2013 Administrative Law Conference

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I write this note to you as the year 2013 has come to a close with good wishes to you and your families for a prosperous New Year. The beginning of the year is a good time for reflection and a little free association with the swirl of personal and business obligations we are all confronted with the beginning of a new year.

With the passage of time, I reflect that I have come to increasingly value and greatly appreciate the legacy that our Founding Fathers left in the form of the U.S. Constitution and Bill of Rights. As lawyers and AdLaw Section members, we need to remind our peers of the importance of these documents as they pertain to the rule of law and ultimately to the protections that free and open regulatory process provides all Americans.

This may sound somewhat basic and beneath the Section's responsibilities; but, I ask you to spread the word that the Administrative Law and Regulatory Practice Section is the place to be, to paraphrase a great quote of President Thomas Jefferson, where regulatory process should be seen as nourishment to the tree of liberty and the protections that the Constitution and Bill of Rights affords all Americans through the regulatory state.

The regulatory state, however, is only so good as the participation of lawyers of all professional and educational backgrounds in it. To be sure, you may have avoided Administrative law in law school, like so many others, but if you are actively in the practice of law – administrative law will find you whether you like it or not. Virtually every law passed by a legislative body has regulations that implement the statute.

Fox News is advertised as a place where the news is “fair and balanced,” and the ABA’s Administrative Law Section needs no advertising because it is a place for “fair and balanced” discourse on the impact of regulatory law on everything from the use of cell phones on airplanes to food quality to the permissible investment and business practices of financial institutions under the new Volcker Rule.

To be sure, there are other Sections and places where fair and balanced discussions on regulatory law take place in the ABA, but a good place for you to get an active dialogue on regulations is the ABA's Administrative Law and Regulatory Practice Section.

To accomplish this place for dialogue, our programming is second to none, and the Section’s premiere program annually is the AdLaw Fall Conference.

Looking back on November 2013, to our AdLaw Fall Conference at Georgetown University, I wanted to express my sincere appreciation to all who participated as panelists and moderators in our Fall Administrative Law Conference. This meeting’s program Chairs, Carol Ann Siciliano and Russell Frye, put together a superb conference. In particular, the recognition that was given to our award winners during the Awards Luncheon was a highlight of the conference. Award Winners included Rosemary Hart, awarded the Mary C. Lawton Award for Outstanding Government Service; Professor Kevin Stack and Professor Jerry Mashaw, individually honored with Awards for Scholarship in Administrative Law; and Taylor Owings, awarded the Gelhorne–Sargentich Law Student Essay Award. Our two major sponsors, American University Washington College of Law and The George Washington University Law School are to be congratulated for their financial commitment to the Section.

I would also like to encourage our younger lawyers to visit the Administrative Law Career Opportunities website at http://www.americanbar.org/groups/young_lawyers/events_cle/administrative_law_career_opportunities.html. Please feel free to contact Chris Fortier, Chair of the ABA Young Lawyers Division Membership Committee and Liaison to the AdLaw Section, at his number 757-880-1019 or by email at crflego@gmail.com. Sam Wice, who has assumed the role as ABA Law Student Division Liaison to the AdLaw Section, can be reached at Sam.Wice@lawnet.duke.edu or by phone at 314-740-6915. Sam's Law Student Careers Teleconference on January 16th entitled, “The IL Summer Job Search: Advice from Hiring Managers” was very successful. We look forward to hosting more programs like this with Sam's assistance in the coming months.

Also, I would like to congratulate Adam White and Brian Callahan of the Section on their teleconference program on the NLRB v. Noel Canning case that was argued in the Supreme Court on January 13, 2014. Although weather conditions were somewhat challenging in January, our Mid-Year Council Meeting on the 29th was very productive. I would like to thank all of you who were in attendance either by conference call or in person. Unfortunately, our quarterly Mix & Mingle event was canceled due to snow; however, we rescheduled this excellent networking event for March 26, 2014. Please mark your calendars to attend and bring a non-ABA AdLaw member with you to let them have an opportunity to “taste” what the AdLaw Section is about at all such future events.

continued on next page
The concept of homeland security has evolved from a mostly academic military proposal to the biggest reorganization of the federal government since the creation of a Defense Department in 1947. Homeland Security: Legal and Policy Issues draws upon the expertise of leading practitioners in the emerging and expanding field of homeland security. This comprehensive resource looks at homeland security as a critical area of legal practice affecting both the public and private sectors. It also serves as an important compilation of policy and practice-oriented information pertaining to the Homeland Security Act.

Looking ahead, please put several dates on your calendar so you can attend some of the great slate of programs and meetings for 2014:

10th Annual Administrative Law & Regulatory Practice Institute
April 3–4, 2014
Omni Shoreham Hotel, Washington, DC

Spring Conference & Council Meeting
April 25–26, 2014
April 26, 2014
Grand Hyatt, Atlanta, Georgia

Administrative Law Section Mix & Mingle
May 26, 2014
American Bar Association Headquarters, Washington, DC

9th Annual Homeland Security Law Institute
May 29–30, 2014
Walter E. Washington Convention Center, Washington, DC

ABA Annual Meeting
August 8, 2014
Boston, Massachusetts

Administrative Law Conference
October 16–17, 2014
Washington, DC

Please join us at some of our excellent programs throughout the year.

In addition to great programs, take a look at the AdLaw Publications Section site for a number of diverse topics and “must have” books to consider for your day-to-day practice, such as the Developments in Administrative Law and Regulatory Practice, Veterans Appeals Guidebook, Federal Agency Adjudication, Federal Agency Rulemaking, Federal Torts Claims Act, Lobbying Manual, Blackletter Administrative Law, Judicial and Political Review, Federal Preemption of State Law, Federal Administrative Procedure Sourcebook – just to name a few. Please visit the Publications site at http://www.americanbar.org/groups/administrative_law/publications.html.

I would like to challenge you this year to actively spread the word on the AdLaw Section, encouraging your non-member friends and colleagues to join, particularly those engaged in day-to-day work in Administrative law. Our Section’s slogan says it best, “Administrative Law—Everybody Does It!” And the AdLaw Section membership is a great bargain!

With appreciation,
Joe Whitley

Pictured on the front cover are, left, Section Chair Joe Whitley and Mary C. Lawton Award for Outstanding Government Service winner Rosemary Hart; on top right, Jamie Conrad and Chair’s Award for Outstanding Volunteer Service winner Jeff Lubbers; and, on bottom right, Jack Young with Gellhorn-Sargentich Law Student Essay Award winner Taylor Owings.

From the ABA Section of Administrative Law and Regulatory Practice

Homeland Security: Legal and Policy Issues

Joe D. Whitley and Lynne K. Zusman, Editors

The concept of homeland security has evolved from a mostly academic military proposal to the biggest reorganization of the federal government since the creation of a Defense Department in 1947. Homeland Security: Legal and Policy Issues draws upon the expertise of leading practitioners in the emerging and expanding field of homeland security. This comprehensive resource looks at homeland security as a critical area of legal practice affecting both the public and private sectors. It also serves as an important compilation of policy and practice-oriented information pertaining to the Homeland Security Act.

The book begins with an evaluation of the policy shifts and outcomes to date and looks ahead to the challenges that exist for the Obama Administration. It then seeks to familiarize you with 14 key and essential areas in the Homeland Security legal discipline such as state and federal emergency powers, the USA Patriot Act, information security, CFIUS and foreign investment and so much more. The expert authors have included easy references to additional authorities and information sites, making this publication a useful tool and lasting legal education sourcebook. Order your copy today.

To be well informed on Homeland Security law this book is a must read.”

—The Honorable Tom Ridge, Chair of Ridge Global, Former Secretary of the U.S. Department of Homeland Security and Former Governor of Pennsylvania

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Administrative & Regulatory Law News

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Over 475 persons attended the Section’s annual Fall Conference — reflecting the importance, as Section Chair Joe D. Whitley noted, of “this premiere program for lawyers who practice in the area of administrative law.” Fifty-eight speakers in fourteen sessions over two days provided meaningful insights and in-depth analysis of cutting-edge issues critical to the profession. Conference Chairs Carol Ann Siciliano and Russell Frye put together a top-notch program covering a variety of topical subjects for attendees. The high level of participation — particularly given the impact of sequestration and the prior month’s government shutdown on government agency personnel — was a testimonial to the high regard in which the program is held.

In Democracy and Statutory Interpretation: New Empirical Work and Positive Theory, moderator Victoria Nourse and William Eskridge, Abbe Gluck, and Edward Rubin provided stimulating perceptions of recent empirical research on major new theories on interpreting law that challenge current notions used by courts as to how Congress governs. This topic included a review of a recent empirical survey of congressional staffers and how they draft statutes; rule-based theories of statutory interpretation; and meta-theoretic approaches based on democratic theory. A spirited audience interchange with the panel was initiated by Peter Strauss.

In Rulemaking 101, Andrew Emery, Jane C. Luxton, and Aditi Prabhu gave an introductory/refresher presentation on procedural steps, legal requirements, and practical constraints confronted in the rule-making process.

In The Globalization of Administrative Law, Chris Brummer, Reeve T. Bull, Richard W. Parker, Adam Schlosser, and Jeff Weiss examined the conflicting jurisdictional issues that arise where supply chains and trading partners interact in overlapping and duplicative jurisdictions and current U.S. administrative law procedures prevent optimal coordination between U.S. agencies and their foreign counterparts. Central to their analysis were functions of the Transatlantic Trade and Investment Partnership, current cooperation activities through the U.S.-Canada Regulatory Cooperation Council, and U.S. and European Union implementation of financial market reforms. The need for new compatibility analysis was emphasized.

In The White House Role in the Agency Rulemaking Process, moderator Richard J. Pierce, Jr., and Lisa Heinzerling, Jennifer Nou, and Michael Livermore discussed the trend towards centralization of regulatory power in the White House, and its influences on behavior in nominally independent agencies that still strive to maintain as much
freedom as is possible. The discussion also touched on decentralization trends on the White House staff.

In Ethical Quandaries for Public Lawyers, moderator Diana Wick, Carlos F. Acosta, Judy Kaleta, Sharon E. Pandak, Richard H. Meinick, and Cynthia Rapp provided a series of role-playing scenarios (in a lively and sometimes humorous format) that effectively illustrated both unique problems that can arise for government lawyers and various issues in handling them.

Following a satisfying lunch, in The Democratic Potential and Possible Pitfalls of Social Media & the Administrative State, moderator Emily Bremer, Alissa M. Ardito, Reeve T. Bull, and Michael Herz provided thoughtful commentaries on using social media and virtual technologies that might enhance democracy and citizen participation in agency decision-making. The Open Government Directive, M-10-16, Office of Management and Budget (2009), asked federal agencies to increase their use of innovative and interactive technologies in enhancing participation and responses to agency proposed rules. Legal and policy issues related to use of technology illustrated in the forthcoming Administrative Conference Report, “Social Media in Rulemaking,” were examined, as were tensions between widespread popular participation and informed deliberation that underlie assumptions about the need to democratize agency practice. Alissa Ardito provided a thoughtful analysis of the effect of First Amendment free speech jurisprudence, including the Public Forum Doctrine, on this emerging effort to solicit public commentary.

The George Washington Law Review’s Annual Review of Administrative Law, moderated by William E. Kovacic, provided a forum for distinguished professors who have authored significant contributions in this year’s volume: (1) Mariano-Florentino Cuellar, who is writing the forward for the volume; (2) John F. Manning, whose article discusses use of legislative history under the Chevron doctrine; and (3) Christopher J. Walker, whose article examines immigration agency adjudications from a study of over 400 court of appeals decisions.

In Speak No Evil: Changing Controls on Commercial Speech by Federal Enforcement Agencies, moderator James T. O’Reilly, Richard J. Leighton, David Kirstein, Richard Samp, and Katherine A. Van Tassel examined topics such as whether government prosecution of factual commercial claims before agency approval of such claims constitutes suppression of commercial speech; whether the government can compel detailed dissemination of airline fares where the total price is disclosed; and whether government can suppress food firms from advertising truthful information about its products that might improperly influence consumer purchase decisions.

In What Technology Can Do for Rulemaking, moderator Neil Eisner, Bryant Crowe, Cynthia Farina, Brett Jortland, and Whitney Patross evaluated three successful applications of technology at various points in the rulemaking process. Representatives from the Departments of Transportation and Homeland Security described their current rulemaking management systems. Representatives from U.S. Fish & Wildlife Service and the Regulations.gov project discussed software being used to sort and identify unique text in mass email comments, including software available to agencies through Federal Document Management System. The panelists also discussed how to choose the right rules and tools available in Web 2.0 techniques now being used for successful e-participation by the Consumer Finance Protection Bureau and the CeRI Regulation Room project.

In After Sequestration: Getting the Job Done with a Slashed Budget (and Pitfalls to Avoid), moderator Russell Frye, John F. Cooney, James T. O’Reilly, Elise Packard, and Karyn Schmidt focused on using private parties, including industry groups, to participate in regulatory development and enforcement in the context of significant governmental belt-tightening and reduced budgets. The panelists also discussed limitations imposed by the Antideficiency Act’s prohibition on accepting voluntary services; the extent to which budgetary constraints can excuse compliance with statutory deadlines; and problems with using agency “guidance” in lieu of rulemaking.

continued on next page
Jeffrey S. Lubbers again moderated Developments in Administrative Law. In Part I, William Funk (Constitutional Law) and Phyllis Bernard (Adjudication) presented overviews of developments in administrative law in these areas. In Part 2, William S. Jordan III (Rulemaking), Kathryn A. Watts (Judicial Review, Scope of Review), and Richard Murphy (Judicial Review, Access to the Courts) presented the most important developments in these areas.

At the Awards Luncheon, Jerry L. Mashaw, Sterling Professor of Law, Yale Law School, was honored with the Section’s 2013 Annual Award for Scholarship for Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law (Yale University Press 2012).* Kevin M. Stack, Professor of Law, Vanderbilt Law School, was honored with the Section’s 2013 Annual Award for Scholarship for “Interpreting Regulations,” 111 Mich. L. Rev. 355 (2012).** The Mary C. Lawton Award for Outstanding Government Service was bestowed upon Rosemary Hart, Senior Counsel, Office of Legal Counsel, U.S. Department of Justice — who early in her career worked with

Mary Lawton.*** The Gelhorn-Sargentich Law Student Essay Award was then presented to Taylor M. Owings for her paper Identifying a Maverick: When Antitrust Law Should Protect a Low-Cost Competitor.

In The Year in Government Information: NSA Surveillance, Bin Laden Photos, White House Logs and More, moderator James T. O’Reilly, Bernard W. Bell, Alan Butler, and Harry A. Hammitt reviewed developments regarding public access to government information and related considerations of privacy law during the last year. Among matters covered were the constitutionality of restrictions to “citizens only” provisions in state Freedom of Information Act (FOIA) laws; FOIA litigation relating to the government’s participation in the war on terror (such as the photos and videotape on the raid on Osama bin Laden’s compound); and the accessibility and publication of information regarding gun owners.

In Rulemaking in Comparative Perspective, moderator Jeffrey S. Lubbers, Susan Rose-Ackerman, Neyesun Mahboubi, Mariana Mota Prado, and Dorit Rubinstein Reiss provided perspectives on administrative law systems from different countries and continents. They identified common ground and contrast, emphasizing different forms that participation and evidence-based regulation can take.

The 2013 conference concluded with the Annual Section Dinner, an enjoyable event held aboard the National Elite Yacht while cruising the Potomac. After dinner, Section Chair Joe D. Whitley bestowed upon Jeffrey S. Lubbers, Professor of Practice in Administrative Law, American University, Washington College of Law, the Chair’s Award for Outstanding Volunteer Service. Professor Lubbers, whom some affectionately dubbed “Volunteer of the Decade” for the breadth of his contributions to the Section, then gave personal commentary as to why he has through the years remained so committed to the work of the Section. Recent Section Chair Michael Herz, Arthur Kaplan Professor of Law, Cardozo School of Law, then received the Fellow Award, sharing reminiscences about his recent experiences and satisfactions during his year serving as Section Chair.

*See also Remarks of Jerry L. Mashaw, this issue.
**See also Remarks of Kevin M. Stack, this issue.
***See also Remarks of Rosemary Hart, this issue.
Remarks of Rosemary Hart,*
U.S. Department of Justice,
Accepting Mary C. Lawton Award
For Outstanding Government Service

Thank you to Elaine Reiss for that lovely introduction — and thank you to the American Bar Association’s (ABA’s) Section of Administrative Law & Regulatory Practice for honoring my government service with the Mary C. Lawton award. I had the great fortune to have worked with Mary Lawton early in my career in the Department of Justice (DOJ), and she was both a teacher and a genuine inspiration to me. So it is especially meaningful — and really, quite moving — for me to be associated with Mary through this award.

I was not only greatly honored, but also completely surprised when Jonathan Cedarbaum called me to tell me that I had been selected. I had no idea that I had even been nominated. It is famously difficult to keep a secret in Washington, but I am not surprised that my current and former colleagues and supervisors at the Office of Legal Counsel (OLC) who had written letters in support of my nomination had managed to keep this under wraps. We take confidentiality very seriously in OLC, and this obviously was no exception. Thank you to the former heads of OLC who wrote in support of my nomination, from Chuck Cooper, who hired me, to the current Assistant Attorney General, Virginia Seitz, and the many outstanding men and women who have led the office inbetween. That support and appreciation means a lot to me.

I also want to thank the AdLaw Section for establishing the Mary Lawton award. The award not only continues to honor Mary for her many contributions to the Department of Justice and the government as a whole, but also gives important recognition to government attorneys who work hard to advance the rule of law — many times behind the scenes. This has been an especially difficult year for many federal employees, and it’s terrific that the AdLaw Section continues to recognize the work of career government attorneys in this public way. This award not only honors the recipients, but also focuses positive attention on government service more broadly.

I’ve been asked to talk about my work at the Office of Legal Counsel, and I will do that, briefly. But in doing so, I also want to talk about Mary Lawton.

For those of you who are not familiar with the Office of Legal Counsel, it is an office of about 25 attorneys in the Department of Justice, headed by one of the Department’s Assistant Attorneys General. OLC provides legal advice to the President and to all Executive Branch agencies. On delegation from the Attorney General, we issue legal opinions and give oral advice in response to requests from legal offices within the Executive Branch, including the White House Counsel's Office. We are responsible for providing legal advice on many significant constitutional and statutory questions and for reviewing pending legislation for constitutionality.

OLC also reviews for form and legality every executive order and proclamation issued by the President, as well as the orders, including regulations, issued by the Attorney General. And it is that function, what we call OLC’s “orders practice,” that has been the core of my responsibilities at OLC for over twenty-five years.

The orders practice has been endlessly fascinating to me because of the variety of subjects and issues. The President’s orders could impose economic sanctions against a country, create commissions to address specific matters (such as the Deepwater Horizon oil spill or intelligence community activities related to weapons of mass destruction), declare national emergencies and invoke emergency powers, and issue government-wide directives to agencies on everything from ethics to access to classified information to labor-management relations to earmarks. This legal review requires OLC attorneys to clearly understand the constitutional law, administrative law, statutes, and regulations at issue. We determine whether the proposed executive order is legal, but don’t make any determination as to whether the order is good or bad from a policy perspective. The Attorney General’s (AG’s) orders obviously don’t cover as wide a range of issues as the President’s orders — DOJ is not primarily a regulatory agency — but the AG does issue regulations on many important topics, including the Americans with Disabilities Act, the Prison Rape Elimination Act, and immigration law. One of the things I love about the orders practice is that you’re learning something new every day.

With most areas of law, the more you know about something, the more interesting it becomes, and

*Senior Counsel, Office of Legal Counsel.
the Administrative Procedure Act (APA) is no exception. OLC gets a lot of APA questions from within the Department and also from other agencies, and many of them find their way to my desk at some point. Before this particular audience, I can at long last confess how much I enjoy examining an imaginative good cause argument (or an attempt at one), or determining whether some other exception to the APA’s notice-and-comment requirements applies, or whether a final rule is a logical outgrowth of the proposed rule, or whether some agency action poses an Accardi problem. Fortunately, I work in an office of colleagues who find these issues interesting, too, and it’s always great to have a team working through the issues together.

On the top shelf of the small bookcase I keep next to my computer, I keep an ABA publication that is important to OLC’s work and mine in particular — and that’s Jeffrey Lubbers’ A Guide to Federal Agency Rulemaking. I used to check that book out of the OLC library so often that the office now orders me a personal copy every time a new edition comes out. I consult it often, and it’s always sitting there next to my other “Top 10” resources, which include the Annotated Constitution, volume 5 of OLC’s published opinions, and the Official Rules of Major League Baseball. (I’ll admit that I have not yet had the occasion to work the baseball rules into any OLC opinions, but I’m always hopeful that the opportunity will arise some day — and I want to be ready!)

My other main area of practice is presidential emergency authorities, and that’s where Mary Lawton comes in. Everyone knows about Mary’s great contributions to the drafting of two laws that are as important today as they were when they were enacted: the Freedom of Information Act (FOIA) and the Foreign Intelligence Surveillance Act (FISA). In addition, Mary was also the primary author of the Attorney General’s Guidelines for FBI investigations. Those laws and the Guidelines addressed vastly different subject matters, and it is simply amazing that one person had such central a role in all of them.

But, before Mary Lawton became immersed in the world of electronic surveillance, for many years she was an Attorney-Adviser and then a Deputy Assistant Attorney General in OLC, and in those jobs she was involved in the very broad range of legal issues that OLC addresses. When I started at OLC, Mary was no longer part of the Office. But I of course knew her by reputation and, after I started at OLC, I read many of her opinions and memoranda.

Like most other new attorneys at OLC, I started out as a generalist, handling any assignment I was given. But OLC is run like a small law firm, where attorneys gradually develop areas of expertise because they handle a particular issue one time — whether it’s related to the Appointments Clause, the First Amendment, or the War Powers Act — and then continue to get related issues because they already know something about it.

There is a fair amount of turnover in the Office and, when longtime attorneys leave, they sometimes pass along resources. At some point I inherited Mary Lawton’s binder on the Posse Comitatus Act. In case you don’t immediately recall the Posse Comitatus Act — and I know I didn’t — it’s the law that makes it a crime to use the military to enforce domestic law unless the use is expressly authorized by the Constitution or an Act of Congress.

One such express authorization by Congress is the Insurrection Act, which allows the military to enforce domestic law when an insurrection against the authority of a state or the federal government overwhelms traditional domestic law enforcement. The Insurrection Act, to which many people incorrectly refer as invoking martial law, was used to quell various rebellions in the 1800s and early 1900s, to enforce federal court orders on desegregation in the 1950s and early 1960s, and to address riots in Chicago and Baltimore in 1968.

When I received Mary’s binder, the Insurrection Act hadn’t been used for over 20 years. In fact, the attorney who passed it on to me said something to the effect that the materials might be interesting, but wouldn’t ever be of any practical use. One evening I opened Mary’s binder and indeed it was fascinating reading, including the history of the Insurrection Act and guidance for its possible uses for the future. I finished reading the materials and put the binder on my shelf, little knowing that I would be using it a year later when President H.W. Bush invoked the Insurrection Act to address rampant looting in the Virgin Islands following Hurricane Hugo and again, three years later, when riots broke out in Los Angeles after the Rodney King verdict.

That was my first taste of emergency authorities, and I went on to take part in subsequent OLC teams examining and helping to implement many other emergency authorities — many requiring presidential action — including those used during Desert Shield and Desert Storm, after the 9/11 terrorist attacks, during a couple of flu pandemics, and during Hurricane Katrina.

After the President’s use of the Insurrection Act in 1989, I mustered the courage to speak to Mary when we rode the same elevator up from the garage one day. I introduced myself and told her that her binder had come in handy. She laughed and we ended up talking about various related legal issues. Then our paths started to cross more often as I began to work on some issues handled by the Office of Intelligence Policy and Review (the FISA office), which she then headed. I soon found that Mary was not just a brilliant attorney, but also a kind mentor who was generous with her time and advice, especially with junior attorneys. She was completely unpretentious, and you could talk to her about anything.

I also learned a lot just by watching Mary in action at meetings. She ran a great meeting and always got a lot done. I was especially interested in how she handled working with FBI.

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Remarks of Jerry L. Mashaw,*
Accepting the Section’s 2013 Annual Award For Scholarship in Administrative Law
FOR CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW*

First, thanks very much to Jack Beermann for that generous introduction. It is a great honor to receive this award from the Section of Administrative Law and Regulatory Practice. This Section has a long and distinguished history of combining the interests of academics with those of practitioners in its programs, publications, and practice of giving annual scholarship awards. While one often hears the complaint that the academy and the practice are growing apart, the activities of this Section are dramatic evidence to the contrary.

I should say a word or two about the content of the book for which I am the happy recipient of this year’s award. The project started as one designed to provide a brief and accessible overview of the history of American administrative law for students, practitioners, and particularly for non-U.S. audiences. It was, indeed, suggested by colleagues in Australia and New Zealand, where I gave a series of brief historical overview lectures over a decade ago.

I believed the project could be pulled off in short order because I believed that I had a reasonably good “handle” on 20th-century developments and that 19th-century developments were of little moment. The latter belief was based on the conventional historiography, both in administrative law and American political development, that federal administration became an important element of government only in the Progressive era and that one could not properly speak of an American administrative state until at least the New Deal — or perhaps the New Deal augmented by the massive outpouring of regulatory legislation in the Great Society period.

That conventional wisdom was summed up in Stephen Skowronek’s famous aphorism that 19th-century America was a state of “courts and parties,” and in Theodore Lowi’s canonical description of pre-20th-century American national legislation as composed of self-executing laws that delegated little discretion to federal administrators. Following Lawrence Friedman’s magisterial work on the history of American law, we have largely been content to view American administrative law as beginning essentially with the adoption of the Interstate Commerce Act and its creation of the Interstate Commerce Commission.

These views are not nutty; there is much truth in them, but I discovered that they are very far from the whole truth. The project changed its focus entirely when I started to read the first volume of the U.S. Statutes at Large. I discovered to my surprise a Congress that was attentive to departmental and bureau design, to the procedures by which administrators carried out their duties and to the relationship of the President to the executive establishment that was being created. Moreover, these statutes conferred substantial discretion on administrators in statutes requiring massive feats of administrative interpretation.

The sheer range of activities attended to in the congressional sessions that make up the first volume of the U.S. Statutes at Large is astonishing. The First Congress established the great departments of War, Foreign Affairs, and the Treasury — soon to be followed by a Naval Department and Post Office. Legislation was adopted on patents and copyrights, and pensions were provided for veterans of the Revolutionary War. A host of legislative initiatives dealt with navigation, ranging from providing lighthouses to registering U.S. vessels to establishing a system of seamen’s hospitals. Congress regulated seamen’s contracts and licensed trade with the Indian tribes. It established the Customs Service and the First Bank of the United States. By establishing rules and regulations for the sale of public lands, Congress initiated the great project of settling the West.

These statutes set in motion significant administrative activity to implement congressional designs. Providing pension benefits, collecting taxes, and awarding land patents gave rise to thousands of individual adjudications at the administrative level. Customs officers were charged with

*Sterling Professor of Law, Yale Law School. (See also Remarks of Kevin M. Stack, this issue.)

continued on next page
health regulation and the regulation of the quality of exports by the simple expedient of requiring compliance with state quarantine and inspection law as a condition for carrying goods or persons into or out of U.S. ports. Tax collectors were given the power to engage in administrative inspections without the necessity of warrants. The Treasury alone issued scores, if not hundreds, of rulings, circulars, and ultimately manuals interpreting both the tax laws and the statutes on sale of public lands.

In short, administrative adjudication and rulemaking began almost as soon as we began to have a national government under the 1787 Constitution. Moreover, administration was complexly designed. Not all bureaus and boards were within departments. While some internal departmental structures were left to administrators, Congress paid attention to the internal design of departments as well. Both hierarchical accountability and internal checks and balances were built into agency structures.

The things that are missing here, of course, are the things that we now associate preemminently with federal administrative law — that is, judicial review in courts of general jurisdiction and trans-substantive statutes like the Administrative Procedure Act, the National Environmental Policy Act, the Federal Advisory Committee Act, and the like. Before the 20th century, judicial review in the appellate form that we now think conventional was largely absent. Trans-substantive statutes do not really begin importantly until after the Second World War. Administrative law lived in the patterns of action by Congress in its statutes and the practices of agencies in implementing those statutes. As such, it has largely been invisible to us.

The middle and later years of the 19th century saw many developments, reforms and advances in administrative practice, as the book recounts. But my foray into the first volume of the Statutes at Large brought me up short. It turned a year’s project of a brief history of American administrative law into a decade-long project in which I spent three years getting simply from 1789-1801. In the end it was a massively rewarding learning experience, and my hope is that it will have something of the same value to those who dip into its pages.

Friends and colleagues have asked whether, having explored what I’ve called “the lost 100 years of American administrative law,” I intend to plow on into a complete history of the 20th and early 21st centuries? Hardly! I have learned my lesson.

agents, almost all of whom at that time were men. It was not uncommon that Mary and I were the only women in a meeting, although that certainly has changed over the years.

And her appearance added to her mystique. Short, with a sturdy build, Mary often puffed on a cigarette while she worked. But, what she lacked in physical stature, she more than made up for in intellectual firepower. She was one tough, highly intelligent, highly principled lady. She knew the law, she knew the facts, she always came prepared, and she wasn’t easily — actually, she wasn’t ever — intimidated. Her approach, especially with the FBI and other parts of the intelligence community, was what we might now call “tough love.” But she also was a person who cared about other people, and the mission, and that showed. In any event, she always seemed to find the right approach for the occasion and the company, and her view usually carried the day.

I have been fortunate that Mary was just one of the many wonderful (and sometimes colorful) mentors, teachers, and colleagues I’ve had at the Department of Justice. The tradition of excellence and sense of mission at the Department makes going to work each day a pleasure.

Before I close I want to mention three people outside the Department — my sons, David and Mark, and my husband, Craig — who are all here today. They have always supported my career, even though I can’t usually talk about my work — although they have teased me about carrying a pocket Constitution in my purse. After today, David and Mark may finally believe that I actually accomplish things at OLC, though I certainly can forgive them for wondering at times. Like most OLC attorneys, I leave no fingerprints, I leave no footprints, and my name never appears on any public documents.

It doesn’t seem that there should be an award for doing work that is so enjoyable, but I am greatly honored — and very happy — to have been selected to receive the Mary C. Lawton award, and I thank you all.

Remarks of Rosemary Hart continued from page 8
Remarks of Kevin M. Stack,*
Accepting the Section’s 2013 Annual Award For Scholarship in Administrative Law

I thank Professor Ronald Krotoszynski for his generous introduction on behalf of the Scholarship Committee and the American Bar Association’s Section of Administrative Law and Regulatory Practice for hosting this terrific event. It is a particular pleasure to follow Professor Jerry Mashaw, whose class on administrative law sparked my interest in the field, and whose writings continue to guide that interest. I would also like to thank my colleagues Professors Michael Herz, Lisa Bressman, and Ed Rubin for encouraging that interest — and my wife, Josephine Robins, whom I am delighted is here today. I could not be more honored by the Scholarship Committee’s recognition of this article.

The puzzle that launched the article: We all recall the cracking debates over statutory interpretation, debates in which the thrust and parry between Justices Breyer and Scalia are just the most recent entries in a long chain of exchange. What fun! We lack, however, a comparable debate over how to interpret regulations. This is particularly surprising to administrative lawyers, like us, for whom it is old news that administrative regulations outnumber statutes as sources of binding norms. This is also particularly surprising to administrative lawyers, like us, who know that regulations, like other sources of law, contain ambiguities. The article starts from this puzzle: Given how central regulations are to contemporary law, how could we have so little to say about their interpretation, especially in contrast to the lavish attention devoted to statutes?

Developing an approach to interpreting regulations — that is, notice-and-comment rules — is a critical task for administrative law. Not only are regulations creatures of administrative law, but their interpretation is also central to our most prominent doctrines and agency practice in ways not often acknowledged. Consider the following two examples of how the interpretation of regulations is implicated in our most central judicial doctrines. Whenever a court addresses a challenge to the consistency of a regulation with an authorizing statute — typically under the Chevron standard — the court must interpret the regulation, just as a court must interpret a statute to judge its constitutionality. Likewise, when a court reviews the validity of an agency’s construction of its own regulations, the court must interpret the regulation to determine if the agency’s construction is, under Auer/Seminole Rock, “plainly erroneous or inconsistent with the regulation.”

But even under these well-established doctrines, judicial practice is surprisingly ad hoc: Courts rely on the regulation’s text, the agency’s intent, the statute’s text and purpose, the regulation’s procedural history, and principles of statutory interpretation, among other sources — all without a principled method.

An approach to interpreting regulations is just as important to administrative agencies. Agencies inevitably face circumstances not addressed by their regulations and ambiguities in their meaning or application. In those cases, what principles should guide the agency lawyer? Part of the answer to that question is their approach to regulatory interpretation. All told, administrative law needs an approach to interpreting regulations.

The central aim of the article is to defend an approach to regulatory interpretation, an approach I argue could guide administrative and judicial practice. My strategy to developing an approach — a “technique” of interpretation — is to examine the distinctive characteristics of regulations. That examination led to two key principles for interpretation:

Principle 1: Interpret the regulation’s text in light of the regulation’s statement of basis and purpose. The intuition here is pretty simple. The Administrative Procedure Act generally requires the agency issuing a rule through notice-and-comment to publish an accompanying explanatory statement, a “concise general” statement of “basis and purpose.” That statement is necessary to the procedural validity of the rule. Under established principles of judicial review, courts evaluate the validity of regulations based on the grounds the agency invokes to justify them at the time of issuance — that is, what appears in the regulation’s statement of basis and purpose. As a

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PA § 553(b)(3) requires agencies engaged in informal rulemaking to provide notice of “either the terms or substance of the proposed rule or a description of the subjects and issues involved.” In most cases, agencies publish the complete text of their proposed rules, together with a preamble describing the need for the rule and the major considerations of policy and law that are raised by the proposal. Comments often convince agencies to make changes to their proposed rules. This, of course, is the whole point of the process. Difficulties arise, however, when, in reaction to comments, agencies promulgate rules that differ substantially from the initial proposal. In such cases, parties whose interests are harmed by the changes to the rule may claim that the process was unfair because they could not have anticipated the scope of the changes and thus did not have an adequate opportunity to participate in the rulemaking.

The issue addressed in this essay is the standard that reviewing courts should apply when deciding whether changes between a proposed rule and a final rule render the notice inadequate under APA § 553. Since I have written about this issue before, taking the position that courts should stick closely to the language of § 553 and generally allow agencies great leeway in making changes between proposals and final rules. In this essay, I raise some concerns about my prior position that have led me to reconsider the issue. In short, I now believe there is a good instrumental case to be made against strict adherence to the text of the APA and in favor of requiring a new round of notice and comment when agencies make unanticipated changes to their proposals when promulgating final rules.

In 2007, my colleague Gary Lawson and I published an article arguing that courts had strayed too far from the APA in evaluating the degree to which agencies may make changes to rules between proposal and promulgation. (See Jack M. Beermann & Gary Lawson, Reprocessing Vermont Yankee, 75 Geo. Wash. L. Rev. 856, 896 (2007).) We concluded that the standards courts currently apply in these cases was inconsistent with language of § 553: “Because the statute permits the agency to limit its notice to ‘the subjects and issues involved,’ our view of the best understanding of § 553 is that no new notice and comment is required if the final rule is within the subjects and issues involved in the proposal, even if the direction of the final rule is substantially different from the direction suggested by the notice.”

We also concluded that this standard was required by the spirit, if not the letter, of the Supreme Court’s Vermont Yankee decision (Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519 (1978)), in which the Court held that reviewing courts do not have authority to impose procedural requirements on agencies beyond those specified in applicable statutes and rules.

In early cases, the courts were very tolerant when comments led agencies to make significant changes to proposed rules before promulgation. The courts applied the language of the APA and rejected arguments for a new round of notice and comment even when agencies made significant changes between the notice and the final rule. This attitude is exemplified by the following observation from a 1954 Court of Appeals opinion: “Surely every time the Commission decided to take account of some additional factor it was not required to start the proceedings all over again. If such were the rule the proceedings might never be terminated.” (Logansport Broad. Corp. v. United States, 210 F.2d 24, 28 (D.C. Cir. 1954).)

Some standard is necessary to determine whether changes between notices and final rules are so significant that interested parties did not truly have notice of the agency’s proposal. Without a standard, an agency could propose a rule with no intention of actually adopting it and then promulgate something radically different. This would frustrate the entire purpose of the notice-and-comment process because affected parties would not have any opportunity to comment on the agency’s true proposal.

Despite these concerns, Gary Lawson and I previously condemned the various tests courts had developed for determining whether a new round of notice and comment is required. In these tests the court have asked whether the final rule is a “logical outgrowth” of the notice (and sometimes the comments) already given; whether the agency made a “material alteration” between the notice and the final rule; and whether the final rule is “in character with” the original notice. All of the tests boil down to the same basic question: were notice specific enough to provide interested parties with a reasonable opportunity to comment to protect their interests? In our view then, the courts had not been sufficiently tolerant of agencies when changes were made between notices and final rules.

Although the Supreme Court has not weighed in definitively on the proper understanding of § 553’s notice...
Chocolate Manufacturers did not from the list, the court held that the Department to remove flavored milk. Despite the lengthy preamble discussed sugared cereal and sugar in juice but did not mention flavored milk. The proposed rule continued the inclusion of flavored milk on the list of approved foods might not be adopted.

Gary Lawson and I previously supported our critique of the way the courts have applied the notice requirement by relying on the Supreme Court’s Vermont Yankee rule, which prohibits courts from imposing procedural requirements on agencies not contained in any applicable statute or rule. As the Supreme Court explained, allowing courts to increase procedural requirements beyond those required by law would lead to great unpredictability — which would give agencies the incentive to overproceduralize, thus losing the benefits of the informal rulemaking process prescribed by Congress. Thus, aggressive judicial monitoring of changes between proposed and final rules under unclear standards like the “logical outgrowth” test would incentivize agencies to conduct multiple rounds of notice and comment to ensure against reversal, the exact procedural situation condemned in Vermont Yankee. Even worse, strict application of the notice requirement in this context would undercut the very purpose of the entire procedure by discouraging agencies from incorporating what they learn from the comments into their final rules.

When I teach Chocolate Manufacturers in my Administrative Law course, I urge students to think about the decision in light of the Vermont Yankee rule, and ask whether the Chocolate Manufacturers might have chosen not to comment so as not to draw attention to the flavored milk issue and perhaps to preserve the notice objection if flavored milk was removed from the list. The “punch line” is to push the argument that courts should approve any notice that meets the statutory requirement of containing “either terms or substance of the proposed rule or a description of the subjects and issues involved” — which the notice in Chocolate Manufacturers surely did.

This year during the discussion the class’s attention turned to the cost of commenting and whether each of those interested in preserving each item on the Department of Agriculture’s list should have spent the time, energy, and money to submit a comment. Was there any realistic chance that the Department of Agriculture would remove flavored whole milk from the list of foods available in a program focusing on nutrition for women and young children? It is conceivable that some group of comments might attack the inclusion of milk — perhaps due to its fat content, the hormones used to stimulate milk production in cows, or its alleged connection in some circles to the incidence of some forms of cancer. But similar attacks could be made concerning other products on the list such as baby formula, cheese, cereal, juice, eggs, peanut butter, and numerous varieties of beans and peas, all of which were included in at least some of the food packages covered by the program. Is it cost-effective to encourage every single beneficiary of a proposed rule to comment in support of the proposal?

Class discussion suggested that, while it is costly when an agency is forced to conduct a second comment period when comments convince it to make an unanticipated change to a proposed rule, it may be more costly for all regulatory beneficiaries to feel the need to submit comments every time they have a conceivable economic interest in the outcome of a rulemaking proceeding. If the occasional additional comment period required under the “logical outgrowth” test is less costly than producing numerous additional comments under a standard allowing agencies to make more changes.

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without an additional comment period, then — contrary to what Gary Lawson and I previously argued — the current application of the “logical outgrowth” and related tests may make economic sense. Further, additional comments impose costs on agencies that must analyze and respond to them. See Wendy Wagner, Administrative Law, Filter Failure, and Information Capture, 59 Duke L.J. 1321, 1325 (2010). If every single party whose interests could conceivably be affected by changes to a proposed rule submits comments, the agency will have to devote significantly greater resources to analyzing the comments and addressing them in the concise general statement of basis and purpose of the final rules.

I do not mean to suggest that courts should freely require agencies to conduct additional comment periods whenever their final rules differ from their proposals. Courts should do so only when the changes made were truly not foreseeable by the party whose interests were prejudiced by a change. Interested parties should be encouraged to comment whenever it appears that there is a realistic possibility that the rule might be changed to their detriment. They should not, however, be expected to comment when such changes are not reasonably foreseeable.

E-rulemaking might also ameliorate some of the problems agencies have had in the past when comments point them in an unexpected direction. If comments are quickly posted to the agency’s website in a form that is easily accessible by affected parties, those parties are more likely to be able to anticipate the need for comments during the initial comment period.

What of the Vermont Yankee rule? The Vermont Yankee rule itself was built largely upon pragmatic concerns involving preserving the benefits of cleaner air, more efficient markets, and addressing them in the concise general statement of basis and purpose of the final rules.

Putting these two principles together yields a basic framework for regulatory interpretation: Interpret the text of a regulation in light of its purposes, purposes discerned from the text of the regulation itself and set forth in the regulation’s statement of basis and purpose. Thus the core idea is to treat an agency’s public and authoritative justifications for its regulations as more than an elaborate exercise necessary to survive judicial review; they also create commitments that continue to guide the meaning of the regulations. In the article, I argue that this approach is not subject to the critiques of the use of legislative history or purposivism in statutory interpretation.

I also defend this approach as practical — “out-of-the-box ready” — for use by lawyers and courts. For regulatory lawyers, this approach — use the purposes articulated in the preamble to guide interpretation of the regulation — gives concrete directions for how to handle regulatory ambiguity. It also provides a consistent and workable approach for courts to employ, whether interpreting a regulation under Chevron or under Auer/Seminole Rock or other doctrines. Under this approach, a court would ask two questions: Whether the prospective interpretation of the regulation is (1) permitted by its text and also (2) consistent with the regulation’s purposes set forth in its text and statement of basis and purpose.

At a more general level, in an era in which agencies are frequently characterized as overly political, this approach recognizes and affirms a role for law in guiding agency action. It sees regulations as more than creating a zone of agency discretion, but as launching a policy to which the agency owes allegiance. Thank you very much.
U.S. Department of Agriculture’s Revocation of 40+-Year-Old Policy on Engaging in Notice-and-Comment Rulemaking

By William Funk*

On October 28, 2013, the Department of Agriculture revoked its more than 40-year-old policy of engaging in notice-and-comment rulemaking — notwithstanding the exemption in the Administrative Procedure Act (APA) for rules relating to public property, loans, grants, benefits, or contracts. See 78 Fed. Reg. 64194 (Oct. 28, 2013). In proposing the revocation last July, the Department explained that it had adopted this policy at the suggestion of the Administrative Conference of the United States (ACUS) in anticipation of legislation that would have statutorily eliminated the exemption, and with the expectation that the advantages of public participation would outweigh the disadvantages in terms of increased costs and delayed implementation. The Department “ascribe[d] significant weight” to Congress’s failure to enact the expected legislation. Moreover, the Department said that it had now reassessed the costs and benefits of providing public participation in these rulemakings, concluding that in many cases using the APA’s notice-and-comment procedures necessarily delays the implementation of a program without having to resort to notice-and-comment rulemaking.

As if to prove its point, there were only two commenters on the Department’s proposal. There is no excuse for the failure to catch this proposal by entities like the American Bar Association (ABA) and the Administrative Conference of the United States (ACUS), as well as numerous public interest groups, which would have strongly opposed it. After all, ACUS has always urged agencies to waive this exemption, and the ABA likewise since 1981 has expressly called for notice-and-comment rulemaking in rules relating to public property, loans, grants, benefits, and contracts. The Humane Society of the United States did comment critically on the proposal, but it failed to communicate with other groups who might well have assisted.

It is ironic at best for the Department of Agriculture to revoke its policy in favor of public participation in these rulemakings when E.O. 12866 requires that “[e]ach agency shall provide the public with meaningful participation in the regulatory process.” Moreover, President Obama’s Executive Order 13563 likewise requires that “regulations shall be adopted through a process that involves public participation,” specifically ordering “each agency [to] endeavor to provide the public with an opportunity to participate in the regulatory process.”

The Department’s justifications for revoking its longstanding policy seem puzzling. First, when it adopted the policy in 1971, its explanation contained no suggestion that it was issued in anticipation of legislative action. To the contrary, it specifically noted that the Administrative Conference of the United States recommended “that Government agencies provide for public participation when formulating rules relating to public property, loans, grants, benefits, or contracts as a matter of policy.” Nothing in the adoption of the policy was contingent on subsequent legislation. Perhaps the most important explanation for why Congress did not amend the APA is the fact that agencies widely had voluntarily agreed to use notice-and-comment rulemaking despite the exemption, making statutory change unnecessary.

Second, the delays associated with procedural requirements imposed by E.O. 12866 and reviews by OMB are not imposed by the notice-and-comment procedures of the APA, but rather apply to agency regulatory actions regardless of whether they go through notice and comment. Moreover, not one of the three rules the Department gave as examples of cases where it believed there was little benefit to the agency from allowing for public comment demonstrated any delay or cost resulting from compliance with the APA’s notice-and-comment procedures. Indeed, two of the example rules were issued as interim final rules, enabling swift implementation. In addition, the Department of Agriculture has also effectively used direct final rulemaking further to reduce the costs and time associated with rules

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* Distinguished Professor of Law, Lewis and Clark Law School.
in which there is little public interest or controversy. In short, there is sufficient flexibility under the APA to adopt routine and uncontroversial regulations without full notice and comment so that a requirement for public participation in rulemaking need not entail any particular delay or cost for such regulations, making unnecessary a wholesale revocation of the policy in favor of public participation.

Third, it certainly is true that much has changed since 1971 in the ways agencies communicate with the public and the public with agencies, but none of the facilities available to the public and the Department, as valuable as they may be for various purposes, ensures interested persons that their comments on a proposed Department of Agriculture rule will be read and considered.

The actual effect of the revocation is yet to be determined. The Department maintained that it was merely eliminating a requirement for notice-and-comment rulemaking and restoring the discretion it previously had to allow for public participation in appropriate circumstances. Unfortunately, prior to 1971 the Department had apparently never found appropriate circumstances for providing notice-and-comment for rulemakings relating to public property, loan, grants, benefits, and contracts. Perhaps its attitude has changed since then regarding public participation, but the revocation notice is not reassuring. Whatever its attitude, the Department did not in its notice of revocation of the policy actually repeal any of the regulations requiring notice-and-comment rulemaking that it adopted in 1971 pursuant to the policy. See, e.g., 36 C.F.R. § 261.70(c). Of course, the Department could repeal them immediately without notice and comment because those would be procedural regulations. We will have to wait and see.

Another open question is whether this is the first shoe dropping. That is, there are a number of other agencies, like the Departments of the Interior and Transportation, that adopted similar policies in 1971. Will they follow Agriculture’s lead?

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For more information and to register, please contact Alisha Dixon at 202-662-1528 or alisha.dixon@americanbar.org
by Lincoln L. Davies* and F. Andrew Hessick**

The Court has already issued this Term several decisions important to administrative law. These decisions clarify the applicability of Younger abstention to administrative decisions; address pleading burdens in actions seeking declaratory judgments relating to patent infringement; and resolve whether, under the Fair Labor Standards Act, collective bargaining agreements can foreclose compensation for time spent donning and doffing protective gear. The Court also has pending before it a number of other cases with potentially important administrative law implications. These cases include several high-profile cases, including one involving the President’s ability to make recess appointments and two implicating the Clean Air Act.

Recess Appointments
Perhaps the most far-reaching administrative law case on the Court’s docket so far this Term involves the scope of the President’s power to make recess appointments. That is the issue in NLRB v. Canning (oral argument, January 13, 2014). On January 3, 2012, the Senate convened for the Second Session of the 112th Congress. It thereafter adjourned, reconvening only for several pro forma sessions at which no business was conducted, until January 20th. During this time, President Obama made three recess appointments to the NLRB pursuant to his recess appointments power under Article II, § 2.

The D.C. Circuit held that the appointments were unconstitutional for two reasons. First, it reasoned that the President has the power to make recess appointments only during a recess that occurs between enumerated sessions of the Senate, and the appointments in this case were made during a recess that occurred within a session of the Senate. Second, the D.C. Circuit concluded that President has the power to make recess appointments only to fill vacancies that first arise during the recess in which the appointment is made, and in this case the vacancies occurred before the recess began. Both of these issues are before the Court. The Court will also consider whether the Senate was in recess for purposes of the recess-appointments power when it was holding only periodic pro forma sessions.

The Clean Air Act
Two other high-profile cases before the Court this term involve actions by the Environmental Protection Agency (EPA) under the Clean Air Act (CAA).

The first case, Environmental Protection Agency v. EME Homer City Generation, is another entry in the long saga of EPA’s efforts to regulate air pollution that travels from one state to another. The case involves challenges to the Obama EPA’s Cross-State Air Pollution Rule, known more commonly as the “Transport Rule.” The Transport Rule seeks to force upwind states to decrease their air pollutant emissions when that pollution interferes with downwind states’ ability to meet the statute’s National Ambient Air Quality Standards (NAAQS).

The D.C. Circuit, in a 2-1 decision, vacated the rule as exceeding the agency’s statutory authority. The court reasoned that the rule went too far by requiring states to reduce more than the amount of pollution they send downwind, forcing upwind states to make “massive” emissions reductions. The D.C. Circuit also ruled that EPA overstepped its authority by imposing the steps upwind states need to take to reduce emissions, rather than allowing states the “initial opportunity” to find the most cost-effective ways to do so.

Three questions are now before the Supreme Court (oral argument, December 10, 2013). One is whether the D.C. Circuit lacked jurisdiction, because states had not challenged EPA’s earlier disapproval of their plans to reduce pollution, and because the parties failed to make some of their arguments on appeal in the agency proceeding. Another is whether state need not adopt state implementation plans reducing their cross-boundary pollution until EPA quantifies each state’s interstate pollution obligation. The final issue is what the term “contribute significantly” means under the relevant provisions of the CAA — a question that implicates whether EPA can require upwind states to reduce pollution beyond the amount each state sends downwind.

The second Clean Air Act case before the Court is Utility Air Regulatory Group v. Environmental Protection Agency (oral argument February 24, 2014). This case involves a portion of the rules adopted by EPA to regulate greenhouse gas (GHG) emissions that contribute to climate change.

The Court’s grant of certiorari in this case is important not only for what it includes but also for what it does not include. Petitions had been filed challenging the D.C. Circuit ruling upholding the agency’s greenhouse gas rules in a number of ways, but the Court did not grant certiorari on most aspects of those rules. The aspects the Court declined to hear include whether greenhouse gases endanger public health (EPA’s “endangerment finding”) and the EPA’s new emissions standards for motor vehicles.

Instead, in granting six petitions, the Court limited its review to a single question: whether EPA’s GHG regulations for motor vehicles can “trigger” GHG permitting requirements for existing stationary sources such as power
plants — known as Prevention of Significant Deterioration (PSD) permits. Possible outcomes include requiring the agency to issue a GHG endangerment finding specific to PSD permits, upsetting the agency’s so-called “tailoring” rule that limited the number of stationary sources to which these PSD rules apply, or upholding the rules in their entirety.

Abstention

The Court clarified the scope of Younger abstention in Sprint Communications Co. v. Jacobs, 134 S. Ct. 584 (Dec. 10, 2013). Although federal courts ordinarily must exercise the jurisdiction conferred on them, in Younger v. Harris, the Court held that federal courts should abstain from enjoining ongoing state criminal prosecutions. Later cases extended that doctrine to various civil proceedings. In Sprint, the question was whether to extend Younger abstention to situations where there is a pending state court action reviewing the lawfulness of a state administrative order that is not coercive in nature.

The case arose when Sprint sought an order from the Iowa Utilities Board (IUB). Sprint sought a ruling that, under federal law, it was not required to pay access charges to other providers that deliver telephone calls made over the internet by Sprint customers. The IUB rejected the request, concluding that Sprint may be required to pay access charges for VoIP calls. Sprint sought review of that decision in Iowa state court, and it also filed a suit in federal district court seeking declaratory and injunctive relief against IUB officials.

In a unanimous opinion by Justice Ginsburg, the Supreme Court held that it would be inappropriate for the federal district court to abstain under Younger from hearing the request for declaratory and injunctive relief. It explained that Younger abstention applies in only three circumstances: 1) when the federal proceeding will interfere with a pending state criminal action; 2) when the federal proceeding will interfere with pending state civil enforcement proceedings “akin to criminal prosecutions”; and 3) when the federal proceeding will interfere with a pending civil proceeding “uniquely in furtherance of the state courts’ ability to perform their judicial functions,” such as a civil contempt proceeding. According to the Court, the pending state action in Sprint did not fall in any of these three categories. The IUB order was not criminal, and it did not touch on the state court’s ability to perform its judicial function. Nor did the IUB order constitute a civil enforcement proceeding warranting abstention because it did not impose sanctions on Sprint (or anyone else) and was not brought by the State in its “sovereign capacity.”

Limits on Article I Courts

Article III limits on the power of Article I bankruptcy judges are the issue in Executive Benefits Insurance Agency v. Arkison (oral argument, January 14, 2014). Under 28 U.S.C. § 157(b), non–Article III bankruptcy judges have the power to enter final judgments in so-called “core” bankruptcy proceedings — proceedings arising under Title II. In Stern v. Marshall, the Court held that this provision violated Article III insofar as it allowed non–Article III bankruptcy judges to enter final judgment for claims involving private rights. The issue in Arkison is whether a bankruptcy judge may nevertheless hear such private-right claims if a litigant consents to it, and, if so, whether that consent can be implied from a litigant’s conduct. The case also raises the issue of what procedures should apply in core bankruptcy proceedings involving private rights given that bankruptcy judges can no longer enter final judgments as required by § 157(b). In particular, the Court will consider whether it should extend to core proceedings the provisions regulating non–core proceedings, 28 U.S.C. § 157(c), under which bankruptcy judges must submit proposed findings of fact and conclusions of law for de novo review by a district court.

Statutory Construction Cases

The Court already has decided and has before it this Term a number of cases involving statutory construction, some of which involve agencies or their interpretations of statutory provisions.

Pleading Burdens and the Declaratory Judgment Act

In Medtronic, Inc. v. Mirowski Family Ventures, LLC, 134 S. Ct. 843 (Jan. 22, 2014), the Court resolved the question of who bears the burden of proof of proving infringement when a potential patent infringer brings an action seeking a declaratory judgment that she does not infringe the patent.

In a unanimous opinion written by Justice Breyer, the Court held that, as in a usual infringement action, the patent holder bears the burden of proving infringement. This burden of proof does not shift in a declaratory judgment action by a possible infringer, the Court reasoned, because the Declaratory Judgment Act does not affect “substantive rights” — it merely provides a new procedural mechanism for assessing infringement — and the burden of proof is a “substantive” aspect of infringement claims.

The Court further supported its conclusion by noting that shifting the burden of proof for declaratory judgment actions would create uncertainty about the patent’s scope. In situations where evidence of infringement is

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inconclusive, a patent would be construed narrowly in a direct infringement action brought by the patent holder. But, if the burden shifted, the same evidence would give the patent broader scope in a declaratory judgment action brought by a potential infringer presenting the same infringement claim.

Protective Gear and Collective Bargaining Agreements

Sandifer v. United States Steel Corp., 134 S. Ct. 870 (Jan. 27, 2014), presented the question of whether collective bargaining agreements can foreclose compensation for time spent by employees “donning and doffing” protective wear needed for their jobs. The Supreme Court unanimously answered yes.

The statutory provision at issue was § 203(o) of the Fair Labor Standards Act (FLSA), which makes available for collective bargaining agreements compensation for “any time spent in changing clothes or washing at the beginning or end of each workday.” 29 U.S.C. §203(o). Although the Labor Department had construed this provision “on a number of occasions,” the Court did not defer to those interpretations because the Government “expressly declined to ask” for such deference. 134 S. Ct. at 876 n.5.

Instead, Justice Scalia, writing for the Court, looked to the ordinary meaning of “clothes” as “items that are both designed and used to cover the body and are commonly regarded as articles of dress.” Id. at 876. The Court rejected the argument that this definition was too indeterminate to be workable, as well as the contention that “clothes” and “protective clothing” are necessarily different because one is for comfort and the other is for safety. Instead, the Court noted, an item of clothing can do both simultaneously: “A parasol protects against the sun, enhancing the comfort of the wearer,” the Court wrote, “just as work gloves protect against scrapes and cuts, enhancing the comfort of the wearer.” Id. at 877.

The Court also declined to follow some circuits’ reading of “clothes” as “essentially anything worn on the body,” finding that definition too unconstrained. Id. at 878. Nor did the Court find convincing the suggestion that the word “changing” should be limited to substituting clothing. Time spent altering dress, the Court held, is included within time spent changing clothes.

Finally, the Court ruled that the entire time spent donning and doffing protective wear was subject to § 203(o). Sandifer involved twelve items of safety gear, and, as the Court acknowledged, three of those items — safety glasses, earplugs, and respirators — were not clothes. Nevertheless, the Court held that if the donning and doffing time in question “can, on the whole, be fairly characterized as ‘time spent in changing clothes or washing,'” the whole period of time would qualify under § 203(o) even if some of the protective gear did not fit within the plain meaning of “clothes.” Id. at 881.

Standing under the Lanham Act

Who has standing to bring suit under the Lanham Act is the issue in Lexmark International, Inc. v. Static Control Components, Inc. (oral argument, December 3, 2013). The Lanham Act provides a cause of action to “any person who believes that he . . . is likely to be damaged” by false advertising. The circuit courts have disagreed on who has standing under this statute. Some have held that only actual competitors may bring suit. Others have concluded that anyone with a reasonable interest in the suit has standing. Still others have applied a multifactor test similar to that used for assessing standing under antitrust laws. The Supreme Court granted review to resolve this disagreement.

Children Seeking Visas under the Immigration and Nationality Act

In Mayorkas v. Cuellar de Osorio (oral argument, December 10, 2013), at issue is whether the Board of Immigration Appeals (BIA) reasonably interpreted a provision of the Immigration and Nationality Act relating to children seeking visas. The question is whether children who apply for “derivative” visas based on their family membership, but then “age out” of this eligibility before their visa is granted, nevertheless can have the dates of their applications apply. In a divided (6-5) en banc decision, the Ninth Circuit ruled that the BIA’s interpretation did not deserve deference because the plain language of the Child Status Protection Act unambiguously grants “priority date retention to aged-out derivative beneficiaries.”

Severance Payments under the Federal Insurance Contributions Act

Finally, in United States v. Quality Stores, Inc. (oral argument, January 14, 2014), at issue is a statutory construction question with important tax law implications. Employer and employee taxes collected under the Federal Insurance Contributions Act (FICA) fund Social Security and Medicare benefits. Are severance payments made to employees who were involuntarily terminated taxable under FICA? The case challenges a Sixth Circuit ruling that such payments are not taxable wages under FICA.
By Bill Jordan*

10th Circuit and 2d Circuit decisions reveal ripeness pitfalls

Ripeness doctrine prevents “the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies.” It also protects “agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.” Abbott Labs. v. Gardner, 387 U.S. 136, 148–49 (1967). The agency decision must be final, and the nature of the claim must be such that further factual development is not necessary or helpful to the court (often referred to as “purely legal”). In essence, ripeness doctrine prevents judicial involvement that is premature in that the agency has not yet finished addressing the issue and also in the sense that further factual development might assist the court’s consideration of the claim.

Challengers stumbled over these limitations for somewhat different reasons in two recent decisions. In Farrell-Cooper Mining Co. v. U.S. Dep’t of the Interior, 728 F.3d 1229 (10th Cir. 2013), the regulated party apparently sought to avoid seemingly obvious ripeness problems by framing the issue as a challenge to the regulatory scheme, rather than as a challenge to agency decisions in particular cases. Farrell-Cooper owned two mines subject to regulation under the Surface Mining Control and Reclamation Act (SMCRA). The Office of Surface Mining, Reclamation, and Enforcement (OSMRE) had recognized the Oklahoma Department of Mines (ODM) as having achieved “primacy” such that OMD had “exclusive jurisdiction over the regulation of surface coal mining and reclamation operations” in Oklahoma, subject to certain exceptions.

ODM approved permits for two Farrell-Cooper mines, Liberty #5 and Liberty #6. Relying on exceptions to ODM primacy, the federal agency (OSMRE) initiated proceedings against both mines, issuing Notices of Violation (NOVs) first against #5, later against #6. Farrell-Cooper sought administrative review of the #5 NOV. While that administrative proceeding was in progress, and before issuance of the #6 NOV, Farrell-Cooper filed a complaint in U.S. District Court seeking a declaratory judgment that ODM had exclusive regulatory authority over its permits.

Despite Farrell-Cooper’s characterization of the claim as involving the general question of regulatory authority, rather than the particulars of any specific mine dispute, the Tenth Circuit rejected the action as unripe. Noting that the claimant “bears the burden of providing evidence to establish that the issues are ripe,” the court noted that the administrative appeal had not yet been resolved. Thus, there had “not been a consummation of the agency’s decisionmaking process,” and “the Department of Interior could well agree with Farrell-Cooper that OSMRE acted unlawfully and vacate each action.” Thus, judicial involvement could “disrupt the administrative process” and was premature. Moreover, there was a need for further factual development given the nature of the claims.

The absence of final agency action (and thus the possibility of an agency-level outcome favorable to the challenger) was quite stark in Farrell-Cooper — the administrative hearings were still in process.

Although somewhat less obvious on the facts, the same principle doomed aspects of the challenge in Entergy Nuclear Vermont Yankee, LLC v. Shumlin, 733 F.3d 393 (2d Cir. 2013).

When Entergy purchased the Vermont Yankee Nuclear Power Plant in 2001-02, it was required to obtain various approvals from the State of Vermont. At that time, Entergy obtained a Vermont Certificate of Public Good (CPG) by negotiating a Power Purchase Agreement (PPA) that ensured favorable wholesale electricity prices to Vermont retail electric companies through 2012. As 2012 approached, Entergy needed not only to seek continued approval from Vermont, but also to seek renewal of the plant’s operating license from the U.S. Nuclear Regulatory Commission.

Meanwhile, the Vermont Legislature got into the act, passing legislation that purported to require state approvals to address economic concerns. The Second Circuit rejected the Vermont legislation as an invalid attempt to address concerns about radiological safety, an area preempted by the Atomic Energy Act.

But Entergy still needed a Vermont Certificate of Public Good, and Vermont wanted a Power Purchase Agreement that would ensure favorable wholesale electricity prices to its residents. Entergy challenged Vermont’s intent to seek terms more favorable than those dictated by the market, as a violation of the dormant commerce clause, which prohibits states from burdening interstate commerce. The court essentially found that some such arrangements may violate the dormant commerce clause (e.g., banning or restricting export of electricity generated in the state), while others might not (e.g., merely seeking lower prices for the state’s consumers).

Entergy also argued that Vermont’s “efforts to obtain a favorable PPA” violated the Federal Power Act, under which the Federal Energy Regulatory Commission (FERC) regulates the wholesale market for electricity.

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The ripeness doctrine sank both challenges. In both cases, the actual terms of any eventual Power Purchase Agreement were essential to evaluating the claims. But the PPA was still under negotiation. The court could not determine effects on interstate commerce or evaluate any conflict with Federal Power Act until the parties had reached a final PPA (or perhaps until Vermont had prevented an agreement by insisting upon invalid terms). The fact that Vermont intended to achieve favorable electricity rates was not enough. The court could act only on the basis of the ultimate PPA, not on the basis of what Vermont hoped to achieve in the PPA. Moreover, Entergy’s Federal Power Act claim suffered from the additional requirement that FERC evaluate any PPA before it can be considered by the courts.

In both of these cases, the key to defeating the challenge on ripeness ground was the agency’s (or state’s) ability to show that important aspects of the administrative decision had not yet been resolved. This was straightforward in Farrell-Cooper because the company sought judicial review in the midst of ongoing administrative proceedings. The point was somewhat less obvious in Entergy since Vermont seemed firmly entrenched in its position, but the PPA negotiations were still ongoing. It was important to wait to see what those negotiations produced before involving the courts.

Three decisions on “sue and settle”

Three recent decisions addressed a range of so-called “sue and settle” situations in which someone challenges an agency rulemaking action (or inaction), and the agency and challenger then propose a settlement decree to resolve the dispute. The question is whether the agency can use the settlement process to effect its rule without notice and comment. The answers were “yes,” “no,” and “maybe.” At first glance, the congressional mandate to engage in notice and comment prior to changing a rule may seem an insurmountable barrier to amendment by consent decree, but that mandate is to some extent counterbalanced by the breadth of judicial discretion in resolving disputes and the benefits of settlement to avoid protracted litigation.

In Defenders of Wildlife v. Perciasepe, 714 F.3d 1317 (D.C. Cir. 2013), the D.C. Circuit upheld a consent decree requiring EPA to initiate a rulemaking proceeding and, by a certain deadline, to reach a decision about whether to issue a new rule. The Clean Water Act requires EPA to review and, if appropriate, revise effluent limitations and effluent limitation guidelines every five years. After many years without such reviews or revisions, environmental groups gave EPA notice of their intent to sue to require the statutorily mandated review. The groups later filed a complaint and, on the same day, a proposed consent decree signed by the groups and by EPA. The consent decree established a schedule for EPA to initiate a notice-and-comment proceeding and to reach a decision about whether to change the existing effluent limitations or guidelines.

The Utility Water Action Group (UWAG), representing industry interests subject to the effluent limitations in question, sought to intervene. UWAG argued that the consent decree violated its members’ rights to be subject to a rulemaking only as mandated by statute or as determined by EPA in the exercise of its discretion. UWAG also argued that the decree would impose an unduly strict deadline for EPA’s implementation of the rulemaking process, such that its members would not have adequate time to participate in the rulemaking, with the likely result of a stricter rule harmful to their interests. The court rejected this challenge, noting that EPA would not violate any statutory requirement if it complied with the decree. Since the decree did not change any substantive requirements governing UWAG’s members and did not violate any of their statutory procedural rights, UWAG had no standing because its members had not been injured. The requirement (or opportunity) to participate in a rulemaking proceeding does not constitute injury.

By contrast, in Conservation Northwest v. Sherman, 715 F.3d 1181 (9th Cir. 2013), the Ninth Circuit rejected
a consent decree that would have changed the implementation of the National Forest Plan (NFP), which governs logging activities on federal lands in the Pacific Northwest. The NFP includes the Survey and Manage Standard, which guided agency assessments of the impact of logging on approximately 400 ecologically crucial species in the region. When the relevant agencies tried to eliminate the Survey and Manage Standard, environmentalists sued. The environmentalists and the agencies ultimately reached a settlement agreement “detailing how Survey and Manage would operate going forward. The settlement includes a lengthy description of ‘New Exemptions from Pre-Disturbance Surveys,’ and a list of ‘Species and Category Assignment[s],’ including an explanation of new management requirements for certain species.”

A logger challenged the consent decree for failure to comply with the statutorily mandated procedures for public participation prior to changes in the NFP. The District Court rejected the challenge on the ground that the consent decree constituted a judicial act, which is not governed by the statutory procedural requirements.

The Ninth Circuit disagreed, holding that “a district court abuses its discretion when it enters a consent decree that permanently and substantially amends an agency rule that would have otherwise been subject to statutory rulemaking procedures.” Here, the decree did just that, creating “changes to species classifications and establish[ing] new exemptions from pre-disturbance surveys . . . nothing short of amend[ing]” the standard. Moreover, the decree changed the operation of the Survey and Manage Standard for the foreseeable future. Since nothing in the decree or elsewhere required the agency to treat the change as temporary, the court had to treat the change as permanent. The court’s language leaves the door open for argument that a temporary change by consent decree might survive review, but little in the court’s language would justify such treatment.

The D.C. District Court provided just such language in American Forest Resource Council v. Ashe, 2013 WL 1289724 (D.D.C. 2013), even while rejecting the consent decree at issue. The American Forest Resource Council, representing the logging and forestry industry, challenged the Fish and Wildlife Service’s (FWS’s) designation of critical habitat for the marbled murrelet. The parties then proposed a settlement agreement under which the critical habitat designation would be vacated and the agency would eventually issue a revised designation. Conservation groups challenged the decree for failure to follow the procedural requirements for changes to habitat designations.

Although the court held that it had the power to enter the decree, it also held that it “must first determine that the consent decree is ‘fair, adequate, reasonable and appropriate under the particular facts’ and that it is in the public interest.” A major consideration in that determination was the fact that “[i]f every lawsuit challenging agency action ended in a consent decree giving a private interest group plaintiff the relief it was seeking, the procedural safeguards of the APA would be eviscerated. The public has an interest in seeing these procedural safeguards enforced.”

This did not necessarily mean, however, that the consent decree was automatically invalid. Instead, the court had to take into account anything that might bear on whether the decree was in the public interest. This included some consideration of the merits, despite the fact that courts reviewing consent decrees do not normally “inquire into the precise legal rights of the parties [or] reach and resolve the merits of the claims or controversy.” Reviewing decisions in which courts relied upon some consideration of the merits in upholding rule-changing consent decrees, the court found that the logic of those cases did not apply. Here, the FWS had “pointed to no particular aspect of its critical habitat designation that is defective or even questionable.” Vague assertions were not enough to allow the court find the decree was in the public interest in the face of failure to comply with normal statutory requirements for public participation. While the agency lost on these facts, the court left open the possibility that an agency could justify changing its regulation through a consent decree: “Given a fuller explanation from the agency on the basis for vacatur (which may stop short of an outright admission that the law was violated) and a more reasonable remand period, the Court might conclude that a consent decree modeled on the one proposed is fair, reasonable, and in the public interest.”

9th Circuit upholds “probabilistic” standing and splits on arbitrary and capricious review

Remember when your toddler chewed on her clothing or bed linens — more than she had done as an infant? That widely shared experience was crucial to the majority’s ruling in Natural Resources Defense Council v. U.S. EPA., 2013 WL 5943409 (9th Cir. 2013), although the dissent questioned whether the agency had adequately explained that point, however widely accepted it might be. One of our modern miracles, “nanosilver,” suppresses the growth of microbes when incorporated into fabric. That characteristic makes it a pesticide. The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) prohibits the sale of any unregistered pesticide. EPA may register a

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pesticide only upon a determination that it will not cause “unreasonable adverse effects” on human health or the environment.

After performing a risk assessment, EPA granted a conditional registration to allow the applicant time to collect data on the effects of nanosilver. NRDC challenged the conditional registration, arguing that there were several flaws in the risk assessment. First, however, NRDC had to overcome EPA’s challenge to standing. EPA challenged the probabilistic nature of the alleged injury to NRDC’s members, asserting that the injury was not “actual or imminent,” but “conjectural or hypothetical,” because it was uncertain whether any harm would actually occur. The court held, however, that NRDC had “carried its burden to demonstrate that there is a ‘credible threat’ that its members’ children will be exposed” to nanosilver as a result of EPA’s decision. The expected widespread application of nanosilver, coupled with consumers’ inability to avoid contact, distinguished the situation from two decisions denying probabilistic standing where the challengers could avoid the alleged future harm.

Turning to the risk assessment challenge, the court (1) accepted EPA’s decision to base the risk assessment upon toddlers as the most vulnerable population (NRDC argued for infants), (2) vacated EPA’s conclusion of acceptable risk, and (3) accepted EPA’s decision not consider the potential effects of exposure from other sources of nanosilver. As to toddlers versus infants, the court noted that “[i]nfants are more vulnerable because they weigh less, but toddlers are more vulnerable because they can chew fabric aggressively. Infants spend more time resting on a single piece of cloth, such as a parent’s shirt, but toddlers move around and make contact with more textiles.” The aggressive chewing was enough to uphold EPA’s conclusion. As is so often the case in such challenges, NRDC had “merely demonstrated that there is a reasonable basis” for its position. Since EPA’s position was also reasonable, however, the agency prevailed.

On the acceptable risk issue, EPA tripped on its own statement of the applicable standard and its practice of calculating compliance with that standard. EPA’s own standard for acceptable risk was a calculated “margin of exposure” (MOE) of greater than 1,000. EPA’s own tables showed an MOE of 1,000 for the pesticide, so the agency seemingly failed on the face of the tables. EPA tried to recover by arguing that the table failed to reflect the reality that the MOE would actually be an acceptable 1,006, but for some EPA rounding during the calculations. But the data in the actual decision document supported only 1,000, not 1,006. EPA could not alter that result.

As to nanosilver exposure from other sources, the court noted that there was no statutory requirement to consider such sources for a conditional registration and that EPA’s position was consistent with its regulations. The court also accepted EPA’s explanation that concern about differences among various types of nanosilver particles (and the recommendations of the FIFRA Scientific Advisory Panel) justified a “case-by-case basis approach to hazard exposure assessment (i.e., product-by-product).”

Perhaps the most interesting aspect of this decision, however, is the concurring/dissenting opinion. District Court Judge Lynn S. Adelman, sitting by designation, agreed as to standing and the acceptable risk (“margin of exposure”) ruling, but said that the majority should not have addressed the other two issues at all. As Judge Adelman saw it, the acceptable risk ruling required that the court grant NRDC’s petition in full. To him, the court had no business even discussing the toddler-choice or other sources issues. He opined that courts review orders, not agency reasoning; once the agency order had been rendered invalid by the acceptable risk ruling, that should have been the end of it.

Moreover, the dissenting aspect of the opinion rejected the agency’s choice of toddlers in the risk assessment because the agency had failed to explain that choice in its decision document. However logical the choice might be, the analysis had actually been undertaken by the court, not the agency. On the other-sources issue, the dissent read the statute broadly enough to require that analysis and rejected the conclusion that EPA’s position was supported by substantial evidence.

MAKE YOUR OPINION COUNT

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David J. Arkush, The Senate and the Recess Appointments, 127 Harv. L. Rev. Forum 1 (2013). This Article offers a new perspective on recess appointments controversies. It argues, contrary to the dominant views, that the courts should defer to the Senate’s wishes regarding its recesses rather than define the term “recess” themselves, at least when the Senate and the President both favor the disputed appointments. It also argues that the relevant body for determining Senate intent is the Senate majority, rather than the whole Senate. This perspective recommends an important change in the judicial approach to the recess appointments at issue in Noel Canning v. NLRB: The courts should uphold the appointments unless the challengers demonstrate that the Senate majority wished to block them. In addition, in a case like Noel Canning, the courts should consider seeking the views of the Senate majority, which has been wholly absent from the litigation.

Kate Andrias, The President’s Enforcement Power, 88 N.Y.U. L. Rev 101 (2013). Enforcement of law is at the core of the President’s constitutional duty to “take Care” that the laws are faithfully executed, and it is a primary mechanism for effecting national regulatory policy. Yet questions about how presidents oversee agency enforcement activity have received surprisingly little scholarly attention. This Article provides a positive account of the President’s role in administrative enforcement, explores why presidential enforcement has taken the shape it has, and examines the bounds of the President’s enforcement power. It demonstrates that presidential involvement in agency enforcement, though extensive, has been ad hoc, crisis-driven, and frequently opaque. The Article thus reveals the need for institutional design reforms – namely, more coordination across agencies and greater disclosure of enforcement policy. The seeds for such reforms can be found in several recent efforts that have yet to be made systematic. Concerns about politicization of law enforcement should not override the considerable benefits that would ensue. Rather, by acknowledging the President’s role in, and responsibility for, enforcement, we can better ensure the structure and transparency that promote appropriate presidential influence.

William H. Simon, The Organizational Premises of Administrative Law, 76 Law & Contemp. Problems (forthcoming), available at http://ssrn.com/abstract=2332079. Administrative law is out of touch with forms of public administration developed since the Progressive and New Deal eras. It is strongly influenced by bureaucratic conceptions of administration that see (1) legitimacy in terms of prior authorization; (2) organization as a balance of stable rules and unaccountable discretion; and (3) error detection as a reactive, complaint-driven process. Yet many public programs developed since the 1970s strive to establish post-bureaucratic or performance-based forms of administration that view (1) legitimacy in terms of exposure to public oversight; (2) administration as a matter of comprehensive but flexible planning; and (3) error detection as proactive. This Article illustrates the dominance of the latter style of organization in major contemporary regulatory and social welfare regimes. It also shows that, while the administrative law of the casebooks and treatises ineffectively addresses key issues of accountability presented by the newer regimes, a parallel law of public administration has emerged in recurring provisions of modern regulatory and welfare statutes, in executive branch initiatives, and in the activities of courts in institutional reform cases. This “noncanonical” administrative law is more attuned to performance-based organization. Canonical doctrine could improve by accommodating this alternative conception of organization.

Louis J. Virelli, Deconstructing Arbitrary and Capricious Review, 92 N. C. L. Rev. (forthcoming), available at http://ssrn.com/abstract=2330327. Arbitrary and capricious — or “hard look” — review is a critical and legitimizing force in a political and legal environment that is increasingly hostile to administrative government. It employs principles of judicial deference to balance the authority of courts and agencies in pursuit of rational, transparent administrative policymaking. It is thus no surprise that arbitrary and capricious review

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is a favorite topic of both courts and commentators. Despite this active focus on hard look review, however, a crucial point has been overlooked. Existing scholarship overwhelmingly portrays arbitrary and capricious review as one-dimensional — as applying the same standard in the same way across all manner of agency conduct. This Article rejects this one-dimensional approach and offers a new perspective that represents a potentially transformative view of arbitrary and capricious review. It reconceptualizes hard look review as a multidimensional expression of judicial deference and argues that arbitrariness review is both more effective and more easily justified when it is “deconstructed” — when it first divides administrative policymaking into its constituent parts, such as record-building, reason-giving, scope and quality of input, and rationality. This shift exposes arbitrary and capricious review for what it should be: a collection of more particularized inquiries into specific components of agency decision-making. The deconstruction model is useful for several reasons. First, it provides a new and coherent theoretical framework for arbitrary and capricious review. This framework may then be used to evaluate each of the deconstructed components of agency conduct against the underlying principles of judicial deference and goals of hard look review to develop a new, dynamic view of arbitrariness review that tailors judicial deference to discreet aspects of agency decision-making. Deconstruction also reveals institutional and systemic benefits to viewing hard look review as a multidimensional exercise. These in turn increase our understanding of how hard look review should be utilized in different contexts and of when courts should defer to the political branches more generally.

Nicholas Bagley, *The Puzzling Presumption of Revievability*, 127 Harv. L. Rev. (forthcoming), available at http://ssrn.com/abstract=2320043. The presumption in favor of judicial review of agency action is a cornerstone of administrative law, accepted by courts and commentators alike as both legally appropriate and obviously desirable. Yet the presumption is puzzling. As with any canon of statutory construction that serves a substantive end, it should find a source in history, positive law, or the Constitution. None of these, however, offers a plausible justification for the presumption. As for history, the sort of judicial review that the presumption favors — appellate-style arbitrariness review — was not only unheard of prior to the twentieth century, but was commonly thought to be unconstitutional. The ostensible statutory source for the presumption — the Administrative Procedure Act — nowhere instructs courts to strain to read statutes to avoid the preclusion of judicial review. And although the text and structure of the Constitution may prohibit Congress from precluding review of constitutional claims, a presumption responsive to constitutional concerns would favor review of such claims, not any and all claims of agency wrongdoing. To date, however, the presumption has gone unchallenged. This is regrettable. Congress has the constitutional authority, democratic legitimacy, and institutional capacity to make fact-intensive and value-laden judgments of how best to weigh the desire to afford private relief against the disruption to the smooth administration of public programs that such relief may entail. Courts do not. When the courts invoke the presumption to contort statutes that rather clearly preclude review to nonetheless permit it, they dishonor Congress’s choices and limit its ability to tailor administrative and regulatory schemes to their particular contexts. The courts should end this practice. Where the best construction of a statute indicates that Congress meant to preclude judicial review, the courts should no longer insist that their participation is nonetheless indispensable.

Aaron Nielson, *In Defense of Formal Rulemaking*, Ohio St. L. J. (forthcoming), available at http://ssrn.com/abstract=2322062. About the only thing administrative law professors agree on is that formal rulemaking — with its trial-like procedures — is a bad idea best forgotten. Although the Administrative Procedure Act provides for formal rulemaking, the Supreme Court largely put an end to it decades ago in the revolutionary case of *United States v. Florida East Coast Railway Co.* The academy has shed no tears over its loss. Indeed, the American Bar Association’s Section of Administrative Law has recently declared that it has “not identified a single scholarly article written in the past thirty years that expresses regret about the retreat from formal rulemaking.” This Article fills the void. Drawing on forgotten administrative law scholarship and modern civil procedure insights, this Article contends that, while formal rulemaking can be a misfit for some contexts, it is a mistake to dismiss it in all contexts, especially because formal rulemaking can facilitate both more technically sound rules and greater legitimacy in the regulatory process. And the time to reassess formal rulemaking is now. Anecdotes about the “bad old days” before *Florida East Coast Railway* cannot replace rigorous analysis of the situation today. In an era where a handful of rules can impose billions of dollars of costs, the time has come to reconsider whether formal rulemaking might yet play a limited but crucial role in the future of administrative law.

own regulations utilizing a standard of review that has the same effect as *Chevron* deference. Although this review standard — commonly referred to as *Auer* or *Seminole Rock* deference — has been widely accepted, the Supreme Court has provided very little theoretical support for the standard. The Court’s decision in *United States v. Mead* has recently reshaped the application of *Chevron* deference. *Mead*’s effect has now begun to be felt when the Court reviews an agency’s interpretation of its regulations. A quintet of recent Supreme Court decisions has had a cumulative effect on *Auer* deference that resembles the impact that *Mead* has had on *Chevron* deference. This Article assesses this developing area of administrative law. The first part describes the past of the long-accepted rule of deference to an agency’s interpretation of its own regulations. The second part discusses the Court’s recent changes in its approach to the traditional rule of deference, highlighting its incompatibility with *Mead*. The final part of the Article discusses the future of judicial review in this context, and presents a new standard of review that accommodates form and function. The Article supports a two-step standard that would first apply the clear meaning of the regulation. If the regulation were ambiguous, a new standard of review, analogous to *Skidmore* review, would apply. Under this regime, an agency would not bind a court by its interpretation, but would have an opportunity to convince the court that the court should adopt the agency’s interpretation, informed as it may be by the agency’s experience and expertise. The makes the case that the judicial exercise of interpretive power in this context is consistent with the Constitution, the APA, and the structure of administrative law.

**Brian D. Feinstein, Congressional Control of Administrative Agencies, available at** http://ssrn.com/abstract=2304497. Conventional wisdom holds that Congress has limited ex post means of controlling the administrative state. This Article examines the efficacy of oversight hearings — a relatively understudied potential mechanism for congressional control — to determine the extent to which these hearings can alter agency activity and then examine the specific conditions under which oversight is likely to occur. Leveraging original data on agency behavior yields that agency “infractions” subject to congressional oversight are approximately 22% less likely to reoccur, compared to similar actions that do not receive oversight attention. The Article then examines how structural features of the administrative and congressional environments are associated with oversight activity, suggesting that these institutions may be designed with an eye to altering congressional involvement in administration. These findings indicate that oversight hearings offer a significant means of congressional control over administration under specific circumstances.

**David Thaw, Enlightened Regulatory Capture, available at** http://ssrn.com/abstract=2298205. Regulatory capture generally evokes negative images of private interests exerting excessive influence on government action to advance their own agendas at the expense of the public interest. There are some cases, however, where this conventional wisdom is exactly backwards. This Article explores the first verifiable case, taken from healthcare cybersecurity, where regulatory capture enabled regulators to harness private expertise to advance exclusively public goals. Comparing this example to other attempts at harnessing industry expertise reveals a set of characteristics under which regulatory capture can be used in the public interest. These include: (1) legislatively mandated adoption of recommendations by an advisory committee comprising private interests and “reduced-bias” subject matter experts; (2) relaxed procedural constraints for committee action to prevent internal committee capture; and (3) opportunities for committee participation to be worthwhile for representatives of private parties beyond the mere opportunity to advance their own interests. This Article presents recommendations based on those characteristics as to how and when legislatures may endeavor to replicate this success in other industries to improve both the legitimacy and efficacy of the regulatory process.

**Sean Croston, Evading Public and Congressional Review of Agency Policy Statements, available at** http://ssrn.com/abstract=2320133. On August 13, 2013, *The New York Times* announced to the surprise of most Americans that “[i]n another setback for President Obama’s health care initiative, the administration has delayed until 2015 a significant consumer protection in the law that limits how much people may have to spend on their own health care.” Despite a strict statutory limit, the paper reported, “under a little-noticed ruling, federal officials have granted a one-year grace period to some insurers, allowing them to set higher limits, or no limit at all. . . .” The most unnerving fact was the realization that this new “grace period” had been buried on the Department of Labor’s website “since February, but was obscured in a maze of legal and bureaucratic language that went largely unnoticed. When asked in recent days about the language — which appeared as an answer to one of 137 ‘frequently asked questions about Affordable Care Act implementation’ — department officials confirmed the policy.” This is not how the United States government is supposed to develop and announce new enforcement

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policies, especially for critically important and politically sensitive measures like the implementation of the blockbuster health care reform legislation. Should Americans expect to learn about these significant policy initiatives only when newspaper reporters are fortunate enough to stumble upon them (or receive tips from insiders) months after their implementation? Such practices raise troubling questions about democratic accountability across the government. Should not there be laws in place requiring earlier, formal notice of these developments? The problem is that these laws aren’t effective — in too many cases, they aren’t followed, and they aren’t enforced. This essay conducts an in-depth study of those laws and their failures, and considers whether Congress, the public, or the agencies themselves can (or should) do anything about it.

Margo Schlanger, Offices of Goodness: Influence Without Authority in Federal Agencies, available at http://ssrn.com/abstract=2322797. Inducing governmental organizations to do the right thing is the central problem of public administration. If Congress or another principal wants a federal executive agency to pay attention to a value that constrains or conflicts with the agency’s overall mission — that additional value is here labeled, generically, “Goodness” — the principal often creates a subsidiary agency office, an “Office of Goodness.” Both policymakers and scholars should care about how and when Offices of Goodness work. Yet while Offices of Goodness are frequently established in federal agencies, they are nearly invisible in scholarship. And the resulting knowledge gap is currently particularly problematic, because President Obama has just proposed a new Office of Goodness, within the National Security Agency, to increase oversight of surveillance activities. An Office of Goodness’s success is far from guaranteed. To actually increase Goodness in its agency, its staff must skillfully use a highly constrained toolkit, and must avoid the twin shoals of impotence or capture/assimilation. This Article analyzes the relevant dynamics. The Article begins by describing a paradigmatic Office of Goodness, the Department of Homeland Security’s Office for Civil Rights and Civil Liberties, and the details of four controversies: (1) information-sharing relating to the Occupy movement; (2) laptop border searches; (3) Border Patrol’s Spanish-language assistance for police; and (4) data retention by the National Counterterrorism Center. These examples ground the more general discussion that follows, which is also informed by both theory and other case studies. The Article canvasses tools available to an Office of Goodness: inclusion in working groups, clearance authority, advice-giving, training and technical assistance, program review, complaint investigation, outreach, document generation, and congressional reporting. It then explains why Office influence and commitment are continually threatened, and argues that both depend crucially on external reinforcement — from Congress, the White House, non-governmental organizations, the courts, and other agencies. The efficacy of an Office of Goodness should not be taken for granted. Unless the goal is purely cosmetic, each Office’s tools must be carefully prepared, and its influence and commitment purposefully produced and maintained.

Michael A. Livermore, Cost-Benefit Analysis and Agency Independence, U. Chicago L. Rev. (forthcoming), available at http://ssrn.com/abstract=2327554. The presidential mandate that agency rulemakings be subjected to cost-benefit analysis and regulatory review is one of the most controversial developments in administrative law over the past several decades. There is a prevailing view that the role of cost-benefit analysis in the executive branch is to help facilitate control of agencies by the Office of Information and Regulatory Affairs (OIRA). This Article challenges that view, arguing that cost-benefit analysis in fact helps preserve agency autonomy in the face of oversight. This effect stems from the constraints imposed on reviewers by the regularization of cost-benefit analysis methodology and the fact that agencies have played a major role in shaping that methodology. The autonomy-preserving effect of cost-benefit analysis has been largely ignored in debates over the institution of regulatory review. Ultimately, cost-benefit analysis has ambiguous effects on agency independence, simultaneously preserving, informing, and constraining agency power.

James Dawson, Retroactivity Analysis After Brand X, Yale J. on Reg. (forthcoming), available at http://ssrn.com/abstract=2332545. Under Brand X, federal courts must reverse their own prior precedent in deference to an intervening agency decision if that agency decision is based on a reasonable interpretation of the statute. Thus, if the first-in-time court sets the law at A, and if a second-in-time agency later finds that B is a superior interpretation of the statute, then the third-in-time court must defer to the agency and move the law from A to B. But can law B be retroactively applied to a litigant who reasonably relied on the first-in-time court’s opinion that the law was A? The answer to that question depends on which retroactivity standard applies to the Brand X problem, which in turn depends on the answers to two threshold legal questions. First, does the decision to move the law from A to B “change” the law, or does it merely “clarify” what the law has always been? Second, if the law has been changed, should that change be attributed to the second-in-time agency, which offered the “authoritative”
interpretation of the statute, or to the third-in-time court, which decided whether to ratify that interpretation? Recent decisions have created circuit splits on both questions, and the Supreme Court has offered little in the way of guidance. The Article argues that a move from A to B does “change” the law, and that the third-in-time court, rather than the agency, is responsible for that change. In hopes of protecting reasonable litigants from the specter of retroactivity, the Article then proposes and defends a default rule for federal courts faced with the *Brand X* problem. Under this rule, third-in-time courts reversing their own prior precedent in deference to an intervening agency opinion should presume that their decision applies purely prospectively.

Mark Seidenfeld, *A “Process Failure” Theory of Statutory Interpretation*, available at http://ssrn.com/abstract=2339698. This Article lays out a legislative process failure theory of statutory interpretation. It first defends an intent-based approach to interpretation by arguing that Congress, in the process of drafting statutes, does not use the same mechanisms for determining meaning as do courts when they interpret them. Therefore, courts and legislatures comprise different linguistic interpretive communities. The Article proceeds to define legislative process failure as occurring when the mechanism of each community leads to different understandings of statutory text. The paramount question then becomes: What is the best response of the legal system to such failure? Legislative supremacy requires that the courts and Congress come to some accommodation to ensure that courts will interpret statutes in accordance with the legislature’s understanding. That assumption, however, is satisfied so long as Congress knows how courts will interpret statutes and can adjust its process to ensure that the statutes it enacts will be interpreted as it intends. Legislative process failure theory therefore leads to the subsequent question: Which branch should accommodate the other’s method of attaching meaning to statutes, and under what circumstances? The Article concludes that, generally, legislatures cannot engage in judicial-type inquiries into statutory meaning when drafting statutes because the cost of engaging such statutory analysis ex-ante — before identifying the potential provisions that might exhibit process failure — is prohibitive. But once the legislature becomes aware of a process failure, the costs of engaging in judicial-type textual inquiry become manageable, and the error costs of interpretation due to strategic manipulation of legislative meaning greatly increase. Hence, in the face of such awareness, usually a textual approach is justified. Finally, having developed the legislative process failure of interpretation, the Article considers several types of failures for which courts should accommodate the legislative approach to attaching meaning to statutes.

William N. Eskridge, Jr., *Expanding Chevron’s Domain: A Comparative Institutional Analysis of the Relative Competence of Courts and Agencies to Interpret Statutes*, 2013 Wis. L. Rev. 411. Applying Professor Neil Komesar’s comparative institutional analysis, this Article sets out the case for according agencies primacy over courts in statutory interpretation. Under this analysis, courts would retain an important, albeit secondary role. The implications of this analysis are significant. The Supreme Court’s *Chevron* doctrine says that federal judges should defer to agency interpretations of statutes when Congress has delegated those agencies lawmaking authority. The comparative institutional analysis here suggests that *Chevron*’s “domain” should be expanded to include all interpretations issued by an agency’s governing board or director.

Michael A. Livermore and Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 Geo. L.J. 1337-98 (2013). This Article highlights the role of capture in providing a normative foundation for regulatory review of administrative action, which, at the federal level, is conducted by the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB). It also establishes a reform agenda to help bring the practice of review in line with its anti-capture justification. There are two traditional justifications for OIRA review: that centralized review facilitates the exercise of presidential authority over agencies, and that bureaucratic tendencies toward overzealousness require a centralized checking response. Both of these justifications are problematic, however. The normative desirability of maximizing presidential power is subject to debate, and OIRA’s contribution to increasing presidential control is controversial. Bureaucratic incentives can lead to both over-regulation and under-regulation, raising doubts about the need for a systematic check focused solely on the former. An anti-capture juncture for OIRA provides a more promising ground for regulatory review. OIRA has four important features that, in principle, can facilitate an anti-capture role: its generalist nature; its coordination function; its use of cost-benefit analysis; and its tradition of independent leadership. There are, however, elements of OIRA review that undermine its anti-capture potential, most importantly its near-exclusive (hubris-laden?) focus on the review of agency action. The failure of an agency to act can be just as detrimental to social well-being as overzealousness, and special interests may seek deregulation, delay, and weak regulation as

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often as over-regulation. This Article proposes a specific mechanism for OIRA to engage in review of agency inaction by examining petitions for rulemakings filed with agencies. This procedure cabins OIRA’s review powers over agency inaction within a fairly limited field, making the task workable, and takes advantage of information held by parties outside the government.

Wendy Wagner, *The Participation-Centered Model Meets Administrative Process, 2013 Wis. L. Rev. 671.* This Article uses Neil Komesar’s participation-centered model as a tool for gaining new insights into the balance and vigor of pluralistic participation in administrative process. This preliminary investigation exposes a number of ways in which well-meaning administrative process requirements may actually impede, rather than encourage, engagement from a broad spectrum of affected participants. Legal processes that depend on robust engagement from affected groups require rigorous analysis to ensure that they are in working order. Komesar’s model provides the type of exploratory tool needed to understand whether these processes are in fact doing what they promise and to troubleshoot how they might go wrong. This examination of administrative process using Komesar’s participation-centered formula proceeds in three parts. Part I recalls the basics of the model and situates the model within administrative practice. Part II uses the model to identify possible explanations for participatory shortfalls in administrative process in recent years. Part III concludes with preliminary suggestions for reform.

Adrian Vermeule, *Conventions of Agency Independence, 113 Colum. L. Rev. 1163 (2013).* It is often said that the legal touchstone of agency independence is whether agency heads are removable at will or only for cause. Yet this condition is neither necessary nor sufficient for operational independence. Many important agencies whose heads lack for-cause tenure protection are conventionally treated as independent, while other agencies whose heads enjoy for-cause tenure protection are by all accounts thoroughly dependent upon organized interest groups, the White House, or legislators and legislative committees. This Article argues that the crucial role is played by what Commonwealth lawyers call “conventions.” Agencies that lack for-cause tenure yet enjoy operative independence are protected by unwritten conventions that constrain political actors from attempting to remove their members or to direct their exercise of discretion. Such conventions reflect norms within relevant legal and political communities that impose sanctions for violations of agency independence or create beliefs or internalized moral straitjackets protecting independence. Conversely, where agencies enjoy statutory independence yet lack operative independence, the interaction among relevant political actors has failed to generate protective conventions. The lens of convention helps resolve several puzzles about the behavior of Presidents, legislators, judges, and others with respect to agency independence—including the Supreme Court’s puzzling treatment of SEC independence in *Free Enterprise Fund v. Public Co. Accounting Oversight Board.* By acknowledging the conventional character of agency independence, U.S. courts can incorporate ideas from the courts of Commonwealth legal systems that harmonize conventions with written rules of law. This Article’s principal suggestion is that U.S. courts should adopt the leading Commonwealth approach, according to which judges may indirectly “recognize” conventions and incorporate them into their interpretation of written law, but not directly enforce conventions as freestanding obligations.

Joseph W. Mead, *Interagency Litigation and Article III, 47 Ga. L. Rev. 1217 (2013).* People generally have better things to do than sue themselves. In fact, however, litigation between federal agencies is surprisingly common, and often arises in interesting contexts where a lot is at stake. Like all litigation, intragovernmental litigation must satisfy the traditional threshold standards of Article III, including standing and adverse parties. Yet the federal government is no ordinary party, and the application of these general principles to a sovereign is no easy matter. By looking at 200 years of cases, and keeping in mind the Supreme Court’s pronouncements in similar contexts, this Article proposes that a judicially cognizable “case” may not be premised on dueling notions of the public good. Courts have generally been reluctant to hear disputes when both the plaintiff and defendant agency appear before them asserting the sovereign interests of the United States; such disputes are adverse in fiction but not in fact. While the Judicial and Executive Branches have wrestled with the difficulty of interagency litigation, the scholarship has largely ignored it. Unlike prior scholarship, in Part I this Article looks at both historical practice and modern Article III case law and finds meaningful jurisdictional limits on interagency litigation. In Part II, the Article explains that the federal judiciary’s limited jurisdiction over “cases” and “controversies” generally precludes a suit without adverse parties. This requirement of adverseness is riddled with exceptions and complications and is far more complicated than the literature to date has acknowledged. In Part III, the Article surveys the interesting history of interagency litigation. Several rationales have been offered to square these cases with the general rule that no party can sue itself, but none fully satisfy. Instead, the Article argues that these cases can be explained by recognizing the divide that exists between
when an agency alleges a proprietary injury (which has been allowed) and when both agencies assert a sovereign interest (which has generally not been permitted). In Part IV, the Article explains why litigation between two agencies asserting sovereign interests is not justiciable. By studying where interagency litigation is permitted and where it is not, we can better understand the nature of the judicial power, as well as what it means for the “United States” to appear in court.

Peter H. Schuck and Steven Kochevar, Reg Neg Redux: The Career of a Procedural Reform, 15 Theoretical Inquiries in Law (forthcoming), http://ssrn.com/abstract=2330357. A contribution to a conference volume on new approaches to health and safety regulation, this Article reviews the evolution of negotiated rulemaking, an innovative process adopted by Congress as part of the Administrative Procedure Act in 1990. Envisioned as a way to improve policymaking by bringing affected interests together under the auspices of the regulation-writing agency in face-to-face negotiations that would inform but not bind the agency, “reg neg” (as it has come to be called) has been used by various agencies from time to time. The paper updates the experiences with reg neg in light of various theoretical and practical criticisms of the process, as well as the responses of its defenders.

Alexander Volokh, The New Private-Regulation Skepticism: Nondelegation, Due Process, and Antitrust Challenges, available at http://ssrn.com/abstract=2335659. In recent years, state and federal courts have been ruling against private regulatory organizations on a number of theories. This Article explores this new private-regulation skepticism and the theories that underpin it. The Article focuses on three main theories: nondelegation doctrine, due process, and antitrust. To illustrate the doctrines, it follows five examples from recent cases and recent news: Amtrak, the North Carolina Board of Dental Examiners, the Mississippi Board of Pharmacy, the Texas Boll Weevil Eradication Foundation, and Texas landowners’ water-quality protection zones. The federal nondelegation doctrine is unlikely to be much help in these challenges, though some states, like Texas, have vibrant nondelegation doctrines that are not only stricter than the federal one, but also strongly distinguish between public and private delegates. The Due Process Clause is much more helpful, especially if the regulators and the regulated parties compete with each other. Some courts do not clearly distinguish between nondelegation and due process; this Article argues that they should, as the two doctrines serve very different purposes. Finally, federal antitrust law is available to guard against the anticompetitive dangers of “industry regulating itself.” Excessive conflicts of interest decrease the chance that a court will find state-action immunity from antitrust law and increase the chance that a court will find a substantive antitrust violation because of structural anticompetitive factors. Regulators that are sufficiently independent from state government are also less likely to be insulated from damages by sovereign immunity. This new regulation skepticism thus provides several useful tools to challenge private regulation.

David Freeman Engstrom, Public Regulation of Private Enforcement: Empirical Analysis of DOJ Oversight of Qui Tam Litigation Under the False Claims Act, 107 Nw. L. Rev. (forthcoming), available at http://ssrn.com/abstract=2341805. In recent years, a growing chorus of commentators has called upon Congress to vest agencies with litigation “gatekeeper” authority across a range of regulatory areas, from civil rights and antitrust to financial and securities regulation. Agencies, it is said, can rationalize private enforcement regimes through the power to evaluate lawsuits on a case-by-case basis, blocking bad cases, aiding good ones, and otherwise husbanding private enforcement capacity in ways that conserve scarce public resources for other uses. Yet there exists strikingly little theory or evidence on how agency gatekeeper authority might work in practice. This Article begins to fill that gap by offering the first systematic study of an often invoked but little studied example: Department of Justice (DOJ) oversight of qui tam litigation brought pursuant to the False Claims Act (FCA). Using an original dataset encompassing some 4000 qui tam lawsuits filed between 1986 and 2011, this Article offers evidence on numerous issues that have occupied recent judicial, scholarly, and popular debate, including the extent to which DOJ utilizes its various oversight tools, the mix of factors that drives DOJ intervention decisions, and whether DOJ’s seemingly powerful impact on case outcomes can be ascribed to its merits-screening or merits-making role. The analysis mostly rejects heated claims that DOJ decisionmaking has a partisan political cast or is unconnected to case merit. At the same time, however, it uncovers substantial evidence that DOJ makes case decisions strategically, separate and apart from pure merits considerations, in response to simple resource constraints, judicial threats to its ability to police collusive relator-defendant settlements, and the identity (and corporate power) of the defendant. These findings have important implications for judicial evaluation of qui tam suits as well as leading FCA reform proposals. More broadly, the analysis opens up new theoretical and empirical avenues

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for thinking about optimal regulatory design at the border of litigation and administration, with applications well beyond the FCA.

**Kent Barnett, Resolving the ALJ Quandary, 66 Vand. L. Rev. 797 (2013).** As both courts and Administrative Law Judges (ALJs) have noted, the function of ALJs closely parallels that of Article III judges. ALJs hear evidence, decide factual issues, and apply legal principles in all formal administrative adjudications under the Administrative Procedure Act (“APA”). Indeed, they outnumber Article III judges and decide more than two hundred and fifty thousand cases each year. But they lack the defining characteristics of Article III judges. Article III judges are installed under the Appointments Clause, enjoy tenure and salary protection during times of “good Behavior,” and are not generally subject to reversal by the executive branch. In contrast, ALJs are hired as mere employees by executive officials, receive more limited salary protection than Article III judges, and are subject to removal within the executive branch. Moreover, the agencies for which ALJs work — often themselves parties to the proceedings — can reverse ALJs’ decisions in toto. These differences between ALJs and Article III judges do more than chisel a chip on ALJs’ shoulders. They reveal material practical and constitutional tensions, if not constitutional violations, that the U.S. Supreme Court has recently revitalized. These tensions concern the appointments of ALJs, the President’s supervisory powers over ALJs, and the independence and impartiality of ALJs. These three concerns are in tension, rendering their resolution difficult. This Article seeks to do three things: (1) identify the three competing concerns surrounding ALJs; (2) suggest a workable statutory solution to a major problem in administrative law that recent Supreme Court decisions have brought into focus; and (3) clarify the nature and benefits of Congress’s interbranch-appointment power for the federal administrative state. To those ends, Part I provides a brief synopsis of current ALJ hiring, removal, and independence protections. To bring the tripartite quandary into clear view, Part II considers the constitutional questions surrounding the selection, removal, and independence of ALJs. Part III considers the limitations on prior solutions and scholarship in light of this quandary, most of which focus only on ALJ independence. Finally, Part IV provides a refined manner of analyzing the propriety of interbranch appointments and argues that an interbranch appointment of ALJs would resolve the quandary.

**Stephen B. Burbank, Sean Farhang, and Herbert Kritzer, Private Enforcement, 17 Lewis & Clark L. Rev. 637 (2013).** The aim of this Article is to advance understanding of private enforcement of statutory and administrative law in the United States and to raise questions that will be useful to those who are concerned with regulatory design in other countries. To that end, it briefly discusses aspects of American culture, history, and political institutions that reasonably can be thought to have contributed to the growth and subsequent development of private enforcement. It also sets forth key elements of the general legal landscape in which decisions about private enforcement are made, aspects of which should be central to the choice of an enforcement strategy and are critical to the efficacy of a private enforcement regime. It then turns to the business of institutional architecture, describing the considerations — both in favor of and against private enforcement — that should affect the choice of an enforcement strategy. It lays out choices to be made about elements of a private enforcement regime, attending to the general legal landscape in which the regime would operate, particularly court access, as well as how incentives for enforcement interact with the market for legal services, which has important implications for private enforcement activity. It situates these legislative choices about private enforcement in the context of institutions that shape them. Finally, it seeks to demonstrate how general considerations play out by examining private enforcement in two policy areas: legislation proscribing discrimination in employment and laws protecting consumers from unfair and deceptive practices.

**Brian D. Galle, Tax, Command — or Nudge?: Evaluating the New Regulation, Tex. L. Rev. (forthcoming), available at http://ssrn.com/abstract=2318004.** This Article compares for the first time the relative economic efficiency of “nudges” and other forms of behaviorally inspired regulation against more common policy alternatives, such as taxes, subsidies, or traditional quantity regulation. Environmental economists and some legal commentators have dismissed nudge-type interventions out of hand for their failure to match the revenues and informational benefits taxes can provide. Similarly, writers in the law and economics tradition argue that fines are generally superior to non-pecuniary punishments. Drawing on prior work in the choice-of-instruments literature, and contrary to this popular wisdom, this Article shows that nudges may out-perform fines, other Pigouvian taxes, or subsidies in some contexts. These same arguments may also imply the superiority of some traditional “command and control” regulations over their tax or subsidy alternatives. The Article then applies these lessons to a set of contemporary policy controversies, such as New York City’s cap on beverage portion sizes, climate change, retirement savings, and charitable contributions.
Aaron-Andrew P. Bruhl, Hierarchically Variable Deference to Agency Interpretations, Notre Dame L.Rev. (forthcoming), available at http://ssrn.com/abstract=2319531. When courts review agency action, they typically accord agency decisions a degree of deference. As many courts and commentators have recognized, the law in this area is complicated because it features numerous standards of review, including several distinct regimes for evaluating agencies’ legal interpretations. There is, however, at least one important respect in which uniformity rather than variety prevails: the applicable standards of review do not vary depending on which court is reviewing the agency. Whichever standard governs a particular case — Chevron, Skidmore, or something else — all courts in the judicial hierarchy are supposed to apply that same standard. This Article proposes instead that deference doctrine should take into account the varying institutional circumstances and competencies of courts at different positions in the judicial hierarchy. More specifically, lower courts should be more deferential to agencies than should higher courts. The argument divides into two parts. Part I, which presents the theoretical case, lays out a series of common rationales for judicial deference and explains how those rationales actually support a regime of hierarchically variable deference. Part II then turns to questions of institutional implementation. As it turns out, our system already manifests a few features of hierarchically variable deference, though it does not do so openly. Thus, this Article helps to explain and justify some current practices. Prescriptively, Part II suggests a number of ways in which the judicial system could more systematically implement a regime of hierarchically variable review, while also acknowledging some impediments and countervailing considerations. One possibility is that different courts should employ somewhat different doctrinal standards, but hierarchical variation can also manifest itself through non-doctrinal means, such as through decisions about how to allocate jurisdiction.

Matthew D. Adler, Cost-Benefit Analysis and Distributional Weights: An Overview, available at http://ssrn.com/abstract=2313388. Standard cost-benefit analysis (CBA) is insensitive to distributional concerns. A policy that improves the lives of the rich, and makes the poor yet worse off, will be favored by CBA as long as the policy’s aggregate monetized benefits are positive. Distributional weights offer an apparent solution to this troubling feature of the CBA methodology: Adjust costs and benefits with weighting factors that are inversely proportional to the well-being levels (as determined by income and also perhaps non-income attributes such as health) of the affected individuals. Indeed, an academic literature dating from the 1950s discusses how to specify distributional weights. Moreover, the current official guidance document for governmental CBA in the U.K. recommends their use. However, CBA scholarship in the U.S. has usually ignored the possibility of distributional weights. The prevailing wisdom, in the U.S., seems to be that the specification of weights is hopelessly “value laden” and that distributional considerations are best handled through the tax system. Although CBA is now entrenched in the federal regulatory bureaucracy, via review by the Office of Information and Regulatory Affairs (OIRA), distributional considerations — let alone the specific device of weights — are barely mentioned in OIRA guidance. This paper provides a systematic overview of the specification of distributional weights. It shows, in detail, how to “put structure” on the problem. Two kinds of weights are described: (1) utilitarian weights, which correct for the diminishing marginal utility of money, and (2) isoelastic/Atkinson weights, which embody an aversion to inequality in the distribution of well-being itself. Both kinds of weights can be captured in simple and quite implementable formulas. Although the choice to adjust CBA with weights does involve a contestable ethical/moral judgment, that is equally true of the decision to use CBA in the first place — which remains intensely controversial outside the community of economists. The paper illustrates the effect of weights by applying them to the “value of statistical life” (VSL), capturing individuals’ willingness to pay for fatality risk reduction. Richer individuals have higher VSL values, and this creates a policy dilemma: CBA with income-differentiated VSL can benefit the rich at the expense of the poor, but CBA with undifferentiated, population-average VSL may require the poor to pay more than they can afford for risk reduction. The Article shows how the use of distributionally weighted VSL values can greatly mitigate this dilemma. The paper also dissects the objection of the “tax system” to the use of weights.

Deborah Thompson Eisenberg, Regulation by Amicus: The Department of Labor’s Policy Making in the Courts, 65 Fl. L. Rev. 799 (2013). This Article examines the practice of “regulation by amicus”: that is, an agency’s attempt to mold statutory interpretation and establish policy by filing “friend of the court” briefs in private litigation. Since the United States Supreme Court recognized agency amicus interpretations as a source of controlling law entitled to deference in Auer v. Robbins, agencies have used amicus curiae briefs — in strategic and at times aggressive ways — to advance the political agenda of the President in the courts. Using the lens of the U.S. Department of Labor’s (DOL’s) amicus activity in wage and hour cases, this Article explores the tension...
between the extraordinary power and efficiency of agency amicus policy making on the one hand, with the harms this less transparent approach may inflict on fundamental democratic values such as public participation and separation of powers. The Article first puts the issue in empirical context by examining the nature and impact of the DOL’s amicus filings in 324 Fair Labor Standards Act (FLSA) cases from the Roosevelt through Obama Administrations. To evaluate the normative implications of amicus policy making, the piece then juxtaposes the especially active amicus strategies employed by the Bush Administration — which manipulated deference principles to weaken worker protection laws — and the Obama Administration — which increased amicus filings to revive enforcement of the Fair Labor Standards Act. The Article proposes an analytical framework for judicial review of agency amicus arguments that remains faithful to separation of powers — especially Congress’s purpose in passing remedial statutes like the FLSA.

Daniel A. Farber, The Thirty Years War Over Federal Regulation, available at http://ssrn.com/abstract=2310392. Using the evidence Tom McGarity assembles in his recent book “Freedom to Harm,” this Article examines regulatory history during the thirty-plus years since Reagan became president. Although the available evidence presented is necessarily incomplete, it suggests strongly that the opponents of regulation have had only mixed success. Legislative efforts to roll back the regulatory state have given rise to pitched political battles, but in the end have not infrequently ended in modest expansions of agency authority. Opponents of regulation have had more luck in the rule-making process, where they have succeeded in delaying or killing regulatory efforts or in weakening the final regulations. They have successfully joined advocates of “smarter regulation” in some of these efforts. Yet in the end the body of federal regulation has continued to grow almost unabated. The biggest success of the opponents of regulation has come through budget cuts and policy changes that have weakened enforcement, but even there, other factors may have helped soften the impact on the beneficiaries of regulation. Altogether, despite the frustrations of environmentalists, they have succeeded in delaying or killing regulatory efforts or in weakening the final regulations. Jurists and scholars have argued that the doctrine runs afoul of a constitutional norm against self-interpretation, and last Term Chief Justice Roberts asked future litigants to brief whether the Court should overturn the doctrine on this basis. This Article is the first to comprehensively examine constitutional self-interpretation norms by looking at the conditions under which the heads of the three branches of government exercise self-interpretation powers. It shows that self-interpretation is pervasive and that the Supreme Court would be wrong to overturn Seminole Rock on self-interpretation grounds. Moreover, by examining self-interpretation practices, this Article brings new insight to the many areas of law that involve self-interpretation, including presidential oversight of agencies and judicial stare decisis.

Daniel Bodansky, Book Review of Jack Goldsmith, Power and Constraint: The Accountable Presidency after 9/11 (2012), 107 Am. J. of Int’l Law 714 (2013). Like all of Goldsmith’s work, Power and Constraint offers a powerful challenge to the conventional thinking that we live in an era of unconstrained presidential power. But just as the conventional critique of the terror presidency goes too far in sounding “the death knell for the separation of powers,” Power and Constraint swings too far the other way in its claims about presidential accountability. As usual, the truth lies somewhere in between. Goldsmith argues that the Bush Administration’s policies encountered significant pushback from a wide variety of actors both within and outside the government, including inspectors general, military and national security lawyers, the press, and human rights attorneys. The result was a rethinking, recalibration, and in some cases revision of the Bush Administration’s counter-terrorism policies, which have become the “new normal,” largely followed by the Obama Administration. Paradoxically, the constraints on the Presidency enhanced its power by endowing it with greater legitimacy. Power and Constraint’s analysis of what Goldsmith calls “distributed checks and balances” is largely convincing, subject to two caveats. First, his conclusion about the “accountable Presidency” is not fully convincing because he evaluates accountability almost exclusively in prospective rather than retrospective terms and does not consider the question of accountability to the victims of abuse. Second, his explanation for the pushback against the Bush Administration’s policies focuses largely on procedural factors, such as the Bush Administration’s unilateralism and expansive rhetoric. But the bigger...
problems with the Bush Administration’s policies were substantive rather than procedural — for example, its use of enhanced interrogation techniques such as waterboarding and its refusal to apply the Geneva Conventions to the conflict in Afghanistan — where even the strongest possible pushback often came to naught. Nevertheless, Goldsmith has done a valuable service in providing a more complete and nuanced analysis of the various checks on presidential power; he reminds us of the power of law and legitimacy within, if not among, nations.

Ashley Deeks, The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference, 82 Fordham L. Rev. 828 (2013). The national security deference debate has reached a stalemate. Those favoring extensive deference to executive branch national security decisions celebrate the limited role courts have played in reviewing those policies. The executive, they contend, is constitutionally charged with such decisions and structurally better suited than the judiciary to make them. Those who bemoan such deference fear for individual rights and an imbalance in the separation of powers. Yet both sides assume that the courts’ role is minimal. Both sides are wrong. This Article shows why. While courts rarely intervene in national security disputes, the Article demonstrates that they nevertheless play a significant role in shaping executive branch security policies. Call this the “observer effect.” Physics teaches us that observing a particle alters how it behaves. Through psychology, we know that people act differently when they are aware that someone is watching them. In the national security context, the executive is highly sensitive to looming judicial oversight in the national security arena, and establishes or alters policies in an effort to avert direct judicial involvement. By identifying and analyzing the observer effect, this Article provides a more accurate positive account of national security deference, without which reasoned normative judgments cannot be made. This Article makes another contribution to the literature as well. By illustrating how the uncertain, but lurking, threat of judicial decisions spurs increasingly rights-protective policy decisions by the executive, it poses a rejoinder to those who are skeptical that law constrains the executive.


By Jeffrey S. Lubbers

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.

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INCORPORATION BY REFERENCE

Last October, the Office of the Federal Register published a Notice of Proposed Rulemaking (78 Fed. Reg. 60,784 (Oct. 2, 2013)) to revise its regulations governing the practice of “incorporation by Reference,” which permits federal agencies to create binding regulatory obligations just by referring to standards that have been developed by private nongovernmental organizations, standards development organizations (SDOs) such as the American National Standards Institute (ANSI) or the American Society of Mechanical Engineers (ASME). This rulemaking should be of substantial interest to the occupational safety community. While its comment period has closed, comments remain open until May 12, 2014, on the Office of Management and Budget’s Circular No. A-119 (79 Fed. Reg. 8,207 (Feb. 11, 2014)) — also important for incorporation by reference practice. Professor Strauss’ BNA article of last November will help illuminate the stakes.

Incorporating by Reference:
Knowing the Law in the Electronic Age

By Peter L. Strauss

By statute, matters otherwise publishable in the Federal Register—as regulations establishing one’s legal obligations ordinarily must be—may instead be incorporated by reference if the director of the OFR finds them “reasonably available to the class of persons affected thereby.”1 These matters may include “statements of general policy or interpretations of general applicability”—soft law—as well as the hard law of regulatory obligation. The existing OFR regulations,2 unchanged since 1982 and designed for the age of print, nonetheless restrict the possibilities of incorporation to “requirements.” Remarkably, they fail to define what it might mean for incorporated standards to be “reasonably available,” and require that condition to be satisfied only on the date of publication of the adopted regulation—without attention to its continuing availability as the regulation ages. In practice this has meant that one wishing to know an incorporated standard’s content must go to the SDO that developed it and, unless it happened to be available over the Internet in read-only format, pay the SDO for a copy. Over 10,000 federal regulatory requirements have been created by the incorporation of voluntary consensus standards; limited agency resources and the costs of new rulemaking have kept aged and displaced voluntary standards—over two-thirds this number—in place as legal obligations.

Congress Steps In. People familiar with OSHA’s workplace safety regulations are probably aware that those regulations often do not fully state OSHA’s regulatory requirements, but rather incorporate by reference SDO standards. As a means of jump-starting OSHA, Congress directed it to formulate its initial body of safety regulations on the basis of the then-prevailing consensus industrial standards.3 Some of the standards OSHA regulations refer to are listed in appendices, identified as acceptable but not mandatory means of complying with regulatory requirements that are independently stated; others are mandatory but in essence state technical means of complying with a regulation whose requirements are readily understood;4 but others are themselves the safety standard, whose requirements are not readily understood without having the standard in hand. An example of the last is the following subsection of 29 C.F.R. § 1910. Storage and handling of liquefied petroleum gases:

(b)(3) Requirements for construction and original test of containers.

(i) Containers used with systems embodied in paragraphs (d), (e), (g), and (h) of this section, except as provided in paragraphs (e)(3)(iii) and (g)(2)(i) of this section, shall be designed, constructed, and tested in accordance with the Rules for Construction of Unfired Pressure Vessels, Section VIII, Division I, American Society of Mechanical Engineers (ASME) Boiler and

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2 1 C.F.R. Part 51.
3 E.g., an ANSI standard defining the glossy yellow and black colors required for caution signs by 29 C.F.R. § 1926.200(c).
4 29 C.F.R. § 1910.110(b)(3).
Pressure Vessel Code, 1968 edition, which is incorporated by reference as specified in § 1910.6. 5

Notice two things about this requirement: First, the ASME standard referred to was adopted in 1968; and second, 29 C.F.R., § 1910.6, which specifies the terms of incorporation by reference, provides that this standard can either be consulted at one of two government libraries in Washington, D.C., or purchased from ASME. Section 1910.6 lists dozens of occupational safety and health standards that a person located at any distance from Washington would have to buy to know what OSHA’s regulations require—and that purchase is not always cheap. One would have to pay $849 to obtain an Underwriters Laboratories standard of equal age (1968) that is also incorporated by Section 1910. That the standards, unlike the C.F.R., cannot be costlessly consulted in a local library or on the Internet is the result of their having been copyrighted. Unquestionably the private property of the SDOs before their incorporation, SDOs contend that their standards remain private property even when incorporation has converted them into legal obligations.

Hurdles for Updates. A 2010 edition of ASME’s Rules for Construction of Unfired Pressure Vessels, Section VIII, Division 1 is available on its website, which offers the 2010 Rules for sale for $720; ASME updates all these regulations on a three-year cycle. That OSHA’s regulations still require compliance with the 1968 edition reflects the costs OSHA faces whenever it engages in rulemaking, and the insistence of the OFR that only the particular edition of a standard that is precisely identified in a rule may be incorporated. Under the 1982 OFR regulations, OSHA would have to initiate new rulemaking to bring this (or its many other incorporated regulatory requirements) up to date. And should it propose a new rule incorporating the most recent version of ASME’s Pressure Vessel standards, anyone wishing to know what that version would require if adopted, in order to comment on it, would also be required to purchase it. In December 2011 the Administrative Conference of the United States adopted a number of recommendations concerning agency practice in “incorporating by reference” regulatory requirements that would not be independently stated. 6 These recommendations urged agencies to work to improve public access to incorporated standards, not only once they had been finally converted into regulatory obligations, but also at the proposal stage, when both the regulated and the affected public have a strong interest to know just what requirements are being proposed and also the scientific or other basis for that proposal. However, the recommendations did not seek revision of the OFR’s regulations to accommodate the changed circumstances of the computer age, or take issue with the continued copyright status of private standards once (and to the extent) they had been converted into regulatory obligations. Seeing these as deficiencies in the ACUS recommendations, I and 23 others filed a petition for rulemaking with the OFR in late February 2012. Our petition sought changes that would bring the OFR regulations into the electronic age, make standards that had been converted into law freely available to the public, and by eliminating the “requirement” requirement, both reduce the obstacles agencies face in keeping pace with changes in consensus standards and support a workable contemporary business model for SDOs. It is in reaction to this petition that the recent notice of proposed rulemaking was issued.

ANSI Announces Free Portal. On the same day as OFR published its proposal, ANSI held an open forum in Washington, D.C., “Government Reliance on Voluntary Consensus Standards and Conformance Programs.” Joe Bhatia, ANSI’s president and chief executive officer, proudly announced that ANSI was creating an Incorporation by Reference Portal—already subscribed to by 14 standards development organizations (SDOs, including the International Standards Organization and other heavy hitters)—to provide free public access on a tightly controlled read-only basis to voluntary consensus standards that had been converted into legal obligations through their incorporation by reference into agency regulations. James Shannon, president and chief executive officer of the National Fire Protection Association, responsible inter alia for the National Electric Code many states have incorporated by reference into their laws, reminded the audience that NFPA had been providing such a facility for 10 years, without appreciable damage to a financial base heavily dependent on sales of its standards. The dependency became greater, he remarked, when an industrial member of NFPA lowered its annual dues payment from $25,000 to $42 in retaliation for the adoption of a standard of which it did not approve. That persuaded NFPA to move away from reliance on industry support for its work to greater reliance on sales revenues. (Such a step is perhaps unlikely to be taken by industrial SDOs like the American Petroleum Institute or the Pipeline Construction Council, both of which have been relied upon by the Pipeline

and Hazardous Materials Safety Administration to develop safety-related standards it has incorporated into its regulations.) It thus appears that the SDO community is taking helpful steps to bring its work and its business model into the electronic age; if this is (understandably from its perspective) not quite the recognition that “law must be free” that some would hope for, it responds to that impulse.

OFR Notice Falls Short. The OFR notice, on the other hand, is a disappointment in almost every respect. Its one positive element reflects one of the more important and less controversial aspects of the ACUS recommendations: In order to have a notice of proposed rulemaking that includes incorporation elements published, an agency would be required in its preamble either to summarize the material proposed to be incorporated, or to describe the ways in which it has worked to make the materials it proposes to incorporate by reference reasonably available to interested parties. A similar preamble discussion of the ways in which the agency has worked to make the materials it is incorporating by reference reasonably available to interested parties would be required to attend the final rule. But, mirroring the deficiencies of its 1982 regulations in this respect, not a word in the proposed rule addresses what “reasonably available”—the sole statutory criterion for the director’s approval or disapproval of incorporation—might be. The absent definition (and consequent failure of responsibility) is underscored by the definition of a condition that is not statutory—whether the matter incorporated is “usable”—and by the repeated incantation in the OFR’s preamble to the proposal that the director’s resources are limited (as they certainly are). Strikingly, the continuing, unaltered content of the usability definition reflects the proposal’s complete indifference to the electronic age—an incorporated standard will be usable only if it is “bound, numbered, and organized.” Absent, too, is any softening of the “requirement” requirement. In the rest of the developed world, standards are generally regarded not as law, but as identified (sufficient but not necessary) means for compliance with regulatory obligations independently stated. A similar approach is readily imaginable under the language of the governing statute, and in fact is the approach OSHA takes in those appendices in which it identifies some SDO standards as acceptable but not mandatory means for complying with independently, fully stated regulatory requirements. When this is OSHA’s approach, it can much more easily keep up to date. The Appendices do not require notice and comment rulemaking, making them much simpler to change as years go by—both removing outdated standards, and indicating new ones. Today, on the other hand, the 1968 standard governs unfired pressure vessels, although it has long since been replaced as a consensus standard by ASME and indeed may no longer be available from it. Reasonable availability is an issue only at the moment of incorporation; by preserving the unnecessary “requirement” requirement, OFR assures a situation in which such outcomes will occur again and again.

Not Limited to Technical Matters. Much more could be said, but perhaps the following will nail home the remarkable deficiencies of OFR’s proposal. When incorporation by reference was authorized, the expectation was that it would be used for technical matters of little interest to the public—“published data, criteria, standards, specifications, techniques, illustrations, or similar material”—exactly what colors, for example, will satisfy a requirement to use glossy yellow and black paint on workplace caution signs? The 1982 regulations accepted this expectation, providing that only such matters were eligible for incorporation. Similar expectations have inhered in subsequent federal statutes and policies—the National Technology Transfer and Advancement Act of 1995, and OMB’s Circular A-119 on implementation of that statute. But in fact OFR has never enforced this limitation, permitting incorporation by reference of standards like 29 C.F.R. § 1910(b)(3), that create regulatory obligations, plain and simple. Its proposal now would ratify this neglect, by making it an alternative condition of eligibility that publication “[s]ubstantially reduces the volume of material published in the Federal Register.” It is not only that the electronic age makes this criterion unnecessary; explicitly permitting the incorporation by reference of regulatory obligations would take us a step back into secret law. To the extent incorporations by reference persist that do importantly take on the characteristics of “law” that are unmistakably regulatory standards or requirements, it is hard to avoid the conclusion that knowledge of them is the citizen’s right, and that monopoly pricing power over that knowledge cannot properly be conferred by recognizing copyright in them after the fact of their incorporation.

Peter L. Strauss is Betts Professor of Law at Columbia Law School, teaching courses in administrative law, legal method, and legislation. He joined the faculty in 1971. In 1992-1993, he served as chair of the Section of Administrative Law and Regulatory Practice of the American Bar Association. His published works include Administrative Justice in the United States (1989 and 2002); Gellhorn’s & Byse’s Administrative Law: Cases and Comments (most recently, 2011, with Rakoff, Farina and Metzger); Legal Methods: Understanding and Using Cases and Statutes (2005 and 2008); Legislation, Understanding and Using Statutes (2006); and Administrative Law Stories (2006). He is a member of the National Academy of Arts and Sciences and senior fellow at the Administrative Conference of the United States.
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Friday • April 25, 2014

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