitive sanction, such as criminal prosecution.” Id. at 36 (emphasis in original).

After concluding that the shared responsibility exaction is a “tax,” Chief Justice Roberts then went on to analyze whether the “tax” complied with other express constitutional limitations on the taxing power. Although the Supreme Court has generally accorded Congress a presumption of validity in the exercise of its taxing power, express constitutional limitations on the taxing power include the uniformity requirement imposed on indirect taxes, the prohibition against the taxation of exports, and the apportionment requirement imposed on direct taxes. In addition, under the Origination Clause, all bills for “raising revenue” must originate in the House of Representatives. The taxing power is also limited by the crosscutting limitations of the Bill of Rights, which can apply to any exercise of congressional power.

Chief Justice Roberts rejected the argument asserted by the plaintiffs that the shared responsibility payment was a “direct” tax subject to the apportionment requirement. He first observed that a tax on going without health insurance was not within any recognized category of “direct” tax. It is not a “capitation” and “also plainly not a tax on the ownership of land or personal property.” Id. at 41.

He then went on to explain why it was not troubling to permit Congress to impose a tax for not doing something when it had held that the Commerce Clause “did not permit Congress to regulate those who abstain from commerce.” Id. at 41. According to the Chief Justice, three considerations alloyed any potential concern. First, “and most importantly, it is abundantly clear the Constitution does not guarantee that individuals may avoid taxation through inactivity,” with the express contemplation of a capitation tax by the Constitution. He then pointed out that Congress’s use of the Taxing Clause “to encourage buying something is, by contrast, not new,” citing provisions related to the home mortgage interest deduction and certain higher education tax incentives. Id. at 42. Second, although Congress’s ability to use its taxing power to influence conduct is not without its limits, the shared responsibility payment “passed muster” within the “strictest limits” applied by the Court. “More often, and more recently,” he observed, the Court had “declined to closely examine the regulatory motive or effect of revenue raising measures.” Id. He noted, “we need not here decide the precise point at which an exaction becomes so punitive that the taxing power does not authorize it.” Id. at 43.

Third, imposition of a tax “nonetheless leaves an individual with a lawful choice to do or not to do a certain act, so long as he is willing to pay a tax levied on that choice.” The only thing they may not lawfully do “is not buy health insurance and not pay the resulting tax.” Id. at 44 & n.11.

In the past, courts have offered limited additional guidance with regard to the meaning of the term “revenue” in other constitutional contexts, distinguishing between revenue measures and special assessments or user fees. In interpreting the Origination Clause, for example, the Supreme Court has included revenues intended for the general support of government but not special assessments designed to fund specific programs through fines or fees. For purposes of interpreting the Export Clause, which prohibits the taxation of exports from the states, the Supreme Court has similarly distinguished between prohibited taxes on exports and permissible user fees tied to specific benefits, services, or facilities. Thus, in defining revenue provisions, both Origination Clause and Export Clause cases draw distinctions between individually financed “user fees” and collectively financed “general revenues.”

Federalism and the Spending Power

On the spending side, Congress also has had a great deal of latitude historically in determining whether a particular expenditure serves “public” purposes, that is, whether the spending is in pursuit of the “general welfare.” Under the spending power cases such as South Dakota v. Dole, 483 U.S. 203 (1987), objectives not thought to be within the enumerated legislative powers “may nevertheless be attained through the use of the spending power and the conditional grant of federal funds.” Id. at 207. In Dole the Court adopted a multi-part test to determine whether federal spending conditions are constitutional. Although the Court also noted that Congress cannot enact spending conditions to induce the states to engage in unconstitutional acts or to coerce states into actions rather than offering them a choice, no clear limiting principle on the spending power had emerged under the Court’s subsequent federalism decisions until its decision on the Medicaid portions of the health care reform legislation. In Sebelius, Chief Justice Roberts observed that the threatened loss of all of the state’s existing federal Medicaid funding if a state declined to comply with the legislation’s expanded Medicaid coverage provisions was coercive, continued on next page
The argument that targeted tax incentives are more like spending programs than across-the-board tax cuts is somewhat counterintuitive and has been controversial in both academic and political quarters. Regardless of whether that argument is accepted as a matter of theory, however, the characterization of tax provisions as revenue raisers or revenue losers provides useful information to legislators because taxing and spending decisions tend to be made incrementally, and by reference to a current budgetary or revenue baseline. Since enactment of the Congressional Budget Act of 1974, for example, Congress has required that a list of “tax expenditures” be included in the budget showing revenue losses from certain existing federal income tax incentives.

Tax incentives generally do not involve negotiated relationships between government and private contractors, but typically involve tax reporting to the Internal Revenue Service and oversight jurisdiction by the tax-writing committees. The delivery of subsidies through the tax system can mask governmental funding levels and allocations and obscure accountability for outcomes being funded. The use of tax incentives as an alternative to discretionary spending by government serves privatization goals through their use of market incentives and private choice.

Targeted tax incentives encourage private businesses or individuals to engage in certain socially or economically favored activities. This type of “privatization” also involves a reallocation of lines between the public and private sectors, however, making public goals private interests by modifying market incentives. Privatization proponents tend to favor tax incentives as an alternative to government performance. Incentives use the tax system to stimulate private activity, a mechanism that permits the market to respond to individual preferences. Proponents tend to view the market as representing an aggregation of individual preferences and thus an effective and cost-efficient way of achieving goals. Under this view, public purposes would be well served by programs that permit the market to operate with as little government control as possible.

Critics of privatization tend to view public values as representing something other than the aggregation of individual preferences. They point out that the exercise of individual choice in the marketplace is quite different from collective choice exercised through political participation in the democratic process. The marketplace records individual preferences through purchasing power. Its increased use for performance of collectively financed activities, critics argue, may result in a loss of political participation and deliberation as well as the loss of those choices made possible through government action.

Conclusion

In sum, although the Constitution links the taxing power with the power to spend for the “general welfare,” the courts have largely deferred to the political process for determination of the public purposes appropriate for congressional action. The political dynamics involve raw budgetary conflicts, contested ideas about the value of collective versus private choice, and deep differences in views about governmental competencies and functions. Although the Court in the future may opt to enforce limits on Congress’s use of tax penalties or tax incentives for regulatory purposes, the Supreme Court’s decision in Sebelius demonstrates its current willingness to accord Congress a presumption of validity in the exercise of its taxing power.

Achieving greater political accountability for both the financing and performance of tax incentives remains a central challenge. Administrative lawyers and scholars are engaged in studying new ways in which regulation, contracts, and contract monitoring may respond to the accountability problems created by increased “contracting out” or privatization of government services. A parallel effort to study ways in which effective monitoring of tax incentives can be accomplished needs to be undertaken.
Watch what you pray for;” my Irish Catholic mother was likely to warn us, “for you may get it—and then you’d have to live with it!” In July, when President Obama signed the law that medical device industry lobbyists had been paid so much to advance through a fractious congressional channel, the high-tech industries achieved what they had prayed for... and now discover that the “living with” arbitrariness of regulatory control might not be all that much fun.

Administrative lawyers are very familiar with two strains of client complaints. Some say that administrative agencies need to tell us their expectations in advance. Others complain that administrative agency decisions are so rigid, they wish agencies had been flexible and free to shift as times changed. The 2012 Food & Drug Administration Safety & Innovation Act (FDASIA) posed a problem for the companies that make FDA-regulated products: Some companies want advance notice and relative certainty of needs and demands by regulators; other companies (or the same company at different times) want FDA to be free and flexible and adaptable, i.e. to let the company’s product onto the market despite limitations in an existing FDA directive from years before.

FDA regulated product categories like medical device development are full of company managers, entrepreneurs, venture capitalists, and crowdsourcing funders who expect FDA to have a path of predictable prerequisites to approval—do these steps, win clearance, market that—and for the most part, FDA product approval teams prefer to give a set of directions for the applicants to follow: But some in industry chafe at FDA’s slow progress to change directives as technology and foreign regulations change.

Until 1997, FDA had been a paragon of APA section 553 rulemaking, following the leadership of the iconic Peter Barton Hutt, whose efforts in the 1970s inspired the extensive FDA use of regulations. As Sid Shapiro and other revered scholars have written, “ossification” of the APA section 553 rulemaking process set in during the next two decades as the Office of Management and Budget’s Office of Information & Regulatory Affairs—and a chain of executive orders, case law, and additional statutory conditions—made it impossible for administrative agencies to react quickly to new challenges. Then in 1995 the Indiana Medical Device Manufacturers group petitioned FDA to broaden its stages of extensive public participation from applying only to rulemaking, to also be followed with a wide range of other documents. FDA’s Feb. 27, 1997 response (62 Fed. Reg. 8961, 8962) took a narrow view of what FDA actions would be called a “Guidance” that merited participation efforts. So the industry went to Congress and won its preferred language. The industry efforts in Congress responded to FDA’s use of the less formal “Guidance” as an alternative to the delays in adopting revised regulations. In 1997, Public Law 105–115 provided FDA a new constraint in 21 U.S.C. § 371(h)(1)(B): “Although guidance documents shall not be binding on the Secretary, the Secretary shall ensure that employees of the Food and Drug Administration do not derive from such guidelines without appropriate justification and supervisory concurrence. ... (C) For guidance documents that set forth initial interpretations of a statute or regulation, changes in interpretation or policy that are of more than a minor nature, complex scientific issues, or highly controversial issues, the Secretary shall ensure public participation prior to implementation of guidance documents, unless the Secretary determines that such prior public participation is not feasible or appropriate.”

Fast forward to spring 2012; FDA uses a mix of advisory letters, emails, speeches, and various forms of messages circulated to industry groups that communicate how FDA’s medical device reviewers have expectations for certain aspects of the device filings. FDA did not call these rules (because of the ossified rulemaking process) and did not call them Guidances (because the 1997 law had built in lengthy commenting processes). A rose by any other name is still a rose. FDA wanted the device makers to know its expectations.

But the decline in domestic budgetary dollars for HHS agencies like FDA was a reality, and FDA had grown dependent on money from user fees. Periodic congressional renewal of the user fee legislation was a “must pass” bill in spring 2012; failure to pass the bill would have decimated the FDA science and technical staff, a large portion of whose salaries depended on continued collection of fees. Layoffs on September 30, 2012, loomed ahead. The industry loaded its wish list onto the friendly House bill and then negotiated for months seeking changes to the FDA system. As in the cinematic drama of the last train leaving Paris in the classic movie Casablanca, industry knew that its wishes would have to be accommodated.

The lobbyists who drafted versions of FDASIA sold it to those Congress Members who cared to listen as a job-saving measure that would keep technical and science jobs from leaving America for greener pastures overseas. But somewhere along the line, the lobbyists missed the consequence of what they had “prayed for.” Their new 21 U.S.C. § 371(h)(1)(C) modified the 1997 legislation on FDA’s use of Guidance documents: “(ii) With respect to devices, if a notice to industry guidance letter, a notice to industry advisory letter, or any

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similar notice sets forth initial interpretations of a regulation or policy or sets forth changes in interpretation or policy, such notice shall be treated as a guidance document for purposes of this subparagraph.”

The 2012 statute sought to shut down FDA’s speedy communication of “advisory” communications. If it is not a rule and not a Guidance, then FDA may not call it advisory or any similar title. Stepping back to ask, “Who Cares?”, the persistent device makers now had blocked FDA’s flexibility to change rapidly as technology shifts. FDA cannot communicate the agency’s expectations in a rule, a guidance, a policy, or an advisory letter, without jumping through the expanded hoops of participation. For some firms, the absence of directives inhibits their predictions of FDA approval choices for unconventional product changes. The prospect of one unexpected surprise might be enough to stifle the company’s research team and its investors away from that product direction.

Certainty and lengthy clearance and comment processes have their advantages in static and solid industrial regulation. Technology gatekeeper FDA needs to have flexibility. The future for medical device makers may be an uncomfortable surprise change in FDA expectations, may appear arbitrary, and may be changing via enforcement cases, individual warning letters, or other means. FDA is free to take advantage of the ancient Cheney case principle that an agency may choose to shoot industry “from the hip” by adjudicative means without first formalizing its intentions. An FDA that must choose between rapid action and extensive bureaucratic red tape is likely to employ more enforcement, more warnings and detentions, after 2012. The device industry that won its constraints on advisory letters may be in for years of buyer’s remorse from the absence of advance notice of FDA’s intent. That’s what makes the field of administrative policymaking so much fun for lawyers. Learn from the device lobby: Watch what you pray for!

The Constitutional Limits of Taxing and Spending continued from page 5

expenditures on their federal tax forms (and self-assess most penalties using federal forms), it is relatively easier for taxpayers to discern the federal origin of such tax provisions. This, in turn, allows taxpayers to properly target Congress for blame and praise. Moreover, since federal tax incentives affect taxpayers directly, and, unlike states, individual taxpayers have direct representation in the federal political system, taxes may be more politically responsive than grants. The Supreme Court’s taxing power jurisprudence reflects this notion. For example, the Court has repeatedly held that the ballot box, not the courts, represents the proper avenue for redressing oppressive federal taxation.

Conclusion

Like the spending power, the taxing power raises federalism concerns because federal tax policies may crowd out state regulation of the same regulatory area. Opponents of conditional federal grants argue that by essentially reassigning legislative competence through contract, conditional grants reduce the policy space available to the states and alter the structural division of government power described by the Constitution. In this way, grants are said to redraw the lines of federalism, thereby jeopardizing the benefits conferred by federalism, including decentralization, policy diversity, and regulatory competition. Similarly to grants, Congress uses tax incentives to influence private taxpayer behavior in ways that may crowd out state regulation, including—as Sebelius has shown—in areas that are determined by a majority of the Supreme Court to lie outside Congress’s other enumerated powers. But Chief Justice Roberts’ opinion in Sebelius did not discuss how to evaluate the impact on federalism of an expansive interpretation of the taxing power. This article suggests some factors relevant to that evaluation.

Negotiating Federalism Past the Zero-Sum Game continued from page 9

Intergovernmental bargaining is thus a foundational element of governance within the American system of dual sovereignty. In the face of persistent uncertainty about the boundaries between state and federal reach, regulatory actors move forward by substituting procedural consensus for substantive clarity about the central federalism inquiry—who gets to decide?—in individual regulatory contexts. And when it incorporates the principles of mutual consent and core federalism values procedurally, negotiated governance opens possibilities for filling interpretive gaps in congressional legislation and even the Court’s federalism jurisprudence.

This analysis advances both the regulatory and federalism discourses by providing better theoretical justification for the interpretive work that intergovernmental bargaining has long provided, calling for greater judicial deference to qualifying examples. It also reveals legislative and executive opportunities to engineer legitimizing procedures into state–federal bargaining at the level of regulatory design, improving the quality of federalism bargaining in general. Finally, it moves beyond the hallowed debate about the appropriate roles of the Supreme Court, Congress, and federal executive in unilaterally protecting federalism to fully appreciate the critical role that state and federal actors play in bilaterally implementing constitutional directives. Regulatory realms characterized by jurisdictional overlap yield many instances in which the very process of intergovernmental bargaining proves more able to preserve constitutional values than judicial or legislative decisions alone. Recognizing how negotiation supplements these more conventionally understood means of allocating authority provides a new lens for understanding the uniquely collaborative process of American governance.
Designing Information Disclosure

By Daniel E. Ho*

Information disclosure is a central tool of regulatory policy. While academic research highlights how consumers comprehend information, it largely glosses over the institutional design of information-disclosure schemes. Empirical evidence from over 700,000 restaurant health inspections in 10 jurisdictions shows that the poster child of information disclosure—restaurant letter grading—fails when institutional design is ignored.

Information Disclosure

As any administrative lawyer can attest, mandated information disclosure pervasively pervades in the regulatory state. Decades of research, however, also show that such disclosures are often grossly ineffective. Safe Drinking Water Act reports are notoriously complex—disclosing a litany of contaminant test results (e.g., 5–67 ppb of barium)—and hence unintelligible to the typical consumer. Caloric disclosures can induce consumers to eat a higher quantity of low-caloric foods—the so-called “Snackwell effect.” And cardiac surgery report cards can affect the willingness of physicians to treat sicker patients.

The emerging consensus in social science centers on the idea of a “targeted nudge.” Disclosures should take the form of simplified signals that summarize the underlying complex information and are disseminated to consumers at the time of decisionmaking. Such targeted nudges enable consumers to act in an informed fashion.

Restaurant letter grading is a prime example. Such letter grades (A, B, or C) in principle summarize the health risk of a restaurant, as assessed by inspectors during unannounced on-site inspections that typically last one to two hours. Grades are posted in the entryway of restaurants enabling consumers to choose restaurants based on their sanitation risk. In one study of Los Angeles, researchers found that letter grading reduced hospitalizations for food-borne illness by 20%. Research comparing disclosure regimes across regulatory areas, based on the Los Angeles findings, concludes that restaurant grading is “highly effective” due to the “brief, simple, easy disclosures.” Forbes magazine dubs it as “[t]he most effective regulatory disclosure ever.”

Yet is it really effective?

Empirically Grading Restaurant Grading

In the United States, restaurant food safety is typically regulated at the local level. The institutional design features of local environmental health agencies—such as the degree of inspector specialization, the rules for scoring food code violations, the timing of inspections, and the thresholds for letter grades where they exist—vary widely across jurisdictions.

To assess the effectiveness of letter grading, my research team collected data from over 700,000 restaurant inspections of over 100,000 restaurants in 10 jurisdictions. For simplicity, we focus here only on San Diego and New York, but the results generalize. Our main findings are threefold.

Grade Inflation

Jurisdictions that grade exhibit rampant grade inflation. In San Diego, inspectors score restaurants on a 0–100 scale, with 90 or more points resulting in an A grade. Out of some 9,000 restaurants, all but eight received A’s, with many falling just above the cutoff.

While it is possible that restaurants are cleaning up to precisely target the A threshold, there are reasons to doubt this. First, inspectors exercise considerable discretion in the scoring of individual violations. A typical requirement, for example, is that “food contact surfaces are clean and sanitized,” which may be assessed in different ways. Such discretion likely leads some inspectors to bump up borderline restaurants to an A grade. As one San Diego inspector noted: “Some inspectors will give out a B for an 89. I usually warn somebody at that point. It’s a judgment call.”

Second, San Diego allows restaurants to pay roughly $140 to be reinspected and regraded within days. Nearly a quarter of San Diego restaurants scoring below 90 achieve an A within one day of the original inspection and 80% do so within a month. Third, when New York introduced grading in July 2010, scores similarly began exhibiting sharp differences at the cutoff, with many more restaurants barely receiving A’s. And contrary to the notion that restaurants were cleaning up in response to the grades, average scores, if anything, got worse.

In short, grade inflation appears rampant, suggesting that grades provide little meaningful information that would allow consumers to distinguish between restaurants.

Consistency

For grading to be effective, the grade must minimally convey some information about the sanitation level of the restaurant. To assess this, we examined the consistency of underlying inspection scores across repeat, unannounced inspections of the same establishment. In most jurisdictions, these scores exhibit some degree of substantive consistency. A San Diego restaurant receiving a score of 90, for example, will most likely also receive a score around 90 in the next inspection cycle. Overall, roughly 25% of the variation in San Diego’s scores is explained by scores in the prior inspection cycle. This makes sense if inspection scores measure sanitation levels that are a persistent attribute of the specific restaurant, a predicate assumption of grading.

New York, however, is an outlier. While New York restaurants exhibit substantial

* Professor, Stanford Law School. Email: dho@law.stanford.edu. This article provides an overview of the author’s full article, Regulatory Fudge: The Promise of Targeted Transparency and the Practice of Restaurant Grading, 122 YALE L.J. (forthcoming). Thanks to Patrick Leahy and Laura Trice for helpful comments.

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variation in grades (roughly two thirds receive A’s), the underlying inspection scores have no substantial predictive power over future scores. Prior scores predict less than 2% of the score variation. New York grades, in other words, do not appear to summarize any persistent attribute of restaurant sanitation.

Why does New York exhibit such inconsistency in its inspections? The best answer may lie in institutional design. First, New York’s cadre of roughly 180 inspectors does not specialize exclusively in restaurant inspections. Inspectors are responsible for dozens of different types of inspections, such as for senior centers and summer camps. Second, the set of rules governing the scoring process is more complex than in any other jurisdiction we encountered. New York inspectors score more violations, with a wider point range (relative to the grade threshold), than elsewhere. San Diego, for example, records a single violation for vermin. New York records separate violations for (i) “[e]vidence of rats or live rats,” (ii) “[e]vidence of mice or live mice,” (iii) “[l]ive roaches,” and (iv) “flies,” scored at 5, 6, 7, 8, or 28 points, depending on the evidence. (New York’s cut-off to receive an A is less than 14 points.) Thirty “fresh mice droppings in one area” result in six points, but thirty-one droppings result in seven points.

The result is that inspectors implement restaurant inspections in sharply different ways. As one public health official (albeit not based out of New York) noted: “it is the norm for every single person to do an inspection differently.” A 2009 audit by the City Comptroller, which documented considerable data errors and a failure to supervise and monitor inspectors, showed that of 67 inspectors who conducted at least 100 inspections per year, one inspector averaged 15 points and another 50. And in a raucous oversight hearing in March 2012, N.Y. City Council Speaker Christine Quinn focused on the “inconsistent” implementation of restaurant inspections.

In short, New York’s grades appear to have little meaning.

Resource Allocation

Perhaps the most pernicious feature of institutional design is that letter grading appears to shift inspection resources away from the worst offenders.

Prior to grading, New York’s Department of Health would conduct “compliance inspections” of restaurants posing the greatest risks—those now in the C-range. While some compliance inspections still occur, the grading system introduced “reinspections” for restaurants scoring less than an A to have a second chance to obtain a better grade. (When the Department first proposed grading, it did not include provisions for reinspections, but ultimately succumbed to restaurateur pressure.) Such reinspections occur roughly a month after the initial inspection and restaurants do not have to post a grade during the interim period. Some 14,000 inspections in the first year and a half of the grading system have been devoted to reinspections for grade resolution of B-range restaurants.

Grading thereby consumes resources that could have been deployed at restaurants with more egregious violations.

Institutional Design

Design and implementation matters. The underlying idea of letter grading may be well conceived. Indeed, letter grades are the rare example of a disclosure that appears to have a substantial effect on consumers. But targeted nudges fail without a well-designed public institutions to generate the underlying information.

How could we do better?

First, rules can be too detailed. Although New York’s scoring system was designed to make the inspection process more objective and informative, the opposite has occurred. As has also been shown in the context of nursing home inspections, highly detailed rules (in lieu of standards) can impede the consistency and reliability of inspections. (The irony is that while proponents of grading prefer simplification for consumers, they ignore it for information producers.) In jurisdictions like New York, rules need to be simplified to reduce differences across inspectors.

Second, reinspections, which typically accompany grading systems, are ineffective. Restauranters know with relative precision when such reinspections occur: in New York, roughly one month after the initial inspection; in San Diego, within days upon payment. Strategic cleanups in anticipation of such reinspections undermine the meaningfulness of sanitation scores and reinspections improperly draw resources away from the worst offenders. Grades should be based on truly random inspections to provide a meaningful measure of a restaurant’s sanitation level.

Third, jurisdictions should fight grade inflation. One way to do so is by setting higher cut-offs for A grades and disclosing the proportion of restaurants achieving each grade.

Fourth, letter grade disclosures should account for the uncertainty in the inspection process. Well-known statistical adjustments can account for factors, such as inspector differences, as well as aid agencies in training, supervising, and monitoring inspectors. And some measure of uncertainty—akin to the margin of error in a presidential poll—should be disclosed to consumers.

Last, agencies should make full inspection data freely available. The only way to assess grading is to enable researchers to study its operation. Comprehensive data disclosure will also empower information intermediaries to find more effective ways to disseminate information to consumers. A website like Yelp, which aggregates information and ratings of local businesses and reaches roughly 66 million unique visitors per month, could, for example, include health inspection data in its restaurant characteristics, even in jurisdictions that currently do not mandate letter grade posting.

The Risk of False Promises

Our study shows that even the perceived paragon of information disclosure can be seriously flawed in implementation. Targeted nudges cannot solve or avoid the core administrative law issues—the institutional design of inspection agencies, the development of administrable rules and standards, and the accountability and oversight of expert agents. Without such elements in place, health inspections cannot generate meaningful information and targeted nudges risk turning into a facile mantra of regulatory reform.
Introduction

In light of the economic challenges our country faces, President Obama directed agencies to carefully consider the effects on jobs when designing regulations:

Our regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness and job creation. ... As stated in Executive Order 12866, and to the extent permitted by law, each agency must ... tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account the costs of cumulative regulations.

Executive Order 13563, Sec. 1 (Jan. 18, 2011) (emphasis added).

In its Draft 2012 Report to Congress on the Benefits and Costs of Federal Regulation, the Office of Management and Budget (OMB) followed up on the President’s directive by requesting public comment on whether and how agencies should evaluate employment impacts when analyzing the costs and benefits of economically significant regulations. Concern about job displacement by regulations is not new. President Clinton’s Executive Order 12866 and President Reagan’s Executive Order 12291 included within the scope of rules subject to rigorous benefit-cost analysis (BCA) those that might adversely affect jobs. Now more than ever, regulation should be supported by the three pillars of sustainability—it should meet economic needs, environmental concerns, and social expectations.

The dismal job market and concerns about over-regulation have brought the issue to a head. On one hand, some concerns, and social expectations. Meeting economic needs, environmental concerns, and social expectations. For workers and their families, the costs of job displacement can readily destroy human capital and produce discouraged workers. Second, recent studies have shown that the adverse impacts of job loss on workers are far higher than previously assumed by analysts. Indeed, new research indicates not only that the employment impacts of regulation can be estimated but also that such estimates can change the outcome of BCA and alter regulatory decisions. The issue is ripe for action.

The Impacts of Job Displacement

Over 12 million Americans currently are unemployed, and the U.S. unemployment rate has hovered above 8% for over 40 months. Estimates that include discouraged workers are far higher. Americans are facing the worst job market since the Great Depression.

Job losses result in a host of costs to workers, their families, their communities, and society. For workers and their families, the costs of job displacement include:

- lost productivity, such as lost earnings potential from the destruction of human capital that makes skills less valuable in the future, the deterioration of job skills during extended unemployment, and retraining costs;
- search costs and relocation expenses;
- adverse health impacts, including morbidity and mortality, as well as other adverse impacts on well-being.

Recent research shows that both the economic and health impacts of job loss are much greater than previously thought. More recently, a study by Masur and Posner monetizes the adverse employment effects of regulations and reaches alarming conclusions:

First, unemployment costs for workers are far from trivial. A conservative estimate is that an average worker who loses his job in a mass layoff will suffer earnings losses of more than $100,000 over the rest of his life, plus a host of nonpecuniary costs including increased mortality and unhappiness, which could be valued at another $160,000. Second, unemployment costs for workers vary with the characteristics of workers, such as age and experience and the industry in which they are employed. (emphasis added).

Furthermore, Masur and Posner examine past agency BCA and find that accounting for the costs of job displacement could change the outcome of the analyses. In theory, if the analyses were taken seriously, they could alter decisions of whether and how to regulate, particularly for the most adversely affected industries.

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Current Agency Practices

Current agency practices analyzing and considering the employment impacts of regulation need significant improvement. As Masur and Posner observed, ‘agencies’ existing approaches for addressing the unemployment effects of proposed regulations are ad hoc and incoherent.”

First, agencies typically do not incorporate the costs of job displacement into their BCA where they might make a difference in the outcome of the BCA and the selection of a regulatory alternative. Instead, agencies generally include only direct compliance costs in the BCA and assume that the economy is at full employment and that any costs associated with job losses are trivial. Workers displaced from their jobs today are assumed to readily find a replacement job. Of course, such an assumption is highly dubious in today’s economy. Moreover, agencies often do not include a robust distributional analysis in the regulatory impact analysis that describes the workers who likely will be displaced from their jobs and the effects. If employment effects are assessed, the agency may include the assessment in a feasibility analysis or do a job-loss analysis, but in neither case does it incorporate the results into the BCA. The agency may perform the analysis with little rigor or clarity in how it is applied. Typically, there is no uniform definition of what is “feasible,” so there may be a lack of consistency within a particular analysis, as well as among feasibility analyses by a specific agency and across multiple agencies.

There also may be data quality and transparency problems. Agencies often fail to consider data specific to a given industry, and they often lump disparate industries together, which can produce estimates with little or no relevance to a particular industry. The data also may be outdated, and even if the data relates directly to the relevant industry, it may no longer be applicable. For example, the elasticity of demand curves may have changed significantly due to foreign competition, technological changes, structural changes in the economy, etc. Agencies also may rely on models that are not transparent and data that is not accessible to the public.

Finally, agencies may focus only on net job effects, not gross job effects, under the assumption that “a job is a job.” This assumption is highly questionable, and in the process of making it, agencies neglect significant costs to displaced workers, their families, and their communities. Job displacement costs to workers that agencies could—but do not—monetize and incorporate into BCAs include lost earnings potential from the destruction of human capital, the deterioration of job skills, retraining costs, search and relocation costs, etc. Agencies also could—but do not—include the adverse health effects of job displacement, including physical and mental health, as well as other adverse impacts on well-being.

Recommendations for Reform

There are concrete steps that could reduce the adverse impact of regulations on jobs. For economically significant rules, agencies should analyze the employment effects, monetize those impacts to the extent feasible, and incorporate them into the BCA. The distributional impacts of job displacement by regulations, while outside the traditional benefit-cost framework, should be identified and described in the regulatory impact analysis and considered by the relevant policymaking officials. Distributional impacts include whether there are particularly vulnerable subpopulations that could be harmed by job displacement and the extent of the harm.

An independent entity should perform analyses of the employment displacement effects of regulation. One possibility is the Office of Manufacturing Services in the Department of Commerce. The Office already has taken significant strides to assemble an excellent staff, but it should be provided with additional resources as needed. Having an independent entity conduct the analysis would foster greater objectivity and promote the development of expertise in state-of-the-art methodologies for conducting the analyses. The independent entity also could build a database and models that are publicly accessible, transparent, and will facilitate employment impact analyses.

OMB should prepare, and take public comment on, best practices for conducting employment impact analyses for regulations. When the potential job displacement for an industry is calculated, it is critical, as Masur and Posner recommend, that the analysis be done using data relevant to that particular industry, not an aggregation of data from disparate industries that bears little or no relevance to the industry at issue. Employment impact analyses also should account for the difference between short-term and longer-term employment impacts. For example, the use of job-years should be considered.

In the tradition of the Regulatory Flexibility Act, which was intended to minimize the adverse impacts of regulation on small entities, the President, OMB, or Congress could direct the agencies to minimize the adverse impacts of regulations on disproportionately affected industries and their workers. Just as regulatory agencies often protect consumers who are highly sensitive or highly exposed, agencies could identify workers whose skills are industry-specific or are in areas where regulation could cause the supply of workers to exceed the near-term demand. This would focus the regulatory agency, OMB, and other participants in the regulatory review process on regulatory options that could minimize unnecessary regulatory costs. It also should be noted that unwarranted job displacement can be mitigated through the rigorous and objective application of the efficiency criteria governing regulatory review, by regulating less than is typical during periods of low unemployment, and by extending the effective dates of rules to allow time for economic recovery.

Conclusion

If these recommendations were implemented rigorously, they could create a market for the production of high-quality information about the impacts of regulations on jobs and reveal regulatory options that could significantly reduce regulatory burdens, avoid unwarranted job displacement, and free up additional investment and job creation without sacrificing important regulatory benefits. Our goal should be sustainable regulation—regulation that addresses economic needs, environmental concerns, and social expectations. There is no better place for a robust manufacturing sector than the United States, which has highly productive workers, creative entrepreneurs and innovators, abundant resources, a strong democratic legal system, and regulatory agencies capable of leading the world on sustainable regulation.
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By Robin Kundis Craig*

At the end of its 2011-2012 term, the U.S. Supreme Court decided a number of cases of interest to administrative law practitioners, including National Federation of Independent Business v. Sebelius, 567 U.S. — (2012). For once, most of the Court’s Chevron deference decisions were among its least contentious, and it projected strong concerns for due process in the context of agency enforcement, both in terms of notice and in the context of the appropriateness of Auer deference. Rounding the term were two cases regarding the availability of judicial review, one involving the Civil Service Reform Act and statutory displacement of the federal courts’ general federal question jurisdiction, the other involving the invocation of the Administrative Procedure Act (APA) in the context of Indian lands.

The Patient Protection and Affordable Health Care Act Decision

National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566 (June 28, 2012), is a long, complex, and fractured decision, very little of which directly affects administrative law. However, the decision does address the availability of judicial review, principles of separation of powers, and the regulatory authority of the federal government.

With respect to the availability of judicial review, Chief Justice Roberts, joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan, concluded that the Anti-Injunction Act did not bar the lawsuit. The “Act provides that ‘no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.’” Id. at 2582 (quoting 26 U.S.C. § 7421(a)). However, in the Patient Protection and Affordable Health Care Act (PPAHCA), Congress chose to describe its enactment for failure to comply with the individual mandate as a “penalty” rather than a “tax.” Because Congress drafted both statutes, and in light of the fact that the Court had applied the Anti-Injunction Act to exactions that Congress had labeled “taxes” even when they were clearly not taxes, the majority determined that application of the Anti-Injunction Act would follow Congress’s choices in labeling government enactments—even though the penalty in the PPAHCA could clearly be (and eventually was) considered a tax. Id. at 2583–84. Indeed, and quite ironically, these five Justices upheld the mandate that individuals buy health insurance on the grounds that it was a tax. Id. at 2594–2600. The four dissenters, in contrast, would have held Congress to its label for all purposes, id. at 2650–55 (Scalia, J., dissenting), arguing that if the majority was going to call the individual mandate a tax for purposes of upholding it, then the Anti-Injunction Act should also apply. Id. at 2655–56.

Five Justices agreed that the PPAHCA’s mandate that individuals buy health insurance exceeded Congress’s Commerce Clause authority because it regulated a failure to act. Chief Justice Roberts indicated that Commerce Clause authority extends only to actions—not to individuals’ failure to act—but no other Justice joined this section of the opinion. Id. at 2587–89. Nevertheless, dissenting Justice Scalia, joined by Justices Kennedy, Thomas, and Alito, agreed with Chief Justice Roberts’ basic rationale. Id. at 2643, 2644–48. Moreover, the dissenters emphasized:

What is absolutely clear, affirmed by the text of the 1789 Constitution, by the Tenth Amendment ratified in 1791, and by innumerable cases of ours in the 220 years since, is that there are structural limits upon federal power—upon what it can prescribe with respect to private conduct, and upon what it can impose upon the sovereign States. Whatever may be the conceptual limits upon the Commerce Clause and upon the power to tax and spend, they cannot be such as will enable the Federal Government to regulate all private conduct and to compel the States to function as administrators of federal programs. Id. at 2643.

Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, considered the Chief Justice’s reading of the Commerce Clause “crabbed,” id. at 2610 (Ginsburg, J., concurring in part and dissenting in part), and would have upheld the individual mandate both under the Commerce Clause and under Congress’s taxation authority. They emphasized that the Commerce Clause was intended to protect the interests of the nation as a whole, id. at 2615, and that its extent should be evaluated in light of practical considerations. Id. at 2616. These four Justices advocated the following standards for Commerce Clause evaluations:

Until today, this Court’s pragmatic approach to judging whether Congress validly exercised its commerce power was guided by two familiar principles. First, Congress has the power to regulate economic activities “that substantially affect interstate commerce.” This capacious power extends even to local activities that, viewed in the aggregate, have a substantial impact on interstate commerce.

Second, we owe a large measure of respect to Congress when it frames and enacts economic and social legislation. When appraising such legislation, we ask only (1) whether Congress had a “rational basis” for concluding that the regulated activity substantially affects interstate commerce, and (2) whether there is a “reasonable connection between the regulatory means selected

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and the asserted ends.” In answering these questions, we presume the statute under review is constitutional and may strike it down only on a “plain showing” that Congress acted irrationally.

Id. at 2616–17 (citations omitted). The individual mandate satisfied these standards: “Beyond dispute, Congress had a rational basis for concluding that the uninsured, as a class, substantially affect interstate commerce,” and “[t]he minimum coverage provision . . . bears a ‘reasonable connection’ to Congress’ goal of protecting the health-care market from the disruption caused by individuals who fail to obtain insurance.” Id. at 2617.

Seven Justices agreed that the Medicaid provisions of the PPACA violated Congress’s Spending Clause authority. According to Chief Justice Roberts, Justice Sotomayor, and Justice Kagan, the Act’s threat to eliminate all federal Medicaid funds if states did not expand Medicaid coverage essentially “held a gun” to the states’ heads, coercing them to adopt new federal policy. Id. at 2601–2607. However, these Justices considered the Medicaid penalties for states severable from the rest of the Medicaid provisions. Id. at 2607–08. The dissenters agreed that the Medicaid expansion provisions exceeded Congress’s Spending Clause authority on the coercion rationale, id. at 2656–2666 (Scalia, J., dissenting), but they would have invalidated the entirety of the Medicaid provisions as a result. Id. at 2666–68. Justice Ginsburg, in contrast, joined by Justice Sotomayor, would have upheld the Medicaid provisions in their entirety, but agreed with Chief Justice Roberts’s severance solution in light of the majority’s finding of unconstitutionality. Id. at 2629–42.

Due Process and Agency Enforcement

The Federal Communications Commission’s (FCC’s) attempt to enforce against indecency on television was back in the Supreme Court this term in F.C.C. v. Fox Television Stations, Inc., 132 S. Ct. 2307 (June 21, 2012) (Fox I). Two of the enforcement actions arose out of Fox Television’s broadcasts of the Billboard Music Awards in 2002 and 2003, during which Cher and Nicole Ritchie, respectively, used unscripted expletives that the network failed to “bleep” out. The third incident involved a 2003 broadcast of NYPD Blue by ABC Television that included seven seconds of female rear and partial frontal nudity. These incidents occurred before the FCC announced its new policy banning fleeting expletives and fleeting nudity in its so-called Golden Globes Order, but it pursued enforcement actions anyway.

In the case’s first trip to the Supreme Court, the Court upheld the new decency policy under the APA’s arbitrary and capricious standard. F.C.C. v. Fox Television Stations, Inc., 556 U.S. 502, 529 (2009) (Fox I). On remand, the Court of Appeals for the Second Circuit found the policy unconstitutionally vague and vacated it in its entirety. In its second decision in this case, the Supreme Court unanimously (Justice Sotomayor did not participate) vacated and remanded the decision but held that the television stations had not received adequate notice of the new decency policies. Fox II, 132 S. Ct. at 2317–18. According to the Court, “[a] fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.” Id. at 2317. Notice issues are particularly important in the speech context:

Even when speech is not at issue, the void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech.

Id. (citation omitted). Moreover, the regulatory history made it clear that Fox and ABC had not received the notice to which they were entitled:

In the 2004 Golden Globes Order, issued after the broadcasts, the Commission changed course and held that fleeting expletives could be a statutory violation. In the challenged orders now under review the Commission applied the new principle promulgated in the Golden Globes Order and determined fleeting expletives and a brief moment of indecency were actionably indecent. This regulatory history, however, makes it apparent that the Commission policy in place at the time of the broadcasts gave no notice to Fox or ABC that a fleeting expletive or a brief shot of nudity could be actionably indecent; yet Fox and ABC were found to be in violation.

Id. at 2318. Finally, the Court emphasized that its decision was narrow. It was not addressing the First Amendment issues in the background of the case; it was not ruling on the constitutionality (based on vagueness) of the FCC’s current indecency policy; and it “leaves the Commission free to modify its current indecency policy in light of its determination of the public interest and applicable legal requirements. And it leaves the courts free to review the current policy or any modified policy in light of its content and application.” Id. at 2320.

APA Review: Waivers of Sovereign Immunity and Prudential Standing

continued on next page
The Supreme Court addressed the APA’s waiver of federal sovereign immunity and the doctrine of prudential standing in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199 (June 18, 2012). The case involved the Indian Reorganization Act, 25 U.S.C. § 465, which authorizes the Secretary of the Interior to acquire land for Indian tribes. Secretary Salazar acquired land through this provision, held in trust, to allow the Match-E-Be-Nash-She-Wish Band to open a casino, a decision that neighboring landowner David Patchak challenged pursuant to the APA. In an 8–1 decision authored by Justice Kagan, the Supreme Court held that the federal government’s sovereign immunity was waived and that Patchak had prudential standing to bring his lawsuit. *Patchak*, 132 S. Ct. at 2203.

Regarding sovereign immunity, the Court noted that “[i]t he APA generally waives the Federal Government’s immunity from a suit ‘seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority.’” *Id.* at 2204 (quoting 5 U.S.C. § 702). However, section 702 also respects sovereign immunity created and preserved in other statutes. *Id.* As a result, the Court had to look at the Quiet Title Act (QTA), 28 U.S.C. § 2409a, to see whether the APA’s waiver applied. The QTA generally authorizes lawsuits against the federal government to quiet title to land, but that authorization does not extend to “trust or restricted Indian lands.” *Id.* § 2409a(a).

However, the QTA did not invalidate the APA’s waiver of sovereign immunity for Patchak’s lawsuit. According to the Court, “[t]he QTA’s ‘Indian lands’ clause does not render the Government immune because the QTA addresses a kind of grievance different from the one Patchak advances. [T]he QTA—whose full name, recall, is the Quiet Title Act—concerns (no great surprise) quiet title actions. And Patchak’s suit is not a quiet title action, because although it contests the Secretary’s title, it does not claim any competing interest in the Bradley Property. That fact makes the QTA’s ‘Indian lands’ limitation simply inapposite to this litigation.” *Patchak*, 132 S. Ct. at 2206.

With respect to prudential standing, the government and Band argued that Patchak did not fall within the “zone of interests” to be protected or regulated by 25 U.S.C. § 465, the statutory provision that provided the gravamen of his complaint. *Patchak*, 132 S. Ct. at 2210. The Court disagreed, emphasizing:

The prudential standing test Patchak must meet “is not meant to be especially demanding.” *Clarke v. Securities Industry Assn.*, 479 U.S. 388, 399, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987). We apply the test in keeping with Congress’s “evident intent” when enacting the APA “to make agency action presumptively reviewable.” *Ibid.* We do not require any “indication of congressional purpose to benefit the would-be plaintiff.” *Id.*, at 399–400, 107 S.Ct. 750. And we have always conspicuously included the word “arguably” in the test to indicate that the benefit of any doubt goes to the plaintiff. The test forecloses suit only when a plaintiff’s “interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.” *Id.* (citation and footnote omitted).

Under this test, Patchak was within the zone of interests of section 465 because section 465 has much to do with land use. *Id.* at 2010–11. Section 465 “functions as a primary mechanism to foster Indian tribes’ economic development” through the use of land, and thus the Secretary of the Interior “takes title to properties with at least one eye directed toward how tribes will use those lands to support economic development.” *Id.* at 2011. The Department of the Interior’s regulations underscore this point, showing “that the statute’s implementation centrally depends on the projected use of a given property.” *Id.* (citing 25 C.F.R., § 151.3). As a result, because “the Secretary will typically acquire land with its eventual use in mind, after assessing potential conflicts that use might create. And so neighbors to the use (like Patchak) are reasonable—indeed, predictable—challengers of the Secretary’s decisions: ‘Their interests, whether economic, environmental, or aesthetic, come within § 465’s regulatory ambit.’” *Id.* at 2212 (citation omitted).

Justice Sotomayor dissented. She would have held that the Quiet Title Act preserved the government’s sovereign immunity against Patchak’s action, and hence that the APA’s waiver of sovereign immunity could not apply. *Id.* at 2212–18. She offered no opinion regarding the prudential standing issue.

**Chevron Deference**

The Court once again upheld the authority of its own previous interpretations of statutes against new agency interpretations. *United States v. Home Concrete & Supply*, L.L.C., 132 S. Ct. 1836 (Apr. 25, 2012), involved the Internal Revenue Code’s statutes of limitation for the United States to pursue deficiency judgments against taxpayers. As the Court summarized the issue:

Ordinarily, the Government must assess a deficiency against a taxpayer within “3 years after the return was filed.” 26 U.S.C. § 6501(a) (2000 ed.). The 3-year period is extended to 6 years, however, when a taxpayer “omits from gross income an amount properly includible therein which is in excess of 25 percent of the amount of gross income stated in the return.” § 6501(e)(1)(A) (emphasis added). The question before us is whether this latter provision
applies (and extends the ordinary 3-year limitations period) when the taxpayer overstates his basis in property that he has sold, thereby understating the gain that he received from its sale.

Id. at 1839.

On the merits, the Supreme Court determined, 5-4, that the six-year period does not apply when the taxpayer overstates the basis. Id. Writing for the majority, Justice Breyer rested the decision on the Court’s previous interpretation of the relevant provisions in Colony, Inc. v. Commissioner, 357 U.S. 28, 32–37 (1958), despite new and contrary Treasury regulations. 132 S. Ct. at 1839–42. According to the Court, the Treasury regulation was not entitled to Chevron deference because “[i]n our view, Colony has already interpreted the statute, and there is no longer any different construction that is consistent with Colony and available for adoption by the agency.” Id. at 1843.

The most divisive part of the opinion involved the Court’s discussion of the relationship of the Brand X decision, which appears to allow federal agencies to override prior court interpretations of statutes, and the justification for Chevron deference. Only three other Justices joined Justice Breyer in stating that even though the Colony Court acknowledged that the Internal Revenue Code was “not unambiguous,” that was not the same as acknowledging that Congress had left an interpretive gap for the agency to fill, warranting Chevron deference. Id. at 1844. In particular, the Colony Court had identified its interpretation as both the better textual argument and as the interpretation that Congress had adopted in legislative history, and the Court was consciously overriding the Commissioner’s expert opinion at the time. Id. Justice Scalia concurred in the judgment and would have upheld the Colony interpretation on the basis of taxpayer reliance, but he roundly criticized the plurality’s approach to Chevron deference. Specifically, he reasoned that under the logic of Brand X, the Colony Court had declared the statute ambiguous; as a result, in order to overturn the Treasury regulation, the Home Concrete Court had to find the regulation unreasonable under Chevron Step 2. Id. at 1846–48. Justice Kennedy dissented, joined by Justices Ginsburg, Sotomayor, and Kagan. They rested their dissent on intervening changes in the Internal Revenue Code, arguing that these changes undermined the Colony Court’s interpretation. Id. at 1849–53.

In contrast, the Supreme Court applied Chevron deference to uphold the Social Security Administration’s (SSA’s) interpretation of the Social Security Act in Astmo v. Capato ex rel. B. N.C., 132 S. Ct. 2021 (May 21, 2012). The case involved the availability of Social Security survivor benefits for twin children who were conceived through in vitro fertilization after their father died of cancer; the mother was the surviving spouse. Under the Act, an eligible “child” is “the child or legally adopted child of an [insured] individual.” 42 U.S.C. § 416(e). However, section 416 goes on to state: “In determining whether an applicant is the child or parent of [an] insured individual for purposes of this subchapter, the Commissioner of Social Security shall apply [the intestacy law of the insured individual’s domiciliary State].” Id. § 416(h)(2)(A). Under the SSA’s interpretation of these two provisions, after-conceived children are entitled to Social Security survivor benefits only if they qualify for inheritance under state law. Specifically, the SSA regulations, promulgated through notice-and-comment rulemaking, state that an applicant may qualify for insurance benefits as a “natural child” by meeting any of four conditions: (1) the applicant “could inherit the insured’s personal property as his or her natural child under State inheritance laws”; (2) the applicant is “the insured’s natural child and [his or her parents] went through a ceremony which would have resulted in a valid marriage between them except for a legal impediment”; (3) before death, the insured acknowledged in writing his or her parentage of the applicant, was decreed by a court to be the applicant’s parent, or was ordered by a court to contribute to the applicant’s support; or (4) other evidence shows that the insured is the applicant’s “natural father or mother” and was either living with, or contributing to the support of, the applicant.

Capato, 132 S. Ct. at 2028–29 (quoting and paraphrasing 20 C.F.R. § 404.355(a)). Because Florida law barred the posthumously conceived twins from inheriting from their father, the SSA denied them survivor benefits.

The Supreme Court, in an opinion by Justice Ginsburg, unanimously upheld the SSA’s decision. According to the Court, the SSA’s regulation was entitled to Chevron deference because “[t]he SSA’s interpretation of the relevant provisions, adhered to without deviation for many decades, is at least reasonable . . . .” Id. at 2033. Moreover:

Chevron deference is appropriate “when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law and that the agency interpretation claiming deference was promulgated in the exercise of that authority.” United States v. Mead Corp., 533 U.S. 218, 226–227, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001). Here, as already noted, the SSA’s longstanding interpretation is set forth in regulations published after notice-and-comment rulemaking. Congress gave the Commissioner authority to promulgate rules “necessary or appropriate to carry out” the Commissioner’s functions and the relevant statutory provisions. See 42 U.S.C. §§ 405(a), 902(a)(5). The Commissioner’s regulations

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are neither “arbitrary or capricious in substance, [n]or manifestly contrary to the statute.” They thus warrant the Court’s approbation.

Id. at 2033-34 (citation omitted).

The Supreme Court also unanimously accorded Chevron deference to the Board of Immigration Appeals’ (BIA’s) interpretation of the Immigration and Naturalization Act’s provision, 8 U.S.C. § 1229b(a), that “authorizes the Attorney General to cancel the removal of an alien from the United States so long as the alien satisfies certain criteria.” Holder v. Martinez Gutierrez, 132 S. Ct. 2011, 2014 (May 21, 2012). The question was whether the BIA should impute a parent’s years of continuous residence or permanent resident status to a child threatened with removal. The BIA answered “no,” leading to a split in the Courts of Appeals over whether to defer to the BIA’s position. Id. at 2016 (citations omitted). In an opinion by Justice Kagan, the Supreme Court upheld the BIA’s position under Chevron. First, “[t]he Board’s approach is consistent with the statute’s text, as even respondents tacitly concede.” Id. at 2017. Second, “we cannot conclude that Congress ratified an imputation requirement when it passed § 1229b(a) [to amend the INA]. As all parties agree, Congress enacted §§ 1229b(a)(1) and (a)(2) to resolve an unrelated question about § 212(c)’s meaning.” Id. at 2018. As a result, “the statutory history here provides no basis for holding that the BIA flouted a congressional command in adopting its no-imputation policy.” Id. at 2018-19. Third, the INA’s purposes did not demand imputation of the parents’ residence status to children. Id. at 2019. Fourth, the BIA was not being inconsistent in its use of imputation across the INA. Id. at 2019-20. Finally, there was no evidence that the BIA adopted its interpretation because it, erroneously, believed that it had no other choice. Id. at 2021.

Auer Deference

The Supreme Court narrowly denied Auer deference to the Department of Labor’s interpretation of its own regulation implementing the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 206-207, 213, in Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156 (June 18, 2012). Specifically, the FLSA’s minimum wage and maximum hours requirements do not apply to “outside salesmen,” which the FLSA does not define; instead, it delegates the definition to the Department of Labor, which has repeatedly defined the term in notice-and-comment regulations. Christopher involved the question of whether pharmaceutical sales representatives whose primary job is to obtain nonbinding commitments from physicians to prescribe the representatives’ employers’ drugs are “outside salesmen” for FLSA purposes. The Department interpreted its controlling regulations to determine that these representatives were not making “sales” and hence were not “outside salesmen” exempt from the FLSA. The Second Circuit had previously deferred to that interpretation, but in Christopher the Ninth Circuit declined to give the Department’s interpretation Auer deference, concluding instead that the representatives’ activities amounted to “sales” that made them “outside salesmen,” precluding the plaintiffs’ claims for overtime wages.

Justice Alito authored the opinion for the 5-4 majority, which upheld the Ninth Circuit in denying the Department of Labor Auer deference. The majority outlined Auer deference as follows:

Although Auer ordinarily calls for deference to an agency’s interpretation of its own ambiguous regulation, even when that interpretation is advanced in a legal brief, this general rule does not apply in all cases. Deference is undoubtedly inappropriate, for example, when the agency’s interpretation is “plainly erroneous or inconsistent with the regulation.” And deference is likewise unwarranted when there is reason to suspect that the agency’s interpretation “does not reflect the agency’s fair and considered judgment on the matter in question.” This might occur when the agency’s interpretation conflicts with a prior interpretation, or when it appears that the interpretation is nothing more than a “convenient litigating position,” or a “post hoc rationalization[.]”

Christopher, 132 S. Ct. at 2166-67 (citations omitted). The Christopher case provided such circumstances. Most importantly, petitioners invoked “the DOL’s interpretation of ambiguous regulations to impose potentially massive liability on respondent for conduct that occurred well before that interpretation was announced. To defer to the agency’s interpretation in this circumstance would seriously undermine the principle that agencies should provide regulated parties ‘fair warning of the conduct [a regulation] prohibits or requires.’” Id. at 2167. Thus, the Court suggested a due process rationale for denying Auer deference. Notably, for example, “despite the industry’s decades-long practice of classifying pharmaceutical detailers as exempt employees, the DOL never initiated any enforcement actions with respect to detailers or otherwise suggested that it thought the industry was acting unlawfully.” Id. at 2168. Instead, the Court acceded the Department’s interpretation Skidmore deference, but found it unpersuasive. Id. at 2168-69.

Justice Breyer dissented, joined by Justices Ginsburg, Sotomayor, and Kagan. They reasoned—largely without reference to agency deference—that drug company representatives do not make sales, so they cannot be “outside salesmen.” Id. at 2175-77.
**Fox is loose – D.C. Circuit Upholds Agency Rule Reversal on Old Arguments and Data**

In 2008, the Bush EPA issued a rule regulating renovation and remodeling that creates a hazard from lead paint. The 2008 rule included an opt-out where a homeowner certified that no pregnant woman or child under six lived in the home. EPA declared that imposing the requirements in those situations was not “an effective use of society’s resources.”

In 2010, the Obama EPA promulgated a new rule eliminating the opt-out provision, asserting that elimination of the opt-out provision “will go farther toward protecting children under age six and pregnant women, as well as older children and adult occupants of target housing where no child under age 6 or pregnant woman resides.”

The National Association of Homebuilders (NAHB) challenged the 2010 rule, arguing that EPA had not relied on any information not available to it at the time of the 2008 rule and that EPA had simply “revisited old arguments.” Recognizing that an agency may change its mind, NAHB argued that EPA has to be held to a “higher standard” when it changes its mind. In particular, the NAHB asserted that the higher standard applies where EPA is eliminating a provision that is consistent with congressional intent. The D.C. Circuit in *National Association of Homebuilders v. EPA*, 682 F.3d 1032 (D.C. Cir. 2012), agreed with NAHB’s assertion that neither the facts nor the arguments had changed, but it concluded that the Supreme Court’s decision in *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 129 S. Ct. 1800, 173 L.Ed.2d 738 (2009), foreclosed NAHB’s argument that these circumstances undermined the 2010 rule.

Under Fox, courts must defer to the agency in this situation just as they would with respect to a new rule. The fact that the eliminated provision of the original rule might have been consistent with congressional intent was irrelevant as long as the new rule was “permissible under the statute.” Moreover, the Fox admonition that “[a]n agency’s view of what is in the public interest may change, either with or without a change in circumstances,” meant that EPA could revisit the relevant facts and arguments and reach a different decision.

Under Fox, when an agency’s “new policy rests upon factual findings that contradict those which underlay its prior policy,” the agency must provide a more detailed justification for its change of policy. Here, however, EPA made no new factual findings. Instead, it reached a different policy conclusion based on the same facts.

The D.C. Circuit’s discussion demonstrates, perhaps more clearly than Fox itself, that an agency may reverse position purely for reasons of policy. The court drove this point home by noting that two things had changed since the previous decision: the election of a new President and the appointment of a new EPA administrator.

The court also rejected the NAHB’s argument that EPA’s decision was arbitrary and capricious because the costs of the rule outweigh the benefits. According to the court, the statutory mandate to consider “economic consequences” did not require that the benefits outweigh the costs.

Finally, the court held that it could not review NAHB’s argument that EPA had violated the Regulatory Flexibility Act (RFA) by failing to convene a small business advocacy group panel to consider the rule. That conclusion depended upon details of the RFA. More interesting is the court’s response to NAHB’s argument that the agency’s decision was arbitrary and capricious because of its failure to convene the small business advocacy group. Quoting a law review article by Judge Merrick Garland, the court articulated a useful distinction between so-called “quasi-procedural” arguments (such as the failure to respond to comments), which fall within arbitrary and capricious review, and “procedural arguments.” The concern of “quasi-procedural” arguments is “not with the external process by which litigants present their arguments to the agency but with the internal thought process by which an agency decisionmaker reaches a rational decision.” Here, NAHB’s assertion was, instead, an argument for more procedure, of the sort precluded by *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978).

**D.C. Circuit Clarifies Good Cause for Issuing Interim Final Rules Without Notice & Comment**

In *Mack Trucks, Inc. v. EPA*, 682 F.3d 87 (D.C. Cir. 2012), the D.C. Circuit rejected EPA’s “good cause” argument for issuing an interim final rule without notice and comment. When an agency issues an interim final rule, it typically relies upon the “good cause” exception to avoid notice and comment but provides an opportunity for public comment after the rule is published so the agency can make any appropriate revisions in response to public comment. In *Mack Trucks*, the D.C. Circuit demonstrated that an agency’s characterization of its action as an interim final rule is irrelevant to application of the “good cause” exception to notice and comment.

In 2001, EPA had issued a rule requiring a 95% reduction in NOx from heavy-duty diesel engines. EPA set a compliance deadline of 2010, providing nine years for the industry.
to develop the necessary technology. Most engine manufacturers chose “selective catalytic reaction,” which achieves the necessary reduction. One company, Navistar, chose a different technology, “exhaust gas recirculation,” which has not been shown to meet the 2010 NOx standard. Unless something changed, Navistar would have been excluded from the U.S. market in 2012.

EPA decided to use its statutory authority to allow companies such as Navistar to pay nonconformance penalties (NCPs) in exchange for the right to sell engines in the U.S. As required by the statute, EPA determined that the new standard was “more stringent” or “more difficult to achieve” than the previous standard, that “substantial work will be required to meet the standard for which the NCP is offered,” and that “there is likely to be a technological lag.” Although the court did not reach the merits, it expressed considerable skepticism about EPA’s substantive judgment, noting that, “NCPs are not designed to bail out manufacturers that voluntarily choose, for whatever reason, not to adopt an existing, compliant technology.” The court added that it was “highly skeptical that the penalty and upper limit provided for in this NCP satisfy [the] congressional demand to protect compliant manufacturers.”

Strictly speaking, the court decided only that EPA’s good cause claim was invalid. As an initial matter, the court rejected the challengers’ claim that the good cause exception was not available because the Clean Air Act requires that NCPs be issued “under regulations promulgated by the Administrator after notice and opportunity for public hearing,” with no mention of the good cause exception. The court held that this limitation applied only to the rule that initially set out the “regulatory criteria governing future NCPs—not for each and every NCP subsequently promulgated.” Although of no help to the challengers in this case, the language supports arguments that similar notice and comment requirements in other statutes are not subject to the good cause exception of the APA.

Turning to the three criteria governing application of the good cause exception, the court first noted that it owed EPA’s findings “no particular deference,” and that the exception “is to be narrowly construed and only reluctantly countenanced.” The court noted that the “impracticability” criterion essentially allows an agency to address situations of immediate danger, while this rule served “to rescue a lone manufacturer from the folly of its own choice.” There might be harm to Navistar, but the same could be said of any company unable to comply with an applicable requirement. Permitting an exception here would excuse a company that could have complied “had it made different business choices.”

The “unnecessary” criterion involves matters that are “essentially ministerial” or “insignificant in nature and impact, and inconsequential to the industry and to the public.” The court rejected the proposition that the interim nature of the rule rendered notice and comment unnecessary. To accept this argument would have created a loophole the size of a Mack Truck, so to speak, with agencies issuing “interim rules of limited effect for any plausible reason, irrespective of the degree of urgency,” thereby swallowing the requirement for notice and comment.

Finally, the court held that EPA had misapplied the “contrary to the public interest” criterion in arguing that there was no risk to the public in the period between issuance of the interim final rule and issuance of the final rule after consideration of comments. The court explained: “The question is not whether dispensing with notice and comment would be contrary to the public interest, but whether providing notice and comment would be contrary to the public interest.” (emphasis in original). The court emphasized that this criterion is “met only in the rare circumstance when ordinary procedures—generally presumed to serve the public interest—would in fact harm that interest,” as where the process itself might enable “financial manipulation the rule sought to prevent.”

**D.C. Circuit Invalidates For-Cause-Only Removal of Copyright Royalty Judges**

In the latest fallout from the Supreme Court’s decision in Free Enterprise Fund v. Public Company Accounting Oversight Bd., 130 S. Ct. 3138 (2010), the D.C. Circuit struck down the statutory scheme for the appointment and removal of Copyright Royalty Judges (CRJs), but it managed to retain the judges as currently appointed by giving the Librarian of Congress more control over their removal. The case is interesting as to the core Appointments Clause issue but also because the court recognized the Librarian as a member of the executive branch for this purpose.

Since 1998, the Copyright Act has provided for a “statutory license” for webcasting recorded music and other material, with CRJs determining rates and terms in the absence of agreements. Under the Act, CRJs are appointed by the Librarian of Congress, serve for staggered terms, and may be removed by the Librarian “only for misconduct or neglect of duty.”

After the CRJs determined rates for the Intercollegiate Broadcasting System, which transmits recorded music over the internet to educational institutions, Intercollegiate challenged the appointment-removal provisions as to CRJs on two grounds: (1) that the significant ratemaking power of CRJs renders them principal officers for constitutional purposes, requiring appointment by the president with confirmation by the Senate; and (2) that if the CRJs are inferior officers, their appointments are invalid because the Librarian is not a head of department constitutionally authorized to appoint inferior officers. Intercollegiate Broadcasting
D.C. Circuit Separates Science from Policy in Upholding EPA Greenhouse-Gas Rules

In the latest of several recent hot summers, the D.C. Circuit upheld EPA’s attempt at regulations governing greenhouse gases in Coalition for Responsible Regulation, Inc. v. EPA, 2012 Westlaw 2381955 (D.C. Cir. June 26, 2012).

After the Supreme Court held in Massachusetts v. EPA, 549 U.S. 497 (2007), that greenhouse gases (GHG) are an “air pollutant,” EPA issued an “endangerment finding” that GHG “may reasonably be anticipated to endanger public health or welfare.” The agency then issued the “Tailpipe Rule” governing emissions from motor vehicles, and the “Timing and Tailoring Rules,” which gradually apply restrictions to stationary sources. Although primarily addressed to the specifics of air pollution regulation, the decision reflects broader principles applicable to many areas of administrative law.

Industry first challenged the endangerment finding, arguing that EPA had improperly limited itself “to a science-based judgment devoid of considerations of policy concerns and regulatory consequences,” such as the benefits of GHG-producing activities, the effectiveness of potential regulations, and the possibility of mitigation of or adoption to climate change. According to industry, the failure to consider these matters rendered EPA’s decision arbitrary and capricious.

The court responded that EPA’s decision about whether a pollutant “may reasonably be anticipated to endanger public health or welfare” calls for a “scientific judgment, . . . not policy discussions.” Various reasons not to regulate GHG or to question the effectiveness of such regulation have nothing to do with that “scientific judgment.” Moreover, the “absurd results” argument could not apply here because the statute did not leave room for considering results—absurd or otherwise—that might result from a finding of endangerment. Congress had posed a scientific question, and EPA had answered it.

In challenging the endangerment finding itself, industry argued that EPA had improperly delegated its authority by relying on findings from various bodies such as the Inter-governmental Panel on Climate Change, the U.S. Global Climate Research Program, and the National Research Council, which had synthesized thousands of individual studies. Terming this argument “little more than a semantic trick,” the court explained that “[i]t makes no difference that much of the scientific evidence in large part consisted of ‘syntheses’ of individual studies and research. . . . This is how science works. EPA is not required to re-prove the existence of the atom every time it approaches a scientific question.”

The court then upheld the endangerment finding on the merits, rejecting an argument that the science was too
uncertain to support such a conclusion. Emphasizing the preventive nature of the statute, the court held that “EPA need not provide ‘rigorous step-by-step proof of cause and effect’ to support an endangerment finding.”

Worthy of note among several other rulings are two on standing and one on ripeness. All three illustrate that the application of those doctrines depends upon particular impacts and may change over time. First, industry challengers, all in the motor vehicle industry, argued that EPA’s decision to include certain gasses in an aggregate of GHGs for regulatory purposes was arbitrary and capricious because motor vehicles generally do not emit those gasses. The court denied standing as to this argument precisely because the industry does not emit those gases and would not be affected by their regulation.

Second, the court denied industry standing to challenge EPA’s Timing and Tailoring Rules, which essentially set out an extended timeline for eventual regulation of greenhouse gases from various sources. Industry essentially argued that EPA acted illegally when it chose to “depart unilaterally from the [CAA’s] permitting thresholds and replace them with numbers of its own choosing.” The court denied standing because the statute itself, not these rules, imposed the regulatory burdens. Indeed, these rules helped mitigate the effects of the statute by delaying and tailoring effectiveness of the requirements. When an agency action makes things better than they otherwise would have been for a particular actor, that actor has no standing to challenge the action in question.

Finally, the National Association of Homebuilders (NAHB) and the National Oilseed Producers Association (NOPA) challenged EPA interpretations reached in regulations issued in 1978, 1980, and 2002. EPA sought to preclude these arguments based upon a statutory requirement that challenges be filed within sixty days of promulgation of the rules. These challengers prevailed, however, because the breadth of the endangerment finding and the scope of the Tailpipe rule meant that the regulatory program now reached sources it had never reached before—sources represented by these challengers. Thus, NAHB and NOPA now had standing to challenge EPA’s longstanding positions, and their challenges were now ripe.

D.C. Cir.: Industry Loses on Ripeness & Peer Review

The American Petroleum Institute (API) had a rough go of it in two recent decisions, both of which are instructive on central issues of administrative law. In the first, American Petroleum Institute v. EPA, 2012 WL 2894566 (D.C. Cir. July 17, 2012), the D.C. Circuit upheld EPA’s decision to adopt a new one-hour primary National Ambient Air Quality Standard for nitrogen oxide. The decision is noteworthy for its discussion of EPA’s handling of various scientific studies. First, API argued that EPA had violated its own rules by relying on a study that had not been peer reviewed. Noting that perhaps “API should have had its brief peer-reviewed,” the court rejected this argument because EPA’s peer-review guideline was modified by the word “generally,” so it did not require that all studies be peer-reviewed, and the agency had actually updated a peer-reviewed study with other peer-reviewed material, even though the ultimate product had not been peer reviewed.

Second, EPA adequately explained why it disagreed with the methodology in another study and acknowledged various limitations in its own study, but it adequately explained why the standard was necessary even where the risk “could not be quantified or ‘precisely identified as to nature or degree.’” In upholding EPA’s analyses, the court contrasted the situation with the SEC’s serious analytical deficiencies that the D.C. Circuit had recently struck down in Business Roundtable v. SEC, 647 F.3d 1144 (D.C. Cir. 2011).
Edited by William Funk*

Peter L. Strauss, “Defence” Is Too Confusing—Let’s Call Them “Chevron Space” and “Skidmore Weight,” 112 COLUM. L. REV. 1143 (2012). This essay suggests an under-appreciated, appropriate, and conceptually coherent structure to the Chevron relationship of courts to agencies, grounded in the concept of “allocation.” Because the term “deference” muddles rather than clarifies the structure’s operation, this essay avoids speaking of “Chevron deference” and “Skidmore deference.” Rather, it argues, one could more profitably think in terms of “Chevron space” and “Skidmore weight.” “Chevron space” denotes the area within which an administrative agency has been statutorily empowered to act in a manner that creates legal obligations or constraints—that is, its allocated authority. “Skidmore weight” addresses the possibility that an agency’s view on a given statutory question may in itself warrant the respect of judges who are themselves unmistakably responsible for deciding the question of statutory meaning. “Skidmore weight” has an underappreciated pedigree. For almost two centuries, American courts have given agency views of statutory meaning considerable weight in deciding for themselves issues of statutory meaning. “Chevron space” reflects our more recent understanding and acceptance that Congress may validly confer on executive agencies the authority to act with the force of law, so long as the legality of their action within the boundaries of their authority can be judicially assured. Within its congressionally authorized space, the agency is the prime actor. From a court’s independent conclusion that Congress has delegated authority to an agency—a conclusion that may even be informed by Skidmore weight given to the agency’s own understandings of its authority—it follows ineluctably that the reviewing court is to act not as decider but as overseer.

Kathryn A. Watts, Regulatory Moratoria, 61 DUKE L.J. 1883 (2012). Despite significant scholarly attention given to tools that the political branches use to exert control over the administrative state, one emerging tool has gone largely unnoticed: regulatory moratoria. Regulatory moratoria, which stem from legislative or executive action, aim to freeze rulemaking activity for a period of time. As this article demonstrates, regulatory moratoria have worked their way into the political toolbox at both the federal and state levels. For example, at least fifteen federal bills proposing generalized regulatory moratoria were introduced in the first session of the 112th Congress, and from 2008 to 2011 alone, no fewer than nine states implemented some kind of executive-driven regulatory moratorium. In addition, beginning with President Reagan, all U.S. presidents other than George H.W. Bush have issued short-term regulatory moratoria immediately upon coming into office to facilitate review of midnight regulations passed by their predecessors. President Bush, who followed a member of his own party into the White House, instead implemented a one-year moratorium during his last year in office. The goal of this article is largely descriptive: to provide the first overarching description of the emergence of and proposals for regulatory moratoria at both the federal and state levels and the different contexts in which regulatory moratoria have arisen. The article also seeks to identify and analyze the major arguments for and against regulatory moratoria from both a legal and a policy perspective. In weighing the pros and cons of regulatory moratoria, this article warns against the use of “hard” moratoria—defined as long-term moratoria often spanning a year or more. It also suggests, however, that “soft” moratoria—meaning short-term moratoria keyed to a brief period of political transition—might appropriately further notions of democratic accountability when used carefully by the executive branch following a change in administration to ensure that the regulatory machinery is aligned with the policies of those newly elected to power.

Emily Hammond Meazell, Presidential Control, Expertise, and the Deference Dilemma, 61 DUKE L.J. 1763 (2012). Courts reviewing agency action frequently point to superior political accountability and expertise as justifying deference to agencies. These fundamentals of deference often operate in tandem, providing distinct but complimentary reasons why courts will not substitute their judgment for that of agencies. But when courts review agency actions arising from shared regulatory space, political accountability—often expressed as presidential control—and expertise can seem at odds. How should courts respond when, for example, one agency lays claim to presidential control but another relies on expertise, and the two take inconsistent positions so that a court must choose one over the other? This article examines this “deference dilemma” and suggests a means for confronting it. Overall, this analysis reveals that the expertise and presidential-control justifications for deference do not fit neatly into statutory schemes involving overlapping or competing jurisdiction, particularly when an independent agency is involved. This conclusion exposes weaknesses in both models of deference and supports the claim that—presidential direction and expertise notwithstanding—fidelity to statute and the reasoned-decisionmaking requirements remain the touchpoints of judicial review.

William Robert Dailey, Who Is the Attorney General’s Client?, 87 NOTRE DAME L. REV. 1113 (2012). Two consecutive presidential administrations have been continued on next page
beset with controversies surrounding decision making in the Department of Justice, frequently arising from issues relating to the war on terrorism but generally giving rise to accusations that the work of the Department is being unduly politicized. Much recent academic commentary has been devoted to analyzing and, typically, defending various more or less robust versions of “independence” in the Department generally and in the Attorney General position in particular. This article builds from the Supreme Court’s recent decision in Free Enterprise Fund v. Public Company Accounting Oversight Board, in which the Court set forth key principles relating to the role of the President in seeing that the laws are faithfully executed. This article draws upon these principles to construct a model for understanding the Attorney General’s role. Focusing on the question “who is the Attorney General’s client,” this article presumes that in the most important sense the American people are the Attorney General’s client. This article argues, however, that that client relationship is necessarily a mediated one, with the most important mediating force being the elected head of the executive branch, the President.

Caprice L. Roberts, Discretion & Deference in Senate Consideration of Judicial Nominations, 51 Louisville L. Rev. (forthcoming 2012) (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2103297). This article offers a novel proposal for Senate consideration of judicial nominations. It employs judicial philosophy and discretion models for legislative advice and consent in the judicial confirmation process. Despite legitimate transparency concerns, this article provocatively argues for authentic dialogue and consideration in the early, behind-closed-doors parts of the nomination process. It then urges that the ideal discretion and deference model for judicial confirmations is “an ounce” of legislative discretion akin to Chevron deference balanced with the trustee model of representative democracy. A properly balanced model should inform practical political determinations about judicial nominations. The legislator, alone, is answerable to her constituency and must decide how to exercise her discretion. But discretion exercised unwisely will redound to her discredit. This article offers a convincing rationale for a viable alternative path regardless of which party holds the Presidency and the Congress.

Jodi L. Short, The Political Turn in American Administrative Law: Power, Rationality, and Reasons, 61 Duke L.J. 1811 (2012). Reason giving is central to U.S. administrative law and practice. Traditionally, courts and scholars alike have located both the constraining and the legitimating force of reasons in the constraining and legitimating force of Reason, or rationality, but several recent developments signal a political turn in understandings of administrative justification. First, in upholding the decision of the Federal Communications Commission to penalize broadcasters for televising “fleeting expletives” in the Fox Television case, the Supreme Court signaled the diminished importance of reasoned administrative justification and a broadened acceptance of political justifications for changes in agency policy. Second, motivated by a gathering movement to reconceptualize the legitimacy of administrative agencies in terms of their political—and specifically, their presidential—accountability, prominent administrative law scholars advocate approaches to arbitrary-and-capricious review that would encourage or require agencies to articulate explicitly the political reasons for their actions. This article takes seriously the challenges to the rationalist, reason-giving paradigm posed by political reason-giving models, but it categorically rejects their urge to renovate administrative law’s fundamental commitment to reasoned justification. Instead, it develops a new theoretical framework that sees reasoned justification as a constraint embodied not in doctrine or politics, but in the way that law and political control structure the organizational characteristics and social interactions of agencies. Drawing on this framework, the article critiques models of political reason-giving for undermining the social and organizational structures that shape and constrain what agencies do and for failing to offer a coherent alternative theory of administrative reason-giving. The article concludes by arguing more broadly that reform projects must consider the institutional dimensions of agency constraint and think more deeply about what kinds of agencies they would create.

Thomas O. McGarity, Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age, 61 Duke L.J. 1671 (2012). Students of the policymaking process are familiar with the fashion in which the policies underlying crisis-driven legislation are gradually eroded during the implementation process. A substantial body of administrative law scholarship stands for the proposition that policymaking in administrative agencies is not confined to the formal structures of administrative law as envisioned by the drafters of the Administrative Procedure Act. This article suggests that in this era of deep divisions over the proper role of government in society, high-stakes rulemaking has become a “blood sport” in which regulated industries, and occasionally beneficiary groups, are willing to spend millions of dollars to shape public opinion and influence powerful political actors to exert political pressure on agencies. In addition, the implementation game has attracted a wider variety of players and has spread to arenas that are far less structured and far more overly political than the agency hearing rooms and appellate courtrooms of the past. Employing as an illustration the Federal Reserve Board’s attempt to implement the Durbin Amendment to the Dodd-Frank Wall Street Reform and Consumer Protection
Act, this article suggests some general characteristics of this new model of high-stakes rulemaking, provides some tentative thoughts on the implications of this model for administrative law, and offers some possible responses to the phenomenon aimed at taming some of its least attractive characteristics and at ensuring that it does not further erode public trust in the administrative process.

Ronald J. Krotoszynski, Jr., Cooperative Federalism, the New Formalism, and the Separation of Powers Revisited: Free Enterprise Fund and the Problem of Presidential Oversight of State-Government Officers Enforcing Federal Law, 61 Duke L.J. 1599 (2012). Formalism has returned, displacing the flexible, functionalist separation-of-powers analysis that often characterized the Supreme Court’s separation-of-powers decisions during the Rehnquist Court. Free Enterprise Fund v. Public Co. Accounting Oversight Board provides powerful evidence of this emerging trend. Moreover, a reliable majority of the Justices have strongly embraced formalism in other important separation-of-powers decisions as well. A new formalism now appears to govern the Court’s contemporary separation-of-powers jurisprudence—with the defenders of more flexible, functional approaches to separation-of-powers questions relegated to writing dissents. The Roberts Court, however, has failed to elucidate fully the precise scope and meaning of its new formalist vision for separation-of-powers doctrine. Even so, if the Roberts Court’s decisions mean what they appear to say, serious constitutional questions exist about the constitutional validity of cooperative-federalism programs in which states have primary responsibility for the administration of important federal labor, environmental, and healthcare programs. Simply put, the new formalism renders such programs open to serious constitutional attack on separation-of-powers grounds because the president arguably lacks sufficient direct oversight and control of the state-government officers who administer and enforce federal law on a day-to-day basis. But the Supreme Court need not follow the logic of its more recent separation-of-powers decisions to this ultimate conclusion; plausible arguments exist to support the claim that cooperative-federalism programs do not violate separation-of-powers doctrine even under a demanding formalist analysis.

Michael E. Murphy, The SEC and the District of Columbia Circuit: The Emergence of a Distinct Standard of Judicial Review, 7 Va. L. & Bus. Rev. 125 (2012). The law governing judicial review of rulemaking by federal agencies, in large measure, is informed by an effort to balance the demand for a rational basis with deference to the agency’s determination. The paths of judicial review diverge for legislative and interpretative regulations but are illumined by leading precedents—State Farm for legislative regulations and Chevron for an important category of interpretative regulations—that provide guidelines for maintaining this balance. When legislative regulations come within the arbitrary and capricious standard of review, State Farm demands no more than “a reasoned basis for the agency’s action”—a statement providing a “rational connection between the facts found and the choice made.” If interpretative regulations fall within the precedent of Chevron, “federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.” The first intimation that rulemaking of the Securities and Exchange Commission (SEC) would be subject to a separate standard of review, departing from traditional deference to agency determinations, appeared in Chamber of Commerce v. S.E.C., decided in 2005, which signaled a new approach based on a provision in the National Securities Market Improvement Act of 1996. In 2010, the decision was followed by American Equity Investment Life Insurance Co. v. S.E.C., and in 2011, by Business Roundtable v. S.E.C. It is now clear that the SEC must follow a steeper, more uncertain, and possibly impassable route to secure judicial approval of rulemaking within the wide ambit of the 1996 statute. Challenges to regulations issued under the Dodd-Frank Wall Street Reform and Consumer Protection Act lie near on the horizon. Regulations issued under the Dodd-Frank Act will be reviewed under the new standard based on the 1996 amendments. The standard can be understood only by a close reading of these three precedents.

Sarah Tran, Administrative Law, Patents, and Distorted Rules, 80 Geo. Wash. L. Rev. 831 (2012). Since 1935, courts have embraced a uniformly lenient approach toward congressional delegations of authority to agencies across different regulatory areas, with one notable exception. The Court of Appeals for the Federal Circuit has crafted its own limitations on the authority of a presidentially controlled agency, the Patent and Trademark Office (PTO). Amid ongoing efforts to reform the patent system, this article provides the first analysis of the development of this major administrative law anomaly. It shows that, surprisingly, the Federal Circuit’s approach derives little support from the Constitution, the PTO’s organic statute, Supreme Court precedent, or, for that matter, any other appellate court decision. Indeed, the Federal Circuit has never proffered a coherent rationale for its approach. This article further demonstrates that the Federal Circuit’s approach has generated an incoherent and normatively dysfunctional distinction between valid procedural rules and invalid substantive rules that (1) creates perverse incentives for the PTO to keep the public out of its decisionmaking process, (2) stifies the PTO’s ability to upgrade its notoriously slow and ineffective review process, and (3) sets a precedent that allows the judicial branch to distort congressional delegations of authority.
Multistate Tax Compact Supersedes Exclusive State Formula for Apportionment of Business Income in California

By Jeffrey B. Litwak*

The decision in The Gillette Co. v. Franchise Tax Board, No. A130803 (Cal.App July 24, 2012), was so highly anticipated that California withdrew from the Multistate Tax Compact before the court determined whether California must comply with the compact. In this case, The Gillette Company sought a tax refund for a number of tax years. Gillette claimed it was due this refund by apportioning its income for state tax purposes according to the compact's apportionment formula. The taxpayers argued that the compact was valid and that section 25128 was not a repeal of the election provision. The Multistate Tax Compact instead of the California’s own apportionment formula. Six other companies filed similar refund requests and the court consolidated all the matters.

The California Franchise Tax Board (FTB) denied the refunds on the basis that the taxpayers could not elect to use the Multistate Tax Compact formula. The FTB cited to Cal. Rev. & Tax. Code § 25128, which stated that “[n]otwithstanding section 38006” [California’s codification of the Multistate Tax Compact], income must be apportioned according to the formula in section 25128. Article III.1 of the Multistate Tax Compact, the “election provision,” states in relevant part, “[a]ny taxpayer subject to an income tax whose income is subject to apportionment and allocation for tax purposes pursuant to the laws of a party state or pursuant to the laws of subdivisions in two or more party states may elect to apportion and allocate his income in the manner provided by the laws of such state or by the laws of such states and subdivisions without reference to this compact, or may elect to apportion and allocate in accordance with Article IV.”

The question on appeal was whether the FTB could disallow taxpayers' using the compact's apportionment formula. The FTB raised numerous challenges, including: the taxpayers had no standing, the legislature properly enacted its own state formula, the compact was not valid, and section 25128 was effectively a repeal of the election provision. The Multistate Tax Commission filed an amicus brief on behalf of the FTB arguing that the state is the sole apportionment formula. The taxpayers argued that the compact was not valid and that section 25128 was not a repeal of the election provision. Several amici filed briefs in support of the taxpayers, including the author of this article.

In short, the California Court of Appeal concluded that California may not have properly withdrawn from the compact due to a restriction in the California Constitution that requires a 2/3 majority of the legislature to approve bills that would have the effect of raising taxes. See 64 STATE TAX NOTES 880 (June 25, 2012). Second, the text of this repeal may not apply to the compact allocation formula. Many states have provisions similar to California; the FTB and Multistate Tax Commission highlighted these statutes in their briefs.

As noted above, following oral argument in this case, before the Court of Appeal issued its decision, California withdrew from the Multistate Tax Compact. SB 1015, 2011–2012 Leg. Sess. (Cal. 2012). However, there seem to be two issues concerning the validity of this withdrawal. First, California may not have withdrawn from the compact due to a restriction in the California Constitution that requires a 2/3 majority of the legislature to approve bills that would have the effect of raising taxes. See 64 STATE TAX NOTES 880 (June 25, 2012). Second, the text of this repeal may not apply to the election provision in the compact. See 65 STATE TAX NOTES 333 (July 30, 2012).

A similar case in Michigan is being briefed at this time. I.B.M. v. Dep’t of Treas., No. 306618 (Mich App, filed Oct. 12, 2011), and it is likely that taxpayers may file several more similar cases. Of course, we cannot predict whether other state

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court will reach the same conclusion as the California Court of Appeal reached in Gillette; however, state courts routinely consider decisions of other states when interpreting an inter-state compact. See, e.g., Atlantic Richfield Co v Dep’t of Revenue, 300 Or 637, 646–47 (1986) (considering the decisions of other states when interpreting the Multistate Tax Compact); In re C.B., 116 Cal. Rptr. 3d. 294, 188 Cal.App. 4th 1024 (2010) (same for Interstate Compact on the Placement of Children).

**FLORIDA: The Florida Legislature Responds to Whiley—and More.**

_by Larry Sellers*

During the 2012 Regular Session, the Florida Legislature enacted several measures amending the Florida Administrative Procedure Act (APA). These include a legislative response to the Florida Supreme Court’s decision in Whiley v. Scott, 36 Fla. L. Weekly S 451 (Fla. Aug. 16, 2011), provision for the nullification, repeal and summary removal of rules, and making the online versions of the Florida Administrative Code and the Florida Administrative Register the official versions. Here is a brief summary of some of the bills that passed:

**Administrative Authority.** CS/HB 7055 is the legislative response to the Florida Supreme Court’s decision in Whiley v. Scott that Governor Rick Scott “impermissibly suspended agency rulemaking to the extent that Executive Orders 11-01 and 11-72 require a request that the Office of Fiscal Accountability and Regulatory Reform (OFARR) must first permit an agency to engage in the rulemaking which has been delegated by the Florida Legislature.” The bill affirms that Executive Orders 11-01 and 11-72 are consistent with state law, and it provides express legislative authorization for the direction and supervision by elected officials over the exercise of administrative authority by appointees of those officials. The effective date of this bill was July 1, 2012, Chapter 2012-116.

**Repeal of Unused Statutory Rulemaking Authority.** HB 7029 repeals or revises over 50 statutory provisions authorizing rulemaking, including statutes that are no longer necessary or for other reasons have never been used. In addition, the bill directs the Office of Statutory Revision to include duplicative, redundant, or unused statutory rulemaking authority among its recommended repeals in revisers’ bill recommendations. Rulemaking authority is considered unused if the provision has been in effect for more than five years and no rule has been promulgated in reliance thereon during that time.

**Nullification and Repeal of Administrative Rules.** HB 7029 amends the Florida APA to provide that the repeal of a substantive statute also acts to repeal the administrative rules adopted to implement that statute to the extent the rule implements the repealed statute. A rule is nullified if the only provisions of law it implemented are subsequently repealed. The repeal of one or more provisions of law implemented by a rule, but not all statutes implemented by the rule, requires an agency to publish a notice of rule development, within 80 days of the effective date of the act, stating which parts of the rule are nullified by the new act. In other instances when the repeal of a statute creates uncertainty about the continued enforceability of a rule, the Department of State (DOS) is to use the summary removal process described below. In all cases, DOS is directed to remove such rules from the Florida Administrative Code (FAC) as of the effective date of the law repealing the specific law implemented. HB 7029 also creates a summary removal process to repeal published rules, that DOS identifies as part of the continuous revision system authorized by section 120.55 of the Florida APA, that may be no longer in full force and effect. This process includes notice to and review by the affected agency (or the Governor where no agency may be identified). If DOS is advised that the rule is no longer in effect or receives no timely response from the agency, DOS is to provide notice of such and that the rule will be repealed summarily and removed from the FAC. An objection to the summary repeal must be filed as a petition challenging a proposed rule within 21 days of publication of notice in the Florida Administrative Weekly (renamed the Florida Administrative Register).

HB 7029 also provides for the nullification and repeal of 270 existing rules that are no longer needed or for which the specific law implemented has been repealed. These include 165 rules of five separate water-management districts identified as a result of reviews conducted by the districts and OFARR, that found these rules outdated or otherwise unnecessary for effective program function.

The repealed rules also include another 105 “orphan rules” for which the adopting agency was abolished, the grant of rulemaking authority repealed, or the specific law implemented was repealed. Where no agency appears to have authority to repeal these rules, legislative action is required to remove them from the FAC. The orphan rules also include rules implementing statutes for which responsibility has been transferred to another agency, or the specific statute was repealed but reenacted under a different agency, without a clear transfer of the rules or rulemaking authority to the new agency. The effective date of this bill was May 27, 2012, Chapter 2012-031.

**Florida Administrative Register.** HB 541 revises provisions in the Florida APA with respect to the FAC and the Florida Administrative Weekly. The bill provides that the online version continued on next page
of the FAC is the official version for the state, and that DOS is no longer required to publish a printed version. In addition, the bill changes the name of the Florida Administrative Weekly to the Florida Administrative Register. The online version of the Florida Administrative Register is the official version effective October 1, 2012. The effective date of this bill is October 1, 2012, Chapter 2012-063.

**Summary Hearing for Challenges to Deepwater Ports.** Provisions in two lengthy transportation bills, SB 1998 and HB 599, provide that an administrative challenge to a consolidated environmental resource permit or any associated variance or any sovereign submerged lands authorization proposed or issued by the Department of Environmental Protection in connection with the state’s deepwater ports shall be conducted pursuant to the summary hearing provisions of section 120.574 of the Florida APA. The summary proceeding must be conducted within 30 days after a party files a motion for a summary hearing, regardless of whether the parties agree to the summary proceeding, and the department must issue the final order within 45 working days after receipt of the administrative law judge’s recommended order. These provisions were designed to affect pending legal challenges to approvals for the widening and deepening of portions of the Miami Harbor channels and turning basins, so the bills expressly provide that the new summary hearing provisions apply to pending administrative proceedings. The effective date of SB 1998 was July 1, 2012, Chapter 2012-128; the effective of Section 80 of HB 599 was April 27, 2012, Chapter 2012-174.

**Legislative Ratification of Agency Rules.** In 2010, Florida enacted a measure that requires legislative ratification of “million dollar rules.”3 HB 7121 ratifies the Department of Agriculture and Consumer Services rule updating the minimum standards for the storage and handling of liquefied petroleum gases. Another bill, HB 7051, exempts from the legislative ratification requirement certain proposed amendments to Chapters 62-302 and 62-303, establishing numeric nutrient criteria, published by the Department of Environmental Protection.

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Chair’s Message continued from page ii

almost 6,000 lawyer members like you in the Section. I think it would benefit all of us if we opened up ALCOUNCILPLUS to any interested Section member. Emails to this list are infrequent, and “reply all” is forbidden, so fears of spam should not discourage folks from opting in. I hope many of you will try opting in (just contact anne.kiefer@americanbar.org)—and if you do not like it, you can always drop off.

We also have a blog, Notice and Comment, to which Jon Rusch (its creator) and Michael Herz have been posting for the past two years (http://regulatorypractice.blogspot.com/). We have concluded that this blog cannot and should not attempt to compete with more general, “here is what is happening in publications, and other activities.

Because most ABA leadership roles are only a year long, conversations about assuming one are dominated—besides the winking references to being swamped with work—by questions about what one’s “theme” is going to be. While I briefly explained above the project I am initiating this year, I also know that the vast majority of ABA members are more interested in what the ABA or its component entities can do for them than vice versa. And that is as it should be. The beauty of the process is that the collective actions of ABA members doing what they enjoy and find rewarding is what gives rise to the tremendous diversity and high professional quality of the ABA’s activities. And so my real goal for the coming year is for the Section to empower and enable you, its members, to work on the projects that interest you and to do the things that make ABA involvement worthwhile to you. And so, unironically, let the fun begin!

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1 E.g., Cary Coglianese’s RegBlog (https://www.law.upenn.edu/blogs/regblog/).

2 http://www.americanbar.org/groups/administrative_law/committees.html.
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Edited by Jeffrey B. Litwak

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