

# ADMINISTRATIVE & REGULATORY LAW NEWS

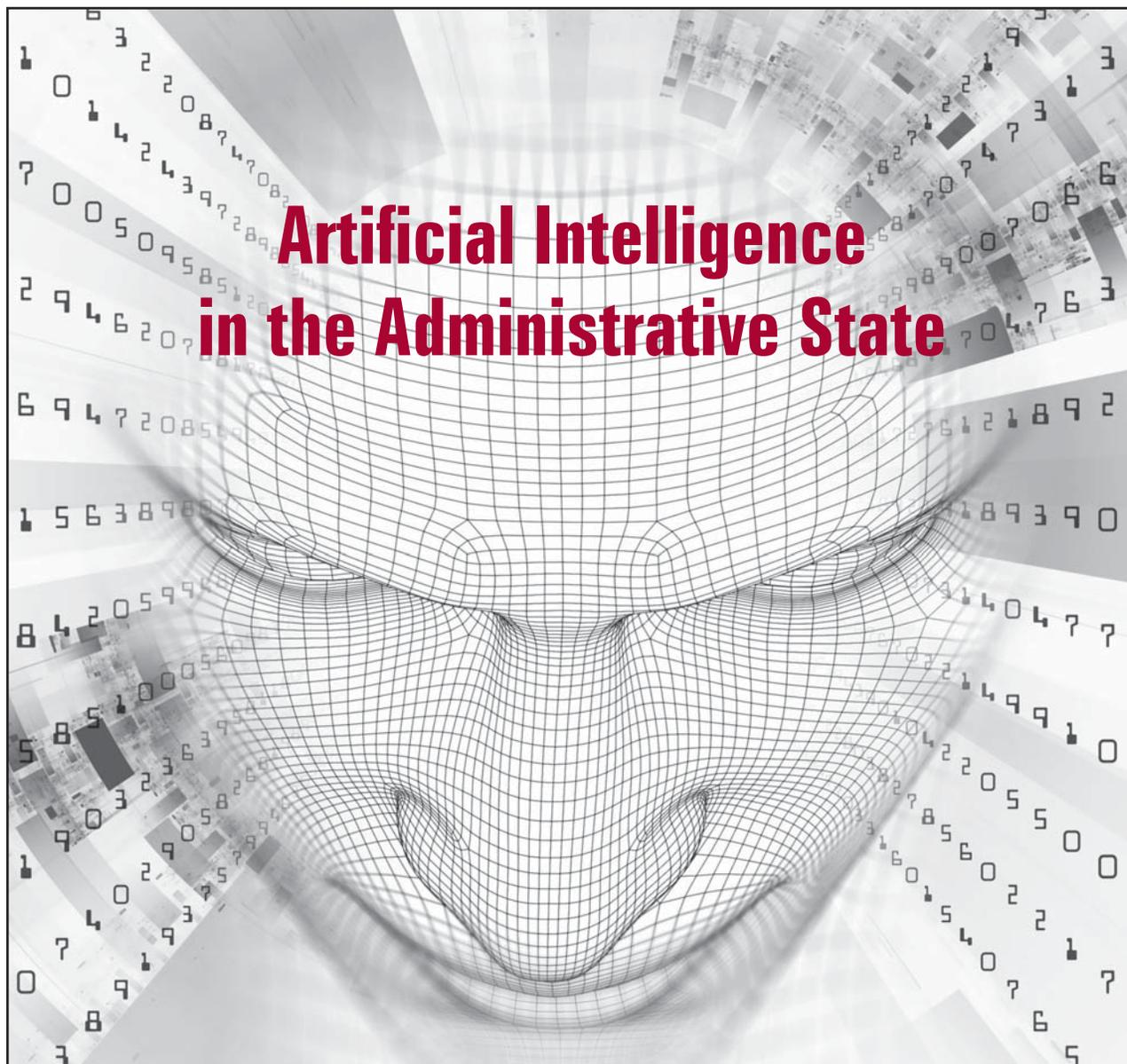


Section of Administrative Law & Regulatory Practice

Vol. 42, No. 4

American Bar Association

Summer 2017



## Artificial Intelligence in the Administrative State

### Also In This Issue

Regulations: The Unsung Heroes

EPA's Records Guidance

Section Nominations

# Upcoming Section Events

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**ANNUAL SECTION COUNCIL MEETING, MEMBERSHIP MEETING, ELECTIONS**  
Saturday, Aug. 12, 2017 | ABA Annual Meeting | New York, NY

**12TH ANNUAL HOMELAND SECURITY LAW INSTITUTE**  
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**Agenda Topics:**

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- The Role of State and Federal Regulators in Cyber-security
- The Role of Lawyers in Cyber-security
- Fundamentals of Incident Response
- DHS General Counsel's Office Priorities and Plans
- The Law and Policy of Securing the Border and the Immigration System
- The National Security Division of DOJ
- Homeland Security and the Law of Investment and Trade
- International Legal Issues
- Facilitating Travel, Security, and Privacy
- The Future of North America and its Impact on Homeland Security from Colombia to the Arctic
- Emerging International Legal Issues and Trends in Maritime Security
- General Counsel's View—Homeland Security and the Private Sector

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**Agenda Topics:**

- Ethics for Government Attorneys
- Developments in Administrative Law
- Administrative Law Litigation in a Time of Regulatory Change: The Impact of Immigration, Reform, and Other Executive Orders
- Agency Adjudication Outside the APA
- International Regulatory Cooperation and a New NAFTA
- The State of Regulatory Reform in Congress
- Modernizing Regulation to Accommodate Huge and Disruptive Technologies
- Agencies Regulating Cyber-security Threats
- Top 10 Challenges for the FDA in 2018
- Federal Agency Guidance: Its Role in Agency Operations, Industry Compliance, and Litigation
- Are ALJ's Unconstitutionally Appointed or Are They Mere Employees? The Rock and Hard Place Posed by the *Bandimere* and *Lucia* Decisions
- How Agencies Are Implementing De-regulatory Requirements
- The Relationship Between the Federal and State Governments in the Trump Administration

# Chair's Comment



Renée M. Landers

**S**erving as Chair of the Section of Administrative Law and Regulatory Practice has been a privilege and has afforded an opportunity for insight into the capacity of a professional organization like the ABA to contribute to public debate. The Section and the ABA have traditionally convened a broad spectrum of voices representing lawyers, the concerns of the legal profession, and the clients and public whose interests lawyers are bound to protect. This role is particularly important at times when polarized views seem to erect insurmountable barriers to the ability of policymakers to achieve workable compromise in forging solutions to some of society's most pressing problems. The Section and the ABA provide a rich environment for deliberation among lawyers and academics representing a landscape of perspectives, and are resources not to be taken for granted. Membership losses, budgetary constraints, and disengaging from associational activities pose threats to the ability of the ABA to serve this function. Thus, I use this last Chair's Comment to urge lawyers already active in the Section or the ABA to remain involved and to encourage new voices to overcome any reticence and join the conversation.

The Model Rules of Professional Conduct draw important distinctions between the obligations of lawyers and the duties of others engaging in typical commercial activity. Rule 6.1 states that every lawyer has a responsibility to provide *pro bono* services, including through "participation in activities for improving the law, the legal system or the legal profession." Admittedly, sometimes the ABA has used its resources in arguably self-serving ways. For example, the ABA successfully challenged the Federal Trade Commission's efforts to regulate lawyers as "creditors" for purposes of the Gramm-Leach-Bliley Act. *ABA v. FTC*, 430 F.3d 457 (D.C. Cir. 2005). Earlier attempts by the organized bar to prohibit lawyer advertising were not as fruitful. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). Legal historian Lawrence M. Friedman has characterized "the performance of the organized bar, compared to its ballyhoo" as "retrograde and weak. In times when justice or civil liberty were in crisis, the organized bar was not on the side of the angels." He goes on to note, however, that "[i]n the last generation or so, the bar has somewhat mended its ways." Lawrence M. Friedman, *A HISTORY OF AMERICAN LAW* 690-91 (2d ed. 1985).

The ABA itself in recent decades has embraced the admonition in the Model Rules and has taken up the challenge of trying to protect and expand legal services for

persons of limited means, evaluating the qualifications of nominees for federal judicial positions, engaging in efforts to diversify the legal profession, and advocating for legal reforms across a wide spectrum of substantive legal areas including administrative law and regulatory practice. At a minimum, the deliberations of its Sections and the House of Delegates have the potential to shed light on the issues debated, even if consensus does not emerge on every issue. While the tendency toward promoting self-protective policies and the inability to take on some controversial topics sometimes cause the ABA to be seen in a less-than-positive light, providing a forum for airing diverse views about the legal system is a bulwark against polarization and the erosion of rights.

According to an annual ABA survey, in 2017 the United States has 1,335,963 lawyers. As Friedman noted, however, at no point have more than half of lawyers been ABA members. In the last decade, membership numbers have tended to fluctuate from year to year, but the ABA website indicates a membership of 400,000, a number representing nearly 30% of lawyers. This percentage has not changed a great deal since the mid-1950s, when the chair of the ABA Membership Committee reported that in 1956 membership stood at 82,000 with only four states having fewer than 25% of lawyers as members of the ABA. While our colleagues in the medical profession have been more successful in the past, they have not been as consistent in persuading doctors to join the American Medical Association. Elisabeth Rosenthal reports in her new book, *AN AMERICAN SICKNESS*, that between 2002 and 2011 AMA membership dropped from nearly 278,000 to 217,000. Today, about 25% of the approximately 923,308 doctors have joined. In the 1950s, 75% of doctors were members. While not suffering this level of decline, the percentage of lawyers joining the ABA has not grown.

The experience of the ABA in recruiting and maintaining members is consistent with the phenomenon that Harvard political scientist Robert D. Putnam described, first in a journal article in 1995 and then in his 2000 book, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY*. Putnam's theory was that people in the United States were no longer as engaged in community, professional, and civic organizations. The result is an increase in social isolation and a decline in social capital—interconnections forged through attending meetings and doing the work of such organizations. While Putnam's work was criticized for emphasizing traditional forms of civic engagement and discounting new forms, the decline in participation in organizations that tend to reach

# Chair's Comment

across socioeconomic or other characteristics—including political orientation—may be real. According to Putnam, the mechanisms for understanding common values and acting on shared concerns become weak when people do not know their neighbors, do not gather with families as often, or do not engage actively in the life of the community by attending meetings and participating in events and programs. The ascendancy of the Federalist Society and the American Constitution Society which pursue focused advocacy agendas perhaps are examples of this trend among lawyers.

The American affinity for forming associations to promote innumerable causes ranging from commercial to religious, moral, general and specific, was a notable national characteristic before Alexis de Tocqueville documented the phenomenon in his classic work *DEMOCRACY IN AMERICA* (1835 & 1840). De Tocqueville connected the vibrancy of associations to the ability of society to engage in mutual aid, and to serve as a bulwark against government abuse of rights. De Tocqueville observed:

Feelings and ideas are renewed, the heart enlarged, and the understanding develop only by the reciprocal action of men one upon another .... In democratic countries, knowledge of how to combine is the mother of all other forms of knowledge; on its progress depends that of all others .... If men are to remain civilized or to become civilized, the art of association must develop and improve among them at the same speed as equality of conditions spreads.

Lawyer volunteers are vital to the ABA's ability to create social capital among the members of the legal profession. As Chair of the Section, I have greater appreciation for how important it is for our legal community to gather at meetings to discuss developments in the law, societal problems where law could form part of a solution, or law reform efforts. These engagements are not only individually rewarding, but also help sustain a legal community with some shared values. We need the participation of every voice.

Transitions have been a consistent theme of my Chair Comments this year, and this column will be no different. After several productive years as chair of the Publications Committee, William S. Jordan, III, is handing control of the press to Jeffrey B. Litwak. Bill enjoyed the confidence of the Section's authors, leadership, and staff because of his attention to detail, wisdom, and gracious manner infused with common sense. Happily, as Bill is the nominee to become Secretary of the Section, we anticipate having the continued presence of these collegial virtues. Jeff is well prepared to assume the role of committee chair. He has been a Section Committee member for nearly a decade,

and is one of the Section's reliable authors and editors. We look forward to the unique perspective he will bring to the Section's important publications.

The Section is fortunate that Andrew Emery and Susan Prosnitz are co-chairs of the Section's signature Fall Conference after leading a program that attracted record attendance in 2016. At the Fall Conference, the Section will recognize the achievements of lawyers who have made important contributions to the field of administrative law and the work of the Section. Sally Katzen will be elevated to the status of Senior Fellow as a tribute to her career in emphasizing the importance of administrative regulation to protect the health, safety, and rights of all Americans. The most recent Last Retiring Chair of the Section, Jeffrey Rosen, and Shawne McGibbon, the General Counsel of the Administrative Conference of the United States, will be named Fellows of the Section. Finally, Andrew Emery will be recognized with the Section's Volunteer of the Year Award for his service as co-chair of numerous Fall Conferences and his generosity in sharing his considerable insights and work with the Section. The Fall Conference is an opportunity to forge direct professional and personal connections with lawyers and academics. I know all who attend will find it a fulfilling experience.

As lawyer volunteers are essential nutrients to the work of the Section, their work would not have impact without the support of the Section staff. Section Director Anne Kiefer, Program Specialist Angela Petro, and Program Associate Rebecca Mobley have my profound appreciation for their creativity, dedication, sensitivity, and professionalism in dealing with the myriad details necessary to keep the Section functioning—from ministerial to monumental.

I hope that the contents of this issue of the *ARLN*, along with the useful substance covered in the Section's programs, are independent and more than adequate reasons to become involved in the Section. Fruitful associations with the other lawyers and the Section's tremendous staff on projects of minute and more expansive consequence will help the legal profession resist the trend toward "Bowling Alone."

Renée M. Landers  
Chair, 2016–2017 

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# Artificial Intelligence in the Administrative State

In what follows, *Administrative & Regulatory Law News (ARLN)* is pleased to present four diverse perspectives on Artificial Intelligence (AI), as both a tool and object of regulation. AI, often characterized as the ability of machines to learn, automate tasks, and solve problems, has the potential to impact almost every area of life. In some areas, such as finance or online searching, that impact is already underway. What is more, these effects are not unique to the private industry; governmental agencies are increasingly considering using AI for greater efficiency and accuracy in both their regulatory and

adjudicatory work. While the benefits of AI can be great for both sectors, so too are the potential obstacles. For example, cultural resistance, legal ramifications, and political accountability could all lead to unintended consequences. Like regulation more generally, careful balancing of the benefits and risks will be necessary.

In order of appearance, the symposium below features the work of Representative Steven Smith, who chairs the New Hampshire House of Representatives Transportation Committee; Professor Cary Coglianese (University of Pennsylvania) and David Lehr

(Georgetown University; University of Pennsylvania); Professor Carla Reyes (Stetson University); and Professor Rory Van Loo (Boston University).

The authors' respective contributions will speak for themselves. Together, they illuminate an array of issues in this complex field. And they speak to a common theme: the need for clear-eyed thinking about AI—one that is neither blindly optimistic, nor overcautiously restrained.

— Jordan Dillon,  
*ARLN Student Editor*



## Preparing for a Driverless Future

*Steven Smith\**

The future is not coming ... it is here already. Driverless cars are being experimented with, tested, and may be next to you on the road today. Some of you may have driven one and not realized that you did. Does your car have antilock brakes, traction control, collision avoidance, lane guidance, adaptive cruise control, or the ability to park itself? If it does, you drove a somewhat-automated vehicle. We don't think about these in depth, but consider the actual mechanics of what occurs. In something as simple as ABS brakes, the driver can provide input that the car can ignore. As driverless technology advances, legislators and the public need to become aware of it and begin thinking about how we manage it, both from a liability and safety standpoint.

\* Steven Smith is a member of the New Hampshire House of Representatives representing Sullivan County District 11. He is the chair of the House Transportation Committee.

The federal government has done a good job of beginning a dialog and regulatory framework. In addition to spelling out the division between state and federal areas of jurisdiction, they have created brackets for identifying the various levels of automation. These range from somewhat-automated to fully automated. The federal policy can be found at <https://www.transportation.gov/AV>, and contains 5 levels of automation (SAE is the Society of Automotive Engineers):

**SAE Level 0**, the human driver does everything (my '76 Dodge pickup; it doesn't even shift itself);

**SAE Level 1**, an automated system on the vehicle can sometimes assist the human driver conduct some parts of the driving task (ABS brakes, power steering);

**SAE Level 2**, an automated system on the vehicle can actually

conduct some parts of the driving task, while the human continues to monitor the driving environment and performs the rest of the driving task (cruise control);

**SAE Level 3**, an automated system can both actually conduct some parts of the driving task and monitor the driving environment in some instances, but the human driver must be ready to take back control when the automated system requests (adaptive cruise control, lane guidance, crash avoidance);

**SAE Level 4**, an automated system can conduct the driving task and monitor the driving environment, and the human need not take back control, but the automated system can operate only in certain environments and under certain conditions (automated shuttles on a campus that cannot leave the campus);

**SAE Level 5**, the automated system can perform all driving tasks, under all conditions that a human driver could perform them (K.I.T.T., from the T.V. show *Knight Rider*).

There are some crossover areas. An example would be three trucks travelling together where only the front truck has a driver, with the others tethered wirelessly to the lead truck. The regulatory question here is whether these are three vehicles, or one with wireless trailer hitches? As the industry develops, there will be more examples. It is critical that our matrix be flexible enough to plug in developments as they occur and not constantly require new regulations and legislation.

Let me add one more element, and then we can get to the big picture. “Connected vehicles,” meaning systems where different vehicles and infrastructure are able to “talk” to one another, are another initiative made more effective by autonomous vehicles. As the Department of Transportation explains, a connected vehicle program will allow cars on the highway to “use short-range radio signals to communicate with each other so every vehicle on the road would be aware of where other nearby vehicles are. Drivers would receive notifications and alerts of dangerous situations, such as someone about to run a red light as they’re nearing an intersection or an oncoming car, out of sight beyond a curve, swerving into their lane to avoid an object on the road.”

This is not a new idea. Traffic Message Channel (TMC) systems have been around for years. These began as a way to receive traffic alerts from a variety of sources and output them to a radio channel. In its earliest iterations, you could tune to a channel on your radio to learn about traffic issues ahead. This concept has evolved to enable mobile-navigation systems to reroute you around traffic jams. There were technical hurdles to overcome. The input was a vast array of data sources, ranging from road sensors and cameras to people calling in reports. Getting

all this data into a uniform format, and then coordinating on uniform outputs, was a successful example of industry cooperation and public-private partnership. For connected vehicles to be viable, something similar will need to occur.

Incorporating vehicle-to-vehicle telematics could further streamline commuter travel. The future vision is enhanced safety and traffic mitigation. Your car could receive data that most cars one mile ahead are traveling 25 mph in a 55 mph zone, and automatically reroute you. Your car could receive data that a vehicle on a cross street is going through a red light and stop.

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*Some culture shifts are needed for autonomous vehicles to be successful.*

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There are challenges. States should be going through their motor-vehicle codes now to get a handle on what changes will be needed to accommodate driverless vehicles. Last year, Audi wanted to demonstrate a driverless vehicle in New York, but was unable to because of a 1971 law that requires that at least one hand be on the steering wheel at all times. The test car doesn’t have a steering wheel, or a hand to hold it. States will need to accommodate driverless cars with section carve outs, or, preferably, write new sections of law that apply to driverless vehicles.

But, before we can create regulatory packages that make sense, we need to be working diligently to find the right questions to ask, particularly due to the fluid nature of who controls driverless vehicles. In a Level 4 vehicle, for instance, there is an expectation that the driver may have to take control of the vehicle. If it crashes, we’ll need to examine the vehicle data to determine if the human or the vehicle was at fault. It is no longer as simple as handing a

ticket to the person behind the wheel. If a person believes that their automated vehicle will make the trip home from the bar without requiring human input, can they be drunk? If the car unexpectedly requires the human to take control, then did they “knowingly and willingly” drive under the influence? If someone controls a driverless vehicle by monitoring its functions from a laptop, are they the “driver”? Do they need a license—and, if so, what kind?

Assigning liability presents its own set of complexities. Think of the possibilities:

An automated vehicle hits a building.

- Did the navigation system malfunction (was it the navigation itself, or the map data)?
- Did the crash-avoidance system malfunction?
- If the crash-avoidance system was working, did the sensors fail (hardware vs. software)?
- If all that worked, did the brakes fail (again, hardware or software)?

I can provide more permutations, but let’s stop there. That example has the potential to have 7 different manufacturers involved. An easy solution is to require on-board data recording that will identify the failure. This should be part of federal vehicle-safety certification. Further, a uniform method should be established, and all manufacturers should be forced to conform to it.

Some culture shifts are also needed for autonomous vehicles to be successful. My experience is that far too many people are designing standards based on the vehicles working perfectly and never malfunctioning. This makes us miss the right questions. If a driverless car malfunctions (speeding for example, or running red lights), how does law enforcement stop the car? Or, suppose the occupant of the car has a medical emergency. How do emergency services stop the car? I talked with my local police chief who was in favor of my idea of hood mounted

electromagnetic pulse (EMP) guns, but we have to be realistic. There needs to be a uniform, secure method of disabling a driverless car. It needs to be simple, standard, and mandated. Assuming that the cars will never malfunction makes us overlook issues like this. Solving this should be a prerequisite to approving autonomous cars for mass market.

Another needed culture shift is to realize that we have two distinctly different things to regulate: the car itself and a system of cars used by the masses. The car is easy. Identify problems with the sensors and software ... fix, test, repeat. The system itself needs altogether different regulations and testing considerations. I have yet to hear anyone talk about the integrated network of autonomous connected vehicles as one thing.

Consider an example. An adaptive-cruise-control unit will maintain a specified safe following distance from the vehicle ahead of it. The vehicle ahead of it has a crash avoidance system that accelerates the vehicle when the car behind gets too close. What happens if those parameters overlap? How will the network behave? Which manufacturer has to make a design adjustment? How will testing be done to show the effects of a small error magnified as it ripples through the system?

Government has typically not been very good at coordinating at this system level. If you remember the debacle over the rollout of the federal healthcare website, you'll get the picture. Several contactors were hired to build separate components of the healthcare exchange. They each tested their components. The contracts held that DHS would do the integration testing. This did not occur, and the components did not work together. As we create a new transportation system comprised of a network of connected-autonomous vehicles, each comprised of a network of separate systems, we need to identify the testing requirements before they go to market and spell out the expectations. Waiting to develop these guidelines can only invite trouble, and will certainly add to cost.

Please do not understand my skepticism as obstructionist. I want these cars to work. Among other things, these cars offer freedom of mobility for the disabled, a solution for traffic mitigation in overcrowded cities, and general highway safety. But realistic testing requirements and integration-testing standards are critical to realizing these beneficial ends.

This presents some challenges. The field is highly competitive, and there are many players. How will manufacturers do the joint testing required to successfully perform integration testing without compromising proprietary information? This nut needs to be cracked before we can even consider opening up the market. Perhaps this is an opportunity for third-party providers who only do testing, and are bound by ironclad nondisclosure agreements. A great example is M City, a project of the University of Michigan. You can see an overview at [https://youtu.be/fsyAr\\_VLQ\\_E](https://youtu.be/fsyAr_VLQ_E) and their website is <https://mcity.umich.edu/>. But we're going to need something a lot bigger, and clear test cases.

Lastly, a recall method needs to be designed for the software involved. Some of you, right now, may be driving vehicles that receive software updates. If you use a computer, you know that those don't always go as expected. Things can:

- stop working;
- work differently;
- malfunction and cause other programs to malfunction.

This is annoying with your computer. It can shut down a city if it affects a few thousand vehicles. Federal standards need to be created so that a rollback can occur in seconds. The party responsible for doing it needs to be identified and authorized. The process needs to be created.

How long do we have to get this all done? We don't know. Manufacturers are currently working on solving the human problem. Autonomous vehicles cannot currently be programmed to react properly to everything, especially

unexpected behavior. A common example is a 4-way intersection controlled by a single traffic light. Let's say you'd like to make a left. If there is traffic, at some point you have to drive out in front of an oncoming vehicle to turn. Most cities also have laws stating that you cannot enter an intersection unless you can also immediately leave it. This is to prevent traffic from becoming gridlocked. If you've driven in a city, you know that gridlock is sometimes necessary. Nevertheless, the driverless car will not violate a law. It will sit there forever. Once issues like this are worked out, we get closer to being market ready. It could happen tomorrow, or in thirty years.

Here's a top-10 list of what we should be doing now:

1. States need to update language in statutes that prevents autonomous cars from being used.
2. States should use the model state policy from USDOT to create statutes that allow testing to occur on public roads with proper supervision. The faster autonomous cars get on real roads, the faster any local irregularities that affect function can be identified (color of the pavement or lane striping, shoulder marking, traffic light position).
3. States should see if any required stickers (inspection, for example) will block a sensor and move them when necessary.
4. States should invite manufacturers to come participate in the process of real-world, strictly supervised testing.
5. The Federal government should begin identifying test requirements for the new system (and keep thinking of these vehicles working together on public roads as a system).
6. The Federal government needs to create a recall process for vehicle software, including sufficiently prompt rollback procedures and processes.
7. The Federal government needs to address standardization for inter-vehicle communications.

8. The Federal government should partner with the industry to ensure that connected vehicles are sufficiently protected from hacking and cyber attacks.
9. The Federal government should partner with the industry to determine how to do the

- inter-manufacturer testing that will be necessary for market certification.
10. The Federal government needs to spec a uniform method for emergency services to stop or disable an automated vehicle.

There are far more than these ten things to do, but we can all start working on these things now. Through every step of the process, manufacturers should work closely with government to ensure that the process will actually work, without having to take steps backward.



## Improving the Administrative State with Machine Learning

Cary Coglianese\* & David Lehr\*\*

“Machine learning” refers to computer algorithms that, on their own, discover patterns in historical datasets, which can then be used for making predictions. Such algorithms undergird important innovations throughout the private sector, making possible high-frequency trading, online video and retail recommendations, and self-driving cars, among other applications. A proliferation of seemingly autonomous decision-making tools has raised alarms over the potential loss of human autonomy. Particularly when government agencies begin to rely more extensively on machine-learning algorithms to support decisions previously made by human officials, the wisdom and legality of machine learning will likely come under increased attention. Can agencies use artificial intelligence while remaining faithful to principles of law and consonant with government “of the people” and “by the people”?

The answer is basically “yes.” Administrative agencies have numerous opportunities to improve their operations through the responsible application of machine-learning technology. Contrary to growing

alarmism, governments can actually use algorithms in important ways without contravening constitutional and administrative law doctrines. We have recently offered an extensive legal analysis of government use of machine-learning algorithms in our article, *Regulating by Robot: Administrative Decision Making in the Machine-Learning Era*, 105 GEO. L.J. 1147 (2017). Here we highlight what machine learning promises government agencies and why standard doctrines should not form insuperable barriers to governmental use of machine-learning algorithms.

### Machine Learning’s Administrative Promise

At an intuitive level, machine-learning algorithms are those that “learn” from the data. But what does this really mean? It means these algorithms find patterns or correlations between variables in a set of data, which can then be used to make predictions. Importantly, this discovery is done on the algorithms’ own; humans do not explicitly program them to look for certain patterns. As a result, it can be difficult to explain exactly how or why a machine-learning algorithm keys in on certain correlations or makes the predictions that it does. In other words, machine-learning algorithms are often considered “black boxes.”

Furthermore, and in contrast with some conventional techniques like regression analysis, machine

learning is not used to support causal inferences about the learned relationships between different variables. Nevertheless, just as machine learning is leading private-sector improvements, its ability to make sense of large quantities of data can help agency officials make smarter decisions, allocate scarce administrative resources more wisely, and improve the accuracy and fairness of governmental processes.

Government agencies are already exploring how to use machine learning. The Environmental Protection Agency (EPA) has used machine learning to forecast chemical toxicity. The Internal Revenue Service (IRS) prioritizes audits based on machine-learning predictions of tax violations. The Securities and Exchange Commission (SEC) similarly relies on machine learning to identify potential instances of insider trading. These are just a few examples, but they show that agencies are already embracing artificial intelligence.

That said, current administrative applications are limited. Many of these applications assist with discretionary aspects of enforcement, such as deciding which facilities to inspect. These existing uses are unlikely to be problematic from the standpoint of administrative law because they involve algorithms as decision-support tools to inform actions that are committed to agency discretion. But in the future, federal agencies

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may find it beneficial to rely on machine learning in less limited ways. We call two such applications *algorithmic adjudication* and *robotic rulemaking*.

Agencies would engage in algorithmic adjudication by automating enforcement or other adjudicatory decision making. Instead of merely identifying taxpayers to audit or facilities to inspect, agencies could develop systems that use algorithms to identify noncompliance and impose consequences. The Federal Aviation Administration, for example, could rely on algorithms to revoke aircraft certifications based solely on machine-learning predictions of airworthiness. The Pipeline and Hazardous Materials Safety Administration might run data from pipeline sensors into machine-learning systems that predict safety risks and then automatically activate shut-off valves. Similarly, social services agencies could terminate health or disability benefits on the basis of machine-learning algorithms. Some agencies are already on their way toward adjudicating by algorithm; the IRS's automated identification of tax fraud is not far removed.

Agencies might also engage in robotic rulemaking, which could take a variety of forms. One current and easy-to-understand example of automated rulemaking is found in the Los Angeles traffic signaling system. For drivers, a red light functions as a rule they must obey—and yet, as with machine learning, no human knows exactly why any particular light turns red or green when it does. The signaling system is set up to optimize traffic flow, with an algorithm drawing in data from sensors in all of the streets and making highly dynamic decisions aimed at reducing overall congestion. When federal agencies engage in analogous algorithmic rulemaking, they would likely build computer programs in which machine learning works in tandem with other procedures, like agent-based modeling. Particularly, they could construct algorithms to model mathematically the system they are seeking to regulate, “issue” a variety of possible rules in the modeled system, observe the

effects of those rules on the behaviors of agents, and then select the rule that best achieves the agency's goal in that system. For example, the EPA could create an agent-based model of a market of polluting firms, simulate how different possible rules would affect company emissions, and then select a rule that reduced emissions to an optimal level.

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*Would using algorithms  
to make rules  
or resolve adjudications  
offend core constitutional  
and administrative  
law principles?*

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Robotic rulemaking will not be possible in all scenarios. The causal processes in a system must already be sufficiently well-understood to be specified in a mathematical model. Also, it should be clear that humans will still have to specify the possible rules from which the algorithm chooses. But robotic rulemaking could be applied in quite consequential settings and could be particularly advantageous for problems where speed matters. For example, imagine an SEC system that could update rules for high-speed trading automatically, adjusting constraints in nanoseconds. When used in such ways, algorithms could have great potential to transform how rules are made.

### **Administrative Law and Artificial Intelligence**

Would using algorithms to make rules or resolve adjudications offend core constitutional and administrative law principles? We consider this question in the context of four major legal principles.

1. *Nondelegation*. Initial questions might arise over the assignment of government responsibilities to machines. Under the nondelegation doctrine, courts traditionally ask whether an “intelligible principle” constrains a delegation of authority. The existence of a clear principle in delegating statutes will necessarily exist with machine learning, as learning algorithms require mathematically stated goals that are sufficiently specific to guide the formulation and execution of the algorithm. In other words, Congress could not feasibly direct an agency to use machine learning without providing a principle that is sufficiently intelligible to be translated into an algorithm's mathematical goal. Furthermore, machine-learning algorithms would not be problematic in the way that courts view delegations to private entities as problematic. Unlike private entities, learning algorithms do not have interests of their own that can create conflicts. Rather than constituting an impermissible delegation, algorithms in effect function much like measurement tools—e.g., thermometers, scales, and sensors—that agencies have permissibly used for years. Machine learning, like any tool, needs to be designed for its intended purpose and sufficiently “calibrated,” but agency reliance on it should not create any nondelegation doctrine issues.

2. *Due process*. Adjudicating by algorithm might seem to raise due process considerations if it effectively cuts humans out of government decision-making, automatically imposing a deprivation of a liberty or property interest on the basis of a machine's prediction. Of course, human decision-making is highly susceptible to bias and error, so algorithmic adjudication could actually enhance governmental fairness, not detract from it. Moreover, when it comes to procedural due process, the constitutional test calls for balancing across three factors: the individual interests at stake; the procedure's contribution to accuracy; and the government's administrative costs. *Mathews v. Eldridge*, 424 U.S. 319 (1976). Machine learning will not affect the first factor at all. But it

could result in improvements on both the second and third factors, producing more accurate decision-making at lower cost and in shorter time. Ultimately, we see no intrinsic incompatibility between machine learning and due process principles.

3. *Nondiscrimination.* Adjudicating by algorithm or regulating by robot might seem to raise equal protection concerns when federal agencies include variables in machine-learning analyses for individuals' memberships in protected classes, such as racial categories. Agencies might choose to include such variables not only to increase the accuracy of their predictions but also to reduce disparate impacts. Yet even the use of variables on race or other protected classes need not violate the Fifth Amendment's equal protection guarantees. Obviously, if clear animus drives the use of machine learning, this would violate equal protection. But under most circumstances, the unique aspects of how machine learning works will likely mitigate against any finding of an impermissible suspect classification. This is because the effect of a class-related variable on predictions will not prove consistently advantageous or disadvantageous to

all members of a given class. The same algorithm applied to the same data may yield some predictions that disadvantage certain individual members of a protected class but other predictions that advantage other individuals in that same class. Furthermore, machine learning's black-box nature makes it virtually impossible to demonstrate discriminatory intent, at least absent some separate showing of animus on the part of agency officials.

4. *Transparency.* Machine learning's black-box nature might raise questions about transparency. Algorithms that support law enforcement strategies may be properly exempted from disclosure under the Freedom of Information Act, but when it comes to rulemaking, agencies do need to offer sufficient reasons to withstand arbitrary-and-capricious review. The methodologies of statistical or scientific models that support rules must be laid bare. This will likely mean that algorithmic objective functions, optimization methods, and input variables will have to be disclosed—but this should prove sufficient given courts' deference to agency use of complex scientific analysis. See, e.g., *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87,

103 (1983). By and large, transparency concerns should not stand in the way of more widespread use of machine learning by federal agencies.

## Conclusion

Despite growing concerns about the use of artificial intelligence in many parts of the economy and society, government agencies have little reason to hesitate to explore further uses of machine learning. Adjudicating by algorithm and regulating by robot are not fantasies; both are possible, and both agencies and the public stand to reap potentially significant benefits from new applications of machine-learning technology, just as the private sector has. Of course, as with any new technology, agencies should exercise caution and use machine learning responsibly as a matter of good governance. As a matter of existing law, though, agencies are unlikely to face serious obstacles. Administrative law does not appear to pose any major barrier to agencies' use of machine-learning algorithms to facilitate smarter decisions, reduce human biases, and improve operational efficiency.



## Blockchain-Based Agencies

Carla L. Reyes★

Delaware launched its Blockchain Initiative in May 2016 to begin moving certain Delaware government processes to software systems based on distributed ledger technology (DLT). DLT is computer software that offers a mechanism for parties operating across a peer-

to-peer network of computers (who may not know each other) to arrive at an agreement about the evolution and present state of facts shared between them. Certain features of DLT, for example, allow software developers to create computer code that will automatically take action upon the fulfillment of pre-specified conditions. These "smart contracts" catch the imagination of many, and government agencies are increasingly turning to them as a solution to perceived flaws in their existing administration of legal functions. For

example, in the first phase of Delaware's Blockchain Initiative, Delaware deployed DLT-based software to automate compliance of its public archives with data retention laws. In the second phase of the initiative, Delaware will use DLT for filing forms related to secured transactions under Article 9 of the Uniform Commercial Code (UCC).

The questions for DLT initiatives are two-fold: (1) when should an administrative legal function be moved to a DLT-based system, and (2) what impact will doing so have on related law?

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## DLT Is Not Appropriate for All Government Processes

With a name like “distributed ledger technology,” it is tempting to assume that DLT protocols simply represent advanced, more efficient, and more secure database technology that should be applied in any circumstance applying existing database technology. But, in fact, DLT is not a more efficient, more secure database technology. Indeed, the leading technologists in this area agree that DLT protocols make exceedingly inefficient databases because the cost of securely enabling massive networks of computers to reach decentralized consensus is unjustifiable in the contexts where existing databases work well. In other words, if the function needed is to store data in a centralized manner and protect it against intruders, existing database technology more efficiently achieves that end. Instead, DLT-based systems offer a cost-justified solution in certain circumstances: most notably, when governments identify a problem of law lag, inefficiency, usability, or transparency that relates to difficulty among multiple parties in reaching a consensus about the existence and evolution of shared facts.

Viewed in this light, Delaware’s efforts to create a DLT-based system for UCC-1 forms fit the bill. Creditors use UCC-1 forms to declare to any future, but presently unknown, interested parties that a lien exists against certain specific personal property belonging to a specific debtor. Although the goal of the filing system is to give prospective creditors actual knowledge of existing liens, state filing systems are generally imprecise, difficult, and expensive to use. A DLT-based system for filing UCC-1 forms, therefore, may enable greater levels of consensus, validity, immutability, and authentication than the existing filing system. Nevertheless, an agency seeking to administer a public

law function through a DLT-based system should not end its design inquiry with the question of whether DLT is a good fit. DLT protocols will cause ripple effects in adjacent areas of law, which must also be accounted for.

### DLT-Based Ripple Effects

Professor Lawrence Lessig famously wrote “[c]ode is law,” to emphasize that “we must understand how ... the software and hardware that make cyberspace what it is regulate cyberspace as it is.” LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* 6 (1999). Building on this idea of code as an additional source of rules that constrain behavior within technology-based systems,

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*Moving government processes to DLT-based computer code will have ripple effects in related law.*

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DLT code can be conceptualized as a foreign legal system. By doing so, it becomes clear that each time a government agency moves a legal process to a DLT-based system, a legal transplant takes place: The agency transplants existing law to the realm of DLT code. As such, comparative law instructs us to anticipate ripple effects in substantive law, legal structures, and legal culture around the legal transplant.

In regard to substantive law, DLT protocols may offer certain features that serve the same essential function as existing substantive legal rules. Identifying those functional similarities may allow the regulatory agency to simplify elements of substantive law rendered moot by the DLT code. Imagine, for example, simplifying the rules related to Article 9 UCC-1 filing

search errors or simplifying priority analysis. Even as applying a comparative functional method to the design of DLT-based agency systems may enable simplification of substantive law, scholarship on legal transplants also evidences that new legal elements and actors should be expected to emerge after legal transplantation. When government agencies move regulatory processes to DLT-based systems, they should expect self-executing elements of the computer code to give rise to new substantive legal issues. For example, the Delaware UCC-1 filing system purportedly features automatic renewal or clearing of filings to ease the burden of releasing or maintaining collateral. What remedies will belong to a creditor if this self-enforcing computer code prematurely releases its collateral and the creditor loses priority? Who will be at fault if the system improperly renews a filing and a debtor is unable to obtain further financing? What liability, if any, will exist for the technology team that wrote the code? These types of questions may be present whenever an agency moves a legal process to DLT, and should be considered at the design stage of the new system.

Moreover, DLT-based systems may disrupt the structural choices of lawmakers as they enact laws. Entities covered by any given law or regulation face a choice as to whether and how to comply. Individuals that interact with those agencies face a similar, but separate compliance choice for each transaction. DLT-based systems present a mechanism for covered entities to choose compliance for both themselves and for the individuals with whom they interact. Once a covered entity makes an initial choice to comply by adopting a DLT-based system prescribed by an agency, the self-executing DLT code ensures that compliance trickles down to all actors in the institution, including individual consumers. In other words, legal rules would no longer

apply to individual transactions, but to patterns of behavior overall. In terms of legal structure, such changes may cause a shift toward regulation through automatic restraint. Given the significant considerations of individual autonomy raised by such possibilities, agencies adopting DLT-based systems would benefit from considering such issues at the design stage.

In addition, moving government processes to DLT-based systems may shift the locus of legal culture from lawyers and regulators to the developers programming the computer code. DLT protocols “are sometimes thought to exist independently of human rule-making, and governed only by mathematical algorithms. This is a misconception. Just like legal code, technical code needs to be produced and

maintained by humans who define the rules that the code embodies.” Vili Lehdonvirta & Robleh Ali, *Governance and Regulation, in DISTRIBUTED LEDGER TECHNOLOGY: BEYOND BLOCK CHAIN* 40, 43 (UK Government Chief Scientific Adviser 2016). If law is implemented through smart contracting computer code, and that code is written by software developers, the coders and the language of the code may begin to influence legal compliance and disputes. The decisions about how to balance the potential efficiency gains from governing through DLT with this anticipated shift in legal and enforcement culture may influence the way lawmakers and regulators think about the law they make and enforce.

## Conclusion

DLT may, in fact, offer significant benefits to improving the legal administration of government processes. However, every implementation of DLT in government represents certain trade-offs between efficiency, existing substantive rules, prevailing legal structures, and current legal culture. Moving government processes to DLT-based computer code will have ripple effects in related law. Regulators, practitioners, and technologists should all be mindful of these realities when designing and implementing such systems. The framework introduced here offers the opportunity to construct a new jurisprudence for governance through DLT; a jurisprudence necessary to anticipate and prepare for the impact on the law of the new trend of governing through DLT.



## Regulation by Digital Intermediary

Rory Van Loo\*

**P**olicy makers have long sought to achieve public goals by influencing private decisions, such as requiring lenders to disclose annual percentage rates or publishing a food pyramid. Many administrative agencies now use a new tool: digitally tailored advice. For instance, agencies have tried to shape private digital intermediaries, such as travel websites, by releasing public data or requiring businesses to disclose pricing data. The Consumer Financial Protection Bureau (CFPB) offers a mortgage calculator that enables anyone to learn what rates similarly situated borrowers have obtained. At the United States Department of Agriculture’s (USDA)

SuperTracker site, people can enter their dietary, weight, and exercise information to receive personalized activity plans.

Whether the digital intermediary is public or private, this mode of regulation poses new challenges, which may require a technological upgrade to the regulatory state.

### Public Digital Intermediaries as Regulatory Tools

Publicly run intermediaries raise two broad sets of challenges. First, can agencies build them well enough to help users at a reasonable cost? Second, under what authority are they launched?

Agencies’ digital intermediaries have the advantage of being operated by an organization that does not have a profit motive, which removes some barriers to conflict-free advice. However, for several reasons

they may not help consumers as much as intended. When agencies launch websites providing advice, they are usually competing with private counterparts. The CFPB’s mortgage calculator, for instance, is one of many mortgage price analysis websites available. This means that for the tools to have a meaningful public impact, they must match or exceed other platforms. Yet private options typically have access to superior data and can spend considerably more resources on development. Public tools also face opposition by industry and the potential for capture. Although some provide valuable services and are used by millions of people, a full market comparison would be necessary to determine whether public digital intermediaries advance the public interest.

It is also unclear how to conceptualize such activities within traditional

\* Associate Professor of Law, Boston University. This Article draws heavily on *Rise of the Digital Regulator*, 66 DUKE L.J. 1267 (2017), and *Helping Buyers Beware: The Need for Supervision of Big Retail*, 63 U. PA. L. REV. 1311 (2015).

policy boxes, and thus what procedural constraints are appropriate. The USDA formally sought public comments for its SuperTracker nutrition and exercise tool, which is consistent with prior non-digital outreach efforts such as food guidelines. In contrast, the CFPB did not solicit public comments before launching its mortgage calculator. Thus, agencies can intervene on a potentially larger scale in markets through digital intermediaries, but without an established framework for procedural accountability.

### Private Digital Intermediaries as Regulatory Tools

Websites such as Expedia, Amazon, and Credit Karma enable people to compare—and sometimes purchase—various end-seller products. These private intermediaries have the potential to improve market decisions by facilitating product and price comparison. In theory, better market decisions can rid the market of inefficient companies, higher prices, and less valuable products. Thus, to the extent digital intermediaries improve market decisions, they help markets self-regulate. For these and other reasons, decision makers have sought to foster private intermediaries by releasing governmental data or requiring sellers to disclose private data in machine-readable form.

However, digital intermediaries can operate in hidden ways that may not be in consumers' best interests. For instance, product-comparison engines have been sued and reprimanded by regulators for not divulging their own financial interests in steering consumers toward particular products. Moreover, digital intermediaries can leverage psychological strategies to increase the prices paid by consumers, such as by ordering search results to anchor consumer perceptions in a higher priced first item that makes the second (slightly cheaper) item seem more affordable. Legal scholars have

argued that behavioral economics-related practices may inefficiently raise consumer prices in areas such as cell phone plans, mortgages, and credit cards. Arguably, “seduction by contract” has a digital cousin in “seduction by algorithm.” OREN BAR-GILL, *SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS* 7–22 (2012).

Private digital intermediaries also raise concerns about competition. Travel websites, for example, have become gatekeepers for airfare sales, positioning them to negotiate price restraint clauses that prevent

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*Digital intermediaries raise common algorithmic, market, and legal issues across diverse agencies.*

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airlines from selling at a lower price elsewhere. The price restraint clauses mean that customers cannot save money by comparing prices themselves at airline websites. The matter is by no means settled empirically, and such clauses have historically been viewed as efficiency improving. But recent work has concluded otherwise. See Benjamin G. Edelman & Julian Wright, *Price Coherence and Excessive Intermediation*, 130 Q.J. ECON. 1283, 1311 (2015). Some digital intermediaries also exhibit features of natural monopolies. Thus, by promoting policies to establish digital intermediaries, regulators may produce a host of unintended market consequences.

### Policy Implications

None of this should be taken to mean that the project of policy making through digital intermediaries should be abandoned. Nor does this discussion call for additional regulation, though it does indicate

that digital intermediaries exhibit features that have prompted regulation in other contexts. Instead, the main goal is to clarify what is involved in regulation-through-digital-intermediation. To understand whether a desired policy goal is achieved through digital intermediaries, it would be necessary to consider a more comprehensive set of potential benefits and harms to consumers and to competition.

Additionally, if policy makers want to regulate effectively through digital intermediaries, they will likely need to invest heavily beyond simply releasing machine-readable information. Public digital intermediaries need significant resource investments and development of a procedural accountability framework. For instance, consumer protection and antitrust agencies may need to regulate the digital intermediaries that are using disclosed information. A historical analog can be found in the congressional decision to supervise the New York Stock Exchange due to concerns about its natural monopoly characteristics and potential for market manipulation.

Assessing and intervening appropriately will be difficult, especially given the technological mismatch between agencies and industry. Nor would it be feasible or efficient for scores of agencies to each gain the requisite expertise. Fortunately, digital intermediaries raise common algorithmic, market, and legal issues across diverse agencies. It would thus be optimal for a centralized entity to serve a support and oversight role. Various configurations could be imagined, including an expanded mandate for the Federal Trade Commission or a new technology meta-agency. ○

# Regulations: The Unsung Heroes

By Sally Katzen★

*Ed. Note: The following is an adapted version of Sally Katzen's keynote address at the Administrative Law & Regulatory Practice Institute held May 18-19, 2017 at the Capital Hilton in Washington, DC.*

Some may be surprised by the title of my talk today: "Regulations: The Unsung Heroes." The "in" thing is not to praise regulations but to bash (or bury) them, and the debate among those in authority—at the White House and on Capitol Hill—is what can we do to reduce the regulatory burden? How can we cut the number and cost of regulations? How can we create incentives for de-regulation and disincentives for new regulations? How much can we slash the budgets of regulatory agencies and undermine the credibility of scientists that suggest the need for more stringent regulations?

My question is how did we get here? Some might say that this is a much-needed course correction because we have been regulating too much, especially during the last eight years. That's a possible explanation, but I think there is more to the story—a lot more to the story.

For starters, think about the most recent campaign for national elections—indeed, think back over the last four decades, whether or not there has been an election on the horizon. Presidential candidates, Congressional candidates, and office holders have repeatedly told us there are too many rules, they burden our business, they are a drag on the economy, they diminish our ability to compete in the global markets, stifle entrepreneurship, innovation and creativity, and compromise our freedom.

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While this criticism has come mainly from Republicans, Democrats shouldn't be too smug. How often do Democratic candidates and office holders provide a full-throated endorsement of the legitimacy of administrative governance? Of course, when a significant new regulation is issued, there is often a justification in the form of a Press

Release or Press Conference or even a Rose Garden ceremony. But rarely does anyone ever speak in favor of regulations writ large—at least not as passionately as critics who rail against "job-killing regs."

To an extent, it has always been this way in our freedom-loving land. But

there is another element to consider. The administrative state has its good points too. Think about food safety, or the lack thereof, that was featured in Sinclair Lewis's *THE JUNGLE*. Now we have federal inspectors at meatpacking plants to ensure the floors are swept, the knives are clean, and the temperature in the freezers is properly controlled. When people purchase products with the USDA seal, they can legitimately expect that the meat they give to their families is safe to consume.

Think about our rivers and how we were shocked when the Cuyahoga River, flowing through downtown Cleveland, caught fire and burned from debris and other contaminants. Even when it wasn't on fire, the river was so contaminated that locals would joke that, when you fell in the river, you didn't drown, "you decayed." Today, the water there runs clean and clear, and people can go boating, fly fishing, and even swimming without fear of getting sick.

Consider that we are a nation that fills over 4 billion prescriptions each year to treat everything from stomach

ailments to mental health. We cannot know what is in that little pill, but the FDA requires an insert in the packaging or on the label listing the active ingredients, dosage, and counter-indicators. We are also a nation of cars, and while we may not have degrees in engineering, we are still protected by airbags, rollover protection, anti-lock brakes, and a host of other safety features that have greatly reduced the number of highway fatalities each year, even as the number of miles driven has increased significantly. In addition, our automobiles run on lead-free gasoline, the paint we use in our homes is lead free, and toys cannot be made with lead. All of this has reduced the very real and very serious adverse effects of lead poisoning (including the impairment of cognitive functions, particularly for children).

Or, for those who use financial institutions, we don't worry that our money might not be there when we want to make a withdrawal because there is an entire regulatory structure in place, including Federal Deposit Insurance, to protect us. And buying stock would be quite scary, but-for rules requiring disclosures and prohibiting insider trading.

We take these and similar regulations for granted, because they are desirable and appropriate for our daily lives. Yet, while we have pocketed the benefits of these regulations, they did not come easily or without opposition. At virtually every stage of the development of every major regulation, the affected industries mounted fierce opposition.

- The first food safety regulations from USDA were said to be a threat to the "liberty of all the people of the United States."
- The creation of the FDA meant, to some vocal opponents, that Americans would be barred from taking an aspirin without a doctor's prescription.



Sally Katzen

- Airbags produced a real *contretemps*, as recited in loving detail in Justice White’s opinion in *Motor Veh. Mfrs. Ass’n v. State Farm Ins.*, 463 U.S. 29 (1983).
- The battle over removing lead in gasoline was also legendary—with opponents carefully explaining that unleaded gasoline could not be produced in the quantities needed and our nation’s traffic flow would come to a standstill.
- The resistance to removing lead in paint and toys reached a fever pitch, with industry advocates going so far as to place blame on the parents of children affected by lead poisoning, “who ‘failed’ to stop ... [them] from [picking paint chips off their walls or putting their] toys in their mouths.”
- The FDIC was called “unsound, unscientific, and dangerous,” and when the SEC started requiring registrations and other filings, opponents said all these regulations would cause companies to forego issuing new securities.

I could go on, but you know the story: Regulated entities have argued, often forcefully, that the cost of new regulations is inordinately and unjustifiably large; that the interference with their business judgment is unwarranted and un-American; and that this will be the death knell of their industry, if not the end of Western civilization as we know it. In turn, this chorus of complaints is invariably picked up and amplified by political candidates. In fact, railing against “regulations, red tape, and paperwork” is a great applause line, virtually guaranteed to get most audiences cheering on their feet.

It is interesting, however, that while polls show that the general public buys into the anti-regulatory rhetoric, these same polls and others reveal a more nuanced view. When people are asked which rules they want to scrap, they are not in favor of wholesale rollback or even significant rollback of most existing regulations—even

(or perhaps especially) environmental or financial regulations, where some opponents claim a mandate to dismantle recent statutory or regulatory activity.

Let’s test it here. Ask yourself: What regulations do you think we should get rid of? Think of everything: from stop lights at busy intersections to building codes for houses and commercial real estate; from directing airlines to address reported safety defects to limits on arsenic in our drinking water; from requirements for hard hats in construction zones to warnings on cigarette packaging and household cleaning products; from documentation of service records for veterans’ benefits to registration of farmland left unplanted for conservation payments. If not these, then what others should we discard? And then ask yourself: Why do you find this (or that) particular regulation so objectionable? And what would you be losing if it were torn up and thrown away?

I know that not all rules are precisely tailored to meet the problems they address; not all rules are the most cost-effective; and not all rules can be implemented without some intended (or unintended) consequences. The question in each case, however, is (or should be): Do the benefits of the rule justify the costs imposed? That is essentially the cost-benefit standard used by both Democratic and Republican Administrations in Washington going back over 30 years.

Do all of the agencies in Washington who develop and ultimately issue these regulations always get it right? Are their underlying assumptions always correct? Is the science always perfectly calibrated? Are the circumstances “on the ground” always constant? No, of course not.

I am not naive. I am not an uncritical cheerleader. I know that the people who work on these rules are not infallible. So it is fine to look at individual regulations, especially with the benefit of reality rather than prediction. But it is wrong to impugn

the whole administrative apparatus or to condemn an entire category of governmental action.

What’s called for is a scalpel, not a sledgehammer or a wrecking ball. And the choice matters for a number of so-called “regulatory reform” bills currently pending in Congress, most of which are a product of anti-regulatory passion. These bills have taken a variety of forms, though most focus on issues of *process*, rather than ripping up the substantive statutes that have spawned the regulations railed against by critics.

Actually, I believe in process. I believe it can bring widely divergent views to the table, afford those who are affected an opportunity to contribute their information and ideas, and, most importantly, focus the minds of the civil servants and the decision-makers so that they think before they act. These are all salutary aims. But, sometimes, too much of a good thing is not good.

I am reminded of some of the provisions of Executive Order 12,866—the charter for centralized review of proposed and final rules for the Executive Branch. Congress is obviously not bound by any executive order, but as a prudential matter, I would urge that proponents of these bills ask and answer the same foundational questions that any agency must confront (and satisfy) before taking regulatory action:

- What is the compelling need and how significant is it?
- What is causing the particular problem that is being addressed?
- Will the proposed action solve the problem in an effective and efficient way?
- What are the other likely consequences (intended and unintended) of adopting the proposal?
- Are there available alternative ways of achieving the desired objective?

These are the right questions to ask. Regrettably, however, many (if not most) of the bills in their current form

would not pass muster if they were proposed regulations.

One last thought. Some have either been persuaded that the administrative state isn't really too bad *or* it would take too much effort to dismantle it, but they are still of the view that we need to put a stop to any *new* regulations unless we get rid of old ones. Really? Is there a magic number of regulations? If so, where did it come from? Or,

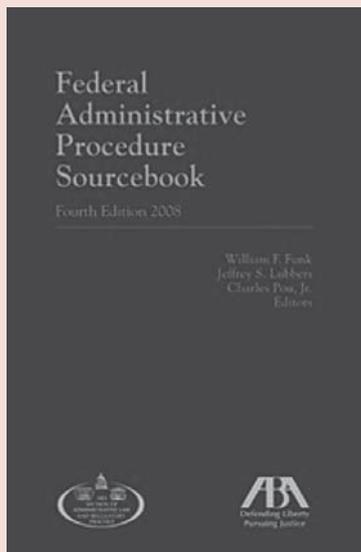
thinking about it another way: Have we stopped innovating—either products or procedures—that might well improve or enrich our lives, in a way that maximizes the benefits and minimizes the harms?

Think about drones or driverless cars. What new frontiers will commercial space flight reach in the next decade? These attractive technologies raise serious questions to which we, acting through our

government, should respond with thought and care. We have the capacity to think about likely benefits and costs, and to write rules of the road that would help everyone get where they want to go. We can do that through the regulatory process—and *that* should be an applause line. For regulations really are the unsung heroes. 

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# EPA's Administrative Records Guidance

By Carrie Wehling\*

## The APA Administrative Record for Judicial Review

**A** critical task for federal agency lawyers and their clients is assembling the administrative record for judicial review under the Administrative Procedure Act (APA). The APA simply specifies that review of final agency actions is to be based on the “whole record,” 5 U.S.C. § 706, but putting together that record is anything but simple. The steady stream of challenges to the completeness of agency records, and the large body of sometimes conflicting and often situation-specific case law, is proof enough of the difficulty. The challenges are amplified in the information age, where electronic information can result in large and complex agency decision-making records, especially where the agency action is governed by notice-and-comment procedures.

Courts reviewing agency action generally presume that the agency's certified administrative record is complete and properly assembled. *See, e.g., Citizens to Preserve Overton Park, Inc., v. Volpe*, 401 U.S. 402, 415 (1971). In light of this presumption, and the complexity of agency records, some courts have turned to agency guidance to determine whether the record is properly compiled. *See, e.g., Desert Survivors v. US DOI*, 2017 U.S. Dist. LEXIS 16536, at \*11 (N.D. Cal. Feb. 6, 2017). It is too soon to say whether this trend will continue. But, if so, federal agencies may want to consider developing guidance to clarify and

explain their procedures for compiling their records for judicial review.

The U.S. Environmental Protection Agency (EPA) has long-established practices on assembling its records for APA judicial review. Several years ago, EPA condensed its practices into an official guidance. *See EPA's Action Development Process: Administrative Records Guidance* (2011) (hereinafter “Guidance”). Recently, this Guidance received judicial imprimatur. In addressing numerous challenges to the lengthy record compiled for a controversial rule promulgated jointly by EPA and the



Carrie Wehling

Department of the Army, the Sixth Circuit deferred to the EPA Guidance in upholding, almost entirely, the agencies' compilation of the record for judicial review. *See In re U.S. Dep't of Def. & EPA Final Rule*, 2016 U.S. App. LEXIS 18309 (6th Cir. 2016).

## EPA's Administrative Records Guidance

The Guidance reflects EPA's practices in compiling records as well as EPA's view of the sometimes-conflicting case law. It is written in a simple question-and-answer format, and its purpose is to clarify EPA administrative record practices for both EPA personnel and the public. The Guidance is intended to address some of the most common questions about assembling proper administrative records and to ensure that the resulting record for judicial review is indeed “whole.”

The Guidance begins with a definition of the administrative record. EPA defines the administrative record to be “the set of non-deliberative documents that the decision-maker considered, directly or indirectly ... in making the final decision.” The Guidance explains that the goal of the administrative record is to compile all

non-deliberative information EPA is aware of that is relevant to the decision and considered by the decision-maker, whether or not that information supports the final agency decision, so that the record presented for court review “fairly represent[s] all relevant factual information and contrary views provided to the agency.”

## EPA's Approach to Deliberative Materials

As is clear from the Guidance's definition of the administrative record, EPA does not include “deliberative” materials in the record for judicial review. The Guidance defines deliberative materials as “materials that solely reflect the internal deliberative processes of decision-making within EPA or within the Executive Branch of the federal government.” The Guidance further explains that deliberative materials are “those that are prepared in order to assist an agency decision-maker in arriving at a decision and reflecting preliminary or candid internal views or advice of the kind that would be discouraged if the document were made part of the record for the decision.” Examples include internal e-mails discussing or evaluating policy options, draft decision documents, the exchange of preliminary opinions or recommendations, briefing papers, options papers, and staff-attorney opinions. Such documents have three characteristics: they are internal, pre-decisional, and have content that reflects internal deliberations over a pending agency decision. Documents that are generally not deliberative include factual and scientific documents, documents conveying or explaining a decision, technical information, public process materials, official correspondence from other federal agencies, and information “generated by, with, or shared among EPA and State personnel.”

\* Carrie Wehling is an Assistant General Counsel at U.S. EPA. She has a B.S. degree from Stanford University and a J.D. from Harvard University. The author appreciates the helpful comments on this article from colleagues Carol Ann Siciliano, Noelle Green, and Jessica O'Donnell.

Courts overwhelmingly agree that deliberative documents are not part of the administrative record, among other reasons, to ensure that it is an agency's articulated basis for its decision that is reviewed by the court under the APA, and to enhance the quality of decisionmaking by encouraging the free flow of information during internal deliberations. However, disagreement persists on the rationale, which in some instances can make a difference. Some courts view the matter as a question of "privilege"; others view it as a question of "materiality." These competing frames have led to different practices among federal agencies, confusing case law, and unnecessary transaction costs.

EPA's position, based on its interpretation of the case law, is that internal deliberative materials are immaterial as a matter of law, and thus not properly part of the "whole record." Accordingly, EPA excludes these materials on relevance grounds, not privilege. *See* Guidance at 5-6 (citing cases).

There are several important implications of excluding deliberative materials based on relevance as opposed to privilege. First, unlike administrative record materials that EPA compiles contemporaneously and carefully throughout the decisionmaking process, EPA does not collect or sort deliberative documents in assembling the administrative record. The back-and-forth of internal deliberations is not just of minimal value in explaining the agency decision but, especially for significant rulemaking actions, can also be voluminous. As a result, excluding these documents has great practical importance.

Second, EPA does not compile a "privilege log" of deliberative materials or include such documents in a separate "privileged" section of the administrative record that is not available to the courts or the litigants. If a document is not part of the administrative record, there is no need to log it.

In addition, because the exclusion of deliberative documents is not based

on privilege, there is no waiver that attaches to release of the documents for other purposes, such as internal deliberative materials required to be posted in the public rulemaking docket under Executive Order 12866 (providing for review of draft federal agency actions by the Office of Management and Budget) or documents released under the Freedom of Information Act (FOIA). Whether internal deliberative materials related to an agency action are released to the public under FOIA requests or pursuant to a waiver of the "deliberative process privilege" or other privilege is a completely separate matter from whether they are part of the administrative record for judicial review. As a result, documents that are deliberative are not part of the EPA administrative record regardless of whether they can be, should be, or are released to the public.

There are several important reasons why EPA relies on relevance and not privilege in excluding deliberative materials from the administrative record. First, excluding deliberative materials based on relevance is consistent with the foundational case law relating to defining the "whole record" and its rationale. *See Overton Park*, 401 U.S. at 420 (holding that courts should avoid inquiry into the mental process of administrative decision-makers). The purpose of the administrative record is to compile the documents for court review that explain an agency's rationale for its final decision. Deliberative documents do not explain the basis of an agency's decision; rather, they represent internal and preliminary discussions of possible courses of action and possible rationales. Deliberative documents do not necessarily reflect what course of action was ultimately chosen by the agency decision-maker or the ultimate reason why they chose it.

By contrast, the purpose of the deliberative process *privilege* is simply to allow an agency, in its discretion, to withhold certain internal documents from public release. In EPA's view, whether a document is part of the agency's explanation for its action

does not logically depend on whether the agency has decided to assert a privilege over the document; nor is it dependent on what is or should be released to the public. Rather, a document is part of the record when it reflects the final rationale for the decision and the factual information considered. Asserting privileges to exclude documents from, or segregate within, administrative records is, in EPA's view, both illogical and unnecessary.

Second, excluding deliberative documents based on relevance requires the agency to be more clear, more transparent, and more proactive in developing its decision-making documents and rationale. EPA's practice is not to rely on any deliberative documents to defend its actions in court. Therefore, EPA personnel must consider the record prior to the final agency decision to ensure that the decision document and supporting materials contain the final agency rationale and all supporting materials, that all needed considerations are documented in non-deliberative form, and that all contrary information is fully addressed. Under the Guidance, if important content is contained in deliberative documents, EPA personnel convert that information into non-deliberative form prior to the issuance of the final decision; this includes culling factual information from deliberative documents. As a result, excluding deliberative materials does not, and is not intended to, hide important considerations from public view but rather to make sure that the record is considered throughout the decision-making process and the rationale for the final decision is clear and well-articulated. In contrast, including deliberative documents would mean that the agency's rationale would likely be buried among volumes of internal deliberations that are at best of questionable value, and at worst, completely unintelligible, or walled off from public view in a "privileged" section of the administrative record. In short, the agency's approach to deliberative documents

ensures that its final decision stands or falls on the public basis for the decision as officially articulated by the agency, and that neither the public nor the courts are misled by the preliminary internal views of agency personnel.

Third, excluding deliberative documents helps to ensure that decisions are well considered. Because the exclusion is based on relevance, not a privilege that may be waived or not asserted, EPA's approach better protects forthright internal debates, contributing to a more thorough vetting of the decision.

Finally, excluding deliberative documents based on relevance eliminates the transaction costs of collecting, compiling, segregating, justifying, and litigating over privileged materials. Such costs are particularly unnecessary because these materials have minimal, if any, value in explaining the agency decision for judicial review.

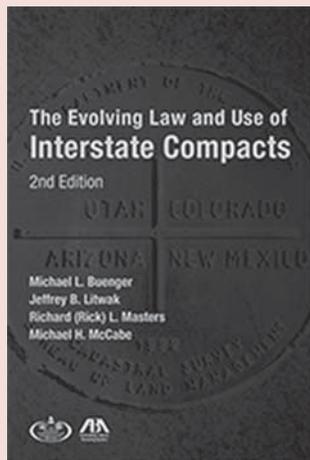
### Conclusion

The Guidance not only assists EPA personnel with the task of compiling the record for judicial review, but also explains to the public and to courts how EPA approaches administrative

record compilation, especially with respect to deliberative documents. As pointed out in the Guidance, the exclusion of such documents is counterbalanced by ensuring that all factual information and public commentary is included in the record, and that EPA's decision is well-articulated in the final decision documents. This approach minimizes unnecessary transaction costs and helps ensure that an accurate, comprehensible, and comprehensive record is available for judicial review. ○

## The Evolving Law and Use of Interstate Compacts, 2nd Edition

*Authors: Jeffrey B. Litwak, Michael H. McCabe, Michael L. Buenger, Richard L. Masters*



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# Nominations for 2017–2018

## Section Officers and Council Members

**P**ursuant to Article IV, § 1 of the Bylaws, the Nominating Committee of the ABA Section of Administrative Law and Regulatory Practice, composed of chair Anna W. Shavers, and members Jill Family and Andrew Emery, has made the following nominations for election at the Section's 2017 Annual Membership Meeting. The meeting will take place on Saturday, August 12, 2017 at 3:00pm Eastern Time in the Sheraton New York Times Square Hotel, in New York, New York.



**Chair**  
*(by operation of the bylaws)*  
**John F. Cooney**

John Cooney is a partner at Venable LLP in Washington, D.C., and has focused for 40 years on economic regulatory, administrative, and constitutional litigation involving federal agencies at the trial and appellate levels. He served previously as Office of Management and Budget Deputy General Counsel for Litigation and Regulatory Affairs and as an Assistant Solicitor General. He is a graduate of Brown University and the University of Chicago Law School. He is a Senior Fellow of the Administrative Conference of the United States, where for many years he chaired the Committee on Administration & Management. Mr. Cooney is a former Section Council member, co-chairs the Section's Banking and Financial Services Committee, has written for Section publications, and has been a frequent speaker at Section conferences.



**Chair Elect**  
*(by operation of the bylaws)*  
**Judge Judith S. Boggs**

Judge Judith Boggs was appointed as an Administrative Appeals Judge and member of the Benefits Review Board (BRB) of the U.S. Department of Labor in 2004. Prior to joining the BRB, she served in the federal government as an Administrative Appeals Judge and member of the Department of Labor's Administrative Review Board, Senior Policy Analyst at the White House, and Special Assistant to the Administrator of the Health Care Financing Administration/U.S. Department of Health and Human Services (HCFA/DHHS). She served in state government as staff to the Kentucky Human Rights Commission, chief legal counsel to the Kentucky Mental Health Department, and as a member of the Kentucky Registry of Election Finance. She also engaged in the private practice of law, focusing on health and administrative law matters.

In addition to her longtime membership in the Section of Administrative Law and Regulatory Practice, and her service as the Section's Vice Chair, Judge Boggs is a Past Chair of the ABA National Conference of the Administrative Law Judiciary (NCALJ) and NCALJ liaison to the Administrative Conference of the United States and the Section. She serves the ABA Judicial Division as a member of its Communications Committee and previously chaired its Judicial Outreach Network committee, and was a member of its Council and Strategic Planning, Webinars, and John Marshall Award committees. She was the Division's representative for the preparation of the ABA

Commission on Disability's guide, "Court Access for Individuals Who Are Deaf and Hard of Hearing."

Judge Boggs graduated cum laude from Brooklyn College of the City University of New York, and holds a Juris Doctor degree from the University of Chicago Law School.



**Last Retiring Chair**  
*(by operation of the bylaws)*  
**Renée M. Landers**

Renée Landers is Professor of Law at Suffolk University Law School in Boston, where she teaches administrative law, constitutional law, and health law. She also is the Faculty Director of the school's Health and Biomedical Law Concentration. She is a graduate of Radcliffe College and the Boston College Law School and has served as President of the Harvard Board of Overseers. She worked in private practice and served as Deputy General Counsel for the U.S. Department of Health and Human Services and as Deputy Assistant Attorney General in the Office of Policy Development at the U.S. Department of Justice during the Clinton Administration. She previously served on the Massachusetts Commission on Judicial Conduct, of which she was vice chair from April 2009 until October 2010, and as a member of the Supreme Judicial Court's committees studying gender bias and racial and ethnic bias in the courts. Currently, she is a member of the Court's Committee on Judicial Ethics after having served as a member of the committee that revised the state's Code of Judicial Conduct.

Professor Landers was president of the Boston Bar Association in 2003–2004, the first woman of color and

the first law professor to serve in that position.

Professor Landers is just concluding a term as Chair (2016–2017), and previously served as Chair-Elect (2015–2016), Vice Chair (2014–2015), and a three-year stint as Secretary of the Section (2011–2014). She has also served as a council member (2000–2003), Nominating Committee member (2003–2004), Membership Committee chair (2004–2006), and vice chair of the Health and Human Services Committee (1998–2000), and is a frequent speaker at Section programs.



### **Vice Chair Linda Jellum**

Linda Jellum is the Ellison Capers Palmer Sr. Professor of Law in Tax Law at Mercer University School of Law. She teaches administrative law, statutory interpretation, federal income taxation, and property, and has written extensively in those areas. She received both her law and undergraduate degrees from Cornell University. Linda serves or has served on many professional committees and boards.

Currently, Professor Jellum is the Deputy Executive Director for the Southeastern Association of Law Schools. She also served as the Deputy Director of the Association of American Law Schools from January 1, 2012 until July 2013.

Within the Section, Professor Jellum is concluding her third year as Secretary. She was a council member from 2010–2013, member of the Section's Scholarship Committee, co-chair or vice chair of the Judicial Review Committee from 2007–2010, co-chair of the Section's 2014 spring meeting in Atlanta, and a selection committee member for the 2013 Gellhorn-Sargentich Law Student Essay Award.



### **Secretary William S. Jordan, III**

William Jordan is a Professor of Law, Emeritus, at The University of Akron School of Law, where he teaches administrative law. He has also taught property, environmental law, and evidence. He received his B.A. from Stanford University and his J.D., cum laude, from the University of Michigan.

Following law school, he served as an attorney-advisor at the U.S. Department of Housing and Urban Development. He then entered the private sector with the Washington, D.C. firm of Sheldon, Harmon, Roisman & Weiss, which became Harmon, Weiss, and Jordan, where he engaged primarily in environmental and administrative litigation. He has taught at Akron Law since 1985.

Professor Jordan's research has addressed various aspects of judicial review and administrative procedure.

He is a former president of the Central States Law School Association. Professor Jordan is an active member of the Section of Administrative Law and Regulatory Practice of the ABA. He has served on the Council of the Section and as Chair of the Judicial Review Committee.

He is currently Chair of the Section's Publications Committee and a contributing editor to *Administrative & Regulatory Law News*. He is a co-editor, with Charles Koch and Richard Murphy, of *Administrative Law: Cases and Materials* (6th Ed.), published by Lexis-Nexis.



### **Budget Officer Louis George (Incumbent)**

Lou George is currently an Assistant Regional Counsel with the Office of General Counsel, U.S. Social Security Administration, in Boston. From 1998–2015 he was an attorney and then the Director of Training and Publications with the National Veterans Legal Services Program in Washington, D.C. He held prior positions as an attorney with the U.S. Department of Veterans Affairs and the Commonwealth of Massachusetts. He is a graduate of Salem State College and Georgetown University Law Center. He has served as President of the Court of Appeals for Veterans Claims Bar Association, and as a member of the Rules Advisory Committee of the U.S. Court of Appeals for Veterans Claims. Mr. George served on the Council of the Section from 2011–2014, served as the Assistant Budget Officer from 2015–2016, and began a three-year term as Budget Officer in 2016. He is also the chair of the Section's Membership Committee, and has co-chaired the Section's Veterans Affairs Committee.



### **Section Delegate Ronald M. Levin (Incumbent)**

Ronald Levin is the William R. Orthwein Distinguished Professor of Law at Washington University in St. Louis, specializing in administrative law and related public law issues. His coauthored books include a casebook, *State and Federal Administrative Law*, now in its fourth edition, and a student text, *Administrative Law and Process in a Nutshell*, now in its sixth edition. He has testified before Congress on regulatory reform issues and has published numerous articles

and book chapters on administrative law topics, including judicial review, rulemaking, and legislative reform of the regulatory process. He also has written about the law of lobbying and legislative ethics. Professor Levin has been active in the ABA Section of Administrative Law and Regulatory Practice for more than three decades and served as its Chair in 2000-2001.

He has represented the Section in the House of Delegates since 2014. He also served as the ABA's advisor to the drafting committee to revise the Model State Administrative Procedure Act. He is a senior fellow of the Administrative Conference of the United States and has chaired its Judicial Review Committee. He is also a member of the American

Law Institute. Before joining the law faculty, he clerked for the Hon. John C. Godbold, U.S. Court of Appeals for the Fifth Circuit, and practiced for three years in Washington, D.C., with the firm of Sutherland, Asbill & Brennan. He was the Associate Dean of the Washington University School of Law from 1990-1993.

## Council Term 2017-2020



### **Council Member Anne Bechdolt**

Anne Bechdolt currently serves as Senior Attorney for Legal and Regulatory Affairs

for FedEx Express, providing counsel on international and domestic aviation safety and security regulatory matters. Prior to joining FedEx Express, Ms. Bechdolt worked as an attorney advisor in Regulations in the Office of the General Counsel of the U.S. Department of Transportation. In this role, she was responsible for reviewing and managing the interagency review process for the Federal Aviation Administration's rulemaking and guidance documents, as well as advising on matters related to international regulatory harmonization, drug and alcohol testing matters, Privacy Act, and Paperwork Reduction Act issues. Prior to joining the General Counsel's office, Ms. Bechdolt worked for five years in the Regulations division of the FAA Chief Counsel's office, primarily focused on commercial aviation regulatory matters. During her tenure, she also served as legislative counsel during the FAA's 2012 reauthorization cycle. Ms. Bechdolt clerked for the Hon. William A. Moorman of the U.S. Court of Appeals for Veterans Claims, and worked as a staff attorney at the U.S. Department of Veterans Affairs. Anne is a graduate of the American University Washington College of Law. This nomination is for a full three-year term (2017-2020).



### **Council Member Emily S. Bremer**

Emily Bremer is currently an Assistant Professor of Law at the

University of Wyoming College of Law. She was previously the Research Chief of the Administrative Conference of the United States (ACUS), a small, free standing federal agency charged with improving government processes, procedures, and performance. She joined the agency in 2010, when it was reconstituted under the leadership of Chairman Paul R. Verkuil.

A graduate of New York University School of Law, Professor Bremer previously served as an associate in the telecommunications and appellate litigation group at Wiley Rein LLP in Washington, D.C. and as a law clerk for Hon. Andrew J. Kleinfeld on the U.S. Court of Appeals for the Ninth Circuit. During law school, she was the Executive Notes Editor for the NYU Journal of Law & Liberty and a student editor for the International Journal of Constitutional Law. This nomination is for a full three-year term (2017-2020).



### **Council Member Kathryn E. Kovacs**

Kathryn Kovacs is a Professor at Rutgers Law School. She teaches

administrative law, natural resources law, and property. Her scholarship focuses primarily on how the Administrative Procedure Act should be interpreted.

Prior to joining the Rutgers faculty in 2011, she spent twelve years in the U.S. Department of Justice's Environment and Natural Resources Division, Appellate Section. She wrote more than 100 appellate and Supreme Court briefs and argued more than sixty appeals in all thirteen of the federal circuit courts of appeals, twice en banc, and in three state supreme courts. Her cases covered a wide range of areas including environmental, administrative, and constitutional law, both civil and criminal. Among other cases, she defended the Navy's use of low frequency active sonar and the display of a Latin cross in the Mojave National Preserve; she prosecuted crimes under the Bald and Golden Eagle Protection Act; she pursued a claim to compensate the Oneida Indians for the State of New York's unlawful purchase of their land in the early 19th Century; and she defended the Endangered Species Act against Fifth Amendment takings claims.

In 2016, Professor Kovacs was a political appointee serving as Senior

Advisor to the Director of the Bureau of Land Management in the U.S. Department of the Interior. She also spent three years litigating primarily constitutional claims as an attorney in the Baltimore City Law Department, and she clerked for the Hon. Robert C. Murphy, former Chief Judge of the Maryland Court of Appeals. Professor Kovacs is a cum laude graduate of Yale University and the Georgetown University Law Center. This nomination is for a full three-year term (2017-2020).



**Council Member Jeffrey G. Weiss**

Jeffrey Weiss is a partner in Venable LLP's International Trade Group.

He focuses his practice on resolving market access issues related to product and digital regulation and standards; strengthening U.S. port and supply chain logistics and infrastructure; and providing counseling and representation on international trade negotiations, domestic and foreign regulation, standards and conformity assessment, and other economic policy matters.

Prior to joining Venable, Mr. Weiss served as the Deputy Director for Policy and Strategic Planning at the

U.S. Department of Commerce. As the second-ranking official in the policy shop, Mr. Weiss served as a senior advisor to former Commerce Secretary Penny Pritzker on a wide range of economic policy issues, including: U.S. port and supply chain logistics and infrastructure (e.g., the U.S. response to the Hanjin Shipping bankruptcy); digital economy; standards and conformity assessment; and aviation (e.g., Open Skies and unmanned aircraft systems). He also developed, coordinated, and implemented policy in these areas across the Commerce Department's twelve bureaus. In addition, he served as the lead U.S. negotiator for the G20 digital economy talks, hosted by China in 2016 and Germany in 2017, which included negotiations on the free flow of data, cybersecurity, standards, competition, and privacy. In 2014-2015, at the direction of the White House, he led the development of the U.S. government strategy for international cybersecurity standardization.

Mr. Weiss also served as the Associate Administrator of the Office of Information and Regulatory Affairs at the White House Office of Management and Budget. In this role, he worked directly with the Administrator to lead development of U.S. regulatory policy and White House review of significant Executive Branch

regulatory action. He co-chaired regulatory cooperation initiatives with Canada, Mexico, and the European Union and led the development of a new U.S. policy on standards and conformity assessment (OMB Circular A-119). From 2001-2011, he also served in the Office of the United States Trade Representative (USTR) as Senior Director for Technical Barriers to Trade, Assistant General Counsel, and Assistant Legal Advisor at the Mission of the United States to the World Trade Organization (WTO) in Geneva. While at USTR, he represented the United States in WTO disputes, served as a lead U.S. negotiator and lawyer in numerous negotiations, including the WTO's Doha Round market access talks, the U.S.-Canada Softwood Lumber dispute, and the Trans-Pacific Partnership, and was chief lawyer for NAFTA from 2004-2007. He assisted U.S. companies and trade associations in addressing dozens of foreign market access issues involving automobiles, chemicals, cosmetics, medical devices, wine, distilled spirits, ICT products, pharmaceuticals, appliances, children's products, textiles and apparel, food and agricultural goods, and many other products. This nomination is for a full three-year term (2017-2020).

## Council Term 2017-2019



**Council Member Darryl L. DePriest**

Darryl DePriest lives and practices law in Chicago, Illinois. From

December 2015 to January 2017, he served as the seventh presidentially appointed and Senate confirmed Chief Counsel for Advocacy,

Small Business Administration. Prior to becoming Chief Counsel, Mr. DePriest was the Senior Consultant for Legal and Regulatory Communications for Hill + Knowlton Strategies, a position he held since 2008. Before joining Hill + Knowlton, Mr. DePriest served as the General Counsel of the American Bar Association from 1988-2006. From 1980-1988, he was a litigation attorney at Jenner & Block, where he was named partner in 1987. From

1979-1980, he was a judicial law clerk for Judge Robert E. Keeton of the United States Court for the District of Massachusetts. Mr. DePriest has also served as a fellow, board member, and president of Leadership Greater Chicago, and as chair of the City of Chicago Board of Ethics. He received a B.A. from Harvard University and a J.D. from Harvard Law School. Mr. DePriest is nominated to serve the final two years of Lynn White's term (2017-2019). ○



Bill Jordan\*

## 9th Cir. – Determination in adjudication does not change underlying rule, and statutory change eliminated finality of EPA Objection Letter

The Clean Water Act (CWA) creates a complex scheme of cooperative federalism in which qualifying states implement the permitting provisions of the Act under EPA oversight. The state must send EPA all permit applications and proposed permits. EPA has ninety days to object, and if it does, EPA must state “the reasons for such objection and the effluent limitations and conditions which such permit would include if it were issued by” EPA. If the state and EPA cannot resolve their differences, the state may seek a public hearing, after which EPA may revise its position or stick to its guns.

If EPA continues to object, the state may “either revise the permit to address EPA’s objection or allow permitting authority to pass back to EPA.”

If the state agrees to EPA’s changes, the permit applicant may seek further administrative review and judicial review under state law. If the state returns permitting jurisdiction to EPA, the permit applicant may appeal within EPA and then seek judicial review.

Thus, an EPA objection letter can produce three types of responses: (1) EPA agreement to the state position after a public hearing, (2) state imposition of EPA’s conditions, subject to state administrative and judicial review, or (3) EPA imposition of its conditions, subject to internal appeal within EPA and federal judicial review.

In *Southern California Alliance of Publicly Owned Treatment Works v. U.S. EPA*, 853 F.3d 1076 (9th Cir. 2017), permit applicants filed a state administrative appeal of a permit the state had revised to meet an EPA Objection Letter. Because the state had revised the permit, it retained jurisdiction over CWA permits. Before the resolution of that appeal, the applicants directly challenged the Objection Letter in the Ninth Circuit, relying upon two provisions of the Act.

The first, 33 U.S.C. § 1369(b)(1)(E), authorizes review of EPA action “approving or promulgating any effluent limitation.” The permit applicants stumbled twice in relying on this provision. First, EPA adopts effluent limitations through rulemaking. Then, the permitting authority (state or EPA) makes “individualized adjudications to determine the proper application” of effluent limitations to particular permits. Thus, the Objection Letter did not approve or promulgate an effluent limitation regulation. Instead, it merely took a position on the application of the

applicable effluent limitation regulation to these permits. This is a good example of the common, but almost always unsuccessful, attempt to characterize adjudication as rulemaking (or vice versa).

This challenge also stumbled over the fact that the Opinion Letter was only “an interim step in a complex statutory scheme.” It was not an order binding on the permitting authority. The state agency had the choice to revise the permit (as it did) or to let EPA take over. If the former (as in this case), administrative and judicial review were available within the state. If the latter, both forms of review were available at the federal level. The actual permit decision, not the Objection Letter, would trigger those reviews.

The second provision relied upon by the applicants, § 1369(b)(1)(F) of the Act, authorized review of EPA action “issuing or denying any permit under section 1342.” The applicants argued that the Objection Letter effectively denied the permits because EPA’s position would prevail one way or the other. Indeed, the Supreme Court had accepted a similar argument under the original version of the CWA.

But the 1977 Amendments to the Act revised this provision to add the various hearings and processes referred to above. Now, the issuance of an Objection Letter triggers additional process between the state and EPA, with the prospect of EPA changing its position. Thus, the Opinion Letter was not final agency action for the purpose of judicial review.

## D.C. Cir. – Agency request for voluntary remand denied where it effectively constitutes dismissal of the claim

Agencies sometimes seek voluntary remands to give further consideration to decisions that have been challenged in court. The Department of Energy (DOE) took the voluntary remand idea a bit too far in *Limnia, Inc. v. U.S. Dep’t of Energy*, 857 F.3d 379 (D.C. Cir. 2017).

Limnia challenged DOE’s rejection of two of its loan applications. While the case was pending in federal district court, DOE sought a voluntary remand to allow Limnia “to submit new applications that could be updated to account for any new and relevant information.” According to DOE, the most Limnia could achieve if its judicial challenge were successful would be a remand for reconsideration of its applications. Thus, the agency argued, a voluntary remand would produce the same result, while preserving judicial resources. The district court agreed and denied Limnia’s request to lift the stay of the judicial proceedings.

\* Professor of Law, Emeritus, University of Akron Law School.

Before the D.C. Circuit, DOE argued that the district court's denial of Limnia's request to lift the stay was tantamount to a non-reviewable grant of voluntary remand. Disagreeing, the D.C. Circuit found that the refusal to lift the litigation stay had effectively resolved the parties' "core dispute," and thus was subject to the D.C. Circuit's appellate review.

On the merits, the D.C. Circuit held that voluntary remands made in response to APA challenges "may be granted only when the agency intends to take further action with respect to the *original agency decision on review*. Otherwise, a remand may instead function, as it did in this case, as a dismissal of a party's claims." An agency need not confess error or impropriety, but it "ordinarily does at least need to profess intention to reconsider, re-review, or modify the original agency decision that is the subject of the legal challenge." Here, the agency gave no indication that it would reconsider its original decision. Thus, the district court's grant of the voluntary remand was invalid.

## **Fed. Cir. — All Writs Act authorizes Court of Veterans Appeals to certify class actions**

While we typically think of class actions as involving private litigation, the Federal Circuit in *Monk v. Shulkin*, 855 F.3d 1312 (Fed. Cir. 2017), held that the All Writs Act and other provisions authorized the Court of Appeals for Veterans Claims (the Veterans Court) to certify and adjudicate class actions concerning veterans' benefits.

Conley Monk served in the Marine Corps in Vietnam. In February 2012, he filed for disability benefits related to alleged service-connected post-traumatic stress disorder, diabetes, hyper-tension, and strokes. In early 2013, the VA notified Mr. Monk that it had denied his claim due to his "other than honorable" discharge. He sought VA review of the denial and separately applied to the Board of Correction of Naval Records (Board) to upgrade his discharge status. In February 2014, the VA held the required hearing, and in March 2015 it informed Mr. Monk it could not process his appeal until it received the results of his request to revise his discharge status. This non-response was more than three years after his original filing and more than a year after the hearing. The VA had yet to consider the substance of his claims.

In April 2015, Mr. Monk sought a writ of mandamus from the Veterans Court to the Secretary of Veterans Affairs to promptly adjudicate his claims. He also asked the Veterans Court to certify a class action or similar procedure for "all veterans who had applied for VA benefits, had timely filed an [administrative appeal], had not received a decision within twelve months, and had demonstrated medical or financial hardship." The Veterans Court held that it could not maintain class actions and ordered the Secretary to respond to the individual mandamus petition.

On appeal, the Federal Circuit accepted the Secretary's claim of mootness as to Mr. Monk's individual disability claim, which by then had been favorably decided. But, according to the court, the question of the Veterans Court's class-action authority was not moot because the legal issue was capable of repetition and of evading review in disputes with other members of the proposed class.

Turning to that question, the Federal Circuit held that the All Writs Act and Veterans Judicial Review Act supported class certification. The All Writs Act provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). In turn, the Veterans Judicial Review Act provides the Veterans Court jurisdiction to, among other things, "compel action of the Secretary unlawfully withheld or unreasonably delayed." 38 U.S.C. § 7261(a)(2). When these were read in conjunction, class certification was appropriate.

The Federal Circuit's reasoning could extend far beyond the Veterans Court. Notably, the All Writs Act has wide application, and the reference in the Veterans Judicial Review Act—to "unlawfully withheld or unreasonably delayed"—is identical to the language of the Administrative Procedure Act, 5 U.S.C. § 706(2).

## **D.C. Circuit battles over the nature of statutory authority required for an agency to promulgate a "major rule"**

Last year, the D.C. Circuit in *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016), upheld the Federal Communications Commission's (FCC) so-called net neutrality rule, in which the FCC determined that cable broadband internet may be regulated as a telecommunications service.

On May 1, 2017, the court denied a broadband industry petition for rehearing en banc. *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381 (D.C. Cir. 2017). Judges Srinivasan and Tatel concurred in the denial of rehearing en banc on the ground that the FCC under the Trump Administration had indicated that it would soon replace the net neutrality rule with something far different. Thus, the en banc court should not "find itself examining, and pronouncing on, the validity of a rule that the agency had already slated for replacement."

Judges Kavanaugh and Brown dissented from the denial, arguing at length that Congress must clearly express the authority to issue a "major rule" or decide a "major question" of the sort at issue here. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000), and various other decisions support the proposition that Congress would not have intended *Chevron* deference to apply to

major interpretive questions, such as whether ambiguous language authorizes this sort of rule. *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2444 (2014), applied the clear statement principle in the context of holding that it was unreasonable for EPA to find broad regulatory authority in the statutory language at issue.

Judges Brown and Kavanaugh pressed this point further. Citing Chief Justice Marshall's opinion in *Wayman v. Southard*, 21 U.S. 1 (1825), Judge Brown argued that the clear statement rule is necessary to protect the powers of Congress from infringement by the Executive Branch. Her opinion is replete with libertarian symbolism and anti-regulatory rhetoric. Judge Brown also went well beyond the clear statement argument to attack President Obama's efforts to encourage the FCC to adopt a net neutrality rule. Quoting press accounts in the *Wall Street Journal*, she described "an unusual, secretive effort" within the White House that ultimately "essentially killed the compromise of 'net neutrality' without reclassification" under the statute. To her, this raised "questions about the form and substance of executive Power." Her strongly worded opinion is worthy of careful study and response. Judge Kavanaugh made similar points, although less vitriolically.

Judges Srinivasan and Tatel did not engage Judge Brown on the broader, more inflammatory issues. They hewed much closer to standard analysis, essentially arguing that the Supreme Court had effectively addressed the breadth of FCC regulatory authority in *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

### **D.C. Circuit recognizes *de minimis* exception to statutory requirements, but the exception may not be based on cost-benefit analysis**

When we clean our cats' litter boxes or pick up after our dogs, we are probably not aware that animal wastes produce serious pollutants, particularly ammonia and hydrogen sulfide. In the case of our pets, it's not enough to be harmful, but emissions "can be quite substantial for farms that have hundreds or thousands of animals." The Comprehensive Environmental Response, Compensation,

and Liability Act (CERCLA) and the Emergency Planning and Community Right-to-Know Act (EPCRA) require that authorities be notified "when large quantities of hazardous materials (such as ammonia or hydrogen sulfide) are released into the environment."

In 2008, EPA issued a final rule generally exempting farms from the reporting requirements for air releases from animal wastes (although the rule retained EPCRA reporting requirements for large Concentrated Animal Feeding Operations). EPA justified the exemption on the ground that these "reports are unnecessary because, in most cases, a federal response is impractical and unnecessary." Ammonia and hydrogen sulfide are both classified as "hazardous substances" and "extremely hazardous substances" under the above statutes. And "[n]one of the parties contend[ed] that the daily emissions of commercial farms fall below" the release reporting threshold set by EPA.

Environmental organizations challenged the farm reporting exemption in *Waterkeeper Alliance v. EPA*, 853 F.3d 527 (D.C. Cir. 2017). The dispute ultimately came down to the question of whether these releases could be ignored as *de minimis*. While the environmentalist challengers argued that the statutes require reporting of all releases, the court recognized that the *de minimis* doctrine allows agencies to avoid applying "the literal terms of a statute to mandate pointless expenditure of effort." The court was unable to conclude the reporting effort would be pointless, however, given the extent of releases and various comments in the rulemaking record asserting the value of reports on these emissions.

Moreover, EPA did not actually argue that reporting would be pointless. Instead, it said that such "reports are unnecessary because, *in most cases*, a federal response is impractical and unlikely." *Id.* (emphasis supplied by the court). Given "the potentiality of some real benefits," the court said EPA was really arguing that the costs involved in the reporting would outweigh the likely benefits. While that may be true, such a cost-benefit showing would not be "enough to support application of the *de minimis* exception." For the exception to apply, the expenditure of effort must be pointless, not just too costly. ○

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Lincoln Davies\*



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In the final quarter of the 2016 Term, the Supreme Court issued a number of significant decisions for administrative law. The highest profile were those dealing with President Trump's so-called travel ban and First Amendment limitations on trademark restrictions. Other topics addressed by these decisions include redistricting, standards of review for EEOC cases, federal jurisdiction for Merit Service Protection Board challenges, federal preemption, and two statutory construction cases.

## Immigration

At the end of the Term, the Court issued three decisions relating to immigration law. The first, which has generated significant public interest, is *Trump v. International Refugee Assistance Project*, 137 S. Ct. 2080 (2017). On March 6, 2017, the President signed Executive Order No. 13780, *Protecting the Nation from Foreign Terrorist Entry Into the United States*, 82 Fed. Reg. 13209. That order suspended, until June 14, 2017, entry into the United States of foreign nationals from six countries—Iran, Libya, Somalia, Sudan, Syria, and Yemen. The order also suspended for 120 days decisions relating to refugee status and limited the entry of refugees into the United States to 50,000 for Fiscal Year 2017.

Two federal district courts preliminarily enjoined portions of this Executive Order on the ground that it likely violated the Establishment Clause. One of the courts preliminarily enjoined the provision temporarily banning entry of nationals from the six countries. The Fourth Circuit affirmed this decision, largely agreeing with the district court's analysis. The other district court also preliminarily enjoined the travel ban, as well as the provisions relating to refugees. The Ninth Circuit affirmed, but it did not do so on Establishment Clause grounds. Instead, it concluded that the Executive Order likely exceeded the President's authority under the Immigration and Nationality Act (INA). Following the entry of these injunctions, the President extended the travel ban for 90 days from the date that the injunctions "are lifted or stayed."

The Supreme Court granted certiorari to consider whether the plaintiffs in these cases have Article III standing, whether the challenge to the travel ban became moot on June 14, and whether the Fourth and Ninth Circuits' rulings on the merits were correct. The Court also stayed both preliminary injunctions to the extent that they prevent enforcement of the Executive Order against any "foreign

nationals who lack any bona fide relationship with a person or entity in the United States." According to the Court, although the equities may support a preliminary injunction on the enforcement of the ban against individuals with connections to the United States, they do not support a preliminary injunction with respect to nationals with no connection to the United States. This is because enforcing the ban would not burden a U.S. party but would impair the President's power to protect national security.

The second immigration decision is *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017), in which the Court held that a conviction for violating California's statutory rape law does not provide a basis for removal. Under the INA, "[a]ny alien who is convicted of an aggravated felony after admission" to the United States may be removed from the country by the Attorney General. 8 U.S.C. § 1227(a)(2)(A)(iii). One of the crimes that constitutes an aggravated felony is a state-law felony for "sexual abuse of a minor." 8 U.S.C. § 1101(a)(43)(A).

*Esquivel-Quintana* was convicted of violating California's statutory rape law. That law makes it a crime for a person to have sexual intercourse with a "minor" who is more than three years younger than the perpetrator, and it defines "minor" as a person under the age of 18. Cal. Penal Code § 261.5(a)-(c). The Board of Immigration Appeals held that *Esquivel-Quintana's* conviction provided a basis for removal. The Sixth Circuit upheld the decision, affording *Chevron* deference to the Board's interpretation of "sexual abuse of a minor."

The Supreme Court unanimously reversed. In an opinion by Justice Thomas, the Court applied the familiar categorical approach to determine whether *Esquivel-Quintana's* conviction constituted an aggravated felony. Under that approach, courts look to the language of the state statute of conviction, rather than the specific facts underlying the conviction, to determine whether the conviction constitutes an aggravated felony. Only if the least severe of the convictions under that state statute constitutes an aggravated felony under the INA will a conviction provide a basis for removal. 137 S. Ct. at 1567-68.

Applying that test, the Court concluded that California's statutory rape law does not categorically constitute "sexual abuse of a minor," and thus did not qualify as an aggravated felony. The Court explained that, under California's law, a person who just turned 21 could be convicted for having intercourse with a person who is almost 18, and that conviction could not be a basis for removal under the

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INA. According to the Court, although the INA does not define sexual abuse of a minor, the “generic federal definition” of sexual abuse of a minor requires that “the victim be younger than 16.” To support that generic federal definition, the Court noted that dictionaries generally defined age of consent to be 16; that another federal statute, 18 U.S.C. § 2243, “closely related” to the INA, also defines minor to be under the age of 16; and that, at the time of the enactment of the INA, a majority of states and the District of Columbia defined minor for statutory rape purposes to be under 16. In so holding, the Court rejected the claim that it should afford *Chevron* deference to the Board’s interpretation of the Act, stating that the Act unambiguously foreclosed the Board’s conclusion that California’s law could qualify as an aggravated felony. *Id.* at 1565–72. That conclusion, according to the Court, also made it unnecessary to decide whether the rule of lenity, or *Chevron* deference, should apply to resolve ambiguities in the INA that turn on criminal law.

In the third immigration decision, *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017), the Court declared unconstitutional a law that imposes different requirements for men and women in conferring U.S. citizenship on children born abroad to unwed parents, when only one of the parents is a U.S. citizen. Morales-Santana was born in 1962 to unwed parents in the Dominican Republic. His father was a U.S. citizen; his mother was a Dominican citizen.

Under the law in effect at that time, if a child was born abroad to unwed parents whose father was a U.S. citizen and whose mother was a citizen of another country, that child acquired U.S. citizenship if, before the child’s birth, the father had at some point been physically present in the United States for 10 years, including 5 years after turning 14 years old. By contrast, if the mother was a U.S. citizen and the father was not, the child acquired citizenship if the mother was present in the U.S. for only a year before the child’s birth.

Because Morales-Santana’s father did not meet the physical presence requirement, Morales-Santana was not a U.S. citizen. Morales-Santana subsequently moved to the U.S. as a U.S. national. In 2000, an immigration judge ordered Morales-Santana removed for committing various crimes, and the Board of Immigration Appeals upheld the removal. The Second Circuit reversed, concluding that the differential treatment of children of unwed fathers and mothers was unconstitutional.

In an opinion by Justice Ginsburg, the Supreme Court affirmed in part and reversed in part. The Court began by stating that Morales-Santana had third-party standing to assert the equal protection rights of his father. Although third-party standing is not the norm, an exception exists when “the party asserting the right has a close relationship

with the person who possesses the right [and] there is a hindrance to the possessor’s ability to protect his own interests.” According to the Court, the ability of a parent to pass citizenship to a child “easily satisfied” the close-relationship requirement, and the father could not assert his own rights because he was dead. *Id.* at 1688–89.

On the merits, the Court applied intermediate scrutiny to the sex discrimination claim. In the Court’s view, the law failed that test because it did not advance an important government objective. Although acknowledging that the law historically treated the ability of unwed mothers to confer citizenship on their children differently from the comparable ability of unwed fathers, the Court reasoned that this differential treatment rested on anachronistic stereotypes and is no longer valid. *Id.* at 1684.

The Court rejected the government’s claim that the preferential treatment for unwed mothers is warranted because the mother is the only “legally recognized” parent of the child and therefore likely to have a stronger influence on the child. That argument, according to the Court, rested on the invalid assumption that fathers of non-marital children will not be involved in the child’s life. The Court also rejected the argument that the differential scheme reduces the risk of foreign-born children being “stateless,” concluding that the government had not shown that the risk of statelessness “disproportionately endangered the children of unwed mothers.” *Id.* at 1685.

Although accepting Morales-Santana’s equal protection argument, the Court refused to grant his request for relief by extending the one-year residency requirement to unwed fathers. Instead, the Court concluded from the statutory scheme as a whole that Congress likely would have preferred to extend the longer residency requirement to unwed mothers. *Id.*

Justice Thomas, joined by Justice Alito, concurred in the judgment in part. Agreeing that the appropriate remedy was to increase the presence requirement for unwed mothers instead of reducing the residency requirement for unwed fathers, Justice Thomas argued that the Court should not have resolved the merits of Morales-Santana’s claim because the Court could not fashion the relief he was seeking.

## First Amendment

The Court decided two First Amendment cases this quarter relevant to administrative law, although one of the decisions was through a summary affirmance of a lower court decision.

In *Matal v. Tam*, 137 S. Ct. 1744 (2017), the Court held that the Lanham Act’s restriction on the registration of disparaging trademarks violates the First Amendment. Under the Lanham Act, a trademark may be federally registered, but the Act prohibits registration of a mark that

“[c]onsists of . . . matter which may disparage . . . persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute.” 15 U.S.C. § 1052(a).

Simon Tam formed a dance-rock band called THE SLANTS. Tam sought to trademark the name. The Patent and Trademark Office refused to register the mark, concluding that the name was disparaging to Asians. Sitting *en banc*, the Federal Circuit vacated the decision, concluding that the prohibition on registering disparaging marks was facially unconstitutional under the First Amendment.

In a sharply divided decision, the Supreme Court affirmed. At the threshold, Justice Alito’s majority opinion rejected Tam’s attempt to avoid the constitutional issues. Tam argued that, by prohibiting the registration of marks that disparage “persons,” the disparagement clause applies only to marks that disparage actual people as opposed to racial and ethnic groups. The Court disagreed, explaining that a “mark that disparages a substantial percentage of the members of a racial or ethnic group necessarily disparages many ‘persons.’” Moreover, the Court explained, reading the clause to apply only to actual people would be unduly narrow, given that the disparagement clause also broadly prohibits registration of marks disparaging “institutions” and “beliefs.” 137 S. Ct. at 1755–56.

Turning to the constitutional question, a majority of the Court concluded that the disparagement clause violates the First Amendment. It rejected the government’s argument that registration of trademarks is government speech exempt from First Amendment scrutiny. A majority of the Court also concluded that the disparagement clause could not be upheld on the ground that registration of a mark is commercial speech or a government subsidy. However, the justices disagreed over the reasons for that conclusion. Writing for a plurality of the Court, Justice Alito argued that, even if registration of a mark is commercial speech, subject to only intermediate scrutiny, the disparagement clause would still fail because it was not “narrowly drawn” to achieve a “substantial interest.” Justice Alito also rejected the argument that the disparagement clause should be upheld based on prior decisions that permitted government programs that subsidize speech expressing a particular viewpoint. He explained that, unlike trademark registration, those past decisions involved “cash subsidies or their equivalent.” *Id.* at 1760–64.

In contrast to Justice Alito’s analysis, Justice Kennedy, joined by Justices Ginsburg, Sotomayor, and Kagan, concluded that, even if registration of a mark is commercial speech, the disparagement clause should be subject to strict scrutiny because it discriminates on the basis of viewpoint. Moreover, he argued that strict scrutiny should apply to

viewpoint discrimination in government programs providing subsidies. *Id.* at 1765.

Justice Thomas wrote separately to express his view that the Court should not have addressed Tam’s statutory argument because it was not raised in the lower court. *Id.* at 1768.

In the second trademark case—*Republican Party of Louisiana v. FEC*, 137 S. Ct. 2178 (2017)—the Court affirmed a special three-judge decision of the U.S. District Court for the District of Columbia, 219 F. Supp. 3d 86 (D.D.C. 2016). The case involved facial and as-applied challenges to campaign finance restrictions in the Bipartisan Campaign Reform Act of 2002 (BCRA). BCRA limits the amount of money that may be contributed to political candidates and parties in federal elections, as well as how those funds can be expended. Specifically, two categories of funds are established under the relevant regulations. Funds contributed within the regulatory limits are called “hard” or “federal” money, and can be used in federal election activities. Funds contributed in excess of those limits are referred to as “soft” or “non-federal” money and cannot be used in federal election activities.

Various Republican entities from Louisiana challenged these limits on First Amendment grounds. They wanted to use the funds for general purposes, such as fundraising. The Act, however, does not allow the use of soft money for general state and local purposes that could influence a federal campaign, such as get-out-the-vote drives. The plaintiffs also sought to invalidate BCRA’s requirement that they report their receipts and disbursements of hard money for federal election activities. The gravamen of this challenge was twofold. First, the entities argued that their activities should be protected by the Constitution because they would be conducted “independent” of the national party’s efforts. Second, they asserted that intervening case law from the Supreme Court—*McCutcheon v. FEC*, 134 S. Ct. 1434 (2014)—undermined the rationale of prior decisions upholding BCRA against facial First Amendment challenges.

The district court rejected these arguments. It ruled that it could not displace clearly controlling Supreme Court precedent simply because the plurality decision in *McCutcheon* might have called into question the precedent’s rationale. The court also ruled that the plaintiffs were misrelying on *Citizens United v. FEC*, 558 U.S. 310 (2010), to support their claims. Thus, the court was required to reject the plaintiffs’ facial challenge to the Act. It also meant that the as-applied challenge must be rejected, because that challenge relied on the same facts and law as the facial challenge. The district court thus entered summary judgment for the FEC.

As already noted above, the Supreme Court summarily affirmed. However, Justices Gorsuch and Thomas would have set the case for oral argument.

## Redistricting

The Court also issued two decisions relating to claims that North Carolina engaged in racial gerrymandering in redrawing district lines following the 2010 census.

In the first, *Cooper v. Harris*, 137 S. Ct. 1455 (2017), voters filed a federal lawsuit challenging North Carolina Districts 1 and 12 on the ground that racial considerations impermissibly predominated in the drawing of those districts. A three-judge district court agreed, and the Supreme Court affirmed.

The Supreme Court first determined that the plaintiffs were not precluded from bringing suit based on a ruling in an earlier state-court case upholding those same districts. Preclusion did not apply because the plaintiffs in the state-court action differed from the plaintiffs in the federal action. Although acknowledging that preclusion may apply to a plaintiff who has a “special relationship,” such as privity with a plaintiff in a prior suit, the Court explained that the federal plaintiffs did not have such a relationship with the state plaintiffs.

On the merits, the Court concluded that race was the predominant factor in the drawing of District 1. The legislative record, according to the Court, clearly established that the General Assembly gerrymandered the district to ensure that African-Americans constituted a majority of voters. In so holding, the Court rejected North Carolina’s argument that using race-based districting was necessary to satisfy the Voting Rights Act (VRA). Although acknowledging that satisfying the VRA through narrowly tailored racial considerations in districting can satisfy strict scrutiny under certain circumstances, the Court explained that this exception applies only if the white voters in a district would vote sufficiently as a bloc to defeat the minority’s preferred candidate. According to the Court, North Carolina had failed to make that showing.

The Court likewise found that District 12 was unconstitutionally drawn. Despite some evidence that the district lines were based on strictly political considerations, the Court explained that other evidence indicated that racial considerations predominated. On this record, the Court could not deem the district court’s conclusion clearly erroneous.

Finally, the Court rejected North Carolina’s argument that, to establish racial gerrymandering, plaintiffs should be obliged to produce proposed maps of districts that achieve the legislature’s political objectives while improving racial balance. The Court explained that other evidence, such as statements from state officials, can establish racial gerrymandering.

Justice Alito, joined by Chief Justice Roberts and Justice Kennedy, concurred in the judgment in part and dissented in part. Although he agreed with the majority’s conclusion regarding District 1, he would have upheld District 12 on the ground that the plaintiffs failed to produce an alternative map with districts that improved racial balancing.

The Court’s other decision relating to North Carolina’s redistricting was *North Carolina v. Covington*, 137 S. Ct. 1624 (2017). In 2015, several North Carolina voters filed a federal suit challenging North Carolina’s 2011 redistricting, arguing that the districts were the product of racial gerrymandering. The three-judge district court agreed. To remedy the violation, that court ordered the General Assembly to redraw the districts within a year, that the term of legislators elected from redrawn districts be shortened to one year instead of two, and that special elections be held to choose legislators from those new districts.

In a *per curiam* opinion, the Supreme Court vacated the decision. It explained that, in fashioning an injunction, a court must undertake an “equitable weighing process” that considers the interests of the plaintiffs, the defendants, and the public. According to the Court, the district court did not adequately justify its weighing of the equities in ordering special elections.

## EEOC Standards of Review

*McLane Co., Inc. v. EEOC*, 137 S. Ct. 1159 (2017), arose when Damiana Ochoa sued her employer for sex discrimination under Title VII of the Civil Rights Act. Ms. Ochoa worked on the distribution floor of McLane, where one of her responsibilities was lifting and moving large containers of cigarettes. After taking three months of maternity leave, she returned to work, but McLane required her to pass a physical evaluation first. After she failed the evaluation three times, McLane fired her. Ochoa then filed a Title VII discrimination charge, which the EEOC investigated.

As part of that investigation, the EEOC issued a subpoena to obtain identifying information of employees that McLane required to undergo physical evaluations similar to Ms. Ochoa’s. McLane refused to comply with the subpoena, so the EEOC filed a proceeding in district court to enforce it. The district court denied the EEOC’s request, but the Ninth Circuit reversed, using a *de novo* standard of review to evaluate the district court’s decision. The question presented to the Supreme Court was whether the Ninth Circuit used the right standard of review.

The Court ruled that the Ninth Circuit had erred. In an opinion by Justice Sotomayor, the Court explained that a two-prong test determines what standard of review a court of appeals should apply to decisions of a district court. First, the court examines the history of judicial precedent on such questions. Second, it looks to the comparative institutional advantages of each court.

The Court found that both prongs of the test pointed clearly toward a deferential, abuse-of-discretion standard of review—not the *de novo* one employed by the Ninth Circuit. On the first prong of the test, the Court explained that the judiciary long had applied an abuse-of-discretion standard when reviewing district court rulings on administrative proceedings. Moreover, in the specific case of EEOC subpoenas under Title VII, the Ninth Circuit was the only circuit to employ a *de novo* standard.

Likewise, on the test's second prong, the Court observed that district courts are better suited than appellate courts to evaluate whether a subpoena should issue. Such decisions are nuanced and fact-specific, like the decisions trial courts make daily, rather than rules-based, like the analyses that appellate courts regularly perform. Further, district courts regularly decide whether evidence is relevant—a key consideration in deciding whether to enforce a subpoena—and they repeatedly must rule on whether pretrial criminal subpoenas are reasonable in scope; again, akin to rulings on administrative subpoenas.

Thus, the Court held that appellate courts must apply an abuse-of-discretion standard when ruling on a district court's decision whether to enforce an administrative subpoena, and it reversed and vacated the Ninth Circuit's decision below for failing to do so.

Justice Ginsburg concurred in part and dissented in part, on the basis that the Ninth Circuit's decision could be upheld on an alternative ground relating to the showing the EEOC had to make to enforce its subpoena.

## Jurisdiction for Merit System Protection Board Challenges

In what court should a federal employee file an appeal to challenge an agency's decision on the employee's claims of civil service violations and racial discrimination? That was the question presented in *Perry v. Merit Systems Protection Board*, 137 S. Ct. 1975 (2017), a case brought by Anthony Perry, who alleged he was pushed out of his Census Bureau job based on age and race discrimination.

Under federal law, an employee who is fired or has their pay reduced can have that decision reviewed by the Merit System Protection Board (MSPB). If the employee does not like the MSPB's decision, they can challenge it in court. Claims based only on civil service arguments are reviewed deferentially in the Federal Circuit. In contrast, claims involving only antidiscrimination arguments go to federal district court, and receive *de novo* review in those courts. Perry's claim did not fit comfortably in either category because it involved both civil service and antidiscrimination claims.

In prior decisions, the Court had ruled that under 5 U.S.C. § 7703(b), such so-called “mixed” cases are the

province of federal district court. This rule applies irrespective of whether the relevant agency below dismisses the case on the merits or for procedural reasons, in part because disentangling procedure and substance in this context is too messy.

Perry's case had been dismissed on jurisdictional grounds. The Court, in an opinion by Justice Ginsburg, held that “mixed” cases dismissed for jurisdictional reasons also must go to federal district court if the aggrieved party wants to challenge the agency's decision. This conclusion flowed from the Court's prior decisions, buttressed by the fact that distinguishing between jurisdiction and procedure can be just as difficult as parsing substance and procedure.

Further, the Court reasoned, if Congress had wanted the odd result of forcing federal employees to go to two different tribunals for review of a single agency decision, it would have said so. “Desirable as national uniformity may be, it should not override the expense, delay, and inconvenience of requiring employees to sever inextricably related claims, resorting to two discrete appellate forums, in order to safeguard their rights.” 137 S. Ct. at 1987.

Justice Gorsuch, joined by Justice Thomas, dissented. Relying on the statute's plain language, he reasoned that if parties wanted Congress to accommodate “mixed” cases, it was Congress's job to create that avenue of review, not the Court's. To hold otherwise would be to “tweak” the statute, which is not the judiciary's job.

## Preemption

The Court decided two cases this quarter involving preemption in the administrative law context. One concerned the Federal Arbitration Act (FAA); the other concerned the Federal Employees Health Benefits Act (FEHBA).

In *Kindred Nursing Centers Limited Partnership v. Clark*, 137 S. Ct. 1421 (2017), the Court addressed the reach of the FAA, which mandates that arbitration agreements are “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2.

The plaintiffs in *Kindred Nursing Centers* were family members of patients who died while in the care of a nursing home. The family members had received broad powers of attorney and, using that authority, had admitted their relatives to the nursing home. In doing so, they signed a contract with Kindred that subjected any disputes to arbitration. After their relatives died, the family members sued, and Kindred sought to block the lawsuits by asserting they must proceed through arbitration instead.

The Kentucky Supreme Court sided with the family members, holding that a general power of attorney would not suffice to give someone the right to enter into an

arbitration agreement. *Extendicare Homes, Inc. v. Whisman*, 478 S.W.3d 306, 328-29 (Ky. 2015). According to the Kentucky Supreme Court, the framers of the state constitution had recognized the “right to access the courts and to trial by jury” as a “divine God-Given right” that is the “only thing” held “sacred” and “inviolable.” *Id.* (citation omitted). Thus, the court concluded, a transfer of such authority must specifically reference the right to give up access to the courts.

Writing for the Court, Justice Kagan explained why the FAA compelled overruling the Kentucky court’s decision. While general contract defenses, such as fraud or unconscionability, could render an arbitration null, the Kentucky court’s specific targeting of arbitration clauses ran afoul of the FAA. The very purpose of the Act is to ensure that arbitration can be used in lieu of litigation. Thus, to rely on the need for litigation to say an arbitration provision cannot stand is tantamount to undermining the FAA’s key goal. The Act, the Court reasoned, “displaces any rule” that disfavors contracts that “have the defining features of arbitration agreements.” 137 S. Ct. at 1426.

Nor did it matter, the Court explained, whether a state law rule was aimed at contract formation—in this case, through power of attorney. That kind of distinction is one without a difference. “A rule selectively finding arbitration contracts invalid because improperly formed fares no better under the Act than a rule selectively refusing to enforce those agreements once properly made.” *Id.* at 1428.

Justice Thomas dissented on the grounds that the FAA should not apply in state court proceedings.

In the second case, *Coventry Health Care of Missouri, Inc. v. Nevils*, 137 S. Ct. 1190 (2017), the Court examined whether a state statute was preempted by the FEHBA. Under that Act, the federal government provides health insurance to its employees through private insurance companies. The government requires that contracts have reimbursement and subrogation provisions. If an injured person receives payment from another source (such as through a lawsuit), then the cost of the health care must be reimbursed from that source—this is the reimbursement provision. If the covered employee chooses not to bring suit to recover for injuries, the insurer has the right to seek such payments on the employee’s behalf—this is the subrogation provision. The Act also includes an express preemption provision, which states that the “terms of any contract under this chapter which related to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any State or local law, or any regulation issued thereunder, which relates to health insurance or plans.” 5 U.S.C. § 8902(m)(1).

Despite these requirements, a number of states ban reimbursement and subrogation provisions, including Missouri.

In *Coventry*, Nevils, a Missourian, received insurance payments from Coventry, an insurance company, for injuries he sustained. After Nevils settled his claims against the person who caused the injuries, Coventry demanded reimbursement from Nevils. Nevils then brought a class action challenging the federal contract requirements.

In an opinion by Justice Ginsburg, the Court found Missouri’s ban on these federal contracting rights preempted. The Court had little difficulty finding that lawsuit settlement payments for injuries fit within the express preemption language of the FEHBA. “When a carrier exercises its right to either reimbursement or subrogation, it receives from either the beneficiary or a third party ‘payment’ respecting the benefits the carrier had previously paid.” 137 S. Ct. at 1197. Indeed, the Court observed, the “carrier’s very provision of benefits triggers the right to payment.” *Id.*

The Court found this plain language reading of the statute buttressed by a number of considerations. First, it said, Congress used the phrase “relate to” in the FEHBA, which the Court has repeatedly held should be read broadly in the preemption context. Second, the provision of benefits to federal employees is an area of longstanding federal involvement. And third, there is a reason why Congress would want to speak broadly in this context; “The Federal Government ... has a significant financial stake.” *Id.*

Given all this, the Court further held that it did not matter that the preemption arose mechanically because of what the government decided to include in its contracts, rather than by automatic and universal application of the statute itself. Many federal laws, including ERISA and the FAA, invoke preemption in this way, and ruling otherwise would “elevate[] semantics over substance.” *Id.* at 1199. “We do not require Congress to employ a particular linguistic formulation when preempting state law.” *Id.*

Justice Thomas concurred but wrote separately to observe the possibility that by giving the Executive Branch the authority to enter into contracts that invoke preemption, Congress may have unconstitutionally delegated legislative power.

## Statutory Construction

Two key administrative law cases this quarter presented the Court with questions of statutory construction.

*Kokesh v. SEC*, 137 S. Ct. 1635 (2017), raised the question of when SEC actions for disgorgement of profits are time-barred. Specifically, the question was whether 28 U.S.C. § 2462’s five-year statute of limitation for any “action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise” applies to disgorgement proceedings. The Court said yes.

The case arose out of the SEC's charge that Charles Kokesh, the owner of two investment advising firms, had misappropriated \$34.9 million from four of those firms' clients between 1995 and 2009. The SEC prevailed in a jury trial, but the question arose whether the amount the SEC could recover was limited because the agency did not bring the proceeding until 2009. If § 2462's time bar applied, the agency could only recover \$5 million in monetary disgorgements plus roughly \$2.3 million in civil penalties. But if the time bar did not apply, the agency could recover all \$34.9 million in disgorgement plus the \$2.3 million in civil penalties.

The Court ruled, in an opinion by Justice Sotomayor, that the time bar applied. The question came down to a single issue: whether disgorgement is a "penalty" under § 2462. Whether something is a penalty depends on two factors, according to the Court. First, if the sanction seeks to redress a harm to the public rather than a private party, it is potentially a penalty. "This is because '[p]enal laws, strictly and properly, are those imposing punishment for an offense committed against the State.'" 137 S. Ct. at 1642 (citation omitted). Second, a court-ordered remedy is a penalty if it seeks to punish and deter, rather than compensate someone for their loss.

Disgorgement sanctions obtained by the SEC, the Court explained, fit neatly into the penalty aspects of both parts of this test. They are imposed for the violation of public, not private, laws—the regulation of securities and markets. Thus, such proceedings can and do occur even without those who were harmed being parties. Further, disgorgement is by definition punitive. Courts have long held that the purpose of disgorgement is to deter the kind of behavior these actions target. The money recovered sometimes is returned to victims, but need not be, and is often paid directly into the federal Treasury.

Given this, the Court unanimously held that "SEC disgorgement ... bears all the hallmarks of a penalty .... The 5-year statute of limitations in § 2462 therefore applies when the SEC seeks disgorgement." *Id.* at 1644.

In *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652 (2017), the Supreme Court addressed the scope

of exempt employee benefit plans under the Employee Retirement Income Security Act of 1974 (ERISA).

ERISA generally imposes certain requirements on the benefit plans offered by employers. However, some plans are exempt from these requirements. This includes "church plans"—plans that are "established and maintained ... for its employees by a church." 29 U.S.C. § 1003(33)(A). Congress later amended the statute to state that church plans also "include[]" those plans "maintained by an organization ... the principal purpose ... of which is the administration or funding of [the] plan ... for the employees of a church ... if such an organization is controlled by or associated with a church." *Id.* at § 1002(33)(C)(i).

The question in *Stapleton* was whether a plan that was originally created by a church-owned hospital would qualify for the exemption. The employers argued it was enough that the plan was maintained by the hospital. The employees said more was required; the church needed to create the plan before letting the hospital run it.

The Court sided with the employers. In an opinion by Justice Kagan, the Court reasoned that Congress's amendment to add the "maintained" provision was meant to expand the exemption. This conclusion flowed naturally from the basic logic of the statutory language. If a "church plan" is exempt, and under ERISA church plans "include" those maintained by a church-affiliated group, then such plans are by definition also ERISA-exempt. "Had Congress wanted, as the employees contend, to alter only the maintenance requirement, it had an easy way to do so—differing by only two words from the language it chose," namely, by making it express that such "included" plans also be "established by" the church. Congress did not do this, so reading the statute otherwise would violate the surplusage canon of construction.

Justice Sotomayor wrote separately to concur. Although she was persuaded that the Court correctly interpreted the statute, she nevertheless was "troubled" by the outcome that such a reading led to. 137 S. Ct. at 1663. ○

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Michael Asimow\*

## Making Policy Through Regulation or Adjudication? It's Up to the Agency

A familiar principle of administrative law is that an agency can employ rulemaking to make policy that binds an entire class, even though the agency could also have made the policy through case-by-case adjudication. A familiar example is Social Security's grid regulations that resolve a range of questions relating to vocational assessment of disabled persons that otherwise would be resolved through adjudication. *Heckler v. Campbell*, 461 U.S. 458 (1983). The California Supreme Court resoundingly endorsed that principle in a case relating to insurance regulation. *Ass'n of California Ins. Cos. v. Jones*, 386 P.3d 1188 (Cal. 2017) (hereafter *ACIC*). The unanimous opinion was written by Justice Tino Cuéllar, formerly Stanford law professor.

The Insurance Commissioner (an elected office in California) was concerned by the problem of insurance companies lowballing their estimates of the replacement cost of residences. Homeowners usually rely on these estimates when they purchase homeowners' insurance. After the 2007 wildfires, only 26% of owners had sufficient coverage to rebuild their homes.

Acting under a general rulemaking power, and complying with the detailed California APA rulemaking requirements, the Commissioner adopted an elaborate regulation on the lowballing issue. Cal. Code Regs., tit. 10, § 2695.183. The regulation standardized the calculation of replacement cost across the industry and specified a long list of items that replacement cost estimates must include. The regulation was adopted to implement a state statute called the Unfair Insurance Practices Act (UIPA), and it labelled any replacement estimate that failed to follow the regulation as an "unfair insurance practice."

UIPA identifies numerous specific practices as unfair. This list does not include replacement cost lowballing. UIPA authorizes the Commissioner to bring an administrative enforcement action against insurers that violate the listed provisions, including seeking damages and an injunction. If the Commissioner believes an *additional* act should be declared unfair, the Commissioner can initiate

an administrative adjudicatory proceeding to so declare. In this situation, however, the Commissioner cannot assess damages or issue an injunction.

Insurers challenged the regulation because they interpreted UIPA to require the Commissioner to act through case-by-case adjudication when identifying an unfair insurance practice that is not listed in the statute. This carefully designed procedure, they argued, was intended to prevent the Commissioner from identifying new unfair practices through an across-the-board regulation.

In *ACIC*, the California Supreme Court construed the general rulemaking statute broadly to empower the Commissioner to enact a regulation to implement any provision in the Insurance Code, including specifying a new unfair insurance practice. The fact that the Commissioner could have tackled this problem through individual enforcement actions does not disable him from addressing it through regulation. Instead, whether to proceed through adjudication or rulemaking is left for agency discretion.

The *ACIC* decision makes good practical sense. Rulemaking was the right way to settle the question, not case-by-case adjudication. The rulemaking process invites participation by everyone, including all insurance companies as well as consumers, and employs a legislative-type process appropriate for setting broad economic and regulatory policy. The entire Insurance Commission staff can participate in this process, without being limited by separation of functions or ex parte communication restrictions. The regulation binds the entire industry, not one company at a time. It produces a comprehensive and accessible set of standards (as opposed to single adjudications that may not comprehensively address the problem and are relatively inaccessible). Rules are subject to various executive and legislative checks, such as scrutiny by California's Office of Administrative Law, which reviews every regulation for legality, reasonableness, and procedural compliance; adjudication is subject to no such checks. Regulatory statutes should always be construed to allow an agency to make policy through rulemaking, even though the policy could also be declared through adjudication, unless the legislature explicitly prohibits rulemaking. ○

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Maximilian Bulinski\*

## June 2017 Plenary Session

The Administrative Conference of the United States (ACUS) held its 67th Plenary Session on June 16, 2017, and adopted two recommendations. Brief descriptions of the recommendations follow. You may reach out to the listed staff contact with any questions or implementation-related suggestions.

1. **Recommendation 2017-1, *Adjudication Materials on Agency Websites*** provides guidance regarding the online dissemination of administrative adjudication materials. It offers best practices and factors for agencies to consider as they seek to increase the accessibility of adjudication materials on their websites and to maintain comprehensive, representative online collections of adjudication materials, consistent with the transparency objectives and privacy considerations of the Freedom of Information Act and other relevant laws and directives. (Daniel Sheffner, [dsheffner@acus.gov](mailto:dsheffner@acus.gov))
2. **Recommendation 2017-2, *Negotiated Rulemaking and Other Options for Public Engagement*** builds on two past Conference Recommendations (Recommendation 85-5 and Recommendation 82-4, both entitled *Procedures for Negotiating Proposed Regulations*), and offers best practices to agencies for choosing among several possible methods—among them negotiated rulemaking—for engaging the public in agency rulemakings. It also offers best practices to agencies that choose negotiated rulemaking on how to structure their processes to enhance the probability of success. (Cheryl Blake, [cblake@acus.gov](mailto:cblake@acus.gov))

### Current Projects

The Conference has a full slate of projects in various stages of development. Brief descriptions of selected projects follow. Reach out to the listed staff contact with any questions you have.

1. **Agency Guidance:** Federal agencies frequently issue guidance documents intended to provide clarification of a particular issue. Guidance documents are exempted from the notice-and-comment process and from pre-enforcement judicial review—exceptions that make the documents relatively easy to issue and modify. To enjoy these exemptions, the documents must not be binding

on officials or the public. An agency guidance document that does not go through notice-and-comment, but is deemed to be binding on judicial review, may be vacated. This project studies federal agencies' use of guidance and its effect on agency personnel and nonfederal stakeholders—as well as courts' use of “vacatur” as a remedy to vacate guidance documents—in order to identify best practices and recommendations. (Gisselle Bourns, [gbourns@acus.gov](mailto:gbourns@acus.gov))

2. **Electronic Case Management in Federal Administrative Adjudication:** This project studies the use and incorporation of electronic case management in agency adjudication in order to make recommendations and share best practices. The project will not only examine the creation and maintenance of an electronic system in which users may file and manage documents, but also will consider various procedural changes that must be made to accommodate such a system. The implementation of an electronic system can be instrumental in streamlining an agency's adjudication practices, improving interagency communication and access, and upgrading technology in related functions, such as recording systems for hearings. (Gisselle Bourns, [gbourns@acus.gov](mailto:gbourns@acus.gov))
3. **Marketable Permits:** The Conference is studying a wide range of existing marketable permitting programs. The aims of this project are to provide guidance and best practices for structuring, administering, and overseeing marketable permitting programs for any agency that has decided to implement such a program. (Maximilian Bulinski, [mbulinski@acus.gov](mailto:mbulinski@acus.gov))
4. **Plain Language in Regulatory Drafting:** This project examines the use of plain language in drafting and implementing regulations. Agencies operate under statutory obligations and executive directives to use plain language in various regulatory documents. Plain language can promote regulatory objectives such as efficient compliance, transparency, public trust, meaningful public comment, and survival under judicial review. This project explores agencies' current plain language practices and obstacles to plain regulatory drafting and seeks to generate proposals to enhance plain writing in the drafting and implementation of rules. (Cheryl Blake, [cblake@acus.gov](mailto:cblake@acus.gov) and Blake Emerson, [bemerson@acus.gov](mailto:bemerson@acus.gov))

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5. **Public-Private Partnerships:** Public-private partnerships are increasingly common as a means for federal agencies to address complex challenges. At the federal level, infrastructure public-private partnerships have been the subject of multiple studies and a presidential memorandum, but much less information is available on other forms of public-private partnerships. Agency experience with public-private partnerships varies, and such partnerships involve novel and crosscutting issues. Because such issues traverse conventional divisions in agency general counsel offices, legal expertise is likewise segmented. This project examines public-private partnerships outside of the infrastructure context, paying close attention to pertinent legal issues, in order to devise recommendations and best practices. (Todd Rubin, [trubin@acus.gov](mailto:trubin@acus.gov))
6. **Regulatory Experimentation:** This project builds on a previous recommendation (Recommendation 2014-5, *Retrospective Review of Agency Rules*) to address situations in which agencies confront high levels of uncertainty about the effects of various regulatory alternatives that cannot be fully resolved prior to implementation. Experimental methods of regulation, such as rules that sunset after a defined period, may help agencies to gather data on the consequences

of regulation before settling on a long-term strategy. This project therefore explores experimental best practices, current experimental efforts, and legal and practical obstacles to regulatory experiments and expects to generate proposals to expand the use of experimental methods in the regulatory process. (Blake Emerson, [bemerson@acus.gov](mailto:bemerson@acus.gov))

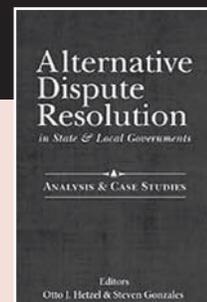
7. **Regulatory Waivers and Exemptions:** Federal agencies sometimes grant temporary or permanent “waivers” or “exemptions” from regulatory requirements. Legally and theoretically distinct from prosecutorial discretion, waivers and exemptions may be useful tools for agencies and offer benefits to regulated parties. At the same time, they may also come at the cost of fairness, predictability, and accountability. This project draws conceptual distinctions among waivers, exemptions, and prosecutorial discretion; examines current practices in agencies that grant waivers and exemptions; reviews statutory and doctrinal requirements; and seeks to make concrete procedural recommendations for implementing agency best practices. (Cheryl Blake, [cblake@acus.gov](mailto:cblake@acus.gov) and Maximilian Bulinski, [mbulinski@acus.gov](mailto:mbulinski@acus.gov))

## Alternative Dispute Resolution in State & Local Governments, Analysis & Case Studies

Editors *Otto J. Hetzel & Steven Gonzales*

In recent years, alternative dispute resolution (ADR) has overtaken trial litigation as a cheaper and less complicated method of resolving disputes. For any lawyer in this field, understanding ADR isn't enough. One must understand the specific needs of state and local governments in order to succeed. This valuable guide, edited by Otto J. Hetzel and Professor Steven Gonzales, collects the thoughts and experiences of eight different ADR experts to analyze the history, usage, and future of state and local government ADR. This important information will position you for this groundbreaking change in government litigation, and help you serve your clients to the best of your abilities. Topics include:

- An overview of ADR
- An analysis of ADR options in various jurisdictions
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- Effective mediation techniques
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- Preparation of clients for ADR
- The use of ADR techniques in government decisionmaking



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# Recent Articles of Interest



Edited by  
Michael Sant'Ambrogio\*

**Jane Bambauer, Jonathan Loe, & D. Alex Winkelman, *A Bad Education*, 2017 U. ILL. L. REV. 109 (2017).** Mandated-disclosure laws achieve their regulatory goals by educating the public about latent attributes of a product or service. At their best, they improve the accuracy of consumers' cost-benefit analyses compared to a world without disclosure and inspire firms to reduce unnecessary risks. When mandated disclosures, however, do not improve cost-benefit assessments—when they are useless or, worse still, when they reduce the quality of those assessments—then they constitute a bad education. American privacy law, which is principally a mandated-disclosure regime, imposes a bad education on consumers. This Article proposes a theory for differentiating valuable disclosures from wasteful and harmful ones. Valuable disclosures provide notice about material attributes without inducing an overreaction. After validating the theory in an experimental setting using disclosures about health risks, moral risks, and pseudoscience, we apply the model to four distinct forms of privacy-invasive practices. We find that the disclosures required by regulators are usually wasteful and may cause consumers to overreact. This is the first study to compare disclosures about privacy practices to disclosures about other types of attributes. It raises, for the first time, a troubling insight: if consumer law were guided by the same justifications as our privacy law, it would have to mandate disclosures about GMOs, animal testing, and an unlimited range of other attributes that produce visceral responses.

**Emily S. Bremer, *The Agency Declaratory Judgment*, 78 OHIO ST. L.J. (forthcoming), available at <https://ssrn.com/abstract=2955214>.** This Article identifies and examines an overlooked provision of the Administrative Procedure Act that extends to administrative agencies a device analogous to the declaratory judgment. This device—the declaratory order—enables agencies to provide case-specific, non-coercive, legally binding advice to regulated entities and the public, thereby reducing regulatory uncertainty and its attendant harms. Recent changes in how the courts interpret the Administrative Procedure Act have made the declaratory order more useful and accessible to agencies while simultaneously reducing the attractiveness of other forms of non-binding agency guidance. This Article fits the declaratory order among the various policymaking forms available to agencies and

comprehensively analyzes current, limited agency use of the device. It argues that agencies should accept the courts' invitation to use declaratory orders more frequently and creatively to improve the administration of federal regulatory programs.

**Nicholas R. Parrillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power*, HARV. L. REV. (forthcoming), available at <https://ssrn.com/abstract=2907797>.** Scholars of administrative law focus overwhelmingly on lawsuits to review federal government action while assuming that, if plaintiffs win such lawsuits, the government will do what the court says. But in fact, the federal government's compliance with court orders is imperfect and fraught, especially with orders compelling the government to act affirmatively. Such orders can strain a federal agency's resources, interfere with its other legally-required tasks, and force it to make decisions on little information. An agency hit with such an order will often warn the judge that it badly needs more latitude and more time to comply. Judges relent, cutting slack and extending deadlines. The plaintiff who has "won" the suit finds that victory was merely the start of a tough negotiation that can drag on for years.

These compliance negotiations are little understood. Basic questions about them are unexplored, including the most fundamental: What is the endgame? That is, if the judge concludes that the agency has delayed too long and demanded too much, is there anything she can do, at long last, to make the agency comply? What the judge can do, ultimately, is the same thing as for any disobedient litigant: find the agency (and its high officials) in contempt. But do judges actually make such contempt findings? If so, can judges couple those findings with the sanctions of fine and imprisonment that give contempt its potency against private parties? If not, what use is contempt? The literature is silent on these questions, and conventional research methods, confined to appellate case law, are hopeless for addressing it. There are no opinions of the Supreme Court on the subject, and while the courts of appeals have handled the problem many times, they have dealt with it in a manner calculated to avoid setting clear and general precedent.

Through an examination of thousands of opinions (especially of district courts), docket sheets, briefs, and other filings, plus archival research and interviews, this Article provides the first general assessment of

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how federal courts handle the federal government's disobedience. It makes four conclusions. First, the federal judiciary is willing to issue contempt findings against agencies and officials. Second, while several federal judges believe they can (and have tried to) attach sanctions to these findings, the higher courts have exhibited a virtually complete unwillingness to allow sanctions, at times swooping down at the eleventh hour to rescue an agency from incurring a budget-straining fine or its top official from being thrown in jail. Third, the higher courts, even as they unfailingly thwart sanctions in all but a few minor instances, have bent over backward to avoid making pronouncements that sanctions are categorically unavailable, deliberately keeping the sanctions issue in a state of low salience and at least nominal legal uncertainty. Fourth, even though contempt findings are practically devoid of sanctions, they have a shaming effect that gives them substantial if imperfect deterrent power.

The efficacy of litigation against agencies rests on a widespread perception that federal officials simply do not disobey court orders and a concomitant norm that identifies any violation as deviant. Contempt findings, regardless of sanctions, are a means of weaponizing that norm by designating the agency and official as violators and subjecting them to shame. But if judges make too many such findings, and especially if they impose (inevitably publicity-grabbing) sanctions, they may risk undermining the perception that officials always comply and thus the norm that they do so. The judiciary therefore may sometimes pull its punches to preserve the substantial yet limited norm-based power it has.

**Daphna Renan, *The Law Presidents Make*, 103 VA. L. REV. (forthcoming), available at <https://ssrn.com/abstract=2948177>.** The standard conception of executive branch legal review in the scholarship is a quasi-judicial Office of Legal Counsel ("OLC") dispensing formal, written opinions binding on the executive branch. That conception of executive branch legalism did have a brief heyday in practice. But its institutional underpinnings are unstable. A different approach to executive branch legalism—informal, diffuse, and intermingled in its approach to lawyers, policymakers, and political leadership—is today on the rise. This Article documents, analyzes, and assesses that transformation.

Scholars have suggested that the failure of OLC to constrain presidential power in recent publicized episodes means that executive branch legalism ought to become more court-like. They have mourned what they perceive to be a disappearing external, legalistic constraint on the presidency. But executive branch legalism has never been an exogenous or external check on presidential power. It has always been a tool of presidential administration itself. The needs of the president have simply shifted. While earlier presidents looked to executive branch legalism to buttress public legitimacy through a more insulated, more court-like design, the president today looks to executive branch legal review to augment discretion at the retail, or issue-specific, level—to forge pathways to policy and political compromise in highly-contested, consequential, and legalistic terrain.

There is much at stake in that transformation. But it is not the disappearance of law as an external constraint on

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the presidency. Rather, it is a reformation of executive branch legalism as an instrument of presidential power. Exploring that transformation sheds light on presidential power, the making of executive branch law, and the inter-relationship between them.

**Bijal Shah, *Interagency Transfers of Adjudication Authority*, 34 YALE J. ON REG. 279 (2017).** Agencies sometimes give away their legislatively delegated decision-making power of their own accord. More specifically, agencies make agreements in order to transfer their entire jurisdiction to adjudicate administrative decisions to other agencies. This Article is the first to explore these mostly informal, endogenous interagency arrangements. One example of this dynamic involves the authority to adjudicate the legality of pharmaceutical imports and exports, initially delegated by Congress to the Department of Treasury. Treasury has since transferred this authority to the U.S. Customs and Border Patrol via interagency agreement, which then retransferred this authority to the Food and Drug Administration (FDA) by means of another interagency agreement. The FDA does not have clear statutory authority to make these decisions. However, transferring this set of adjudications to the FDA allows it to bring its superior technocratic expertise to bear, which may lead to higher quality decision-making.

On the one hand, these arrangements could be harbingers of a future in which agencies take advantage of opportunities to shirk, deteriorate rule of law values, and usurp the legislative branch's power to define agency jurisdiction and make the law. On the other hand, interagency transfers of adjudication authority represent agencies' potential to improve administrative decision-making by sharing or even transferring power based on their on-the-ground knowledge of their own varying capacity to implement an efficient and effective regime of administrative adjudication.

This Article argues that there is a way to ensure these interagency transfers of power and responsibilities are both beneficial to the quality of administrative decision-making and also constitutional—in particular, by allowing those agreements that benefit the quality of administrative decision-making to be deemed legitimate if grounded in statutory language authorizing interagency coordination. Finally, it proposes that courts play a primary role in shaping the development of high-quality interagency transfers of adjudication authority and ensuring that they remain within permissible constitutional bounds.

**Jarrod Shobe, *Agencies as Legislators: An Empirical Study of the Role of Agencies in the Legislative Process*, 85 GEO. WASH. L. REV. 451 (2017).** The scope and power of the administrative state in implementing law is a common theme in academic discussions and judicial decisions, but the role that agencies play in drafting the laws that they implement has gone mostly unexplored. Based on interviews with fifty-four agency staff who work on legislative matters, this Article provides a unique account of the role of agencies in the legislative process. The interviews reveal that agencies are deeply involved in drafting and reviewing statutory text before enactment, and show that Congress often relies heavily on agencies' significant legislative resources and expertise. Respondents reported previously unnoticed external and structural factors that affect the agency-Congress relationship in the legislative process and provided important insight into the ways in which agencies communicate with Congress during the legislative process.

This Article argues that these findings can provide judges and scholars with more accurate assumptions about congressional intent to defer to agencies. This Article also raises new questions about the President's and Congress's ability to monitor and control the modern administrative state. It further shows that the legislative drafting process is more fragmented than commentators have realized, and that this fragmentation generally happens along agency lines. This Article's findings provide a more complete account of the complexity of the legislative process and an initial framework for approaching foundational questions raised by agency involvement in lawmaking.

**Mila Sohoni, *Crackdowns*, 103 VA. L. REV. 31 (2017).** The crackdown is the executive decision to intensify the severity of enforcement of existing laws or regulations as to a selected class of offenders or offenses. Each year, federal, state, and local prosecutors and agencies carry out thousands of crackdowns on everything from trespassing to insider trading to minimum-wage violations at nail salons. Despite crackdowns' ubiquity, legal scholarship has devoted little attention to the crackdown and to the distinctive legal and policy challenges that crackdowns can pose.

This Article offers an examination and a critique of the crackdown as a tool of public law. The crackdown can be a benign and valuable law enforcement technique. But crackdowns can also stretch statutory authority to the breaking point, threaten to infringe on constitutional values, generate unjust or absurd results, and serve the venal interests of the law enforcer at the expense of the interests of the public. Surveying a spectrum of crackdowns from the criminal and administrative contexts, and

from local, state, and federal law, this Article explores the many ways that crackdowns may quietly subvert democratic values.

The obvious challenge, then, is to discourage the implementation of pathological crackdowns, while also preserving the needed flexibility to enforce the law, within the context of a legal and political system that imposes sparse restraints on the crackdown choice. This Article locates a foundation for tackling this challenge in the requirement of “faithful” execution in Article II’s Take Care Clause and its cognate clauses in the state constitutions. The crackdown decision should be faithful—to statutory text and context, to the interests of the public, and to constitutional and rule-of-law values. By elaborating the content of this obligation, this Article supplies a novel normative framework for evaluating the crackdown—and a much-needed legal platform for governing it. Cutting sharply against the grain of modern law, this Article calls for a broad rethinking of the principles and constraints that should frame the executive’s power to selectively and programmatically augment enforcement.

**Matthew C. Turk, *Regulation by Settlement*, U. KAN. L. REV. (forthcoming), available at <https://ssrn.com/abstract=2954047>.** This Article explores a recent development at the intersection of administrative law and financial regulation: the explosion in enforcement actions brought by federal agencies against financial institutions, and the exclusive resolution of those cases via settlement agreements that preclude meaningful judicial review. It argues that those practices have given rise to a distinct new form of policymaking, “regulation by settlement,” which has significant implications for both areas of the law.

Regulation by settlement has two defining features. First, by pursuing settlements that target certain areas of the financial system on a comprehensive basis, agencies are able to leverage those agreements in a manner that effectively establishes novel legal standards of general applicability. Settlements are now a tool for setting policy in financial regulation. Second, the procedural posture of those settlements allows agencies to engage in a uniquely freewheeling style of policymaking, which sidesteps nearly all of the constraints that administrative law applies to more conventional forms of agency action.

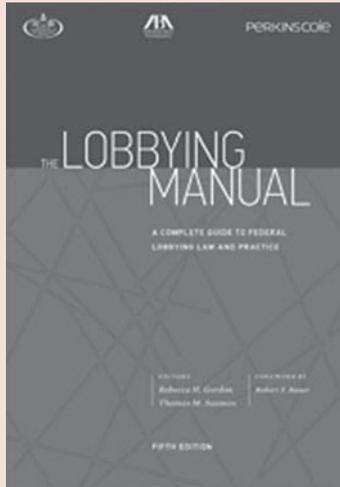
The Article closes by considering normative issues raised by regulation by settlement, including questions concerning its consistency with rule of law values and efficiency from a cost-benefit perspective. It also reviews potential reforms, such as subjecting settlements to greater judicial scrutiny or presidential oversight. The broader contribution to the literature is to show how

a richer understanding of the regulatory process can be gained by analyzing its public law and business law aspects in parallel.

**Wendy Wagner, William West, Thomas McGarity, & Lisa Peters, *Dynamic Rulemaking*, 92 N.Y.U. L. REV. 183 (2017).** In administrative law, it is generally assumed that once an agency promulgates a final rule, its work on that project—provided the rule is not litigated—has come to an end. In order to ensure that these static rules adjust to the times, therefore, both Congress and the White House have imposed a growing number of formal requirements on agencies to “look back” at their rules and revise or repeal ones that are ineffective. This empirical study of the rulemaking process in three agencies (N = 462 revised rules to 183 parent rules) reveals that—contrary to conventional wisdom—agencies face a variety of incentives to revise and update their rules outside of such formal requirements. Not the least of these is pressure from those groups that are affected by their regulations. There is in fact a vibrant world of informal rule revision that occurs voluntarily and through a variety of techniques. The authors label this phenomenon “dynamic rulemaking.” This Article shares empirical findings that provide a conceptual map of this unexplored world of rule revisions and offers preliminary thoughts about the normative implications of dynamic rulemaking for regulatory reform.

**Christopher J. Walker, *Modernizing the Administrative Procedure Act*, 69 ADMIN. L. REV. (forthcoming), available at <https://ssrn.com/abstract=2962142>.** Despite dramatic changes in the modern regulatory state over the last seven decades, Congress has only amended the Administrative Procedure Act sixteen times since its enactment in 1946. The current political climate may present an ideal opportunity for much-needed bipartisan legislative action. This Essay introduces the American Bar Association’s 2016 consensus-driven recommendations to reform the APA and then concludes that the Portman–Heitkamp Regulatory Accountability Act of 2017, which incorporates seven of the ABA’s nine recommendations, is the type of common-sense, bipartisan legislation needed to modernize the APA. ○

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