PRESIDENTIAL ADMINISTRATION:
How Implementing Unitary Executive Theory Can Undermine Accountability

Also In This Issue

Outsourcing Administrative Approvals
The End of the *Alaska Hunters* Doctrine
Nominations for 2015-2016 Section Officers and Council Members
Registration Opening June 1, 2015!
www.americanbar.org/adminlaw

ROOM RESERVATIONS

There is a small block of rooms available for the nights of Wednesday August 26-Thursday, August 27, 2015 at a rate of $179 per night single/double with room tax of 14.5%.

To make a room reservation, call 1-202-737-1234 and ask for the block under the “ABA Administrative Law and Regulatory Practice 2015 Homeland Security Law Institute.” A credit card and advance deposit will be required to hold your reservation. Individuals must make their own room reservations, and we are not able to reimburse Moderators or Panelists for travel or lodging expenses.

TOPICAL AGENDA

★ A View from the Top: Challenges and Changes at the Department of Homeland Security—2015 and Beyond
★ Privacy v. Data Security—Finding a Balance
★ Support Anti-Terrorism by Fostering Effective Technology (SAFETY) Act
★ The U.S. Immigration Agenda
★ A Role of the Lawyer in Emergency Preparedness and Response
★ Homeland Security—A Growing Discipline
★ Drones and UAVs in the Homeland
★ Travel Challenges and Visa Issues
★ Supply Chain 2.0 and Customs-Trade Partnership Against Terrorism (C-TPAT)
★ An Update on the Oklahoma City Conference
★ Committee on Foreign Investments in the United States (CFIUS)—2015 and Beyond
★ Export Controls—Changes in Attitudes, Changes in Latitudes
★ Infrastructure Protection Regulations: Chemical Facility Anti-Terrorism Standards (CFATS)
★ Corporate Compliance with DHS Rules and Regulations
★ Contracting Issues with DHS: Practical Lessons and Emerging Trends
★ DHS General Counsel's Office 2015 Update—Changes and New Direction
★ Foreign Corrupt Practices Act (FCPA): Doing Business Internationally
★ Public & Private Partnerships—Legal & Policy Issues
★ National Response and Recovery Frameworks: Legal Considerations in Emergency Management
★ Cybersecurity & Cyber Insurance
Much has already happened in 2015! Both the U.S. Supreme Court and Congress have been considering issues that may have great impact on the work that many of us do. These issues include the interpretation of the Administrative Procedure Act (APA) as it applies to guidance documents and other interpretive rules.

The Court addressed these issues in Perez v. Mortgage Bankers Ass’n. In a line of cases, based upon Paralyzed Veterans of America v. D.C. Arena L.P., the D.C. Circuit held that agencies must use notice-and-comment procedures when they significantly change an interpretive rule. In Perez, the Court overturned that D.C. Circuit doctrine, stating that the APA does not require agencies to use notice and comment to change an interpretive rule, and courts may not impose such a notice-and-comment requirement themselves. This case and related issues have been discussed at our Fall Conference and Council Meetings, and some of our members have been involved in the case.

There is also activity in Congress directed toward addressing issues of interpretation of the APA, as well as the need for amendments to the APA. After much hard work by the Section Council and other members, we sent a letter in December 2014 to the 113th Congress commenting on S.1029, the Regulatory Accountability Act of 2013, and drawing attention to extensive comments the Section submitted previously on the House version of the Regulatory Accountability Act of 2011. The letter benefitted from input from our politically and geographically diverse membership, which includes private practitioners, government attorneys, judges, and law professors. While there were many who assisted with the drafting of the letter, I must give particular recognition for their efforts to Professor Ronald Levin of Washington University Law in St. Louis, MO, and Professor Kevin Stack of Vanderbilt University Law School in Nashville, TN.

It is our hope that the letter would be helpful to any consideration of administrative law reform legislation that would occur in the future. Included in the Section comments were an acknowledgement of an improvement of the proposed definition of “Guidance” as a replacement for “interpretative rules” (proposed in S.1029), suggestions on the definition of “rule” and other terms such as “major rule,” and recommendations for amending the notice-and-comment procedures. Both letters can be found on our website: http://www.americanbar.org/groups/administrative_law/policy.html.

The Section is continuing to develop policy on these issues. We expect to be a guiding force and welcome the input from our members on these and other important issues. Please contact me at annashavers.aba@gmail.com if you would like to get involved.

Anna W. Shavers

1 Perez v Mortgage Bankers Association, 135 S Ct 1199 (2015).
2 117 F3d 579 (DC Cir 1997).
3 See below, this issue, Supreme Court News, infra p.15.

Please see the 2015 Awards criteria on page 40 for the Section’s Annual Awards to be conferred at the 2015 Fall Administrative Law Conference, October 29–30, 2015, Washington, D.C. Save the date for the conference! And please send your nominations for any of these awards to Anne Kiefer, Section Staff Director.
Given the extensive use of rulemaking in federal agencies, it is important that agency rulemakers have available the clearest guidance possible. As procedures governing the rulemaking process have proliferated since the Administrative Procedure Act (APA) was enacted, the potential procedural pitfalls have multiplied. This fifth edition continues the tradition of demystifying the rulemaking process and brings the Guide up to date with respect to recent cases and changes introduced during the second term of the Bush II Administration, and the first three years of the Obama Administration.

This Fifth Edition retains the basic four-part organization of the previous four editions: Part I is an overview of federal agency rulemaking and describes the major institutional “players” and historical development of rulemaking. Part II describes the statutory structure of rulemaking, including the relevant sections of the APA and other statutes that have an impact on present-day rulemaking. Part III contains a step-by-step description of the informal rulemaking process, from preliminary considerations to the final rule. Part IV discusses judicial review of rulemaking. Appendices include some key rulemaking documents.

This edition explores the dramatic rise of “e-rulemaking” since 2006 and the many ramifications it has wrought that were not present in the era of “paper” rulemaking. This edition also examines court decisions concerning rulemaking procedure and the judicial review of rules.

To order, visit www.ShopABA.org or call the ABA Service Center at 1.800.285.2221.
Table of Contents

Chair’s Message ................................................................. 1
Presidential Administration: How Implementing Unitary Executive Theory Can Undermine Accountability . . . 4
Outsourcing Administrative Approvals: Accounting for Conflicts of Interest ........................................... 8
The Abracadabra of Administrative Rulemaking and the End of Alaska Hunters ........................................ 10
Supreme Court News. .......................................................... 15
News from the Circuits .......................................................... 21
News from the States: California’s Climate Change Regulations Upheld ................................................... 25
News from ACUS: Project Initiated on Federal Permitting and Licensing ................................................ 26
Recent Articles of Interest ....................................................... 28
Nominations for 2015–2016 Section Officers and Council Members ....................................................... 37
Criteria for 2015 Section Awards ........................................... 40

Administrative & Regulatory Law News

Editor-in-Chief: Cynthia A. Drew, Principal, Drew Dispute Resolution, LLC
Advisory Board Chair: Michael Asimow, Visiting Professor of Law, Stanford Law School; Professor of Law Emeritus, UCLA Law School
Advisory Board Members: Warren Belmar, Managing Director, Capitol Counsel Group, LLC; Daniel Cohen, Assistant General Counsel for Legislation, Regulation, and Energy Efficiency, U.S. Department of Energy; John Cooney, Partner, Venable, LLP; William Funk, Professor of Law, Lewis & Clark Law School; Philip J. Harter, Earl F. Nelson Professor of Law, University of Missouri–Columbia School of Law; William S. Morrow, Jr., Executive Director, Washington Metropolitan Area Transit Commission; James T. O’Reilly, Professor of Law, University of Cincinnati College of Law
Contributing Editors: Lincoln L. Davies and F. Andrew Hessick, Professors of Law, S.J. Quinney College of Law; William S. Jordan III, C. Blake McDowell Professor of Law, The University of Akron School of Law; Daniel J. Metcalfe, Adjunct Professor of Law, American University, Washington College of Law, and Executive Director of its Collaboration on Government Secrecy; Edward J. Schoenbaum, Administrative Law Judge, Contract

The Administrative & Regulatory Law News (ISSN 1544–1547) is published quarterly by the Section of Administrative Law & Regulatory Practice of the American Bar Association to provide information on developments pertaining to administrative and regulatory law and policy, Section news, and other information of professional interest to Section members and other readers.

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

Manuscripts should be e-mailed to: anne.kiefer@americanbar.org. Articles should generally be between 1500 and 2500 words and relate to current issues of importance in the field of administrative or regulatory law and/or policy. Correspondence and changes of address should be sent to: ABA Section of Administrative Law & Regulatory Practice, 1050 Connecticut Avenue NW, Suite 400, Washington, DC 20036.

Nonmembers of the Section may subscribe to this publication for $28.00 per year or may obtain back issues for $7.00 per copy. To order, contact the ABA Service Center, 321 North Clark Street, Chicago, IL 60610, Tel. 800/285-2221.

©American Bar Association 2015. Articles appearing in this publication may not be reprinted without the express permission of the ABA.
The concept of accountability is at the heart of arguments for greater presidential direction of the administrative state, or for “presidential administration” as then-Professor Kagan famously called it. Presidential administration proponents point out that the president is the most visible figure in American government and the only person subject to election and re-election by the entire nation. Presidential actions and decisions generate a level of attention and a potential for response that cannot be matched by bureaucratic or congressional players.

Yet the mundane reality is that presidential administration sometimes advances accountability, something does not advance it, and sometimes deeply undermines it. These variances are of little moment when presidential administration arguments are framed as case-by-case policy positions to the effect that this or that statute ought to provide for this or that level of presidential involvement or control over particular acts or decisions. Then-Professor Kagan herself maintained only that a “statutory delegation to an executive agency official . . . usually should be read as allowing the President to assert directive authority . . . over the exercise of the delegated discretion.” She acknowledged “Congress’s broad power to insulate administrative activity from the President.”

That presidential administration does not invariably foster accountability and that it can defeat the same, however, are centrally relevant points in assessing claims that the Constitution categorically mandates own judgment for the decisions of administrators to whom the decisions are statutorily delegated. Unity proponents deem unity functionally necessary to further the constitutional value of accountability. They also understand the constitutional text, particularly Article II’s vesting clause, to mandate unity. They further argue that certain founding-era decisions, such as those to place a single President atop the executive branch and to forego a presidential advisory council, reflect the founders’ desire to create a unitary executive to foster government accountability.

In my new book, Reclaiming Accountability: Transparency, Executive Power, and the U.S. Constitution, I challenge unitary executive theory and another constitutional approach, “presidential supremacy,” that also advocates strong presidential powers. I argue that each theory is incorrect as matters of constitutional text, structure, and history. Drawing on examples spanning presidential administrations and parties, I also describe how each theory has manifested itself in legal positions justifying accountability-defeating secrecy and information manipulation over the years. Insofar as accountability itself is a constitutional value, these examples bolster the case that unity and supremacy are constitutionally flawed. The remainder of this essay provides a glimpse of these arguments as they relate to unitary executive theory and the constitutional value of accountability.

*Heidi Kitrosser is a Professor of Law at the University of Minnesota Law School. Much of this essay consists of slightly modified excerpts from her recent book, Reclaiming Accountability: Transparency, Executive Power, and the U.S. Constitution.
The Constitutional Value of Accountability

The Constitution situates the presidency within a “substantive accountability framework.” As the framework’s name suggests, substantive accountability—that is, the ability of the people or another branch to “demand an explanation or justification” of the president or his subordinates “for [their] actions and to reward or punish [them] on the basis of [their] performance or its explanation”—is at the framework’s core, and thus at the heart of the constitutional scheme for the presidency. Substantive accountability demands two sets of conditions. First, the public and the other branches must have means to respond to presidential misdeeds. Second, and most fundamentally, the public and the other branches must have mechanisms to discover and assess such misdeeds in the first place. Substantive accountability permits, even demands, flexibility for political and legal actors to experiment with measures that enable the people and the other branches to discover and respond to executive wrongdoing.

Substantive accountability encompasses, but goes well beyond, the mechanisms of formal accountability. The latter concept fixates on one or two mechanisms by which the public or the other branches can formally respond to executive behavior—such as the ballot box or impeachment—but concerns itself little with whether those mechanisms are rendered ineffective by information control. Formal accountability thus includes some avenues for response to presidential behavior. Yet it says little about the ability of the people and the other branches to learn of this behavior, beyond what the president wishes for them to know, in the first place.

How Unity Can Undermine Accountability

The Example of Centralized Information Clearance Requirements

Presidential administrations frequently assert a right to prohibit agency employees from speaking directly to the Congress, the press, or the public without first clearing their commentary with the Office of Management and Budget (OMB) or another White House–designated office. Administrations vary in the amount of detail with which they justify this position. The most comprehensive explanations cite both unitary executive theory and executive privilege as independent rationales. Detailing the unity-based aspect of the claim, the Office of Legal Counsel (OLC) in the Reagan administration wrote in 1988:

> The separation of powers requires that the President have ultimate control over subordinate officials who perform purely executive functions and assist [the President] in the performance of . . . constitutional responsibilities. This power includes the right to supervise and review the work of such subordinate officials, including reports issued either to the public or to the Congress. . . .

Consistent with the preceding analysis, it matters not at all [whether] . . . information [is] . . . highly scientific in nature. The President’s supervisory authority encompasses all of the activities of . . . executive branch subordinates, whether those activities be technical or non-technical in nature. This necessarily follows from the fact that the Constitution vests “[t]he entire executive Power,” without subject-matter limitation, in the President.

During the Carter administration, the OLC launched a similar objection to provisions of the Inspector General Act. That act, passed in 1978, created the modern system of inspectors general (IGs). IGs are intra-agency watchdogs charged to investigate and to issue reports and recommendations on agency problems including inefficiency, fraud and abuse. IGs are not empowered to impose punishments or policy changes. Despite IGs’ purely investigative and reportorial functions, the Carter OLC objected to provisions of the act requiring IGs to supply information to Congress. The OLC argued:

The Inspector General’s obligation to keep Congress fully and currently informed, taken with the mandatory requirement that [the IG] provide any additional information or documents requested by Congress, and the condition that [the IG’s] reports be transmitted to Congress without executive branch clearance or approval, and [sic] inconsistent with [the IG’s] status as an officer in the executive branch, reporting to and under the general supervision of the head of the agency. Article II vests the executive power of the United States in the President. This includes general administrative control over those executing the laws. See, Myers v. United States, 272 U.S. 52, 163-164 (1926). The President’s power of control extends to the entire executive branch, and includes the right to coordinate and supervise all replies and comments from the executive branch to Congress.

Similar examples can be found in the Obama administration. Like previous administrations, the Obama administration requires testimony and certain other statements by executive branch employees to be cleared by the OMB. In a 2009 signing statement, President Obama flagged the narrow construction that he would accord a statutory provision
that “prohibit[s] the use of appropriations to pay the salary of any Federal officer or employee who interferes with or prohibits certain communications between Federal employees and Members of Congress.” The President indicated that he would “not interpret this provision to detract from [the President’s] authority to direct the heads of executive departments to supervise, control, and correct employees’ communications with the Congress in cases where such communications would be unlawful or would reveal information that is properly privileged or otherwise confidential.”

The Example of Bureaucratic Politicization

The examples just cited entail what political scientist Terry Moe calls “centralization,” whereby presidents seek to institutionalize top-down White House control over agencies. A still more seamless approach—what Moe calls “ politicization”—enables the White House to control information throughout the administrative state. Specifically, presidents can seek to staff agencies as thickly as possible with political appointees who serve at his pleasure and who can be chosen partly for their party affiliation or other indicia of loyalty to the administration. For ease of reference, I will refer to such appointees within agencies as “politics,” and to other agency employees as “non-politicals.”

By increasing the ratio of politics to non-politicals, the President can enhance presidential ability to control agency messaging in two ways. First, where politics themselves participate in creating reports, testimony, rules or rulemaking records, they structurally are more likely than non-polticals to craft messages and to interpret and report facts in a manner compatible with administration politics. Second, when politics are placed in supervisory roles over non-political agency personnel, the former are well-situated to influence the latter’s communications with the public and the other branches.

How Unity Can Manifest Itself in a More Politicized Bureaucracy

Unity can manifest itself in a presidential power to remove employees—at any time and for any reason—who exercise discretionary executive power. Precisely who that description encompasses is subject to case-by-case debate. Most alarming, from a substantive accountability perspective, would be an unfeathered presidential power to remove scientists or other subject-specific experts from within agencies. These are the persons best situated, after all, to provide non-politically driven information and analyses against which the public and the other branches can assess the policy choices made by the President or agency politics. A strong argument can be made that such persons do not exercise discretionary executive power and thus are outside of the category of those whom unity proponents deem fully removable. Yet given past administrations’ suggestions that preparing information for public dissemination is a discretionary executive act that the President must control, and given the fact that some employees exercise research and analytical functions along with more clearly executive tasks, unity could be invoked to support their removability. Indeed, this notion is in keeping with the suggestion by some pro-unity scholars that a conflict may exist between unity and civil service protections. It also is in keeping with presidential objections to the requirement that the President notify Congress of the reasons for removing an inspector general, despite the fact that IGs are empowered solely to gather information and issue reports and recommendations.

Unity also can manifest itself in a presidential power to ignore statutory hiring criteria for those deemed to exercise discretionary executive power. Administrations and some scholars have argued that Congress constitutionally may not limit the pool from which the president chooses appointees by imposing minimum qualifications. For example, President Clinton took the view, in a 1995 signing statement, that Congress may not forbid him from nominating “as United States Trade Representative or Deputy United States Trade Representative . . . anyone who had ever ‘directly represented, aided, or advised a foreign [government or political party] . . . in any trade negotiation, or trade dispute with the United States.’” President George W. Bush also objected to statutory qualifications for executive nominations and appointments, including a (post-Hurricane Katrina) requirement that nominees to head the Federal Emergency Management Agency have “demonstrated ability in and knowledge of emergency management and homeland security” and at least “5 years of executive leadership and management experience in the public or private sector.”

Unity thus demands a “thickening” of the ranks of politics throughout the administrative state. Such thickening, in turn, has its own effects, creating opportunities for even formally “non-political” parts of the administrative state to become politicized. Such effects are discernible not only as a matter of logic but also through experience. Indeed, a variety of factors—including a political culture increasingly accepting of presidential control, presidential uses of reorganization and force reduction powers, and provisions of the Civil Service Reform Act of 1978 that
created new political appointment opportunities—have substantially increased the ranks of agency politicals over the last several decades. Furthermore, changes to the party and presidential nominating systems as well as cultural and technological shifts enhancing direct presidential ties to ideological constituencies, have increased presidential incentives and opportunities to choose politicals predominantly for their ideological alignment with administrations.

Political scientists link these phenomena to yet further politicization within agencies’ formally non-political realms. Further politicization follows from, among other things, pressure on non-politicals by political supervisors, influence by political staffs over the hiring of non-politicals, job reallocations or other changes to non-politicals’ work to minimize their influence or encourage them to quit, and the use of shadow political staffs within agencies to bypass non-political staffs within agencies’ formally non-political realms. Further politicization follows from, among other things, pressure on non-politicals by political supervisors, influence by political staffs over the hiring of non-politicals, job reassignments or other changes to non-politicals’ work to minimize their influence or encourage them to quit, and the use of shadow political staffs within agencies to bypass non-political staffs.

How a More Politicized Bureaucracy Can Undermine Accountability

Studies in the political science literature support the intuition that excessive politicization has costs for agency competence and expertise. These studies find that politicals and non-politicals bring different skill sets to the table. Non-politicals generally have superior substantive expertise and public management skills, while politicals tend to be more politically responsive and adept at politics outside of bureaucratic confines. As such, a careful mix of political and non-politicals appears to be optimal for agency performance, with the exact balance varying by agency. When agencies are stacked too heavily with politicals, competence and performance can suffer.

It stands to reason that politicals’ deficiencies will include shortcomings in subject-specific research, analysis, and reporting. These difficulties follow partly from politicals’ relative substantive inexpertise and partly from their heightened propensity for political bias. One study found, for example, that state budget agencies with non-political subordinates generated more accurate budget forecasts than did state budget offices staffed by political subordinates. The most accurate forecasts came from states with budget offices comprised of non-political subordinates and political directors. The authors deemed the latter result to follow from the fact that non-politicals tended toward conservative biases while politicals tended toward optimistic biases, and the two biases helped to cancel one another out. Nonetheless, the authors stressed that the single most important predictor of accurate forecasting was the employment of non-political subordinates. As the study demonstrates, the mix of political and non-politicals in an agency can impact the accuracy of information released to the public. Relatedly, it can impact the extent to which agency statements reflect the judgments of subject-specific experts.

The Congressional-Presidential Struggle to Control the Bureaucracy

Pro-unity scholars might respond that the alternative to presidential control is not neutral expertise and undistorted information flow, but rather congressional strong-arming of agency personnel, often behind closed doors. The premise that congressional control can take forms that undermine accountability is entirely sound. While the Constitution builds important elements of dialogue and transparency into the legislative process, it is well known that much of Congress’s work gets done behind the scenes. A congressperson on a relevant committee is well positioned to influence the actions of agency officials and employees, and to do so behind closed doors.

While this consideration is important, it in no way undermines the case against a categorical unity directive. Indeed, the complicated nature of the factual picture only strengthens the case. If some manifestations of unity undermine accountability, some enhance it, and some have neutral, fluctuating, or simply unpredictable relationships to accountability, then a categorical unity requirement simply cannot follow from the constitutional principle of accountability.

Furthermore, the alternative to unity is not unfettered legislative control. In Reclaiming Accountability, I explain that the approach adopted by the U.S. Supreme Court—one imposing flexible, functional boundaries on the extent to which statutes may estrange administrative actors from presidential control—is well supported by the principle of accountability, as well as by constitutional text and structure. The built-in protections of the legislative process—including presidential participation through veto power—combined with flexible, functionally defined constitutional limits and their shadow effect, comprise the alternative to a categorical unity directive. While this alternative is no panacea, it offers far better and more precise tools to respond and adapt over time to problems posed by excessive (or inadequate) congressional or presidential controls than does an unyielding, one-size-fits-all directive. Cf. summary of Peter L. Strauss, The President and the Constitution, Case Western Reserve L. Rev. (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2580421, below, this issue, Recent Articles, pp. 27–28.
I am a “jackass.” Just ask the private sector consultant who disliked my study of conflicts of interest in the outsourcing of administrative clearance of food ingredients.

The topic of outsourcing of the administrative approvals process and the study of conflicts of interest is tedious, and is so boring that I begin my class discussion with that statement about me, which was made by a food industry consultant in a national meeting. (Yes, some of my law students smirk and nod in agreement; they will probably be my “C” students.) This erudite rebuttal to my study of conflicts of interest in a safety agency process serves as a warning to other academic scholars of procedures for product scrutiny: back off, quit rocking the comfortable boat.

If you are an agency manager with a backlog of applicants’ product files awaiting clearance, should you let the same set of non-agency people grant those clearances as an alternative to agency staffers? How much information about influences on their decision should be disclosed? Would outsourcing to a small group of people, in a manner that seems unusually friendly to the manufacturers who seek approvals, pass the “laugh test” of conflicts of interests?

The detailed study on conflicts of interest in administrative approvals of food ingredients, which I coauthored in the Journal of the American Medical Association (JAMA) in 2013, drew the vehemence from those few delegates of administrative clearance power. Stepping back from that specific empirical data on conflicts of interest in one food clearance program, we can pose several pointed questions:

1. What factors lead Congress to “outsource” safety approvals to non-agency adjudicators?
2. What oversight of the non-agency adjudicators is necessary for the public protection?
3. Is the public entitled to more information when the safety regulators are not public servants?

In the archetypal cases, Congress had commanded the agency to clear the safety of new and updated products. The power moves to the agency along with the structure and the starting appropriations. Full-time equivalent (FTE) scientists, engineers and staffers are put into place. Applicants line up at the door of the agency. And Congress can respond through appropriations channels to the potential overload of applications seeking product clearances. Or it can abdicate the function of paying for safety scrutiny. This article urges that funding for the safety decisions that protect the consumer should come from those who are elected to decide how to spend our taxes.

Can a Congress that wants consumer safety decisions from a cadre of career government scientists “have its cake and eat it too?” The aphorism is apt, since the ingredients in tomorrow’s cakes are the focus of today’s Food & Drug Administration food safety clearance decisions. If Congress allows the appropriations to lag behind the workload, the agency may turn to user fees for the applicants, from which to fund agency staff reviewers. But user fee arrangements will be awkward, since the public asks whether employees whose pay comes from application fees have incentives to approve products, so that the flow of work justifies their retention on the federal payroll. Would your streets be safer if the drivers’ license test monitors were paid on commission for each driver approved?

The more extreme outsourcing is to sub-delegate safety decisions to some “third-party review” mechanisms. Short on appropriations, short on FTE reviewers, the agency’s formal clearance process goes into “desuetude.” This is a nice word for abandoning the public role of technical judgment, and letting the decisions go outside the agency, to third-party reviewers. So what oversight is necessary?

Third-party reviewers, including the person who called critics like me “jackasses,” should have a “sunshine” disclosure page on the federal agency website listing their credentials, along with a transparency disclosure of their financial allegiance to the sponsoring companies, and a clear disclaimer of agency endorsement of their findings. The 2012-15 “sunshine” legislation exposing payments by major pharmaceutical companies to prescribing physicians has had a positive effect on some prescribers’ behavior, as more medical groups decline to accept cash or gifts from Big Pharma companies, which gifts would need to be publicly listed. The disclosure web page ideally would list the identity of the third-party reviewer, the product or other application, the size of the sponsor’s payments, the number of applications reviewed in the past three years, and the outcome of that third-party’s clearance decisions over those years. It may be that agency staff members become the most ardent readers of that page—“Gee, we are so underpaid, that sponsor paid Dr. Jones $25,000 for review of that sweetener, and we would have asked lots more questions than he did…”

For all of the courts’ concentration on Auer and Chevron delegations of authority to agencies, what happens when private-review outsourced

*Jim O’Reilly is Professor of Law, University of Cincinnati College of Law.
approvals come up for judicial assessment? Perhaps if courts focused on how these third-party systems of delegated administrative power actually work, deference may not be available. Perhaps a crack in the armor of agency adjudications would develop as third-party review went under the appellate court microscope, and instead of Auer, those adjudicative or license decisions that had been outsourced would receive minimal deference.

When regulatory agency desuetude occurs, and the agency lacks funding for detailed oversight of applications, and probably lacks the funds for auditing for those non-agency adjudicators, what steps are necessary for the public protection? Optimally, the screening function inside the agency has scientists or engineers, who see a package of data which is of equivalent robustness to the quality of the data package that, in happier budget years, would have been reviewed by an agency staff of career specialists. Optimally the agency would have reviewed credentials of the outside reviewing “third parties” before accepting their views of the pending application. Perhaps the person is an alumnus of the agency who now earns more on “piecework” reviews, compared to their former “assembly line” job of reviewing applications from inside that agency. Perhaps the person has great scientific credentials for the particular task, and maybe the agency gets a far better review with reliance on her or his scrutiny of the applicant’s technical data. Or perhaps the $15,000 payment from the regulated company buys a perfunctory check-off clearance from the same cast of characters, with minimal questioning and only a remote risk of delays. Just one additional page on the agency website would be the “disinfectant” that classical “sunshine” advocates have sought.

Is the public entitled to more information when the outsourced safety “regulators” are not public servants, but are alumni of the industry? Recognize that consumer satisfaction will bring “repeat business” to those who can expedite the third-party clearance. Any law student who is picking next semester’s classes can tell you how to avoid the tough graders and skate through with Professor “Easy A” Adams. If the agency tolerates or even establishes the outsourcing channel as a pragmatic response to its FTE shortages, shouldn’t a sunshine web page let the public see who made the approval decision and how often she or he has been making these outsourced decisions?

One predictable response by an over-worked and under-funded agency is to let it go, and discount the significance of sub-delegating to a third party approval. Its clearance letter could note the tradeoff for the company that has paid the outside reviewer a fee of $15,000 or more. The application may lead to a Federal Register or website listing of product clearance. Or it may evoke a standard form letter, which insiders of the FDA process have described to me as a “YOYO” letter, stating that the agency has opted to take no action, with no objection to the marketing of the food ingredient, since “You’re On Your Own.” If this were done in the presence of external powers which would reinforce the compliance incentive, this might be impressive. If there were to be a functioning tort law system or a viable remedy under a (non-preempted) state consumer protection law, then a federal agency’s YOYO letter undercuts any claim that the clearance could be used as a form of federal blessing by the defenders of the product. But now?

Is sunshine for third-party reviewers and their profitable sideline able to be implemented? Yes, there are agency staffers who could easily update the web page and the public could choose whether to respect or to question this third-party approval. Would the price go up from the current $15,000 payment by sponsors to reviewers? Probably. Would injured persons’ counsel want a future jury to know how the allegedly harmful product cleared the regulatory hurdles? Probably. Would the consultants who fumed at the JAMA study of conflicts be exposed for their incentives as surrogate approvers? Undoubtedly. Would the public be better protected? Time will tell. Consumers of outsourced safety decisions, you’re on your own.

IS YOUR LIBRARY COMPLETE?

Check the list of Administrative Law publications at www.americanbar.org/groups/administrative_law/publications to be sure.
Agency flexibility is a battlefield. When circumstances change or a new regime takes power, federal agencies often adjust their settled regulations to reflect new realities. There is a persistent struggle, however, between preserving this flexibility and protecting those who relied upon the previous regulations. When an agency changes course, regulated entities must comply, often with little warning and at great expense. In 1946, Congress passed the Administrative Procedure Act ("APA") to balance these interests by restricting when and how agencies can promulgate and change regulations.

Unsurprisingly, the APA did not achieve a lasting détente. Instead, it created new fronts on which this same conflict has continued to rage. The D.C. Circuit substantially constrained agency flexibility in a line of cases starting with Paralyzed Veterans of America v. D.C. Arena L.P, 117 F.3d 1030 (D.C. Cir. 1999) ("Alaska Hunters"). Although the APA explicitly permits agencies to issue interpretive rules without notice and comment, the D.C. Circuit ruled that an agency cannot change or abandon a definitive interpretation without notice and comment. In Alaska Hunters, for example, guide pilots and lodge operators moved to Alaska and started businesses based upon guidance from the Federal Aviation Administration ("FAA") exempting them from the heightened regulations that apply to commercial air operations. Allowing the FAA to change course, the court reasoned, would impose enormous hardships on the pilots and operators who had relied upon the earlier guidance. In the court's view, protecting these reliance interests justified requiring notice-and-comment procedures, even though the original FAA guidance was issued without them.

Numerous critics suggested that the Alaska Hunters doctrine is inconsistent with a plain reading of the APA and is a harmful constraint on agency flexibility. Yet the doctrine became increasingly entrenched in the D.C. Circuit and gained varying levels of acceptance in other circuits as well. But some circuits sidestepped the question. The Tenth Circuit, for example, ducked the issue in United States v. Magnesium Corp. of America, 616 F.3d 1129 (2010), noting that merely tentative interpretations (as opposed to definite ones) could be changed or abandoned without notice and comment, even under Alaska Hunters. In doing so, Judge Gorsuch observed in a footnote that such an escape hatch could serve as “a sort of abracadabra of administrative decisionmaking” by allowing agencies to employ “assuredly tentative” interpretations that could be changed at will. Id. at 1143 n.6. The agency, of course, would still intend the interpretation to shape the behavior of regulated parties—and would likely succeed in doing so, despite the claimed tentativeness.

Ironically, the Alaska Hunters doctrine and this abracadabra gloss pose the most harm to the very interests the doctrine was designed to protect. In Alaska Hunters, the D.C. Circuit originally intended to protect reliance interests against excessive agency flexibility. But, over the years, the D.C. Circuit has recognized numerous indications that an interpretation is merely tentative: e.g., conditional language, not purporting to be comprehensive, or even giving rise to clarifying questions from regulated entities. So, under the abracadabra gloss, it is not difficult for agencies to preserve their flexibility by pretextually creating the appearance of tentativeness while still directing public behavior. When an agency states that a particular action likely violates a regulation,
for example, regulated entities will usually comply. Compliance, however, is no safe harbor: the use of conditional language—“likely”—can indicate that the regulation was merely tentative and so the agency can change course at will.

While there has always been some confusion about which interpretations are binding, when agencies pretextually disclaim definitiveness, that further “muddies the waters.” The natural result is a public confused about which guidance is actually tentative and which is here to stay.

Consider again the facts in Alaska Hunters. The FAA “consistently advised guide pilots that they were not governed by the regulations dealing with commercial pilots.” 177 F.3d at 1031. The FAA's consistency—in other words, the interpretation's definitiveness—precluded changing its interpretation thirty-five years later. The FAA, however, could have reached into its “grab bag of tricks” to create the appearance of tentativeness and—abracadabra!—preserved its future flexibility. The uncertainty inherent in this flexibility may seem no worse than what existed before Alaska Hunters. But, prior to Alaska Hunters, the guide pilots could have at least relied upon the guidance as an accurate reflection of the agency’s view at the time. The agency’s ability to preserve flexibility by feigning tentativeness, however, incentivizes misrepresentations and undermines the wisdom of taking the agency at its word. This compounded uncertainty makes it that much more difficult for a pilot to decide whether the agency guidance justifies the risk of establishing a business.

Alaska Hunters also jeopardizes the role of the courts in checking excessive agency flexibility. While the doctrine only applies when an interpretation is definitive, the same is not true for the application of deference under Boules v. Seminole Rock & Sand Co., 325 U.S. 410 (1945), which grants “controlling weight” to an agency’s interpretations of its own regulations unless the two clearly conflict. By issuing tentative interpretations of its own ambiguous regulations, an agency can change those interpretations on a whim while still receiving maximum judicial deference. Excessive agency flexibility, especially when combined with decreased judicial review, can prove severely harmful as well. Against the backdrop of incentivizing agencies to claim tentativeness, this new balance could prove far worse for reliance interests than abandoning Alaska Hunters altogether.

Alaska Hunters, then, does not properly balance agency flexibility and reliance interests. And the ability to circumvent Alaska Hunters through tentative rulemaking only compounds the problem by creating perverse incentives for agencies. But there is hope. Extending the framework outlined in FCC v. Fox Television Stations, Inc., 556 U.S. 502 (2009) to interpretive rules would achieve a far better balance than the Alaska Hunters doctrine does, with or without the Tenth Circuit’s gloss.

Though Fox did not overrule the Alaska Hunters doctrine, as some have claimed, it did substantially undermine what little justification the doctrine had left: First, it explicitly prescribed the general level of judicial scrutiny for changes in agency policy, and second, it constructed a clear framework for balancing agency flexibility and reliance interests through arbitrary-and-capricious review. While the Supreme Court stopped short of applying this framework to changed interpretive rules, it is easy to imagine how that application might work. When the Alaska Hunters doctrine finally meets its end, Fox’s framework would achieve a more desirable balance between agency flexibility and reliance interests.

Fox involved the change of a long-standing Federal Communications Commission (“FCC”) policy related to indecency findings for expletives appearing on television. The old policy absolved “fleeting expletives” of indecency. 556 U.S. at 512. But the new policy largely eliminated this safe harbor. Fox Television Stations challenged the change in policy as arbitrary and capricious. In holding that the APA permitted this change, the five-to-four majority also ruled that the applicable section of the APA “makes no distinction . . . between initial agency action and subsequent agency action undoing or revising that action.” Id. at 515. Some have argued that Fox thus overturned the Alaska Hunters doctrine “sub silentio.” See Brian J. Shearer, Comment, Outfoxing Alaska Hunters: How Arbitrary and Capricious Review of Changing Regulatory Interpretations Can More Efficiently Police Agency Discretion, 62 Am. U. L. Rev. 167, 171 (2012).

For now, however, the Alaska Hunters doctrine lives on. True, the Court made a sweeping statement in Fox—that the APA makes no distinction between initial agency action and subsequent changes to that action. But that statement cites 5 U.S.C. § 706 (the APA’s scope-of-review provision that includes arbitrary-and-capricious review), rather than § 553 (the procedures for rulemaking) or even § 551 (the definition of “rule”). The Court in Fox does not seem to apply this principle to the procedures required to issue and change agency policies. Rather, the Court seems to
limit its uniform treatment of initial and subsequent agency actions to the context of judicial review. Moreover, the D.C. Circuit and district courts have continued applying Alaska Hunters, usually without even a passing reference to Fox.

Fox also illustrates how the Supreme Court applies arbitrary-and-capricious review to changed agency policies. Commentators have suggested that arbitrary-and-capricious review, as illustrated in Fox, would suitably replace the Alaska Hunters doctrine as a balancing mechanism for agency flexibility and reliance interests. Indeed, applying Fox to interpretive rules would be quite simple.

The Fox framework for arbitrary-and-capricious review would require an agency seeking to change an interpretation to demonstrate that the new interpretation is permissible under the statute or regulation and that there are good reasons for the agency's new interpretation. When factual findings support the original interpretation, or when the original interpretation resulted in “serious reliance interests,” the agency must “provide a more detailed justification” than merely reciting subjectively “good” reasons. Fox, 556 U.S. at 515. This does not mean that there is a higher standard for changing an interpretation than for issuing one; rather, it merely reflects the reality that changing an interpretation without considering these factors would be arbitrary and capricious.

The circumstances at issue in Alaska Hunters helpfully illustrate how the Fox framework achieves a more desirable balance between agency flexibility and reliance interests. Prior to the Alaska Hunters doctrine, the exceptionally strong reliance interests of the Alaskan small-business owners were virtually unprotected. Under the doctrine, the FAA could not change its interpretation to reflect new safety concerns in a highly regulated field without complying with arduous notice-and-comment procedures. Given the life-and-death nature of flight safety and the high degree of FAA expertise, adjusting the scope of commercial pilot requirements seems exactly the kind of decision that Congress intended the FAA to make. Under the Tenth Circuit's abracadabra gloss, the FAA could have preserved its flexibility, but only at the cost of misdirecting vulnerable reliance interests. In short, these various interests seem inevitably frustrated.

Under Fox, the FAA would need to demonstrate the new interpretation’s permissibility under the statute and good reasons for the change. In Alaska Hunters, neither party disputed the textual permissibility of extending the definition of commercial pilots to include guide pilots. But the parties would likely clash over whether there were good reasons for the new interpretation. The agency would need to consider the factual basis for the original interpretation and the reliance interests at stake. The factual basis would not prove a formidable obstacle, as the original interpretation was largely based on the subjective, regional conclusion that flying was “merely incidental” to the hunting guides' businesses. Alaska Hunters, 177 F.3d at 1031. The hunting guides’ “serious reliance interests,” on the other hand, would require the agency to make “a more detailed justification” of its new interpretation. Fox, 556 U.S. at 515. The FAA would not have to prove that its safety concerns outweighed the reliance interests at stake. The new interpretation would be arbitrary and capricious, however, if the agency failed to demonstrate sufficient consideration of those serious reliance interests.

So agencies would generally maintain the ability to act within their expertise without undue procedural burden. But, in extreme cases, when reliance interests are so strong that even a new, otherwise well-reasoned interpretation seems arbitrary and capricious, courts would still be able restrict the agency’s flexibility.

The Fox framework also alleviates the harmful effects of agencies using tentative interpretations to circumvent the Alaska Hunters doctrine.
While the Alaska Hunters doctrine has managed to survive this onslaught, its application may soon draw to a close. The Tenth Circuit recognized that agencies could circumvent the Alaska Hunters doctrine through the abracadabra of tentative interpretations. The D.C. Circuit has recognized numerous means of projecting tentativeness. These methods allow agencies to easily create the appearance of tentativeness in order to preserve flexibility in the event they need to change their interpretations in the future. This perverse incentive undermines the reliability of agency guidance and endangers reliance interests without fully unshackling agency flexibility.

Before Alaska Hunters, agency flexibility threatened reliance interests. After Alaska Hunters, reliance interests threatened agency flexibility. But under the abracadabra gloss, both sides lose. Regulated entities cannot assess the risk of reliance, and agency experts cannot adequately respond to safety concerns. Perhaps the two sides of this struggle are more like warring factions. Once their interests align against the reigning authority, regime change seems inevitable. In short, the abracadabra circumvention might ultimately prove to be the gloss that broke Alaska Hunters’ back. In its place, extending the Fox framework of arbitrary-and-capricious review to interpretive rules would strike a more desirable truce. By constraining definitive and tentative interpretations equally and focusing on the extent of reliance rather than on hints of definiteness, Fox would incentivize clear and accurate agency guidance to regulated entities. Under Fox, both sides would win.


Edited by Jeffrey B. Litwak

A Guide to Federal Agency Adjudication, now in its second edition, retains the structure and much of the text of the original edition but also includes updates on important changes and developments in the law. In addition to updates, the 2nd edition includes expanded footnotes that give more depth and understanding to issues requiring more than a single sentence explanation. Also, the authors and editor highlight circuit splits and subjects that courts have not yet conclusively addressed. Newly added is a chapter on Adjudication in the 2010 Model State Administrative Procedure Act (MSAPA). Whether a private or government lawyer who engages in adjudication before federal agencies, or an administrative law judge deciding federal adjudication cases, you will not want to be without this invaluable handbook.

2012 320 pages 6X9
PC: 5010072
$75.95—general public
$59.95—Ad Law Section member price
To order or for more information, visit www.ShopABA.org or call the ABA Service Center at 1.800.285.2221.

For more information, or to order, visit our website www.ababooks.org or call (800) 285-2221.
A Blackletter Statement, 2nd edition

A Blackletter Statement, 2nd edition has not only been updated, but also is better organized and more consistent in style and substance. This concise, up-to-date book articulates this important body of law with sufficient clarity and felicity that practitioners can effectively function within it. This edition includes:

Part I: Adjudication—covering from Due Process Requirements for a Hearing through Post-hearing Requirements.

Part II: Informal Rulemaking includes Applicability, Initiating Rulemaking, and more.


Part V: Freedom of Information, Sunshine, Advisory Committees covers the various associated acts.


To order, visit www.ShopABA.org or call the ABA Service Center at 1.800.285.2221.
By Lincoln L. Davies* and F. Andrew Hessick**

In the first quarter of this year, the Supreme Court issued numerous decisions addressing important issues in administrative law. Arguably most important among these are Perez and Association of American Railroads. In the former, the Court eliminated a D.C. Circuit doctrine requiring agencies to use notice-and-comment rulemaking when they substantively change their interpretation of their regulations. In the latter, the Court revisited the nondelegation doctrine. In addition, two other cases clarified the applicable rules for construing collective bargaining agreements and the scope of state action immunity under federal antitrust law. The bulk of the cases so far this Term, however, involve statutory construction, including a whale of a case involving the Sarbanes-Oxley Act.

Interpretive Rules and Notice-and-Comment Rulemaking

A blockbuster administrative law case is Perez v. Mortgage Bankers Ass’n, 2015 WL 998535. The issue in the case was whether agencies must use notice-and-comment rulemaking when they substantively change their reading of a regulation. Under the D.C. Circuit’s decisions in Paralyzed Veterans of America v. D.C. Arena L.P., 117 F.3d 579 (D.C. Cir. 1997), and Alaska Professional Hunters Ass’n, Inc. v. Federal Aviation Administration, 177 F.3d 1030 (D.C. Cir. 1999), agencies had been obliged to do so—even though their initial interpretive rule was exempted from the APA’s notice-and-comment requirements. The dispute arose in Perez when, in 2006, the Department of Labor issued an opinion letter stating that mortgage loan officers were exempt from the minimum wage and overtime requirements of the Fair Labor Standards Act of 1938, and then, in 2010, allowed its Wage and Hour Division to make a contrary interpretation. Citing Paralyzed Veterans and Alaska Hunters, the Mortgage Bankers Association contended that the Department could make this change only through notice and comment rulemaking.

The Supreme Court held otherwise. In a unanimous decision penned by Justice Sotomayor, the Court ruled that the “Paralyzed Veterans doctrine is contrary to the clear text of the APA’s rulemaking provisions.” Id. at *6. Quoting Vermont Yankee, the Court announced that this doctrine “improperly imposes on agencies an obligation beyond the ‘maximum procedural requirements’ specified in the APA.” Id.

The APA’s plain text, the Court said, was “fatal” to the Paralyzed Veterans doctrine. Id. The APA categorically exempts interpretive rules from notice-and-comment requirements, so the D.C. Circuit erred by focusing on the statute’s definitional provisions rather than this exemption. Indeed, because interpretive rules are exempt from notice- and-comment procedures under § 553, it makes no sense to say that a change in an interpretation must go through notice-and-comment when the initial interpretation did not—but that is exactly what Paralyzed Veterans required. Moreover, “longstanding principles” of administrative law foreclosed the D.C. Circuit doctrine, because “courts lack authority” to impose additional procedures outside the APA or Constitution on agencies, and that “foundational principle[] apply[es] with equal force to the APA’s procedures for rulemaking.” Id. at *7.

Justice Scalia concurred in the judgment but wrote separately to highlight the underlying problem that Paralyzed Veterans sought to address: allowing agencies too much discretion to interpret their regulations, as he implied often occurs under the doctrine of Boules v. Seminole Rock & Sand Co., 325 U.S. 410 (1945). “Needless of the original design of the APA,” Justice Scalia wrote, “we have developed an elaborate law of deference to agencies’ interpretations of statutes and regulations” that has “revolutionized the import of interpretive rules’ exemption from notice-and-comment rulemaking.” Id. at *11.

Focusing on history and the importance of separation of powers, Justice Thomas concurred in the judgment but also wrote separately to question the deference afforded to agencies’ interpretations of their regulations. He noted that the “doctrine of deference to an agency’s interpretation of regulations is usually traced back” to Seminole Rock, but that the rule announced in that case was “unsupported” and since has “taken on a life of its own.” Id. at *14.

Justice Alito concurred in the judgment and the bulk of the Court’s opinion but wrote separately to note that Justices Scalia and Thomas gave “substantial reasons” for reconsidering Seminole Rock. Id. at *10.

Nondelegation Doctrine

The Court revisited the nondelegation doctrine in U.S. Dep’t of Transportation v. Ass’n of American Railroads, 2015 WL 998536. The non-delegation doctrine limits Congress’s power to delegate regulatory power. One of the limitations suggested by Supreme Court precedent is that Congress cannot delegate regulatory power to a private entity. The Passenger Rail Investment and Improvement Act of 2008 directs the Federal Railroad Administration (FRA) and Amtrak to jointly develop “metrics and

* Associate Dean and Professor of Law, S.J. Quinney College of Law, University of Utah.
** Professor of Law, S.J. Quinney College of Law, University of Utah.
standards” related to passenger trains. Pursuant to this power, Amtrak and the FRA issued regulations limiting delays that freight trains may cause Amtrak trains. An association of freight trains challenged these regulations on the ground that they were the product of an unconstitutional delegation because Amtrak is a private entity. They based their argument on statements by Congress that Amtrak “is not a department, agency, or instrumentality of the United States Government,” 49 U. S. C. §24301(a)(3), and that Amtrak “shall be operated and managed as a for-profit corporation,” id. §24301(a)(2)).

The Supreme Court rejected the association’s argument. It began by explaining that Congress’s statements about Amtrak’s status were “not dispositive of Amtrak’s status as a governmental entity for purposes of separation of powers analysis under the Constitution.” Id. at *6. Instead, the Court said, it would conduct an “independent inquiry” to determine Amtrak’s status. Id. Based on its analysis, the Court held that, “for purposes of determining the validity of the metrics and standards, Amtrak is a governmental entity.” Id. at *3.

To support this conclusion, the Court observed that the government exercises substantial control over Amtrak stock and its board members: The Department of Transportation holds all of Amtrak’s preferred stock and most of its common stock. Seven of the nine members of Amtrak’s Board are appointed by the President and confirmed by the Senate, the eighth Board member is the Secretary of Transportation, and the last is picked by the other eight members. Congress may limit Board member salaries. The President may remove any Board member without cause. And statutes impose various qualifications for those Board members appointed by the President.

The Court further noted that the government exercises substantial supervision over Amtrak operations. Among other things, Amtrak must submit reports to Congress and the President, is subject to congressional oversight hearings, and must maintain an inspector general. Moreover, the Court explained, federal statutes direct Amtrak to pursue various goals other than advancing its own private economic interests. Finally, the Court noted that Amtrak has received over $43 billion in federal subsidies. “Given the combination of these unique features and its significant ties to the Government,” the Court concluded, Amtrak “acted as a governmental entity” in issuing the regulations. Id. at *7. The Court nevertheless vacated and remanded the case to the D.C. Circuit for consideration of a number of other constitutional arguments against the regulations.

Although joining the majority, Justice Alito wrote a separate concurrence to highlight a number of constitutional questions raised by the conclusion that Amtrak is part of the federal government. Justice Thomas concurred in the judgment, arguing that the delegation to Amtrak was unconstitutional because it confers too much legislative power on an entity other than Congress.

**Standards of Review**

The Court reiterated and reinforced what substantial-evidence review requires in *T-Mobile South, LLC v. City of Roswell*, 135 S. Ct. 808 (2015). At issue in *T-Mobile South* was a provision of the Telecommunications Act of 1996, which mandates that localities that deny requests to construct “personal wireless service facilities” do so “in writing and supported by substantial evidence contained in a written record.” 47 U.S.C. § 332(c)(7)(B)(iii). T-Mobile South had applied to build a cell phone tower in Roswell, Georgia. The city’s Planning and Zoning Division recommended approval of the application, but after a two-hour public meeting, the City Council denied T-Mobile South’s request. It did so in a four-sentence letter that simply informed T-Mobile South that its request was denied and how T-Mobile South could obtain more information. Twenty-nine days after sending its letter—and thus one day before the thirty-day window to seek judicial review expired—the Council also sent the minutes of the meeting to T-Mobile South.

A divided court held that this fell short of the Act’s requirements. In an opinion by Justice Sotomayor, the Court ruled that the statute’s mandate of substantial-evidence review mandated that cities give their reasons for denying applications. Indeed, on this point, the Court was unanimous. Relying on *SEC v. Chenery Corp.*, 318 U.S. 80 (1943), the Court wrote: “By employing the term ‘substantial evidence,’ Congress . . . invoked . . . our recognition that . . . ‘[substantial-evidence] review requires that the grounds upon which the administrative agency acted be clearly disclosed’ . . . .” *T-Mobile South*, supra, at 815. In reaching this conclusion, the Court rejected the suggestion that forcing cities to give reasons would deprive them of traditional zoning authority, as the Act itself imposed the substantial evidence requirement. The Court noted, however, that the mandate to give reasons was not an onerous one. “We stress . . . that these reasons need not be elaborate or even sophisticated, but rather . . . , simply clear enough to enable judicial review.” Id. The Court also held that the reasons need not be contained in the same document as the denial, but could be provided separately should a city so wish.

Where the Court divided was on the question of whether cities’ provision of their reasons for denial must be contemporaneous with the denial itself. A majority of the Court said yes. This conclusion flowed, the Court reasoned, from an entity’s need to evaluate promptly (because of the 30-day limitation period) whether to
challenge a denial in court. So, the Court held, the reasons for a denial must be provided “at essentially the same time as [a locality] communicates its denial.” Id. at 816. Given this, the Court held that Roswell had failed to comply with the Act and remanded the case to the Eleventh Circuit, though it reserved judgment on whether Roswell’s error was harmless.

Chief Justice Roberts, joined by Justices Ginsburg and Thomas, dissented from the Court’s interpretation of the Act to require a contemporaneous explanation of a denial. The Chief Justice called this interpretation “improbable,” particularly since “T-Mobile never even mentioned this timeline . . . in its filings in the lower courts or its petition for certiorari.” Id. at 821 (Roberts, C.J., dissenting). Justice Thomas also separately dissented, and Justice Alito wrote separately to concur in the Court’s judgment.

Teva Pharmaceuticals USA, Inc. v. Sandoz, Inc., 135 S. Ct. 831 (2015), presented the question of what standard of review applies to factual findings made by a district court in patent claim construction cases. The Court, in its decision in Markham v. Westview Instruments, Inc., 571 U.S. 370 (1996), ruled that patent claim construction is a question exclusively for the courts, not juries. But that case did not answer how factual findings made in the course of claim construction should be treated by reviewing courts.

Teva centered on the applicability of Federal Rule of Civil Procedure 52(a)(6), which mandates that appellate courts cannot set aside factual findings unless they are “clearly erroneous.” All nine justices agreed that this rule has no exceptions. The dispute hinged, then, on whether patent-claim construction could involve factual findings, or if it is solely conducted through legal analysis.

Justice Breyer, writing for seven justices, concluded that factual findings can be made during the course of patent claim construction. He reasoned that, because patents are more like deeds or contracts than statutes, the underlying factual determinations made about them are indeed “findings of fact” under Rule 52 and that district court judges are in the best position to make such findings: “A district court judge who has presided over, and listened to, the entirety of a proceeding has a comparatively greater opportunity to gain that familiarity than an appeals court judge who must read a written transcript or perhaps just those portions to which the parties have referred.” Teva, 135 S. Ct. at 838. The Court thus reversed the Federal Circuit, which had ruled that a de novo standard of review applied to factual determinations in patent claim construction cases.

Justice Thomas, joined by Justice Alito, dissented, arguing that patents are more like statutes than deeds or contracts, and thus present legal questions rather than factual ones.

Statutory Interpretation

Yates v. United States, 2015 WL 7733330, offers a textbook case in statutory construction. The provision in question was 18 U.S.C. § 1519, adopted as part of the Sarbanes-Oxley Act of 2002. That provision makes it a federal crime to “knowingly alter[], destroy[], mutilate[], conceal[], cover[] up, falsify[], or make[] a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence” a federal investigation. The defendant in Yates was a commercial fisherman who had caught undersized red grouper in the Gulf of Mexico and then ordered crew members to toss them back into the ocean after their boat, the Miss Katie, was boarded.

A plurality of the Court, in an opinion by Justice Ginsburg joined by Chief Justice Roberts and Justices Breyer and Sotomayor, found that the term “tangible object” did not include fish. To do so, the plurality turned to the statute’s text, structure, history, captions and titles, and various canons of construction. Focusing on the nouns “record” and “document” preceding “tangible object,” the plurality ruled that the phrase “tangible object” includes only objects that record information. “It is highly improbable,” the plurality wrote, “that Congress would have buried a general spoliation statute covering objects of any and every kind in a provision targeting fraud in financial record-keeping.” Id. at *10. Rather, in order to keep this provision connected to its “financial-fraud mooring,” it is necessary to confine tangible objects in this context to items “used to record or preserve information.” Id. at *3.

Justice Alito concurred. While he found the question “close,” he agreed that as used in the Act, the term tangible object necessarily takes on the meaning of the words surrounding it. Id. at *12. “Applying [the canons noscitur a socci and ejusdem generis], the term ‘tangible object’ should refer to something similar to records or documents. A fish does not spring to mind—not does an antelope, a colonial farmhouse, a hydrofoil, or an oil derrick. All are ‘objects’ that are ‘tangible.’ But who wouldn’t raise an eyebrow if a neighbor, when asked to identify something similar to a ‘record’ or ‘document,’ said ‘crocodile?’” Id. Justice Alito also highlighted that the verbs in § 1519 all appeared to be associated with filekeeping, removing their possible application to fish. “How does one make a false entry in a fish?” Id.

In dissent, Justice Kagan, joined by Justices Scalia, Kennedy, and Thomas, took issue with each of the plurality’s arguments. Citing, among other things, Dr. Seuss (One Fish Two Fish Red Fish Blue Fish), the dissent concluded that “tangible objects” plainly included fish, which are objects and can be touched, under the statute.

“The plurality searches far and wide for anything—anything—to support its interpretation of § 1519. But its
fishing expedition comes up empty.” *Id.* at *17. Congress, it said, intentionally cast a broad net in banning any tampering of evidence, and the plurality’s contrary ruling emptied the statute of that intent. “This case raises the question whether the term ‘tangible object’ means the same thing in § 1519 as it means in everyday language . . . . The answer should be easy: Yes. The term ‘tangible object’ is broad, but clear.” *Id.* at *14.

The scope of federal whistleblower protections was at issue in *Department of Homeland Security v. MacLean*, 135 S. Ct. 913 (2015). Under 5 U.S.C. § 2302(b)(8)(A), an employee cannot be terminated for disclosing information that he “reasonably believes” shows a “violation of any law”—unless that disclosure is “specifically prohibited by law.” In *MacLean*, Robert MacLean, then an air marshal for the Transportation Security Administration, disclosed information about the deployment of air marshals that he believed demonstrated the deployments were unlawful. The TSA dismissed MacLean on the ground that this disclosure violated TSA regulations.

In a 7-2 decision, the Supreme Court held that the dismissal was improper because MacLean was entitled to whistleblower protection. In an opinion by the Chief Justice, the Court explained that the pertinent TSA regulation did not constitute a “law” as used in § 2302(b)(8)(A). The Court noted that Congress used the phrase “law, rule, or regulation” nine times throughout § 2302, but it used only the word “law” in § 2302(b)(8)(A). According to the Court, the use of the word “law” instead of the phrase “law, regulation, or rule” established that Congress meant to exclude regulations from the exemption from whistleblower protection.

The Court bolstered this conclusion by noting that Congress used the phrase “law, regulation, or rule” in the same sentence, suggesting that Congress deliberately excluded regulations when it used only the word “law” in the exemption provision. The Court further reasoned that interpreting § 2302(b)(8)(A) to include regulations would undermine the goal of the whistleblower statute, because an agency could insulate itself from whistleblower suits merely by promulgating a regulation prohibiting whistleblowing. The Court rejected the argument that the word “law” should be interpreted to include regulations that have the “force and effect of law,” explaining that Congress’s use of the word “law,” in contradistinction to the phrase “law, regulation, or rule,” indicated Congress’s intent to exclude all regulations from the exemption.

The Court further concluded that MacLean’s disclosure was not specifically prohibited by 29 U.S.C. § 114(r)(1). That provision directs the TSA to “prescribe regulations prohibiting the disclosure of information [relevant to] security” when necessary. According to the Court, that statute does not prohibit anything, but merely authorizes the TSA to promulgate regulations.

Justice Sotomayor, joined by Justice Kennedy, dissented. In her view, MacLean’s disclosure violated 29 U.S.C. § 114(r)(1). Unlike the majority, she concluded that the statute does not simply authorize the TSA to prohibit disclosures, but instead imposes a legislative mandate requiring the TSA to prohibit disclosure of any information whose disclosure the Under Secretary deems would pose a security threat.

*Holt v. Hobbs*, 135 S. Ct. 853 (2015), presented the question of how to interpret the Religious Land Use and Institutionalized Persons Act (RLUIPA). An inmate in the Arkansas state prison system sought to grow a ½-inch beard in connection with his religious beliefs, and the prison officials denied his request, noting that only inmates with medical conditions were allowed to have beards. The Arkansas Department of Corrections sought to justify this policy on the ground that the beard ban was necessary to prevent prisoners from hiding contraband, and to ensure that inmates can be swiftly identified.

The Supreme Court unanimously reversed the Eighth Circuit’s decision upholding this policy. In an opinion by Justice Alito, the Court reasoned that the RLUIPA extends religious protections beyond the contours of the First Amendment, and that “religious exercise” is defined “capaciously” under the Act. *Id.* at 860. Accordingly, the courts below erred by relying on “the availability of alternative means of practicing religion,” as well as whether a religious belief is shared universally within a religion, as justification for the Arkansas policy. Instead, under RLUIPA, the government may limit practices of religion covered by the Act, only if doing so is the least restrictive way of advancing a compelling interest. As the Court saw it, while limiting contraband and identifying prisoners are compelling government interests, the Arkansas policy hardly achieved them by the most restrictive means. The Court found the notion that a ½-inch beard could conceal contraband such as “razors, needles, drugs,” and SIM cards “hard to take seriously.” *Id.* at 863. And it noted that pre- and post-beard photos could be taken of prisoners, while the beard ban was also “substantially underinclusive.” *Id.* at 865. “Hair on the head is a more plausible place to hide contraband than a ½-inch beard,” the Court wrote. “Nevertheless, the Department does not require inmates to go about bald, barefoot, or naked.” *Id.* at 866.

Justices Ginsburg and Sotomayor wrote separately in concurrence.

In *Direct Marketing Ass’n v. Brohl*, 2015 WL 867663, the Court resolved a question about the Tax Injunction Act (TIA), which provides that federal courts “shall not enjoin, suspend, or restrain” the state “assessment,
levy or collection of any tax.” 28 U.S.C. § 1341. Under Colorado law, if a Colorado resident buys from a retailer who does not collect Colorado taxes, the resident must pay taxes directly to the Colorado Department of Revenue. Colorado law requires the retailer to notify customers of this requirement, and to report tax-related information to the customers and the State. An association of retailers who sell in Colorado but do not collect taxes sought to enjoin this law on constitutional grounds.

In a unanimous opinion by Justice Thomas, the Court held that the TIA did not bar the suit in federal court. It explained that the notice and information requirements did not constitute an “assessment, levy, or collection.” According to the Court, an “assessment” refers to the determination of “tax payer liability;” “levy” refers to “a specific mode of collection” of property to satisfy the tax debt; and “collection” is the “act of obtaining payment of taxes due.” Id. at *5. The Court stated that the notice and information collection occurs before any assessment, levy, or collection; it is used to gather and disseminate information that is later used in the assessment, levy, and collection process.

The Court further concluded that enjoining the notice and reporting requirements would not “restrain” Colorado’s collection of taxes. The Court acknowledged that enjoining those requirements would, in a colloquial sense, “restrain” Colorado’s ability to collect taxes. But, it explained, the term “restrain” should be read to have its more limited definition from equity of “to enjoin.” The Court justified this conclusion on the grounds that “restrain” appears alongside “enjoin” and “suspend,” both of which are terms of art in equity referring to “restrict[ing] or stop[ping] official action.” Id. at *7. The Court also noted that giving “restrain” a precise definition instead of a vague colloquial one would be more consistent with the rule that “jurisdictional rules should be clear.” Id. at *8.

Although joining the majority in full, Justice Kennedy concurred to cast doubt on the constitutional doctrine forming the basis for the association’s challenge to the Colorado law.

Justice Ginsburg also concurred, joined by Justice Breyer in full and Justice Sotomayor in part, to state her views that the majority decision was consistent with Supreme Court precedent and that enjoining the Colorado law did not implicate the reasons motivating Congress for enacting the TIA, which were to prevent individuals from using federal courts to circumvent paying taxes under state tax schemes.


Alabama subjects railroads to the general 4% state tax for the purchase or use of diesel fuel for their rail operations. Motor carriers and water carriers are exempt from this tax. Instead, motor-carriers must pay a 19 cent-per-gallon excise on diesel fuel, and water-carriers pay neither tax nor an excise for diesel fuel. The Eleventh Circuit held that this scheme violates §11501(b)(4).

The Court reversed in a 7-2 decision. In an opinion written by Justice Scalia, the Court began by explaining that §11501(b)(4) prohibits imposing different taxes on “similarly situated persons.” It then explained that whether a group is similarly situated under §11501(b)(4) depends on the theory of discrimination: If the claim is that the railroad is treated differently from all local businesses, all local commercial and industrial taxpayers are similarly situated to the railroad. But if the claim is that the state taxes railroad competitors differently, the relevant group for comparison is other businesses engaged in transportation. The Court buttressed its reading of §11501(b)(4) by noting that, unlike the restrictions in §11501(b)(1)-(3), §11501(b)(4) does not explicitly refer to “commercial and industrial” taxpayers. Id. at *4-*6.

Having concluded that railroads are similarly situated to motor and water carriers, the Court turned to whether Alabama discriminated against railroads by exempting those other carriers from the general tax. According to the Court, the exemption alone did not prove discrimination, because a state does not discriminate against the railroad if it subjects its competitors to other taxes from which the railroad is exempt. Thus, the Court concluded that, by subjecting the motor carriers to an excise that the railroad need not pay, Alabama did not discriminate against railroads. But, the Court said, Alabama’s exemption of water carriers did constitute discrimination, because the water carriers are not subject to a substitute tax or fee. Nevertheless, the Court remanded to the Eleventh Circuit for it to address in the first instance other arguments potentially justifying the different treatment for water carriers. Id. at *6-*8.

Justice Thomas, joined by Justice Ginsburg, dissented. In his view, the only permissible group for comparison for determining discrimination under §11501(b)(4) is all commercial and industrial taxpayers. Thus, he explained, because almost all other commercial and industrial taxpayers are subject to the general 4% tax, Alabama did not discriminate against the railroads.

The Court clarified the requirements for exercising the right to rescind under the Truth in Lending Act in Jesinoski v. Countrywide Home Loans, 135 S. Ct. 790 (2015). The Truth in Lending Act provides that a borrower may rescind certain loans for up to three years after the transaction is consummated. A borrower exercises this right “by
notifying the creditor . . . of his intention” to rescind. 15 U.S.C. §1635. The issue in Jesinoski was whether, for the exercise of the right to rescission to be timely, a borrower must file a lawsuit for rescission within three years—or whether it suffices to provide only written notification of an intent to rescind.

The Supreme Court unanimously held that written notification to the lender within the three-year period suffices to exercise the right to rescind. The Court explained that nothing in the Act requires a borrower to file suit to exercise his right to rescind. Instead, the Act provides only that a borrower need “notify[]” the creditor within three years to rescind. In so holding, the Court acknowledged that the right to rescission under the Act departed from the common law, which allowed a person to rescind only by returning what he received or by obtaining a court decree of rescission. But, the Court explained, “nothing in our jurisprudence, and no tool of statutory interpretation, requires that a congressional Act be construed as implementing its closest common-law analog.” 135 S. Ct. at 792-93.

The Court in Integrity Staffing Solutions, Inc. v. Busk, 135 S. Ct. 513 (2014), clarified the meaning of “postliminary” under the Fair Labor Standards Act (FLSA). At issue in Busk was a putative class action claim by a group of employees who provide inventory warehouse and shipping services for Amazon.com in Nevada. The employees alleged that the requirement that they undergo security screenings before leaving work entitled them to pay under the FLSA. According to the employees, they were spending almost a half hour each day waiting to be screened, but their employer, Integrity Staffing Solutions, was not compensating them for this time.

The Court unanimously rejected the employees’ claim. Noting that the Portal-to-Portal Act of 1947 specifically amended the FLSA to limit what time was compensable, the Court, in an opinion by Justice Thomas, ruled that whether an employer requires an employee to engage in an activity is immaterial for FLSA purposes. Rather, under the statute’s plain language, what controls is whether the activity in question is “preliminary” or “postliminary” to the employee’s “principal activity.” Something is postliminary, the Court ruled, when it is “integral and indispensable to the principal activities that an employee is employed to perform”—an interpretation that, the Court noted, is consistent with Department of Labor regulations and a 1951 opinion letter. Id. at 517. Here, the security screenings were not integral or indispensable to the warehousing and order fulfillment activities the employees performed. Those duties could have been performed without a security screening at all. Justice Sotomayor, joined by Justice Kagan, wrote separately in concurrence.

### Collective Bargaining Agreements

At issue in M&G Polymers USA, LLC v. Tackett, 135 S. Ct. 926 (2015), was the interpretation of a collective bargaining agreement pertaining to retiree benefits. Under a 2000 Pension and Insurance agreement (P&I Agreement) tied to a collective bargaining agreement, M&G agreed to provide “full . . . contribution towards the [health care] benefits” of certain retired employees. The P&I Agreement further provided that it would expire in 2003. M&G subsequently entered into a new P&I Agreement. Consistent with the terms of the agreement, M&G announced that it would no longer provide full contribution to the health care benefits of retirees.

Retired employees sued M&G for violating §310 of the Labor Management Relations Act by breaching the P&I Agreement, claiming that the agreement entitled them to lifetime healthcare benefits for themselves, their spouses, and their dependents. The Sixth Circuit agreed, relying on International Union, United Auto., Aerospace, & Agricultural Implement Workers of Am. v. Yard-Man, Inc., 716 F.2d 1476 (6th Cir. 1983), and other Sixth Circuit precedent. Those decisions established a presumption that parties to a collective bargaining agreement intend retiree benefits to vest for life, even after the agreement has expired. That presumption was drawn from the fact that, in the P&I Agreement, other provisions of the contract had specific termination provisions while the retiree benefit provision did not, and from a desire to avoid the risk of creating illusory promises because some retirees might not be eligible for full health benefits until after the collective bargaining agreement expired.

The Supreme Court vacated the Sixth Circuit’s decision. In a unanimous opinion by Justice Thomas, the Court stated that ordinary principles of contract interpretation apply to collective bargaining agreements for retiree benefits and that the Sixth Circuit’s Yard-Man presumptions are inconsistent with “ordinary principles of contract law.” The Court explained that, under ordinary contract law, the meaning of the contract turns on the intention of the parties, and the Yard-Man presumptions do not rest on record evidence establishing an intent to vest retiree benefits for life. The Court also rejected the general assumption that the general expiration clause for a collective bargaining agreement should not apply to retiree benefits if other provisions have termination clauses and the premise that not construing to vest lifetime benefits would result in an illusory promise: Although not all retirees would benefit from the promise of full contributions to health care, the Court said, at least some retirees would benefit from the promise, which suffices to render

continued on page 36
By Bill Jordan*

D.C. Circuit upholds FTC’s “substantiation” requirement imposed in adjudication without prior rulemaking, but it closely scrutinizes the FTC’s remedial order.

Section 5(a) of the Federal Trade Commission Act renders unlawful any “[u]nfair methods of competition . . . and unfair or deceptive acts or practices in or affecting commerce.” It then empowers the Federal Trade Commission to prevent anyone from engaging in such behaviors. Pursuant to that authority, the FTC brought an administrative complaint against POM Wonderful, LLC, charging that the company had committed unfair and deceptive acts in its advertisement of the health benefits of its products. The FTC ultimately concluded that the company had violated the Act by, for example, touting a very small controlled study when larger and more reliable studies found no benefits for its product, and that the company otherwise distorted the results of various studies of its products. The Commission ordered the company and related actors to cease and desist from such deceptive advertising and barred them from making such claims about the health benefits of the company’s products unless such future claims were supported by “at least two randomized, controlled, human clinical trials demonstrating statistically significant results.”

On review, POM Wonderful, LLC v. FTC, 2015 WL 394093 (D.C. Cir. 2015), the court had no difficulty upholding the Commission’s factual findings of deceptive acts or practices under the substantial evidence standard of review. One of the core factual questions was whether the company had claimed that the superiority of its products for health purposes had been scientifically established, a so-called “establishment” claim. Noting that the company had “repeatedly claimed the benefits of POM’s products in the treatment or prevention of heart disease, prostate cancer, or erectile dysfunction, and consistently touted medical studies ostensibly supporting those claimed benefits,” the court emphasized the Commission’s role in deciding whether these assertions constituted an “establishment” claim. According to the court, “The question whether a claim of establishment is in fact made is a question of fact the evaluation of which is within the FTC’s peculiar expertise.” This is a fairly standard articulation of the deference due to an agency on substantial evidence review of this sort of agency determination of a mixed question of fact and law.

Having found that the company had made such claims with respect to its products, the Commission then found on the factual record that the company had failed to substantiate those claims. No doubt sensing the weakness of its position on the facts, the company argued to the D.C. Circuit that “the substantiation standard applied by the Commission” amounted “to a new legal rule adopted in violation of the Administrative Procedure Act’s notice-and-comment requirements for rulemaking.” The court rejected this argument out of hand, reiterating the long-standing principle that it “is well settled that an agency ‘is not precluded from announcing new principles in an adjudicative proceeding,’ and that ‘the choice between rulemaking and adjudication lies in the first instance within the agency’s discretion.’” In the absence of something more than a mere “new standard” argument, this sort of assertion that an agency must develop principles through rulemaking prior to adjudication has virtually no chance of success.

In any case, the court found that the Commission’s decision did not “involve a ‘major substantive legal addition’ to its substantiation standards.” Instead, it was entirely consistent with Commission precedent and relied upon factors the Commission had applied in the past. Despite general judicial deference to agency remedial orders, the court rejected the Commission’s require- ment that future advertising be supported by at least two randomized controlled human trials. Prompted by First Amendment concerns, the court noted that, “the Commission still bears the burden to demonstrate a ‘reasonable fit’ between the particular means chosen and the government interest pursued.” The court expressed concern that a categorical requirement for two randomized controlled studies imposed considerable costs and precluded advertising based upon a single significant well-designed randomized study even if that study were supported by other legitimate information. Accordingly, the court limited the Commission’s remedial order to requiring only one such study, but it acknowledged that requiring two such studies might be appropriate under certain circumstances.

D.C. Circuit splits on Clean Air Act interpretation—what does it mean?

The D.C. Circuit’s recent decision in Natural Resources Defense Council v. EPA, 2014 WL 7269521 (D.C. Cir. 2014), is an interesting case study of interpretive method. Most decisions concerning interpretations of complex statutes such as the Clean Air Act (at issue here) involve such intricate details of the particular statutes that they have little relevance to issues of interpretive method or broader issues of administrative law. Of course, a panel

---

*Associate Dean of Academic Affairs, University of Akron Law School.
split is always likely to reveal more of interest than a unanimous decision.

Here, the court addressed the complex interaction between EPA's updating of standards governing ozone in the atmosphere and its designation of various areas of the country as in "attainment" or "nonattainment" of those standards. This discussion examines the court's decision concerning EPA's establishment of deadlines for compliance with updated standards. The court also rejected EPA's treatment of so-called "transportation conformity requirements," which the dissent argued had not been adequately briefed and as to which the dissent again disagreed on the merits.

The Clean Air Act requires compliance with the updated standards within a certain period of time, but the question is when that period of time begins (or, of course, when it ends). Although the majority held that "the statute is silent or ambiguous with respect to the specific issue," (Step One of Chevron analysis), it held that EPA's position did not constitute a reasonable interpretation or implementation of the statute.

The majority's position hinged on details of the statute and prior administrative practice, under which the beginning of the period of time for compliance began on the date a certain area was designated or redesignated as in nonattainment of the ozone standard. Under this interpretation, the areas had three years from the date of designation, resulting in a deadline that turned out to be July 20, 2015.

EPA, on the other hand, had decided that the compliance period should begin to run on December 31 of the year of designation, rather than in mid-summer. Among other things, EPA explained that the statute required considering emissions over three ozone zone seasons, but that setting the deadline in the middle of the year would mean that data for that year could not be included in the calculation. Despite having held that Congress had not decided the precise question at issue, the majority rejected EPA's position on the ground that it lacked "any grounding in the statute." Thus, the majority focused narrowly on statutory provisions relating to the beginning of a period of compliance (the so-called trigger date) to determine that those periods must always run from the date that a certain area is designated as nonattainment.

In dissent, Judge Randolph accused the majority of choosing a solution that it thought was "better than EPA's," rather than respecting the agency's authority and expertise under Chevron Step Two. Noting that the Supreme Court had identified a "timing gap" in the statute with respect to determining when "to start the clock" after the issuance of more stringent ozone standards, Judge Randolph would have deferred to the agency's choice of a date that resulted in "the same number of post-designation ozone seasons to demonstrate attainment as similarly-classified areas" had had in the past.

What are we to make of this decision? First, it is interesting to note that the judges in the majority were appointed by Presidents Obama and Clinton. They struck down slightly less stringent deadlines than they ultimately required (presumably the liberal or pro-environment position). By contrast, Judge Randolph was appointed by President George H. W. Bush. He would have allowed more time for compliance (presumably the conservative or pro-state, pro-industry position). Second, the seemingly more liberal majority constrained the range of EPA's discretion, while the conservative dissenter would have recognized broader agency freedom of action.

Finally, it is interesting to compare the interpretive approaches to those taken by Justice O'Connor (for the majority) and Justice Breyer (in dissent) in FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000). There, the conservative majority constrained the agency through a very close reading of the term "safe" in the Food, Drug, and Cosmetic Act and of the legislative history. Here, the liberals took essentially the same approach in constraining EPA. Justice Breyer, by contrast to Justice O'Connor, urged a broader reading of the agency's authority to achieve the statutory purpose, an approach arguably somewhat analogous to Judge Randolph's approach in the decision at hand. Judge Randolph might well cringe at this analogy, but the comparison is interesting.

2d Circuit recognizes possibility of due process property interest in application for Medicare Part A benefits.

In Barrows v. Burwell, 2015 WL 264727 (2d Cir. 2015), the Second Circuit recently addressed a claim that Medicare Part A beneficiaries are entitled to notice of and an opportunity to contest hospital decisions to put them on "observation status" rather than admitting them as inpatients. The issue arises as a result of the hospital practice of avoiding admitting patients by putting them on observation status, sometimes for days at a time. This adversely affects Medicare Part A beneficiaries because Part A fully covers inpatient treatment, while observation status imposes substantial costs upon patients.

The District Court had dismissed the due process claim on the ground that Medicare Part A beneficiaries have no property interest in being treated as inpatients. According to the District Court, the beneficiaries lacked a property interest because the hospital's decision to admit for inpatient treatment involves "a complex medical judgment left to the doctor's discretion." Under Goldberg v. Kelly, 397 U.S. 254 (1970), and Board of Regents v. Roth, 408 U.S.
564 (1972), if the award or termination of a public benefit depends upon the exercise of agency discretion, the potential recipient or holder of that benefit has no property right in the benefit. Thus, at first glance, the District Court’s decision seems clearly correct. Surely, one thinks, this is a discretionary decision. But the plaintiffs had alleged that “the decision to admit is, in practice, guided by fixed and objective criteria set forth in ‘commercial screening guides,’” such that the decision is determined by applicable principles and standards, rather than by the exercise of physician discretion. If that were true, Medicare Part A beneficiaries could have an entitlement comparable to the welfare entitlement recognized in Goldberg as constituting a property right. Thus, the Second Circuit held that the District Court had improperly assumed a fact in issue and remanded for trial on the question of whether the decision to admit as an impatient was truly discretionary.

But there is a significant difference between the welfare recipients in Goldberg and the Medicare Part A beneficiaries in this case. In Goldberg, the government had previously determined that the plaintiffs were entitled to welfare benefits, and it was now trying to terminate those benefits. This case, however, involves patients who have not yet been found to qualify for Medicare Part A benefits. They are, essentially, applicants for these benefits. This raises the question of how someone can have a property interest in something the person does not yet actually have in hand.

The Supreme Court has not ruled on the question of whether an applicant for government benefits has a property right where applicable statutes, regulations, or other governing principles effectively eliminate any discretion in determining whether the applicant qualifies for benefits. At this point, it appears that all circuits to have ruled on the question agree that the situation gives rise to a property interest and to concomitant rights to notice and a hearing. In remanding to the District Court, the Second Circuit relied upon its own precedent recognizing that applicants for government benefits may have a property interest where the decision to grant or deny benefits is determined by applicable standards and not within the discretion of the agency decision maker. Unless some other circuit at some point disagrees, the Supreme Court may never resolve the matter.

D.C. Circuit rejects argument that prior regulatory treatment of an issue narrows the range of possible “logical outgrowths” of a proposed rule.

In National Oilseed Processors Association v. Occupational Safety & Health Administration, 769 F.3d 1173 (D.C. Cir. 2014), various businesses that handle and process grain and other agricultural products challenged a rule that included combustible dust as a “hazardous chemical” under the Hazard Communication Standard. The industry’s argument seems to have arisen from the fact that OSHA had promulgated a safety standard for grain handling in 1987, and that standard had addressed control of combustible dust. When OSHA issued the proposed rule in 2009, it indicated that combustible dust would be treated as an “unclassified hazard,” but the final rule treated combustible dust as a specific category of hazard under the Hazard Communication Standard. In light of the earlier history of distinct treatment for grain handling (including combustible dust), the industry argued that, “the grain industry could not have anticipated that the Hazard Communication Standard revisions would address grain dust because grain dust had been regulated since 1987 by the Grain Handling Standard.” They also argued that “they had no reason to expect that grain would be considered a ‘hazardous chemical’ because food products had long been exempted from the Hazard Communication Standard.”

OSHA overcame all of these objections because it had stated in the proposal that “it was contemplating continuing to treat combustible dust as a hazardous chemical,” and its proposal would have required chemicals posing unclassified hazards, including combustible dust, to be treated as hazardous chemicals under the rule. Thus, the proposal had provided express notice of the possible treatment of combustible dust as a hazardous chemical, although through a slightly different route than the agency ultimately chose in the final rule. The court rejected the proposition that the prior regulatory treatment of combustible somehow undermined the otherwise clear notice provided by the proposed rule.

11th Circuit holds FTC’s pursuit of administrative enforcement action is not final agency action, rejects arguments for exceptions to standard finality requirement.

In LabMD, Inc. v. FTC, 2015 WL 233072 (11th Cir. 2015), the Eleventh Circuit upheld a District Court determination that the Federal Trade Commission’s pursuit of an administrative enforcement action against the plaintiff company did not constitute final agency action and thus was not subject to judicial review under the Administrative Procedure Act. The company, a laboratory providing cancer–detection testing services for physicians, had argued that the FTC’s intrusion into the healthcare arena was an improper expansion of the FTC’s authority, retaliatory, and a violation of the company’s due process rights.
At first glance, this decision seems to be a retread of the old chestnut, *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 239 (1980), in which the Supreme Court had held that the FTC’s issuance of a complaint, even one arguably beyond its jurisdiction, did not constitute final agency action. The principle underlying that and similar decisions is that the issuance of a complaint is only the beginning of a process. The process gives the agency an opportunity to examine the relevant facts and law before reaching a final conclusion. In the later words of *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997), that final conclusion constitutes the consummation of the agency’s decision-making process and determines the rights of those affected and the legal consequences of the agency’s action.

The company argued that the FTC’s complaint and denial of a company motion to dismiss constituted final agency action because, according to the company, the filing of an FTC complaint would almost certainly lead to a cease-and-desist order. But, according to the court, “high odds of a cease-and-desist order coming from the FTC” did not constitute final agency action. However likely the outcome predicted by the company, that outcome had not yet been reached. The company still had the opportunity to convince the FTC to the contrary. For similar reasons, no legal consequences flowed from the FTC’s action to that point because the agency proceeding was still ongoing.

The company tried in vain to suggest various exceptions to the finality requirement. Purported exceptions within finality doctrine foundered on the fact that the agency was “best suited to develop the factual record, continue to evaluate its position on the issues, and apply its expertise to complete the proceeding.” The court also rejected finality arguments as to potential constitutional claims, including assertions of violations of equal protection and of the First Amendment. As to all of these, the court held that the various claims were so “inescapably intertwined” with the substance being considered by the agency such that the court could not intrude until the agency had completed its decision-making process.
News from the States

California’s Climate Change Regulations—Voluntary Offset Programs Upheld in Challenge by Advocacy Groups

By Michael Asimow*

California likes to go boldly where no state has gone before. Thus the Legislature enacted a greenhouse gas (GHG) reduction program in 2006, delegating implementation to the Air Resources Board (ARB). After an agonizing rulemaking proceeding which produced a 2000-page statement of reasons, the ARB adopted a cap and trade program—which has been operating since 2012. California’s economy would, on its own, rank as the seventh biggest in the world, so it seems appropriate that it should be a world leader in attacking climate change. Really, the effort is quite noble, considering that everyone will benefit, but Californians will pick up the tab.

The details, of course, are ferociously complicated. It shouldn’t be surprising that the legal attacks, so far, have come from climate change advocacy groups, demanding that the ARB hasn’t been tough enough. This illustrates the old adage that no good deed goes unpunished. The court recently repelled one such attack in Our Children’s Earth Foundation v. Calif. Air Resources Bd., 2015 WL 757708 (Ct. App. 2015).

The ARB regulations require companies covered by cap and trade to secure permits for their emissions beyond certain levels (which they can purchase from others who don’t exceed those levels). However, the companies can also get “offset credits” (meaning they don’t have to purchase permits to the extent of the credits). Offset credits are for voluntary programs, not required by law, that reduce GHG emissions. They have to be programs that would not have been adopted in the ordinary course of business—in other words, they must meet the requirement of “additionality.” Examples are urban forest programs or reduction of methane emissions from livestock through installation of anaerobic manure digesters. Implementing such options may, of course, be much cheaper than either limiting your own GHG emissions or buying permits from others.

The challengers argued that the Board was not strict enough in establishing criteria to assure “additionality.” The court pointed out that the issue being dealt with here was “counter-factuals”—i.e., would the new programs have even been established if it were not for the possibility of offset credits? How could anyone know? It declined to independently evaluate the effectiveness of specific approved offsets, stating that this would go far beyond the authorized scope of judicial review.

After this decision, the ARB no doubt breathed a big sigh of relief. Nevertheless, legal and political attacks on cap and trade will be a fixture of California administrative laws for a long time to come.

---

*Visiting professor of law at Stanford Law School, professor of law emeritus at UCLA Law School.

CONNECT with the people who know the most about Rulemaking, Administrative Procedure, Working with Government Agencies, and Lobbying. Join the Section of Administrative Law & Regulatory Practice!

Questions? Call 202-662-1582, or go to http://www.americanbar.org/groups/administrative_law/. Join us at our next meeting!
In 2013, I had the privilege of joining a group of government lawyers and academics for a conference in Beijing examining reforms to the Chinese system of administrative licensing. Overhauling the licensing regime has been a major emphasis of the administrative law reform efforts underway in China, and officials in certain provinces have enjoyed major successes in substantially reducing the hundreds of licensing approvals a business must obtain prior to opening shop or undertaking certain regulated activities. While preparing my remarks, I sought to gain a more complete understanding of the U.S. licensing system, attempting to identify “best practices” that Chinese scholars might wish to consider while contemplating reforms. In so doing, I was struck by the paucity of scholarship in the area: although licensing and permitting represent a major mechanism for federal agencies (as well as their state and local counterparts) to regulate economic activity, few law review articles or even general treatises examined the topic at any length.

To be sure, the lack of scholarly attention to the topic does not represent general contentment with the status quo. As a recent report by the Business Roundtable explored, licensing requirements pose a significant impediment to opening a new business, developing property, or undertaking any number of productive economic activities. Though the U.S. licensing system is undoubtedly less burdensome than that prevailing in China or many other major trading partners, U.S. businesses nevertheless must navigate a confusing array of federal, state, and local permits and licenses in any number of contexts. This can both serve as a barrier to new market entrants and greatly increase costs for existing firms. Frustrating though this may be for domestic players, it is even more challenging for foreign firms that may not otherwise be familiar with the U.S. legal landscape—a concern I have often heard expressed in my discussions with Chinese administrative law experts. Nonetheless, federal, state, and local licensing regimes serve a crucial function in preserving the environment, promoting worker safety, and otherwise advancing the public interest. Thus, any reform effort must strive to retain these important public protections while minimizing the burden on regulated entities.

On Capitol Hill, Senators and Representatives from both parties have recently proposed a number of bills that seek to streamline the federal licensing and permitting regime. Earlier this year, Senators Portman and McCaskill introduced the Federal Permitting Improvement Act (S. 280). This follows on the heels of a number of other bills designed to improve federal licensing and permitting considered in previous sessions of Congress, including the Water Resources Development Act of 2013 (S. 601), the RAPID Act (H.R. 2641), the Natural Gas Pipeline Permitting Reform Act (H.R. 1900), and several others. At the same time, the White House has initiated its own reforms, issuing Executive Order 13,604 on Improving Performance of Federal Permitting and Review of Infrastructure Projects.

These various reform efforts share a number of common elements. All feature some combination of enhanced coordination amongst federal permitting agencies (and

Since “federal, state, and local licensing regimes serve a crucial function in preserving the environment, promoting worker safety, and otherwise advancing the public interest,” reform efforts of such permitting and licensing programs “must strive to retain these important public protections while minimizing the burden on regulated entities.”
between federal agencies and their state and local counterparts), concurrent review by agencies with jurisdiction over permitting determinations, and/or periodic deadlines for permitting decisions. In this respect, they closely resemble Administrative Conference Recommendation 84-1, *Public Regulation of Siting of Industrial Development Projects*, which similarly promoted the use of “coordinating agencies” in instances where multiple agencies enjoy jurisdiction and of intermediate deadlines during long-term approval processes. As an initial matter, ACUS is pleased to see this resurgence of interest in the approach it recommended some thirty years ago and welcomes the opportunity to work with Congress, the White House, and affected agencies as they consider and implement these various initiatives.

As current reform efforts proceed, however, ACUS is interested in exploring yet another aspect of the federal permitting and licensing framework. In a recent article in the Duke Law Journal (64 Duke L.J. 133), Professors Eric Biber (UC-Berkeley Law School) and J.B. Ruhl (Vanderbilt Law School) articulate an overarching categorization scheme for federal permits, dividing them into “general” and “specific” permitting programs (while acknowledging that many intermediate cases exist). “General permits” are more akin to agency rules: the issuing authority sets forth a generally applicable framework, and all entities that meet certain qualifications are entitled to engage in a particular activity. “Specific permits,” by contrast, are issued via adjudicative procedures: an entity must furnish certain pieces of information to apply for the permit, and the agency then decides each application on a case-by-case basis. Each approach possesses certain advantages. General permits are usually less burdensome on regulated entities and are therefore more politically viable in contexts in which heavy regulation may prove unpopular. Specific permits allow agencies to tailor the legal requirements in light of the complexities of individual cases and can allow for greater outside participation in rendering individual decisions.

Federal policymakers have not, as a general matter, carefully assessed the comparative strengths and weaknesses of general and specific permitting regimes to determine which approach is optimal in any given case. In some instances, Congress or an administrative agency might be able to streamline an existing specific permitting regime by transitioning to a more generalized framework, setting forth criteria governing a large number of cases rather than considering each application individually. In other cases, a specific permitting regime may be entirely appropriate, allowing the agency to gather extensive information from each applicant and tailor the requirements in light of the complexities of each case. Thus, legislators and agency decisionmakers could benefit from a list of factors to consider in selecting between specific and general permitting programs (or designing hybrid permitting programs).

By the same token, Congress and agency officials should be especially attuned to the benefits and drawbacks of both styles of permitting when designing new regulatory regimes. For instance, Professors Biber and Ruhl have explored the potential use of general permitting under the Clean Air Act to enhance oversight of small-scale sources of carbon emissions (e.g., individual automobiles). Though the more intrusive approach associated with specific permitting would impose a substantial burden on the economy and likely produce public backlash, a relatively modest general permitting system may prove more economically and politically viable.

In this light, ACUS’s project underway on this subject will seek to produce a list of factors that legislators and agency officials could consider when designing new permitting regimes or reassessing existing ones. Professors Biber and Ruhl will serve as consultants on the project, building on the research that they’ve done in connection with the Duke Law Journal article and examining additional permitting regimes. The research will proceed over the next several months. ACUS now plans to hold committee meetings on the project in Fall 2015 and to produce a set of recommendations for consideration at the December 2015 Plenary Session.

One can debate whether the public welfare benefits of modern permitting regimes justify the economic costs. Some scholars of a libertarian bent, most notably Professor Richard Epstein, have suggested, for example, that the entire permitting apparatus be scrapped in favor of less restrictive alternatives. Whatever their merits, such proposals for radical reform are unlikely to materialize in the near future. Regulatory advocates and skeptics would likely agree, however, that whatever system of permitting Congress and agencies erect should be no more burdensome than necessary to achieve its legitimate objectives. The Conference’s current project in this area should substantially advance this goal, providing a clearer picture for legislators and regulators when deciding how to design and tailor permitting programs.
**Recent Articles of Interest**

*By William Funk*

**Symposium. Chevron at 30: Looking Back and Looking Forward, 83 Fordham L. Rev. 475 (2014).** Peter M. Shane and Christopher J. Walker, Foreword; James J. Brudney, Chevron and Skidmore in the Workplace: Unhappy Together; Kristin E. Hickman, The Three Phases of Mead; Aaron Saiger, Chevron and Deference in State Administrative Law; Kent Barnett, Improving Agencies’ Preemption Expertise with Chevron Codification; Abbe R. Gluck, What 30 Years of Chevron Teach Us about the Rest of Statutory Interpretation; Miriam Seifter, Federalism at Step Zero; Emily Hammond, Chevron’s Generality Principles; Peter M. Shane, Chevron Deferece, the Rule of Law, and Presidential Influence in the Administrative State; Christopher J. Walker, Chevron Inside the Regulatory State: an Empirical Assessment; Jack M. Beermann, Chevron at the Roberts Court: Still Failing after All These Years; Thomas W. Merrill, Step Zero after City of Arlington; Peter L. Strauss, In Search of Skidmore.


---

*Lewis & Clark Distinguished Professor of Law, Lewis & Clark Law School.*


The Brennan Center Jorde Symposium, 102 Cal. L. Rev. 1369 (2014), Cass R. Sunstein, The Limits of Quantification; Richard L. Revesz, Quantifying Regulatory Benefits; Lisa Heinzerling, Quality Control: A Reply to Professor Sunstein; Daniel A. Farber, Breaking Bad? The Uneasy Case for Regulatory Breakeven Analysis.

Peter L. Strauss, The President and the Constitution, Case Western Reserve L. Rev. (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2580421. Controversies surrounding President Obama’s use of his office, no less than his immediate predecessors, heighten the interest of two recently published books, Harold Bruff’s Untrodden Ground: How Presidents Interpret the Constitution and Heidi Kitrosser’s Reclaiming Accountability: Transparency, Executive Power, and the U.S. Constitution. Strauss’s paper draws on both in the service of a perception that the presidency exemplifies a tension that animates all of administrative law, between the worlds of law and politics. The aspiration to a “government of laws and not of men” is impossible of realization at even the most basic of levels, individual bureaucrats, since “people” will always be a part of government, and discretion can never be entirely subdoubt. The issue, rather, is assuring that we have a government of laws as well as “people”—that politics occurs within a framework respectful of legal constraint, that we are able to preserve what Peter Shane has wisely described as a “rule of law culture.” Bruff’s work, understandably focusing largely on the President’s role in military and foreign affairs—that context in which Chief Justice Marshall asserted that the exercise of “discretion” could never be subjected to judicial examination—has some tendency to divert our attention from the place of law in controlling that other form of discretion (the EPA’s, say) that we tolerate only because judicial controls are there. Kitrosser’s, more attentive to the domestic regulatory scene, reinforces Shane’s further observation that “the written documents of law must be buttressed by a set of norms, conventional expectations, and routine behaviors that lead officials to behave as if they are accountable to the public interest and to legitimate sources of legal and political authority.” There must be, that is, a psychology of office promoting the personal responsibility of those in whom Congress has created duties of administration—a psychology that might be reinforced both by the discipline of judicial oversight, and by the possibilities of political oversight not just from the White House but also from Congress and ultimately from the people—yet a psychology that ultimately will
depend on personal understanding of the nature of one’s position. The servant acts in a different mindset than the independent contractor—the soldier, than an attorney. See also Kitrosser’s Presidential Administration: How Implementing Unitary Executive Theory Can Undermine Accountability, above, this issue, pp. 4–7.

John F. Manning, Chevron and the Reasonable Legislator, 128 Harv. L. Rev. 457 (2014). Justice Breyer is a quintessential Legal Process judge. In their influential Legal Process materials, Professors Henry Hart and Albert Sacks tell us that all law is purposive, and that interpreters should presume, if at all possible, “that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably.” Justice Breyer likes that idea. He tells us that “when difficult statutory questions are at issue, courts do better to focus foremost upon statutory purpose” rather than struggle with the fine points of the text. From this premise, it follows that a judge should ask how a “reasonable member of Congress” would have wanted a court to interpret the statute in light of present circumstances of the particular case.” This approach, Justice Breyer argues, promotes legislative accountability because the ordinary citizen evaluates laws in terms of their “general purposes” rather than the minutiae of the text. It also “means that laws will work better for the people they are presently meant to affect.” Although the Legal Process school long held sway on the Court, its premises have faced challenges in the past quarter century as the Court has become more textualist. Today’s Court is more prone to view a statute not as the instantiation of a coherent legislative purpose, but rather as a bundle of compromises, whose text takes the law so far and no further. Hence, the Court has emphasized that since “no legislation pursues its purposes at all costs,” interpreters must not assume “that whatever furthers the statute’s primary objective must be the law.” The Court has also suggested that “[i]nvocation of the ‘plain purpose’ of legislation at the expense of the terms of the statute ... takes no account of the processes of compromise.” Accordingly, the Court is now far less likely to extend the reach of a statutory text in order to capture the full legislative purpose or to rely on such purpose to engraft new statutory elements, such as implied rights of action. This shift, however, has not eliminated all Legal Process reasoning from the Court’s case law. Put to one side the odd pockets of doctrine—such as implied preemption or the “borrowing” of statutes of limitations for federal statutes—in which the Court still asserts power to supply the means of statutory implementation in the face of contrary legislative signals. Those doctrines represent a strong form of purposivism that is difficult, if not impossible, to square with the Court’s new approach. At the same time, however, the Court’s cases also rely on purpose in a more modest way that is consistent with its new textualism. In particular, the Court’s new textualism permits interpreters to read statutes reasonably and purposively—to engage in Legal Process-style reasoning—within the margins of discretion left by the statutory text.

This essay argues that the Court’s rules of judicial deference to agency interpretations of law represent an example of this more modest form of Legal Process reasoning. Though the case law on deference seems to oscillate between all-things-considered approaches that fit obviously in the Legal Process tradition and more rule-bound approaches that seem to belong to a more formalist tradition, the truth is that each move by the Court in this area has reflected Legal Process reasoning in at least one important respect: Every framework used by the Court for determining the availability of deference has rested on a legal fiction about presumed legislative intent. Not one has turned on the explicit terms of any governing statute. Rather, every Justice who has weighed in on this topic, from Justice Breyer to Justice Scalia, has done so on the basis of his or her conception of what form of deference makes the most sense. The Court’s convergence around Legal Process reasoning in this context reflects the judiciary’s effort to fill a perceived gap in statutory instructions about the allocation of decisionmaking authority. Judges properly defer to an agency’s interpretation of its own organic act where Congress has delegated to the agency rather than the reviewing court the discretion to choose among reasonably available interpretations. In such a case, the reviewing court fulfills its duty to “interpret” the statute by determining whether the agency has stayed within the bounds of its assigned discretion—that is, whether the agency has construed its organic act reasonably. Since organic acts often delegate interpretive discretion without specifying explicitly to which institution the delegation runs, the Court has taken it upon itself to ask what a reasonable legislator would do. This essay discusses that phenomenon. Part I traces the Court’s various post-World War II approaches to deference. Part II explores the implications of these developments for our understanding of the Legal Process tradition.

Sanne H. Knudsen and Amy J. Wildermuth, Unearthing Seminole Rock, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2555718. In 1945, the Supreme Court blessed a lesser known type of agency deference in Bowles v. Seminole Rock. Also known as Auer deference, it affords deference to agency interpretations of their own regulations. Courts regularly defer to agencies under this doctrine, regardless of where the interpretations first appear or
how long-standing they are. Though Seminole Rock has come under scrutiny in recent years from scholars and the Supreme Court, the modern debate on whether and how to reform Seminole Rock deference still remains untherted from its roots and evolution. This article is the first to consider the historical foundations of Seminole Rock and closely examine how this doctrine has risen to its current stature. In particular, this article starts by describing Seminole Rock’s modest origins, which began in relatively limited price control contexts in the 1940s and 1950s during the first period of expansion of the modern administrative state. It goes on to examine the changing tides of the 1960s and describes how Seminole Rock deference shed its origins and emerged as a more widely-applied doctrine of judicial restraint by the 1970s, a time in which we experienced yet another expansion of the administrative state and a major transformation in administrative law theory. Most notable, the gradual but broad expansion of the Seminole Rock doctrine has occurred largely without explanation from the courts and with very little commentary from academics. This article details how, from its highly specific origins in 1945 to its evolution as an “axiom of judicial review” by the 1970s, Seminole Rock escaped examination by courts and scholars. By uncovering the historical roots of the Seminole Rock doctrine, this article provides new depth to the emerging critiques of Seminole Rock deference and lends critical support for reexamination of the doctrine.

Cynthia Barmore, Auer in Action: Deference After Talk America, 76 Ohio St. L. Rev. (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2584055. For decades, judges and commentators took for granted that courts should defer to an agency’s interpretation of its own ambiguous regulation, unless that interpretation is plainly erroneous or inconsistent with the regulation. In 2011, however, Justice Scalia announced his growing discontent with Auer deference in Talk America, and the Court has since rolled back Auer’s scope in recent decisions. While Auer’s judicial and academic critics have explored the theoretical dangers inherent in the doctrine, they have paid little attention to how courts apply Auer in practice. This article adds to the literature on Auer deference by providing the first in-depth analysis of how federal courts of appeals have reacted to the Court’s recent Auer decisions. In the end, the data suggest that there is little to gain—and much to lose—by overruling Auer. The results, drawn from an original data set of all 190 Auer cases decided by courts of appeals since 2011, reveal Auer is no longer the extremely deferential doctrine it was once considered to be. The rate at which courts grant Auer deference fell from 2011 to 2014 among both Republican and Democratic judges. Overall, deference is most common in traditionally conservative courts of appeals, when the agency is party to the litigation, and when the agency’s interpretation appears in an agency order or public issuance. The results also reveal why courts do—and do not—defer. When courts grant Auer deference, they rarely view the agency’s interpretation as unpersuasive, and, when they withhold Auer deference, they typically rely on Auer’s historical boundaries. The data confirm that courts already have and use the necessary tools to reject unreasonable agency interpretations, while overruling Auer would bring substantial costs in lost predictability and reduced political accountability.

Kristin E. Hickman and Mark Thomson, Open Minds and Harmless Errors: Judicial Review of Post-Promulgation Notice and Comment, 101 CORNEll L. Rev. (forthcoming) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2585242. In 2012, the Government Accountability Office surprised many administrative law specialists by reporting that fully 35% of major rules and 44% of non-major rules issued by federal government agencies lacked pre-promulgation notice and opportunity for public comment. For at least most of the major rules, however, the issuing agencies accepted comments from the public after issuing the rule, and, in most of those cases, the agencies followed up with new final rules, responding to comments and often making changes in response thereto. Post-promulgation notice and comment do not precisely comply with the Administrative Procedure Act, yet are arguably close enough that some courts have felt compelled to uphold them. Challenges to rules adopted in this manner have created a jurisprudential mess, however, as courts struggle to balance their duty to enforce the requirements of the Administrative Procedure Act with the practical realities of the modern administrative state. The sheer extent of the practice demonstrates the need for a more consistent judicial response. This article explores the different approaches courts have taken to judicial review of post-promulgation notice and comment. The article concludes that the all-or-nothing models embraced by some courts are doctrinally and practically untenable, but that the middle-ground alternatives employed by other courts thus far do not ensure that post-promulgation notice and comment function as an equivalent substitute for pre-promulgation procedures. The article proposes a solution to the middle-ground problem, first by reviewing the doctrinal theory surrounding agency rulemaking and then articulating a set of factors for courts to employ in evaluating post-promulgation notice and comment case by case.

Jason Parkin, Due Process Disaggregation, 90 Notre Dame L. Rev. 283 (2014). One-size-fits-all procedural safeguards are becoming increasingly suspect under the
Due Process Clause. Although the precise requirements of due process vary from context to context, the Supreme Court has held that, within any particular context, the Due Process Clause merely requires one-size-fits-all procedures that are designed according to the needs of the average or typical person using the procedures. As the Court explained when announcing the modern approach to procedural due process in \textit{Mathews v. Eldridge}, the due process calculus must be focused on “the generality of cases, not the rare exceptions.” A more granular approach to due process rules, the Court emphasized in a series of rulings between 1976 and 1985, would place an undue administrative and financial burden on the government. This aspect of procedural due process law no longer matches the on-the-ground realities of many procedural regimes. In recent years, the space between “the generality of cases” and “the rare exceptions” has become populated with subgroups of individuals whose procedural needs are different from those of the typical individual. Whether due to subgroup members’ capacities and circumstances, their stronger stake in the proceedings, or their unusually complex cases, subgroup members forced to rely on one-size-fits-all procedures may be deprived of truly meaningful procedural safeguards. At the same time, in ways that were unimaginable just a couple of decades ago, technological developments have enabled government agencies to identify and accommodate subgroup members at a comparatively small additional cost. Based on these developments and the inherently flexible nature of due process, it is time to move beyond the Court’s narrow focus on “the generality of cases” and its preference for one-size-fits-all procedures. To be sure, not every subgroup warrants additional procedural safeguards. However, rather than dismissing subgroup members as “rare exceptions” unworthy of procedural accommodation, courts should evaluate the due process rights of subgroups under the traditional \textit{Mathews} balancing test. This refinement of due process doctrine is necessary to ensure that members of due process subgroups—and not just average or typical individuals—are afforded the fundamentally fair procedural protections guaranteed by the Due Process Clause.

\textbf{Harold J. Krent and Scott B. Morris, Inconsistency and Angst in District Court Resolution of Social Security Disability Appeals, available at} http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2530158. This study of federal court decision-making sheds new insight on the links among judicial outcomes, judicial ideology and demographic factors. It asks whether characteristics of a jurist other than ideology, including age, race, gender and work experience, can affect results in the context of the nation’s most frequently litigated administrative law dispute—social security disability claims. Over ten thousand social security disability cases are resolved each year in the federal court system. As a consequence, almost every district court judge and magistrate decides a significant number of such appeals from claimants each year. Social security cases by and large are similar, turning most frequently on claims of mental illness and muscular skeletal pain. There is ample room for discretion among ALJs and federal judges in determining whether or not an applicant is entitled to benefits when the claim turns on the amount of pain or on the presence of debilitating mental illness. Thus, this is the first study to assess and compare the decision-making of virtually all district court judges (and magistrates) resolving nearly identical challenges. The results are remarkable both in what they showed and did not show. The study reached three principal conclusions. First, decision-making patterns among district court judges and magistrates both reveal the same kind of inconsistencies that plague ALJ adjudication more generally. Thus, while ALJs have been attacked repeatedly for such inconsistencies, district court decision-making fares little better. Second, if the cases are similar, the question arises as to what explains the difference in outcomes. Again, the results are striking in that the different outcomes cannot be explained by the sociological factors that others have investigated. No correlation can be drawn between results and the race, gender, seniority, and prior job experience of the jurist. Nor can they be explained by geography or the percentage of disabled within the region. And, there was only a modest correlation between judicial ideology as measured by the politics of the appointing judge and the judicial decision—conservative judges tended to uphold more appeals. In other words, sociological factors evidently played far less of a role in deciding SSDI and SSI cases that one would have expected. Third, although the sociological attributes did not explain much of the variation in resolution of the cases, the authors note a substantial correlation between remand rates and the circuit in which the judges and magistrates sat. Remand rates from both judges and magistrates in the Tenth, Seventh, and Ninth Circuits, for instance, were almost double those from judges and magistrates in the First and Fourth Circuits. The statistics strongly suggest that the doctrine or “culture” within a particular judicial circuit makes a substantial difference in such decision-making.

\textbf{Miriam Seiffter, States as Interest Groups in the Administrative Process, 100 Va. L. Rev. 953 (2014).} A rising tide in federalism scholarship and political discourse accords unmitigated praise to the notion of partnership between states and federal agencies. This article reveals a more complicated picture. It begins by analyzing the penetrating but usually invisible role of
“state interest groups”—lobbying associations of state officials—in shaping federal regulation. These groups have become the core vehicle for state involvement in federal administration, but surprisingly, their pervasive and critical role is rarely noted in the legal literature. The article shows that the pathologies of state interest groups reflect broader, latent tensions within the emerging project of administrative federalism. To develop this claim, the article disaggregates a trio of benefits thought to flow from state involvement in federal administration—protecting state power, enhancing agency expertise, and maintaining a democratically accountable process—and shows that these benefits are unlikely to coincide. Instead, mechanisms designed to pursue state power as an end in itself thrive at the expense of expertise and accountability. The project of affording states a voice in the federal regulatory process must therefore begin to take account of tradeoffs among key goals, not just benefits. The Article closes by sketching best practices to help agencies, courts, and states balance the competing goals of administrative federalism.

Hannah J. Wiseman, Regulatory Islands, 89 N.Y.U. L. REV. 1661 (2014). Policy experimentation in the “laboratory of the states” is a frequently cited benefit of our federalist system, but a necessary condition of thoughtful experimentation is often missing. To conduct useful policy experiments, states and other sub-federal actors need baseline information. In order to learn from the successes and failures of their neighbors, state actors must understand the laws and regulations that other jurisdictions have enacted. And, despite the seemingly ready availability of legal and regulatory materials in the information age, sub-federal officials often lack this understanding. The literature has recognized that states often fail to share policy results, particularly failures, but few legal scholars have explored the lack of information about the substance of policy—an essential foundation for thoughtful experimentation. This information deficit tends to pervade technical policy areas in particular—those that do not follow uniform codes and require expertise to understand, like hydraulic fracturing and health care. In these areas and others, the states may still be laboratories, but in some cases they are laboratories on islands, with no comprehensive, uniform information exchanged among them. This limits the experimental upside of laboratories—informed, efficient, and innovative regulatory approaches. It also expands laboratories’ known downside—the costs to private entities of complying with different standards. This article explores the problem of regulatory islands and the public choice, political economy, and resource-based dynamics that create them. It also explores areas in which states have effectively shared regulatory content—often with federal help—and argues that the federal government is in the best position to work with sub-federal institutions to produce and synthesize regulatory information. Even if the government does not do the collection and synthesis itself—indeed, mistrust by state actors may prevent this level of involvement—it should fund and partially manage it. Federal involvement is important. When the federal government allows sub-federal experimentation in areas of federal concern, it should already be producing much of this information anyway in order to monitor state regulation to ensure both that federal goals are being met and that states are not imposing externalities on their neighbors. Increasing the availability of regulatory information will enable more informed experimentation and allow monitoring.

Daniel A. Crane, Debunking Humphrey’s Executor, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2569273. The Supreme Court’s 1935 Humphrey’s Executor decision paved the way for the modern administrative state by holding that Congress could constitutionally limit the President’s powers to remove heads of regulatory agencies. The Court articulated a quartet of features of the Federal Trade Commission’s statutory design that ostensibly justified the Commission’s constitutional independence. It was to be non-partisan and apolitical, uniquely expert, and performing quasi-legislative and quasi-judicial, rather than executive, functions. In recent years, the staying power of Humphrey’s Executor has been called into question as a matter of constitutional design. This article reconsiders Humphrey’s Executor from a different angle. At the end of a one-hundred-years natural experiment, the Commission bears almost no resemblance to the Progressive-technocratic vision articulated by the Court. The Commission is not politically independent, uniquely expert, or principally legislative or adjudicative. Rather, it is essentially a law enforcement agency beholden to the will of Congress. This finding has potentially important implications for agency design, constitutional doctrine and theory, and understanding of agency functioning.

Emily S. Bremer, The Unwritten Administrative Constitution, 66 FLa. L. REV. 1215 (2014). It is widely accepted that the powers of the federal government flow from the U.S. Constitution. Yet in practice, most federal power is exercised through administrative agencies, institutions not mentioned in the Constitution. Since the New Deal Era, administrative law—the seemingly disparate set of rules governing agency action that are found in statutes, judicial decisions, and executive directives—has accommodated the emergence of this fourth branch of government not contemplated by the Framers.
Familiar principles, including the separation of powers, the rule of law, and individual liberties, permeate administrative law. But these principles cannot be expressly located in the U.S. Constitution. So what is their legal and theoretical foundation? And how are they found in administrative law?

Roy E. Brownell, II, *A Constitutional Chameleon: The Vice President’s Place Within the American System of Separation of Powers, Part I: Text, Structure, Views of the Framers and the Courts*, 24 Kan. J. L. & Pub. Pol’y 1 (2014). The issue in which branch or branches the Vice President resides has not received full-length treatment in the academic literature. When scholars have analyzed the vice presidency and been confronted with the question, most have made only brief mention of the Vice President’s constitutional status. Many seem content to conclude that the position is simply “anomalous” or a “hybrid” and to leave matters at that. This piece is the first in a two-part attempt to remedy this scholarly gap and discuss more broadly the legal and historical question of where the Vice President resides in U.S. constitutional structure. In determining to which branch of government the Vice President (VP) belongs, there are essentially four schools of thought: 1) VP is part of both the executive and legislative branches, with the exact constitutional locus varying depending on the setting (consequently VP’s constitutional placement could be evenly split between the two branches, primarily a legislative branch position or primarily an executive branch one); 2) VP is part of neither branch; 3) VP is solely part of the legislative branch; or 4) VP is solely part of the executive branch. Ultimately, this article and its companion conclude that the first position is the most persuasive: the Vice President’s status within the American constitutional system fluctuates according to the circumstances.

Joshua Hawkes, and Mark Seidenfeld, *A Positive Defense of Administrative Preemption*, 22 Geo. Mason L. Rev. 63 (2014). Several years ago one of these coauthors wrote an article entitled *Administrative Law’s Federalism* suggesting that, from a functionalist perspective, administrative agencies might be preferable to Congress as the primary locus for federal preemption of state law. That article argued that agency rulemaking is more transparent, deliberative, and accountable than Congress’s legislative process. It therefore suggested that, even without specific statutory authority, an agency should be able to preempt state law by issuing rules authorized by its organic statute. The article prompted responses to the effect that the Constitution requires either that only Congress by statute can preempt state law or that an agency can only preempt state law if Congress has explicitly delegated it that power. In any case, these responses would reject the suggestion in *Administrative Law’s Federalism* that agencies should have the power explicitly to prohibit state regulation as part of their ordinary substantive rulemaking authority. In light of this scholarship, this article provides a positive law defense of the position staked out in *Administrative Law’s Federalism*—that as a matter of constitutional law, agencies with substantive rulemaking authority should be viewed as having the power to preempt state law even if neither their organic statutes explicitly provide for this preemption nor Congress explicitly delegated preemptive discretion to the agencies.

Eloise Pasachoff, *Agency Enforcement of Spending Clause Statutes: A Defense of the Funding Cut-off*, 124 Yale L.J. 248 (2014). This Article contends that federal agencies ought more frequently to use the threat of cutting off funds to state and local grantees that are not adequately complying with the terms of a grant statute. Scholars tend to offer four arguments to explain—and often to justify—agencies’ longstanding reluctance to engage in funding cut-offs: 1) that funding cut-offs will hurt the grant program’s beneficiaries and so will undermine the agency’s ultimate goals; 2) that federalism concerns counsel against federal agencies’ taking funds away from state and local grantees; 3) that agencies are neither designed nor motivated to pursue funding cut-offs; and 4) that political dynamics among state governments, Congress, the White House, and the agencies themselves make funding cut-offs difficult to achieve. This article argues that these critiques are deeply flawed. Among other problems, the critiques fail to account for the variety of types of grants, grant conditions, and rationales for grantee noncompliance; reflect lack of a nuanced understanding of the ways in which distinct federalism concerns play different roles at different times in the development and implementation of grant programs; and unrealistically assume static and unified agency incentives and political relationships. After debunking these critiques, the article offers a new conception of the potential benefit of funding cut-offs in the enforcement of federal grant programs: that the threat of a funding cut-off may be appropriate when it can promote change by the noncompliant grantee and when it can signal to other grantees that the agency is serious about enforcement, thereby increasing grantees’ compliance. The article concludes by assessing the implications of this argument for administrative regime design and judicial review. This work opens up new avenues for research in administrative law on the distinct features of the federal grants regime.
Ronald M. Levin, *The REINS Act: Unbridled Impediment to Regulation*, 83 Geo. Wash. L. Rev. (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2550870. The Regulations from the Executive In Need of Scrutiny Act, or REINS Act, is a legislative proposal that would greatly increase congressional control over administrative agency rulemaking. Under the bill, no “major rule” (a rule with a large economic impact) could go into effect unless Congress affirmatively approved it by adopting a joint resolution. The House of Representatives passed REINS Act bills in 2011 and 2013 on near-party-line votes, and the 114th Congress, under unified Republican control, is likely to take up the proposal again. This article criticizes the bill on the basis that it would create an unmanageable workload for Congress, as well as unacceptable risks of stalemate in the development of important regulations. The article also questions the constitutionality of the bill. Some authors contend that the REINS Act would be valid, because Congress does not have to grant rulemaking power in the first place. In contrast, this article argues that the bill’s provisions would bear a fatal resemblance to a one-house legislative veto, which the Supreme Court held unconstitutional in *INS v. Chadha* (1983). In addition, the article draws on experiences with comparable legislation at the state level.

Caroline Cecot and W. Kip Viscusi, *Judicial Review of Agency Benefit-Cost Analysis*, George Mason L. Rev. (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2519139. This article evaluates judicial review of agency benefit-cost analysis (BCA) by examining a substantial sample of thirty-eight judicial decisions on agency actions that implicate BCA. Essentially, the Administrative Procedure Act tasks federal courts with reviewing agency actions that implicate BCA. This article discusses the challenges that trigger judicial review of agency BCAs and the standards that govern the review. It then presents specific examples of how courts analyze BCAs. Overall, the authors find many examples of courts promoting high-quality and transparent BCA. Courts have been willing to question BCA methodology and assumptions and request more transparency on these issues. As agencies rely more on BCA in their decision-making, judicial review of BCA will be increasingly important. The stakes are high. Additional judicial oversight can be valuable—but bolstering any oversight effort to provide a policy check can also impose societal costs if desirable policies are delayed or left unimplemented.

Ideally, efforts to foster greater judicial review should be structured so that the enhanced role of the judiciary itself passes a benefit–cost test.

Cass R. Sunstein and Adrian Vermeule, *The Law of “Not Now”: When Agencies Deferr Decisions*, 103 Geo. L.J. 157 (2014). Administrative agencies frequently say “not now.” They defer decisions about rulemaking or adjudication, or decide not to decide, potentially jeopardizing public health, national security, or other important goals. Such decisions are often made as a result of general Administration policy, may be highly controversial, and are at least potentially subject to legal challenge. When is it lawful for agencies to defer decisions? A substantial degree of agency autonomy is guaranteed by a recognition of resource constraints, which require agencies to set priorities, often with reference to their independent assessments of the relative importance of national policies. Agencies frequently defer decisions because they do not believe that certain policies warrant prompt attention. Unless a fair reading of congressional instructions suggests otherwise, agencies may defer decisions because of their own judgments about appropriate timing. At the same time, agencies may not defer decisions—or decide not to decide—if (1) Congress has imposed a statutory deadline, (2) their failure to act amounts to a circumvention of express or implied statutory requirements, or (3) that failure counts as an abdication of the agency’s basic responsibility to promote and enforce policies established by Congress. Difficult questions are raised by moratoria, formal or informal, on regulatory activity, especially if they are motivated by political considerations. Difficult questions also arise when agencies cannot feasibly meet statutory deadlines while fulfilling their obligation to engage in reasoned decision-making.

John C. Harrison, *Legislative Power, Executive Duty, and Legislative Lawsuits*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2539135. The Constitution does not entitle members of Congress, or the houses of Congress, as such, to judicial relief for executive failure to carry out the law properly. Nor does the Constitution empower Congress to authorize lawsuits for that purpose by legislators or legislative bodies. The argument that the Constitution itself authorizes that kind of litigation rests on an error concerning the concept of legislative power. Insofar as it creates an interest that could be injured so as to figure in a cause of action, legislative power creates an interest in the validity of legal enactments, not in compliance with them. The interest in validity is not threatened when a private person fails to comply with, or when the executive fails to carry out, a valid enactment. Because the legislative power’s operation
is complete when a valid enactment is created, to enable legislators or legislative bodies to sue executive officers for failure properly to carry out the law would be to enable them to exercise or control the executive power, and so would be inconsistent with the separate vesting of the two powers. Although the federal courts have generally assessed the constitutionality of lawsuits by legislators as such under the Supreme Court’s Article III standing doctrine, the genuinely important question involves causes of action, not the authority of the federal judiciary. Legislative lawsuits to enforce the law raise questions concerning the relationship between the legislature and the executive, not the role of the federal courts in the constitutional system.

**Sean Croston, The Chairman or the Board? Appointments at Multimember Agencies, 51 SAN DIEGO L. REV. 247 (2014).** For the past 130 years, Congress has alternated between two competing structural visions of ideal administrative agency design—single-administrator versus multimember organization. Over time, Congress has frequently reacted to strong arguments from both sides by approving various arrangements that conflect the two models, by providing that the chairmen of these multimember boards and commissions retain some or all power to select high-ranking agency staff, whereas their fellow board or commission members have authority over agency rulemaking, adjudication, and other key functions. Although two interesting paragraphs near the end of the Court’s opinion in *Free Enterprise Fund v. Public Co. Accounting Oversight Board* have received little attention, they put the constitutionality of this conflated model in doubt. These paragraphs settled a fairly novel challenge to the board appointments, which alleged that they were invalid because they were effective only after the SEC Chairman obtained the full Commission’s approval, despite the Constitution’s Appointments Clause, which provides that “the Heads of Departments” may appoint “inferior Officers” within their agencies. In the course of rejecting this particular challenge, the Court set forth sensible new criteria for identifying the “Head” that is constitutionally responsible for making appointments of senior staff within a multimember agency. Namely, the “Head” is generally the person or entity that sets the agency’s internal policies and has final say over the exercise of the agency’s rulemaking, adjudicatory, and investigatory powers. But upon applying these standards to the organizational structures of current multimember agencies, it becomes relatively clear that the constitutional heads of all of these agencies are their respective boards or commissions, acting jointly. This conclusion casts serious doubt upon the constitutionality of a number of chairman-initiated and chairman-controlled appointment schemes long provided by statute. In short, the Court’s reasoning suggests that only the purest forms of the two competing organizational models will pass constitutional muster: a full multimember commission or board, acting jointly, must direct all appointments and removals of subordinate officers, or an agency must be controlled by a single administrator who likewise directs all appointments and removals of subordinate officers. The currently popular half-and-half model whereby multimember agency chairmen control appointments and removals or have the sole power to initiate those appointments or removals does not appear to comply with the Appointments Clause, as interpreted by the Court.

**Edward H. Stiglitz, Unitary Innovations and Political Accountability, 99 CORNELL L. REV. 1133 (2014).** An important trend in administrative and constitutional law is to attempt to concentrate ever-greater control over the administrative state in the hands of the President. As the Supreme Court recently reminded us in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, one foundation for this doctrinal trend is a fear that diffusing power diffuses accountability. The author studies whether institutional innovations resulting from such judicial decisions support this functionalist constitutional value of political accountability, emphasizing under-appreciated complications arising out of inter-branch relations. For most of the article, the author conducts an in-depth empirical case study of the legislative veto, one of the legislature’s more potent tools to control the administrative state, focusing in particular on lessons we can draw from the “laboratories” of the states. Using a novel dataset of state session laws, the author demonstrates that legislatures respond to a judicial invalidation of the legislative veto by augmenting alternative tools of administrative control. Moreover, after the loss of the legislative veto, control over administrative agencies seemingly shifted in favor of the legislature, not the executive—an outcome contrary to the expectations of a unitary executive theorist but consistent with a legislative “backlash” to the judicial decision. These findings question a foundation of the unitary impulse present in much recent judicial doctrine and advocate a dynamic perspective in separation of powers doctrine.
the promise non-illusory. Finally, the Court criticized the Sixth Circuit for failing to apply the traditional presumption against construing contracts to create lifetime promises. The Court accordingly vacated the decision and remanded to the Sixth Circuit to assess the claim without relying on the Yardman presumption.

Although joining the opinion of the Court, Justice Ginsburg concurred, joined by Justices Breyer, Kagan, and Sotomayor, to stress that, although the Yard-Man presumptions are improper, a “clear and express” statement in the collective bargaining agreement is unnecessary to demonstrate an intent to provide lifetime health care benefits for retirees. Instead, courts should examine the entire agreement to determine the parties’ intent.

**Antitrust**

The Court clarified the scope of the state-action exception to federal antitrust laws in *North Carolina Board of Dental Examiners v. Federal Trade Commission*, 2015 WL 773331. Under the state-action doctrine, federal antitrust laws do not apply to anticompetitive actions undertaken by the states in their sovereign capacity. But that immunity does not extend to actions performed by private entities acting pursuant to a delegation of state power, unless the action is done pursuant to a “clearly articulated and affirmatively expressed . . . state policy” whose implementation is “actively supervised by the State.” *Id.* at *6.

Under North Carolina law, the North Carolina State Board of Dental Examiners is charged with regulating dentists. The law further provides that a majority of the board members must be practicing dentists who have been elected to the Board by other dentists. Beginning in 2006, the Board ordered non-dentists to stop performing teeth whitening. It issued these orders without state supervision.

By a 6–3 vote, the Supreme Court concluded that these orders violated the Sherman Act. In an opinion by Justice Kennedy, the Court reaffirmed that the state-immunity doctrine does not apply to anticompetitive decisions rendered by market participants acting pursuant to state delegations, unless the state has “‘articulated a clear policy to allow the anticompetitive conduct, and . . . the state actively supervises the anticompetitive conduct.’” *Id.* at *9. Thus, because the state did not supervise the Board’s orders, those were unlawful.

In so concluding, the Court rejected the Board’s argument that it did not need state supervision because it had been formally designated as a state agency. It explained that supervision was necessary because a decision by such an agency to restrict competition might be motivated by a desire for private gain instead of by an effort to protect other public interests. It also rejected the argument that precluding immunity for the Board would overly discourage market participants from serving on state agencies, explaining that states can ensure immunity by articulating a clear policy and providing supervision of the agency.

Justice Alito dissented, joined by Justices Scalia and Thomas. In his view, state supervision is not a prerequisite for state-immunity; rather, that immunity extends to any state agency.

**MAKE YOUR OPINION COUNT**

The Section values the input of all its members. Make your opinion count. Contact us at anne.kiefer@americanbar.org. Also, please let us know how we can help you get more involved with Section activities.
Pursuant to Article IV, section 1 of the Bylaws, the Nominating Committee of the ABA Section of Administrative Law and Regulatory Practice, composed of chair James W. Conrad, Jr., and members Jill Family and Aditi Prabhu, has made the following nominations for election at the Section’s 2015 Annual Membership Meeting. The meeting will take place on Saturday, August 1, 2015, at 3:30 pm CT in the Downtown Chicago Marriott, Chicago, Illinois.

Chair (by operation of the bylaws)
Jeffrey A. Rosen
Jeff is a partner with Kirkland & Ellis in Washington, D.C. A graduate of Northwestern University and Harvard Law School, he first joined the firm in 1982. During the George W. Bush administration, he left Kirkland to serve as General Counsel of the U.S. Department of Transportation (2003-2006) and General Counsel and Senior Policy Advisor for the Office of Management and Budget (2006-2009). Jeff has served the Section in a variety of roles, including Executive Branch Liaison to the Council (2008), council member (2009-2012), co-chair of the Rulemaking Committee (2009-present), Vice Chair (2013-2014) and Chair Elect (2014-2015) of the Section, and organizer, speaker, or panelist at more than a dozen Section or other ABA-related institutes, programs, and meetings since 2004.

Chair-Elect (by operation of the bylaws)
Renée Landers
Renée 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. This year she became a member of the Social Security Advisory Board Disability Review Panel. 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. Renée 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. Renée is just concluding a term as Vice Chair (2014-2015) and a three-year stint as secretary of the Section. 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.

Last Retiring Chair (by operation of the bylaws)
Anna Shavers
Anna is the Cline Williams Professor of Citizenship Law at the University of Nebraska Law School, where she teaches, among other things, administrative law and immigration law, and where she founded the school’s immigration clinic. Anna has her undergraduate degree from Central State University, her Masters of Science from the University of Wisconsin, and her J.D. from the University of Minnesota. Anna has served the Section in many capacities over the years. She was Secretary from 2006-2009, Vice Chair from 2012-2013, Chair Elect from 2013-2014, Section Chair from 2014-2015, and was a long-time chair of both the Publications Committee and the Immigration Committee, was the Section’s liaison to the ABA Commission on Immigration, and served as a council member. In the larger ABA, Anna has served as a member of the ABA Commission on Immigration Law and Aging and a member of the ABA Coordinating Committee on Immigration Law.

Vice Chair
John Cooney
John is a partner at Venable LLP in Washington, D.C., where he focuses on economic regulatory, administrative, and constitutional litigation involving federal agencies at the trial and appellate levels. He served previously as OMB 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 public member of the Administrative Conference of the United States, where he chairs the Committee on Administration & Management. John 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.

**Section Delegate**
**Hon. H. Russell Frisby, Jr. (Incumbent)**
Russell is a Section Delegate to the House of Delegates, Section Fellow, a former Section Chair, a former Chair of the Nominations Committee, a Member of the ABA’s Standing Committee on Governmental Affairs, a Life Fellow of the American Bar Foundation, and a public member of the Administrative Conference of the United States. A partner at the firm of Stinson Leonard Street, LLP, Russell’s past accomplishments are too numerous to list, but among them is his service as chair of the Maryland Public Service Commission. Russell is a graduate of Swarthmore College and Yale Law School.

**Secretary**
**Linda Jellum (Incumbent)**
Linda is the Ellison Capers Palmer Sr. Professor of Law in Tax at the 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; most recently, she was the Deputy Director of the Association of American Law Schools from January 1, 2012 until July 2013. Within the Section, she is just concluding one year as Secretary. She was a council member from 2010 to 2013, co-chair or vice chair of the Judicial Review Committee from 2007 to 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.

**Budget Officer**
**Hon. Edward Schoenbaum (Incumbent)**
Ed was an Administrative Law Judge for the Illinois Department of Employment Security until his recent retirement; he continues as an ALJ under contract with a number of agencies. He is finishing his second year as Budget Officer, was assistant budget officer the year before this, and is a long time co-chair of the Section’s State Administrative Law Committee. Ed is also a past president of the National Association of Administrative Law Judges, past chair of the ABA’s National Conference of Administrative Law Judges (NCALJ), and past chair of the Senior Lawyers Division (2012-13). For six years he was the budget officer for the Judicial Division, and he is the only state ALJ ever to serve as NCALJ’s representative to the ABA House of Delegates.

**Assistant Budget Officer**
**Lou George**
Lou is Director of Training and Publications at the National Veterans Legal Services Program. 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. In August, he will be completing his third year as a Section Council member. He will continue, however, to chair the Section’s Membership Committee. He has also co-chaired the Section’s Veterans Affairs Committee.

**Council Member**
**Ron Krotoszynski**
Ron is the John S. Stone Chair, Director of Faculty Research, and Professor of Law at the University of Alabama School of Law. He has previously taught at Washington and Lee School of Law and at Indiana University School of Law-Indianapolis. He is a graduate of Emory University and the Duke University School of Law. He clerked for Judge Frank M. Johnson, Jr., on the Eleventh Circuit and practiced at Covington & Burling. He is vice chair of the Section’s Annual Scholarship Award Committee, on which he has served since 2007. He previously co-chaired the Publications Committee (2015-2018).
Council Member Ryan Nelson

Ryan has served as General Counsel and Assistant Secretary for Melaleuca, Inc., an international direct marketing consumer goods company, since 2009. Prior to joining Melaleuca, Ryan worked for 10 years as an attorney in Washington, DC, including as Special Counsel to the United States Senate Committee on the Judiciary for the Supreme Court nomination of Sonia Sotomayor; as Deputy General Counsel at the Office of Management and Budget; as Deputy Assistant Attorney General at the Department of Justice, Environment & Natural Resources Division; and as an Associate at the law firm Sidley Austin. Mr. Nelson has also served as a legal advisor for the Iran–U.S. Claims Tribunal in The Hague, Netherlands, and clerked for Judge Karen LeCraft Henderson on the DC Circuit Court of Appeals. Ryan was appointed by the Council in February 2015 to serve until the Annual Meeting, and is nominated for election to serve the final year of Tracy Genesen’s term (2015-2016).

Council Member Levon Schlichter

Levon is a regulatory lawyer at the Department of Education. He has served in a similar position at the Department of Labor and was a regulatory writer at the Federal Transit Administration. He is a graduate of Penn State University and Temple University’s James E. Beasley School of Law. For several years he has chaired the Administrative Law Committee of the ABA’s Young Lawyers Division, in which capacity he has collaborated with the Section on multiple projects (2015-2018).

Council Member Chris Walker

Chris is an Assistant Professor of Law at The Ohio State University’s Michael E. Moritz College of Law, where he also co-directs the Moritz Washington D.C. Summer Program. He is a graduate of Brigham Young University, the John F. Kennedy School of Government at Harvard University, and the Stanford Law School. He clerked for Judge Alex Kozinski on the Ninth Circuit and for Justice Anthony Kennedy, and worked previously at Kellogg Huber Hansen and the Civil Appellate Staff at the Justice Department. He co-chairs the Section’s Adjudication Committee and blogs regularly at the Yale Journal on Regulation (2015-2018).

Council Member Adam White

Adam is counsel at Boyden Gray & Associates, where he works on regulatory and constitutional issues. He is also an adjunct fellow at the Manhattan Institute. He is a graduate of the University of Iowa’s College of Business and Harvard Law School. He clerked for Judge David Sentelle on the D.C. Circuit, and worked previously at Baker Botts LLP. He co-chairs the Section’s Judicial Review Committee and its Supreme Court series (2015-2018).

Council Member Lynn White

Lynn is an EEO Associate at The George Washington University. She served previously as a compliance officer at the Department of Labor’s Office of Federal Contract Compliance Programs. She is a graduate of the University of Texas at Austin and Howard University School of Law. She has headed the team that runs Notice and Comment, the Section’s blog, since 2012. She is also a member of the team that is redesigning the Section’s website. Lynn is an inaugural member of the Collaborative Bar Leadership Program, a joint initiative of the American Bar Association, the Hispanic National Bar Association, the National Asian Pacific American Bar Association, the National Bar Association, and the National Native American Bar Association to strengthen the pipeline of diverse bar association leaders. She has also served on the ABA Commission on Youth at Risk. Lynn was appointed by the Council in May 2015 to serve until the Annual Meeting, and is nominated for election to serve the final year of Carol Ann Siciliano’s term (2015-2016).
Annual Award for Scholarship (2015)

Each year, the ABA Section of Administrative Law and Regulatory Practice recognizes the best work of administrative law scholarship for the prior year. Eligible books and articles are those that were published (copyrighted) during 2014.

In general, publications worthy of the Section’s award should be:
1. well written, since publications that are informative and develop new ideas need not be difficult to read;
2. tightly reasoned, with a clear analysis that does not detour from development of the main thesis of the argument;
3. broadly applicable to at least several programs or issues;
4. provide a new and timely insight into a current issue of administrative law;
5. provide a new theoretical construct that will aid in the understanding or development of administrative law or develop a practical recommendation for solving a problem of administrative law; &
6. contain a minimum of repetition or recitation of existing work.

The award recipient is selected by early June, announced soon thereafter, and the award winner is invited to the Section’s Administrative Law Conference held in Washington, DC at the Walter E. Washington Convention Center on October 29-30, 2015.

Please submit your nomination package to:
The ABA Section of Administrative Law and Regulatory Practice
1050 Connecticut Avenue NW, Suite 400
Washington, D.C. 20036
Email: anne.kiefer@americanbar.org or fax to 202-662-1529.

Please direct inquiries to Section Director Anne Kiefer at 202-662-1690.

2015 Mary C. Lawton Award for Outstanding Government Service

Created in 1989, the Mary C. Lawton Award for Outstanding Government Service honors the memory of Mary Lawton, a distinguished career government lawyer who served on the Council of the Administrative Law Section from 1983-1986, and as Chair of the Section’s Judicial Review Committee from 1986 to 1988. A graduate of Georgetown Law School where she was first in her class and on the Board of Editors of the Law Journal, Mary began her career in the Office of the Legal Counsel in the Department of Justice. At DOJ, she rose through the ranks to become a Deputy Assistant Attorney General. She received numerous awards from the Department of Justice. After a brief stint as General Counsel of the Corporation for Public Broadcasting and service as Administrative Law Officer at the White House, Mary returned to the Justice Department as Counsel for Intelligence Policy.

Eligibility

The Mary C. Lawton Award for Outstanding Government Service is presented annually by the American Bar Association’s Section of Administrative Law and Regulatory Practice. The nomination should be based on outstanding contributions to the development, implementation, or improvement of administrative law and regulatory practice that reflects sustained excellence in performance. This is an extremely prestigious award, and we hope that you will give thoughtful consideration to this request for nominees. There are relatively few honors for government attorneys that recognize them for the “body of their work.” Past recipients of the Award have spoken of this recognition as being a career capstone, and we are privileged to recognize their service. All government attorneys active in the fields of administrative law and regulatory practice are eligible. While career officials generally will be favored, exceptional political appointees also will be considered. Nominations are being solicited from federal government agency general counsels, state attorneys general, and other officials, as well as from members of our Section and the ABA Government and Public Sector Lawyers Division.

Deadline for Nominations: June 30, 2015
http://www.americanbar.org/groups/administrative_law/initiatives_awards/mary_c_lawton_award_for_outstanding-government-service.html
OFFICERS, COUNCIL AND COMMITTEE CHAIRS

Officers
Chair: Anna Williams Shavers*
Chair-Elect: Hon. Jeffrey A. Rosen*
Vice Chair: Renee M. Landers*
Secretary: Linda D. Jellum*
Budget Officer: Hon. Edward J. Schoenbaum*
Section Delegates: Hon. H. Russell Frady, Jr.*
Ronald M. Levin*
Last Retiring Chair: Hon. Joe D. Whitley*
* Executive Committee Member

Council
Member 2015: Jeffrey Clark
Louis George
Kevin M. Stack
Kathryn Watts
Member 2016: Jack M. Beermann
James P. Gerks
Ryan Nelson
Lynn White
Member 2017: Jane C. Luxton
William S. Morrow, Jr.
Connor Raso
David Rosker

Ex-Officio
State Administrative Law: Hon. Errol Powell
Executive Branch: Jeffrey G. Weiss
Judiciary: Hon. A. Raymond Randolph
Legislative Branch: Daniel Flores
Administrative Judiciary: Hon. Julian Mann III

Liaisons
ABA Board of Governors: Hon. Joseph B. Bluemel
Young Lawyers Division: Christopher R. Fortier
Law Student Division: William Haeberle

ADDITIONAL PROCESS COMMITTEES

Adjudication
Co-Chairs: Carla Gunnin
Christopher J. Walker

Constitutional Law and Separation of Powers
Chair: Anne Joseph O’Connell

Corporate Counsel
Co-Chairs: Richard DeSanti
Ryan Nelson
Karyn Schmidt

Collaborative Governance
Chair: Richard Parker

E-Government (formerly E-Rulemaking)
Chair: Cary Coglianese

Government Information and Right to Privacy
Chair: Bernard W. Bell

Intergovernmental Relations
Chair: Jeffrey B. Litwak

Judicial Review
Co-Chairs: Richard W. Murphy
Adam J. White

Legislation
Co-Chairs: James W. Conrad Jr.
Paul Noe

Regulatory Policy
Co-Chairs: Jonathan G. Cedarbaum
Jennifer Alisa Smith

Rulemaking
Co-Chairs: Brian Callanan
Connor Raso

State Administrative Law
Chair: Hon. Errol H. Powell

GOVERNMENT FUNCTIONS COMMITTEES

Amicus
Chair: David Frederick

Antitrust
Chair: Aaron Nielsen

Banking and Financial Services
Co-Chairs: John F. Cooney
Christine C. Franklin

Benefits
Co-Chairs: Hon. Jodi B. Levine
Tom Sutton

Beverage Alcohol Practice
Co-Chairs: Tracy Gnesen
Charles Smarr

Communications
Co-Chairs: Emily Schleicher Bremer
Brendan Carr

Consumer Products Regulation
Co-Chairs: David H. Baker
Eric Rubel

Criminal Process
Chair: Nancy Eyl

Education
Chair: Caroline Newcombe

Elections
Co-Chairs: Elizabeth Howard
Chris Winkelman

Energy
Co-Chairs: Jeffrey Clark
Kenneth G. Hurwitz

Environmental and Natural Resources Regulation
Co-Chairs: Richard Parker
Richard Stoll

Federal Clean Energy Finance
Chair: Warren Belmar

Food and Drug
Co-Chairs: James T. O’Reilly
Katherine Van Tassel

Government Personnel
Co-Chairs: Joel P. Bennett
Andrew Perlmuter

Government Relations and Legislative Process
Chair: Jack Hughes

Health and Human Services
Co-Chairs: Jane B. Burke
Vanessa Burrows

Homeland Security and National Defense
Co-Chairs: Joe D. Whitley
Van Wolf

Housing and Urban Development
Chair: Otto J. Hetzel

Immigration and Naturalization
Chair: Kate Kalmykov

Insurance
Chair: Janet Belkin

Intellectual Property
Chair: Arti K. Rai

International Law
Co-Chairs: Nerysun Mahboubi
David Zaring

International Trade & Customs
Co-Chairs: Leslie Alan Glick
Reeve Bull

Labor and Employment
Chair: Robert J. Hickey

Ombuds
Co-Chairs: Bennett Fagenbaum
Daniel Rainey

Postal Matters
Chair: Ian David Volner

Securities, Commodities and Exchanges
Co-Chairs: James Gerks
Fionna Phillip

Transportation
Chair: Jacqueline Glasman

Veterans Affairs
Chair: Michael Viterna

Young Lawyers
Chair: Christopher R. Fortier

SECTION ACTIVITIES COMMITTEES

Administrative & Regulatory Law News
Editor-in-Chief: Cynthia A. Drew

Administrative Law Review
Editor-in-Chief: Wenxi Li

Annual Awards
Committee on Outstanding Government Service
Co-Chairs: Elaine S. Reiss
John Cooney

Budget
Chair: Hon. Edward J. Schoenbaum

CLE
Chair: Andrew Kloster

Committee on Scholarship
Chair: Russell L. Weaver

Developments in Administrative Law
Co-Editors: Jeffrey Lubbers
Michael Tien

Diversity
Chair: Jennifer Smith

Fellows
Chair: Michael Herz

Fellowship
Chair: Hon. Joe D. Whitley

Membership and Communications
Chair: Louis George

Nominations
Chair: James W. Conrad, Jr.

Pro Bono
Chair: Michael E. Herz

Publications
Chair: William S. Jordan III

Technology
Chair: Justin Hurwitz

Seasonal Meetings
Chair: Andrew Emery

Homeland Security
Chair: Joe D. Whitley

Ad-Hoc Committees

Review of Recruitment of ALJ’s by OPM
Chair: John Vittone

Homeland Security Coordinating Committee
Chair: Joe D. Whitley