Administrative & Regulatory Law News

Section of Administrative Law & Regulatory Practice

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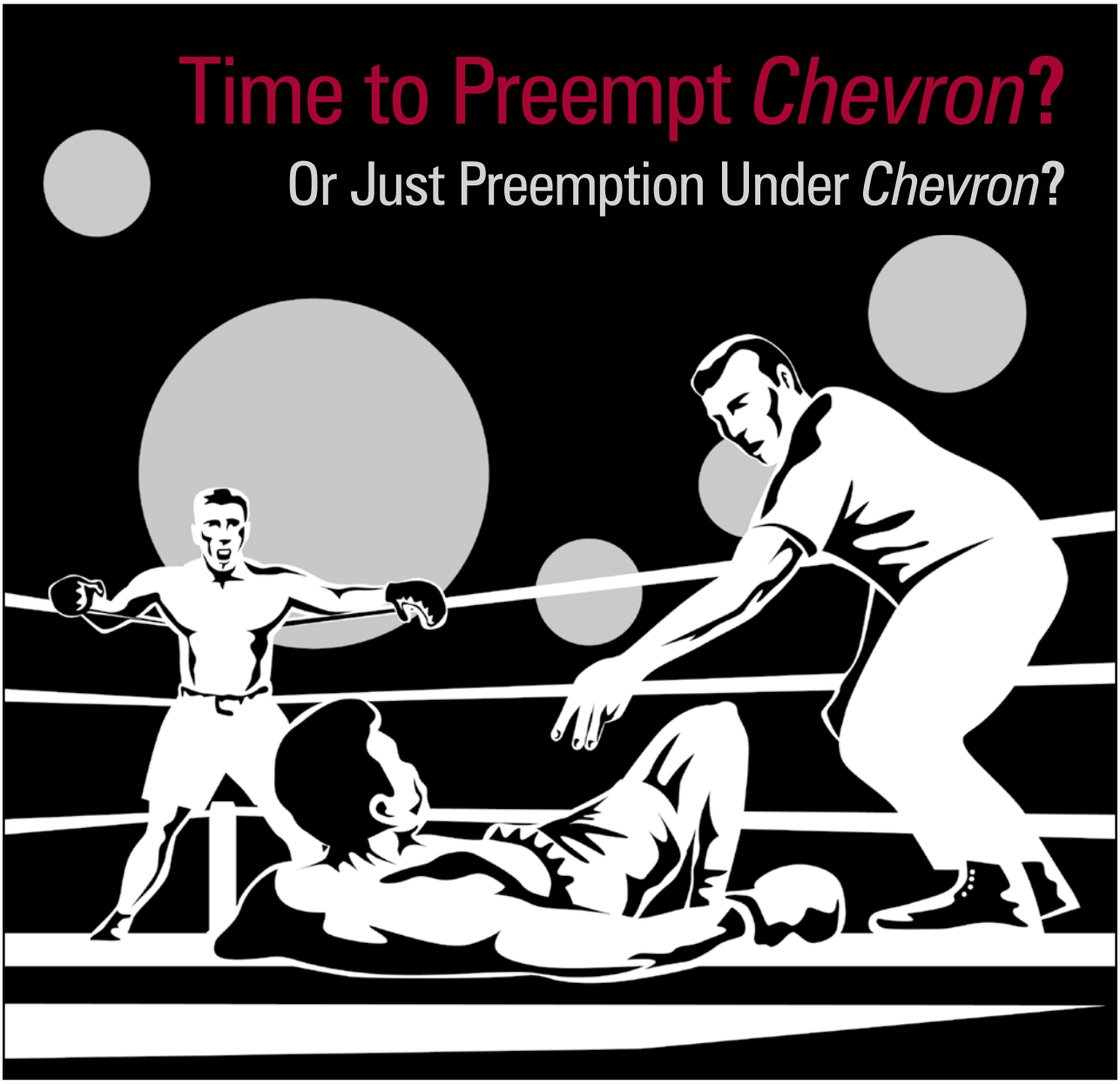
Time to Preempt *Chevron*?

Or Just Preemption Under *Chevron*?



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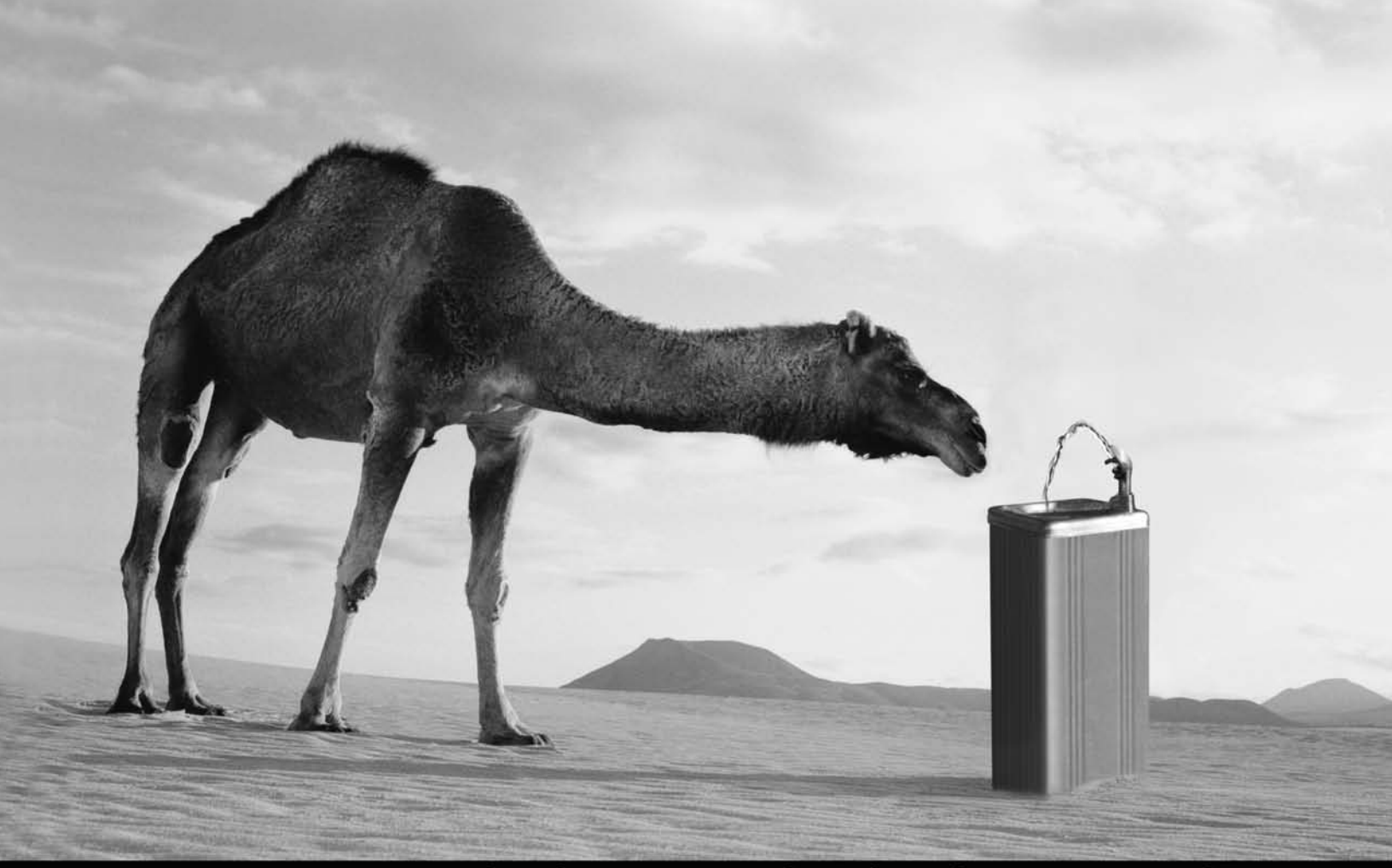

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Chair's Message

William V. Luneberg

The Section's Administrative Law Conference, held on October 22–24 at the Washington Convention Center, was a great success, with more than 350 in attendance. Credit for bringing the event together belongs to, among others, co-chairs of the meeting, Warren Belmar and Linda Lasley-Ford, Neil Eisner, whose suggestions were invaluable in assuring attendance by a large number of government employees, and Tom Susman and Jack Young, whose recruitment efforts obtained White House Special Counsel Norman Eisen and the Vice-President's Chief of Staff Ron Klain as our luncheon and dinner speakers. As a venue, the Convention Center offered both facilities and a location that have prompted us to look into the possibility of entering into a longer-term contact to ensure its availability (at lower cost) for our larger events over the next three years.

Following a well-attended public session at the Conference that examined the need to revisit lobbying reform in light of recent developments and Obama Administration initiatives, the newly established Task Force on Lobbying Regulation held its first meeting on October 22 to finalize its agenda with the hope of producing at least a draft report next year. The Council was also informed at its meeting on October 24 of a new initiative, headed by Charles Koch of William & Mary Law School, to examine ways in which the Section can become a force in the area of global administrative law. Indeed, a panel discussion to focus on various international organizations from an administrative law perspective and a separate meeting at a Council session to discuss this initiative is now being planned for the Spring Meeting (May 14-16) at Nemacolin Woodlands in Western Pennsylvania.

This fall has been an active one with a number of initiatives designed to encourage committee programming and other activities to keep and attract Section members. Those initiatives will continue into the Winter and Spring. Already the Rulemaking Committee, at Jeff Rosen's initiative, held a very successful program in October entitled "A Retrospective on Rulemaking." There was also a teleconference in September dealing with executive branch lobbying conducted by Lobbying Manual co-editor Rebecca Gordon. Other stand-alone CLE programs are planned for the coming months, including those dealing with the future of NAFTA, due process as it applies to denial of veterans benefits, effective representation in EEOC proceedings, and specialized issues affecting federal lobbyists. Jim O'Reilly has completed a book on careers in administrative law aimed at law students and new lawyers and, with Lyn Stewart-Hunter, who is our Law Student Division liaison, conducted the first of hopefully several teleconferences aimed at attracting law students to the Section.

Finally, there are two other developments I should mention. The Section's Strategic Planning Committee met in September and will meet again in December and regularly thereafter throughout the Winter and Spring. I am hopeful that at the January 2010 Council meeting (January 23 in Washington) I will be able to place before it several significant recommendations for action that can be immediately implemented. Meanwhile, the ABA continues to work on improving its website. Among the changes are those that will facilitate the ability of each Section committee to update its own webpage with recent developments and activities and to facilitate involvement of members in committee work.

As always, Section Director Anne Kiefer has been absolutely essential to the smooth functioning of Section activities. Hopefully by the end of December she will have a full staff to assist her.

As always I welcome your suggestions for areas and ways in which the Section can better serve its members, government, and the broader public.

CORRECTION

The Summer 2009 issue of the Administrative & Regulatory Law News included a synopsis of former Office of Information and Regulatory Affairs Administrator Susan Dudley's remarks delivered at the 5th Annual Administrative Law & Regulatory Practice Institute last spring. Instead of remarking on OIRA's failure to "achieve the necessary consistency" in agency performance, the account of her remarks should have reported that Ms. Dudley observed that "OIRA has no constituency because it focuses on the broader public interest, rather than on special interests." In addition, the article should have stated that her criticism of the shortcomings of cost-benefit analysis was directed at the "Pragmatic Regulatory Impact Analysis" approach recommended by other panelists, not the method employed by OIRA. The article also did not highlight her defense of OIRA as an invaluable tool for the President, her rejection of suggestions that OIRA become an advocate for increased agency resources, and her support for transparency between the agency and non-governmental entities but not transparency for internal agency deliberations.

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Administrative & Regulatory Law News

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

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

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End the Failed *Chevron* Experiment Now:

How *Chevron* Has Failed and Why it Can and Should Be Overruled

By Jack M. Beermann[*]

In the now familiar decision in *Chevron U.S.A., Inc.* v. *NRDC,* 467 U.S. 837 (1984), the Supreme Court announced a startling new approach to judicial review of statutory interpretation by administrative agencies which requires courts to defer to agency interpretations of ambiguous statutes. While the Court itself might not have intended to make great changes in administrative law, *Chevron* quickly became the iconic representation of a completely new way of reviewing agency interpretive decisions.

Chevron is administrative law's most highly analyzed doctrine. It does not take much study, however, to reveal one basic fact about the *Chevron* doctrine — as a legal doctrine, it has proven to be a complete and total failure and thus the Supreme Court should overrule it at the first possible opportunity.

Why Overrule *Chevron*?

In short, *Chevron* should be overruled for the following overlapping sets of reasons: 1. *Chevron* is contrary to the statute that governs judicial review of statutory interpretation, APA § 706, so much so that the Court actually found it necessary to re-phrase the statutory standard in the opinion to make the statute appear more deferential than the language passed by Congress.

2. *Chevron* has no adequate theoretical foundation. It was built on a faulty premise concerning congressional intent and was (and is) contrary to established traditions concerning the distribution of authority in statutory interpretation cases, at least as embodied in many of the cases decided after the passage of the APA.

3. The *Chevron* opinion was poorly constructed and unclear on basic issues such as the proper role of interpretation, legislative history, and policy arguments. It is still not clear whether *Chevron* concerns review of statutory interpretation or review of policy decisions.

4. A short time after establishing the *Chevron* doctrine, the Court created a new version of step one which allows the reviewing court to employ the "traditional tools of statutory interpretation" to determine whether Congress's intent is clear. This threw the doctrine into disarray and spawned three competing versions of step one, leading to conflicting lines of cases. Currently, the application of the *Chevron* doctrine is highly unpredictable, and the decision itself is cited for opposing propositions.

5. For a variety of reasons, *Chevron* apparently has not had the desired effect of measurably increasing deference to agencies. The reasons for this failure are not altogether clear, but include first, that *Chevron* is so pliable that courts applying it can still reach any desired result, second, that agencies may have become more adventurous in their statutory interpretation, leading to increased likelihood of rejection on judicial review, and third, that judges may be simply unwilling to defer to interpretations with which they disagree.

6. The Supreme Court does not even cite *Chevron* in a high proportion of the cases in which it arguably applies. Something is amiss when the Court does not find it necessary to employ the test that it has created to govern a class of cases.

7. Relatedly, *Chevron* created uncertainty about when it applies, which made it necessary for the Court to construct a doctrine to determine that. This doctrine, referred to as *Chevron* Step Zero, is even more uncertain than the *Chevron* doctrine itself.

8. All of the uncertainty noted above surrounding the application of *Chevron* and when it applies has forced the Justices and parties to expend inordinate resources on arguing over the *Chevron* doctrine instead of what they should be arguing about, Congress's intent and the rationality of agency policy in the particular case. In short, the litigation costs surrounding *Chevron* appear to outweigh any benefits the doctrine may have created.

9. *Chevron* encourages irresponsible agency and judicial behavior. Agencies expecting that their interpretive decisions will be reviewed under a deferential version of *Chevron* are free to disregard congressional intent and impose their own policy views even when it is possible to have at least a good sense of how Congress would have wanted the agency to act. Reviewing courts can brush off serious challenges to agency decisions by invoking *Chevron* without asking whether the agency is thwarting imperfectly expressed congressional intent.

10. Consensus on the proper understanding and application of the *Chevron* framework is unlikely for the foreseeable future. In addition to the reasons for the indeterminacy of the *Chevron* doctrine discussed above, the unlikelihood of this changing is evidenced by the facts that, despite appearances, there is no stable constituency on the Court for *Chevron* deference and that the scholarly commentary on *Chevron* has not come to consensus on basic issues surrounding *Chevron*. In short, after twenty-five years of instability, there is no reason to believe that the *Chevron* framework is likely to become a stable decisionmaking process.

Overruling *Chevron* would be consistent with the reasoning the Court has used in recent cases in support of the permissibility of overruling precedent within traditions of stare decisis. First, overruling *Chevron* would not upset settled expectations. This is especially true given that the application of *Chevron* is so unpredictable. No one rationally orders their affairs in reliance on *Chevron* defer-

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[*] Professor of Law and Harry Elwood Warren Scholar, Boston University School of Law. This article is a condensed version of a lengthier article accepted for publication in a forthcoming issue of the *Connecticut Law Review*.

ence. Second, *Chevron* is a judge-made rule that did not purport to be based on statutory interpretation that Congress might have relied upon in shaping the law. Third, experience with *Chevron* since it was decided shows that it is a failure. In other words, overruling *Chevron* would not merely be the result of changed views, but rather would be informed by experience that could not have been available at the time *Chevron* was decided.

Perhaps the greatest problem in the application of the *Chevron* doctrine is that the Court very quickly abandoned the original, apparently highly deferential, version of the doctrine and replaced it with multiple versions that, if followed, can lead to different results. The *Chevron* doctrine has basically disappeared and lacks the content necessary to remain a viable decision procedure. I call the various versions of *Chevron* that currently exist "original directly spoken *Chevron*," "traditional tools *Chevron*," "plain meaning *Chevron*," and "extraordinary cases *Chevron*." Each of these versions of *Chevron* is currently applied by the Supreme Court, except perhaps original directly spoken *Chevron*, which may rarely if ever be applied. What has occurred is that the results of judicial review of agency statutory interpretation before and after *Chevron*, especially at the Supreme Court, are virtually indistinguishable, meaning that the effort to increase deference to agencies and clarity in the law has failed.

Chevron's multiple meanings makes analysis of *Chevron* very difficult. In fact, a number of the criticisms raised in this article may appear to be in conflict with each other. Multiple *Chevron*s can mislead agencies and courts. People often see what they want to see. Lower courts and agencies may seize on highly deferential versions of *Chevron*—courts to clear the docket and agencies to test the limits of statutory authority. Both may then be surprised when the Supreme Court employs a less deferential understanding of *Chevron* step one to overrule an agency statutory construction that had been approved on review by a lower court.

One of the great problems with understanding and applying *Chevron* is that it has created confusion over the relative domains of policy and interpretation. Although questions of meaning are often bound up with policy decisions, the two should be separated as much as possible, and reviewing courts should review agency policy decisions under the applicable standard of review separately from questions of statutory meaning. For example, in *Chevron* itself, the Court should have separated the question whether the bubble concept was linguistically consistent with the statutory phrase "stationary source" from the question whether adopting that meaning made regulatory sense. The former question should be reviewed de novo while the latter question should be reviewed under the deferential arbitrary and capricious standard.

Even if *Chevron* as a whole is not abandoned, the standard for determining whether *Chevron* applies should be replaced. The jurisprudence governing the scope of *Chevron* has been dubbed "*Chevron* Step Zero" because the determination of whether *Chevron* applies is made prior to applying *Chevron* steps one and two. The Court's decisions on whether *Chevron* applies are deeply flawed, primarily because they disavow any legal content. Justice Souter's opinion for the Court in *United States v. Mead*, 533 U.S. 218 (2001), the leading case on the scope of *Chevron* deference, is the prime example. Justice Souter catalogued the factors that the Court has found relevant to whether an agency's interpretation should receive *Chevron* deference but he was careful not to characterize any factor as decisive. He constructed the standard with great care to avoid creating any actual binding law, and the entire question is shrouded in mystery inappropriate for a structural matter like the applicability of *Chevron*.

What Should Replace *Chevron*?

If *Chevron* is overruled, what should take its place? Based on the language of the APA, when a federal court conducts judicial review, it should decide all questions of law. I would not, however, prohibit reviewing courts from paying close attention to agency views, but the ultimate judicial decision should be based on what the court finds to be the best reading of the statute in light of all factors, including the agency's views. If genuine ambiguity leaves a range of potential meanings, the Court should return to pre-*Chevron* practice and determine whether the agency has interpreted the statutory provision in a reasonable manner, with attention to the meaning of the statute, its purpose and history and the wisdom of its policy choices under the arbitrary, capricious standard. When an agency has been expressly granted power to create law, the reviewing court should, as in pre-*Chevron* practice, determine if the agency's interpretation is within the delegation of authority and passes muster under the arbitrary, capricious test.

The virtues of replacing *Chevron* with my approach are many. Review of agency statutory interpretation would be much simpler with the focus on the meaning of the statute rather than on whether and how *Chevron* applies to the particular case. This would save litigation costs and force everyone, courts, challengers and agencies, to focus on Congress's expressed intent, which ought to be the most important factor in statutory interpretation and application. Agencies would be less able to frustrate Congress's intent by hiding behind *Chevron* on judicial review. And most important, judicial review of agency statutory interpretation would be more consistent with governing constitutional and statutory principles.

A key issue if *Chevron* is overruled is whether agencies could maintain the flexibility to alter their statutory interpretations under either pre-APA practice or *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Justice Scalia has argued that *Skidmore* was inferior to *Chevron* step two because under *Skidmore* the ultimate interpretive decision is made by the reviewing court and thus could not be altered by the agency. This is an accurate depiction of practice under *Skidmore* — reviewing courts under *Skidmore* arrive at what they consider the correct interpretation while taking into account the agency's views. There is nothing, however, in the nature of *Skidmore* deference or deference under

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Preemption, Deference, and Constitutional Doubt

By Garrick B. Pursley[*]

Federal preemption of state law is an issue on which courts typically exhibit deep deference to the decisionmaking of the political branches. The overriding rule is that congressional intent determines the existence and scope of preemption.

The inquiry into Congress's preemptive intent and its effects on challenged state laws is one that *courts* usually make using the familiar tools of statutory interpretation. But more and more frequently, federal administrative agencies attempt to supplant courts by offering their own interpretations of the preemptive scope of federal statutes. Agency preemption interpretations are at issue, in one form or another, in most preemption cases. Indeed, anytime a *regulation* is argued to preempt state law, there is at least an implicit agency preemption interpretation: Since the legitimacy of all agency action depends on the agency's delegated authority, arguably preemptive agency regulations necessarily depend on the agency's interpretive conclusion that the statute permits it to regulate in that way.

If a statute has express preemption language, agency preemption interpretations may be fairly straightforward constructions of that language. Explicit preemption interpretations may be presented in amicus briefs or as predicates for substantive regulations, like the preemption language in the preamble to the FDA's 2006 drug labeling regulations at issue in *Wyeth v. Levine*, 129 S. Ct. 1187 (2009). But they may also be based on any of the forms of conflict—including conflict with the underlying purposes of a statute—that courts recognize as legitimate bases for preemption.

The obvious question that agency involvement adds to preemption cases is whether courts should defer to agencies' preemption interpretations. The background of judicial deference to Congress on preemption makes the Supreme Court's recent approach to the agency deference question curious—it has *refused to decide* whether deference to agencies on preemption is warranted, under either *Chevron* or *Skidmore*. The Court's decision in *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999 (2008), is illustrative. *Riegel* involved preemption of state tort claims by the Medical Device Amendments (MDA) to the Food, Drug, and Cosmetics Act (FDCA). The FDA offered the Court its interpretation of the preemptive scope of the statute in regulations and briefs, but the Court based its decision on the statute alone, making clear that it was "[n]either accepting nor rejecting the proposition that" the FDA's views "can properly be consulted to determine the statute's meaning." Similarly, in *Levine*, where the question was whether the FDCA's pharmaceutical labeling regime preempted state tort claims, the Court noted the FDA's view that the claims were preempted but explained that while it has "given 'some weight' to an agency's views about the impact of tort law on federal objectives when 'the subject matter is technica[l] and the relevant history and background are complex and extensive,'" it has never "deferred to an agency's *conclusion* that state law is pre-empted." 129 S. Ct. at 1201. I discuss possible justifications for the Court's peculiar recent approach to questions of deference for agency decision-making about preemption in my symposium article *Avoiding Deference Questions*, 44 Tulsa L. Rev. 557 (2009). This article provides a very brief overview of the Court's approach and one plausible constitutional basis for it.

The Supreme Court has not definitively resolved which, if any, of the established deference rules—*Chevron* or *Skidmore*—should apply to agency preemption interpretations. And the Court in recent cases like *Riegel* and *Levine* appears to be deliberately avoiding the deference question. But this may be less anomalous than it appears. If there are colorable constitutional doubts about the legitimacy of constraining judicial interpretive authority on preemption questions and deference constitutes such a constraint, then avoiding the deference question may be an instance of the familiar judicial practice of not deciding constitutional issues unnecessarily.

Importantly, the Court's approach avoids only the question of deference; it remains free to independently adopt the same substantive interpretation of the statute's preemptive scope that is advanced by the agency, as it did, for example, in *Riegel*. Thus, if this is constitutional avoidance, the justification must arise from reasons why deference itself—not the substance of the agency's interpretation claiming deference—raises constitutional doubts.

Chevron deference is a doctrine that is both in flux and lacking clear normative grounding, as Jack Beermann demonstrates in his contribution to this issue and the longer article he summarizes, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why it Can and Should Be Overruled*, 42 Conn. L. Rev. (forthcoming). But at least in principle, *Chevron* is supposed to implement the idea that when Congress delegates lawmaking authority to agencies, it permissibly shifts authority to interpret ambiguous statutory provisions from courts to agencies. *Chevron* is a binding form of deference—where the requirements are satisfied, courts must adopt the agency's interpretation. Where deference is claimed for an agency preemption interpretation, the relevant question is whether Congress intended to give the agency the power to authoritatively construe the statute's preemptive scope. Competing interpretations of the statutory delegation of agency authority most often will be available; and while there are good

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[*] Assistant Professor, Emerging Scholars Program, The University of Texas School of Law.

reasons to think Congress often intends to delegate to agencies the authority to decide preemption questions, it only rarely does so in specific statutory language. In other words, statutory delegations are likely to be ambiguous on this point—they may be read to either include or exclude authority over preemption. Where there is ambiguity as to whether the statute in fact binds the court to accept the agency's interpretation of the statute's preemptive scope, and deference would raise constitutional doubts, the principle of avoidance counsels courts to interpret the statutory delegation in a way that does not require deference.

Avoiding *Chevron* deference may be justified, for example, if congressional delegations of agency authority to issue binding preemption interpretations are constitutionally dubious. This may be because the source of Congress's preemption power is itself non-delegable. (I discuss this possibility at length in the full article.) There also are specific non-delegation rules that narrow delegations to exclude problematic categories of agency authority—one such rule requires that delegations be construed to exclude agency discretion to take actions that raise serious constitutional doubts. Courts might think, for example, that agency authority to issue preemption interpretations raises serious federalism concerns—after all, many worry that preemption, if not properly constrained, threatens to diminish state government authority below the constitutionally required minimum threshold. But federalism is really about balance, and when it comes to agency preemption authority, there is weight on both sides of the scale. On one hand, recognizing an authoritative role for agencies in interpreting the preemptive scope of federal law would likely make for more preemption at the expense of federalism values. It would add to the preemption universe an additional category of actors—federal agencies—with built-in institutional incentives to push for nationalizing regulatory regimes. On the other hand, allowing agencies with relatively greater subject-matter expertise than courts to determine whether state law is preempted may be the best way to efficiently allocate regulatory authority among the national and state governments.

In any event, non-delegation concerns would not fully explain the results: The Court in these cases also avoided deciding the applicability of *Skidmore* deference, which does not depend on a finding that Congress delegated interpretive authority to an agency rather than to the courts. Instead, it provides for deference calibrated to the agency interpretation's "power to persuade." Persuasiveness is measured by qualitative factors, including the interpretation's thoroughness, formality, validity, consistency over time, longevity, and contemporaneity with enactment of the statute, as well as the agency's expertise in the area. *Skidmore* is justified not by respect for the separation-of-powers but primarily by an instrumental norm favoring the interpretation made by the institution best situated to interpret correctly. Avoiding deciding whether to apply *Skidmore* deference may seem like the functional equivalent of applying or rejecting *Skidmore* deference *sub silentio*—one view of *Skidmore* is that the "persuasiveness" of the agency's interpretation depends on the extent to which it coincides with the court's own interpretation of the statute. But most courts view *Skidmore* as a *binding* constraint on judicial interpretive authority: Where the qualitative factors make *Skidmore* applicable, a court must give special and often decisive weight to the agency's interpretation even if it differs from the interpretation the court thinks is best. This makes sense of the idea that *Skidmore* is *deference*—as Henry Monaghan told us years ago, "deference, to be meaningful," must require that the court's preferred interpretation be supplanted by the agency's where the deference applies.[1] The court's and agency's interpretations may be the same, but they need not be; an agency's interpretation may be persuasive enough to qualify for *Skidmore* deference even if the court would independently reach a different result. Avoiding determining *Skidmore*'s applicability thus amounts to avoiding the question of whether courts may abdicate interpretive authority over preemption on instrumental grounds.

Because *Skidmore* deference does not depend on a construction of the statutory delegation of agency authority, the Court needs a justification other than non-delegation for avoiding *Skidmore* in agency preemption cases. The common characteristic of *Chevron* and *Skidmore* deference is that both constrain judicial discretion to engage in *de novo* statutory interpretation—under *Chevron*, on the basis of congressional allocation of interpretive authority to an agency; under *Skidmore*, on the basis of judicial perception that an agency has superior expertise. Avoiding both forms of deference may be justified in preemption cases if constraining judicial interpretive authority *on preemption issues* raises constitutional doubts. And I think, based on a few observations about constitutional structure and the Supremacy Clause, that a plausible case can be made that the Constitution *requires* judicial interpretive authority on preemption questions. This, of course, raises sufficient constitutional doubts to avoid deference in agency preemption cases.

It is well established that Congress possesses the primary constitutional authority to preempt state law. The more interesting question for present purposes is whether the Constitution has anything to say about who should determine whether and how much state law Congress has in fact preempted. Even if there is reason to doubt that the Supremacy Clause is the source of Congress's power to preempt, it clearly provides a rule of decision for these second-order preemption questions. Even read narrowly, it at least provides a choice-of-law rule, *viz.*, federal law governs and state law is preempted if the state law is "contrary" to federal law. By providing that "the Judges in every State shall be bound" by federal law, the Clause also may be read to designate courts as the exclusive venue for application of this decision rule. It clearly authorizes courts to decide when state law is "contrary" to federal law—in fact, the Clause expressly mentions *only* courts. What is substantially less clear is whether any other

1 Henry P. Monaghan, *Marbury and the Administrative State,* 83 Colum. L. Rev. 1, 5 (1983).

governmental actor is authorized to make that decision.

Ensuring the supremacy of federal over state law was a contentious issue during the framing of the Constitution, and the delegates at the Constitutional Convention considered proposals to lodge authority to enforce federal supremacy with each of the three branches of the national government. The small states' New Jersey Plan would have authorized executive use of military force to coerce state compliance with federal law. This and similar proposals were roundly rejected. More plausibly, the large states' Virginia Plan contained, in its version of the enumeration of congressional powers, a provision authorizing Congress "to negative all laws passed by the several States, contravening in the opinion of the national legislature, the articles of… the Union."[2] The alternative was an early version of the Supremacy Clause, which was viewed as leaving to courts the task of invalidating state laws that conflicted with federal law. Madison opposed this in favor of the congressional negative because he thought that it would take too long in federal courts and state courts could not be trusted to fairly promote national interests. But the Convention rejected the congressional negative in favor of the Supremacy Clause. Arguing against the negative on the day it was voted down, Pennsylvania's Robert Morris explained that "[a] law that ought to be negatived will be set aside in the Judiciary department and if that security should fail, may be repealed by a National law."[3]

On one plausible historical reading, then, the Supremacy Clause both confers decisional authority on courts and confines that authority to courts alone. It would seem to follow from this interpretation that binding deference to agency applications of the Supremacy Clause decision rule—in the form of preemption interpretations—is inconsistent with the constitutional structure and therefore impermissible. Of course, this is not the only plausible construction of the Clause, but the fact that this reading is available seems sufficient to generate the sort of constitutional doubt that might prompt courts to avoid the question of whether deference to agency views on preemption is permissible.

Justifying judicial avoidance on this particular constitutional doubt makes it seem similar to the Court's approach in the few contexts in which it has rejected deference on the ground that Congress delegated interpretive authority to courts rather agencies—examples include defining the scope of statutory causes of action and interpreting criminal statutes. The important difference is that, in preemption cases, the Constitution rather than Congress allocates the pertinent interpretive authority. Judicial invalidation of preempted state laws is, at bottom, an application of the Supremacy Clause—it is constitutional review. And since *Marbury*, our practice has been to require independent judicial decisions on constitutional questions. This perhaps explains why, despite having essentially abandoned as unworkable the rule that courts generally should not defer to administrative agencies on "pure" questions of law, the Court in *Smiley v. Citibank* "assume[d] (without deciding)" that the question of whether a federal statute preempts state law "must always be decided *de novo* by the courts." 517 U.S. 735, 744 (1996). And in *Levine*, the Court emphasized that it has only ever "considered [an] agency's explanation of how state law interfered with" regulations "as further support for *our independent conclusion*" about preemption. 129 S. Ct. at 1203. Consideration of agency input is fine. Preemption decisions often require complicated policy determinations that stretch judicial competence. But deference that bindingly constrains independent judicial decisionmaking may raise a serious constitutional doubt in the light of the Supremacy Clause and our tradition of constitutional review by an independent judiciary.

2 James Madison, *Notes on the Constitutional Convention* (May 29, 1787), in *The Records of the Federal Convention of 1787*, vol. 1, 21 (Max Farrand, ed., rev. ed. Yale U. Press 1937) [*Farrand's Records*].

3 *Farrand's Records*, vol. 2, at 29.

In Memoriam

The Section is deeply saddened at the news of the passing of David E. Cardwell.

David was active in the Section for many years as a Council Member and in various other capacities. The Section honored his service by naming him a Section Fellow. He also was a member of the ABA Board of Governors from 1992-1995, a member of the House of Delegates from 1991-2002, and chair of the Section of State and Local Government Law.

The Section has lost a great friend. David will be greatly missed.

FDA's Appetite for Desuetude: Food Safety Exceptions Swallow Statutory Norms

By James T. O'Reilly[*]

What does "regulatory desuetude" sound like at the breakfast table?

"Gee, this coffee is bitter. Maybe I'll add to it the powdered chemically processed extract of a jungle plant that was recently brought to the U.S. I'm certain that this powder is safe, because Congress required FDA approval of new direct food ingredients in 1958. Oh, sure, I read the 12-year-old proposed rule, never finalized, in which FDA stopped looking at the details of safety in most new food ingredients. I'm sure the letter that the sweetener company received from FDA in 2009 is enough. It said, like 93% of the "notification" response letters sent in the last dozen years, that FDA has no questions about the company decision that the product is safe, but that safety recognition is a private company's decision, and FDA's not taking a stance on ingredient safety, so "you're on your own" about the use of that ingredient. So we have the under-funded regulator, operating on a 1997 proposed rule, letting food makers decide for themselves about new ingredients. Isn't that sweet? Pass the sugar!"

Cynical dialogues like this one could occur at every breakfast table if American consumers recognized that the problem of "regulatory desuetude" has stricken our food safety net. That tongue-twisting word means the abandonment of a program, previously familiar, which has atrophied from a dozen years' lack of use. Food ingredient safety review had been in place for 39 years. Novel food additive chemicals were required to undergo a rigorous safety testing regime, either by winning FDA affirmance that they were "generally recognized as safe" (GRAS) or by showing that they passed detailed testing requirements for a new food additive. The active FDA review of data led to a rule (food additives) or an adjudication leading to a published listing (GRAS affirmation). Anyone who came to market with a food material that was not already listed, even if they considered their chemical to be GRAS, was taking the risk of being challenged for adulteration, with a backdrop of civil enforcement cases in which FDA virtually always prevailed.

So what should agencies do when declining resources and staffing collides with statutory structures for product approval? Walking away from the statutory duties is one approach; like a parent who tells errant teens "you're on your own," a regulator who stops adjudicating lets the consumer (literally) eat food ingredients at their own risk. FDA had a serious shortfall of resources in the mid-1990s, and so it changed roles from approver to casual observer of ingredient safety. The FDA rule proposed in April 1997 halted further adjudications that would have affirmed GRAS status, and it discouraged the filing of the complete food additive petitions. Instead, the proposed rule told food ingredient makers to send in a "notification" that the company decided their new ingredient was "generally recognized as safe" by scientific evaluations done by that company or its paid consultants. Only those companies whose notifications were rejected would need to file food additive petitions. All others would receive a letter of "no questions" that expressly declined to find the product was GRAS and that informed the notifier that it was solely responsible for ensuring safety.

The food chemical industry had already sought a comparable laxity of review for packaging materials, catalysts, and "food contact materials" from Congress. The case was easily made that the indirect additives had shown, over many years, that they would not require the painstaking scrutiny accorded to direct ingredients like sweeteners and flavorings. So Congress was persuaded, and after four decades of detailed review, the post-1997 reviews of plastics and other indirect materials would go through notification and an FDA "negative option" process. But Congress did not similarly waive detailed review for directly added ingredients for food recipes or consumer sales.

The timing of the changes inside FDA is significant. In 1958, food additive legislation required FDA to approve new food additives. Long backlogs of food chemical reviews dissatisfied industry as well as FDA. After a study of alternatives, an FDA proposed rule in April 1997 halted submissions of direct food ingredient petitions; only written "notifications" would be accepted instead. In November 1997, Congress had passed a notifications power, but only for plastics and other indirect additives. But from the April 1997 proposal until today, FDA has not been doing the extensive and detailed safety evaluation for direct additives, though FDA has never made the 1997 proposed rule final. Congress never has given FDA power to waive the direct food ingredient review process; but the number of food additive clearance reviews has declined to about 7 a year, while many dozens of notifications have been cleared by FDA. Ideally, the notification comes to FDA with details of why this ingredient is generally recognized as safe in literature and in the opinions of expert scientists. But whether or not that ideal is attained, submitted notifications have about a 93% chance of clearing without further FDA questions.

What does "general recognition of safety" mean? The 1958 legislation used this as an alternative, science-based consensus that could substitute for extensive evaluation by FDA's team of toxicologists and food scientists. Perhaps this exception to mandatory food additive clearance review made sense in 1958 as a transitional provision. But today's understaffed and underfunded food chemical "notification" team in FDA has used the exception to swallow the rule.

The financial analysts who follow chemical stocks and food ingredient suppliers are pleased that novel ingredi-

[*] Professor, University of Cincinnati College of Law; former section chair; current co-chair Food & Drug Committee; member *Administrative & Regulatory Law News* advisory board.

ents don't have to wait to get into sales. Innovators in food technology are happy with rapid access to alternative sweeteners, flavors, etc. Marketers are eager to sell the latest attractive alternative, touting its novel features despite the 1958 law's use of a restrictive term of scientific "general recognition of safety," which usually connotes published journal studies about the safe use of this ingredient. It can be inconsistent for industry to tell a small corner of the bureaucracy that a chemical is well understood for this use, while telling the world of consumers that the breakthrough new chemical is the latest and greatest novelty. And if you are the regulatory specialist for the food company, you might prefer that critics not read too closely the boilerplate text of FDA's response: "Based on the information provided by (submitter), as well as other information available to FDA, the agency has no questions at this time regarding (submitter)'s conclusion that the (food chemical) is GRAS under the intended conditions of use. The agency has not, however, made its own determination regarding the GRAS status of the subject use of the (food chemical). As always, it is the continuing responsibility of (submitter) to ensure that food ingredients that the firm markets are safe, and are otherwise in compliance with all applicable legal and regulatory requirements." Such an underwhelmingly timid agency endorsement makes the food consumer wonder why the agency put its adjudicative power of decision making for food ingredients into desuetude in 1997.

Does it make any difference to have a scientific review that is so bereft of decisions as a tradeoff for having the review made much more quickly? Skeptics would say that we are "one crisis away" from implosion of this system; industry has sold ingredients whose marketing relies on a proposed rule that is almost 13 years old, and a negative option clearance that is very "deniable" for FDA. But the appearance of FDA review does have a commercial value for those who want to assert the image of approval; they are "selling the sizzle without the steak" of detailed federal safety review. A recent food company press release expressed joy that its new sweetener was cleared for marketing after notification to FDA. Deep down in the press release was the bland statement that the decision of the new material's scientific recognition was done by the company's own trade association and that FDA had "no questions" about the company submission.

What should be done? FDA can make final its April 1997 proposed rule, remove the codified regulations which still call for detailed affirmation of food safety status, or scrap the notifications and ask Congress for funding to be a real safety gatekeeper for food ingredients. Congress could agree, or could opt to affirm FDA's desuetude, by weakening the scrutiny of direct food ingredients, down to a level akin to its review of plastics and packaging modifications allowed under the November 1997 legislation. Either way, the return to regulatory certainty will foster a more logical system. That, in turn, will help us explain to our kids what we're putting onto our cereal. Mom, please pass the regulatory desuetude!

Supreme Court News

By Robin Kundis Craig★

The U.S. Supreme Court heard a number of cases in the fall that are of relevance to administrative law practitioners. This quarter's column provides an overview of those cases, several of which—in a variety of contexts—raise issues of fundamental fairness to parties in various relationships with agencies. Indeed, several cases this quarter invite the Supreme Court to step back and opine on the "forest" of administrative law—although the cases certainly provide the Court with far more narrow grounds on which to decide the issues before them.

Cases Involving Constitutional Issues:

The Supreme Court heard oral argument in an unusual Due Process case on October 14, 2009. In *Alvarez v. Smith*, 524 F.3d 834 (7th Cir. 2008), *cert. granted in part,* 129 S. Ct. 1401 (Feb. 23, 2009), property owners brought a lawsuit pursuant to 42 U.S.C. § 1983 against the Chicago Police Department, alleging that the police acted unconstitutionally in seizing the plaintiffs' automobile pursuant to the Illinois Drug Asset Forfeiture Procedure Act (DAFPA), 725 ILCS 150/1, *et seq.* (2004). Specifically, the plaintiffs argued that "when property is seized under the Act, due process requires that they be given a prompt, postseizure, probable cause hearing, even though the DAFPA does not require any such hearing." 524 F.3d at 835. The Seventh Circuit reversed the district court's dismissal of the claim, re-interpreting its precedents regarding the application of the due process analysis in criminal property seizure contexts in the process. *Id.* at 839.

The Supreme Court granted *certiorari* to decide two issues. First, "[i]n determining whether the Due Process Clause requires a State or local government to provide a post-seizure probable cause hearing prior to a statutory judicial forfeiture proceeding and, if so, when such a hearing must take place, should district courts apply the 'speedy trial' test employed in *United States v. $8,850*, 461 U.S. 555 (1983), and *Barker v. Wingo,* 407 U.S. 514 (1972), or the three-part due process analysis set forth in *Mathews v. Eldridge,* 424 U.S. 319 (1976)?" Second, "[i]n light of this Court's holding in *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992), may a court of appeals order a district court to enter permanent injunctive relief enjoining the application of a State statute based simply upon Plaintiffs' allegations in a complaint, where the parties are not at issue as no answer was filed in the district court and no evidence was ever heard in that court?"

The Justices' initial questioning during oral argument focused on the issue of mootness because the forfeiture hearing had already occurred and the plaintiffs had asked only for injunctive relief. For example, against the respondent's arguments that the case was not moot, several Justices noted that the denial of class certification had not been appealed, meaning that the respondent could not rely on the class to support the "capable of repetition while evading review" exception to mootness. On the merits, Justice Stevens then asked how long the statute could allow for a hearing and still be constitutional, whereas Justice Alito asked about the burden on the government. Justice Breyer, in turn, asked both the petitioners and the amicus United States when and how the government had to make a showing that it had probable cause to seize the property, and how the property owners could challenge lack of probable cause. Many of the Justices, including Justice Scalia, appeared troubled that the government could apparently hold onto the property for several months without the owner having the opportunity to receive a judicial ruling as to probable cause, despite both governments' assertions that many seizures are uncontested.

A Florida case raises the issue of so-called "judicial takings" of private property. In *Walton County v. Stop Beach Renourishment, Inc.,* 998 So. 2d 1102 (Fla. 2008), *reh'g denied,* (Fla. 2008), *cert. granted sub nom Stop the Beach Renourishment v. Florida Dep't of Environmental Protection,* 129 S. Ct. 2792 (June 15, 2009), the Florida Supreme Court confronted the question of whether Florida's Beach and Shore Preservation Act, c. 161, Florida Statutes (2005), had been applied to allow a beach renourishment project that constituted a Fourteenth Amendment "taking" of beachfront property owners' littoral rights without just compensation.

After Hurricane Opal struck the Florida panhandle in 1995, the Florida Department of Environmental Protection (FDEP) identified the beaches in the City of Destin and Walton County as critically eroded beaches. 998 So. 2d at 1106. FDEP determined that it would restore the beaches, as the Act allows. "To determine the mean high water line (MHWL) for the restoration area, a coastline survey was completed in September 2003. The Board of Directors for the Internal Improvement Trust Fund (Board) subsequently established an erosion control line (ECL) at the surveyed MHWL. Pursuant to section 161.191(1) of the Beach and Shore Preservation Act, this ECL became the boundary between publicly owned land and privately owned upland after it was recorded." *Id.*

This statutory "freezing" of the line between public and private property along the coast became the basis of the property owners' takings claim. Although the Act specifically preserves littoral rights, especially the right of access, littoral owners are generally entitled to any accretions of sand—that is, their seaward boundary is ambulatory and moves with the mean high tide line. As a result, the First District Court of Appeals of Florida determined that an unconstitutional taking had occurred when FDEP issued the permit for beach renourishment. Specifically, as summarized by the Florida Supreme

★ Associate Dean for Environmental Programs & Attorneys' Title Insurance Professor of Law, The Florida State University College of Law, Tallahassee, FL; Co-Chair, Environmental and Natural Resources Regulation Committee; and Contributing Editor, Admin. & Reg. Law News. The author may be contacted at rcraig@law.fsu.edu.

Court, it "determined that section 161.191 of the Beach and Shore Preservation Act facially results in an unconstitutional taking of upland owners' littoral rights to receive accretions and to maintain direct contact with the water despite the express preservation of littoral rights in section 161.201." *Id.* at 1109.

The Florida Supreme Court reversed, although the logic of its decision is fairly opaque. It first noted that "[u]nder both the Florida Constitution and the common law, the State holds the lands seaward of the MHWL, including the beaches between the mean high and low water lines, in trust for the public for the purposes of bathing, fishing, and navigation." *Id.* Pursuant to this ownership, moreover, the State of Florida has both "duties under the public trust doctrine" and "an obligation to conserve and protect Florida's beaches as important natural resources." *Id.* at 1110. At the same time, however, "upland owners hold several special or exclusive common law littoral rights: (1) the right to have access to the water; (2) the right to reasonably use the water; (3) the right to accretion and reliction; and (4) the right to the unobstructed view of the water." *Id.* at 1111. "Though subject to regulation, these littoral rights are private property rights that cannot be taken from upland owners without just compensation." *Id.*

The Florida Supreme Court then proceeded to classify littoral rights as non-possessory interests in property. Specifically, "the littoral rights to access, use, and view are easements under Florida common law." *Id.* at 1112. In contrast, "[t]he right to accretion and reliction is a contingent, future interest that only becomes a possessory interest if and when land is added to the upland by accretion or reliction." *Id.*

The Florida Supreme Court also noted that different rules can govern the property rights impacts of a changing MHWL, even at common law. In general, "[t]he boundary between public or sovereignty lands and private uplands is a dynamic boundary, which is located on a shoreline that, by its very nature, frequently changes. Florida's common law attempts to bring order and certainty to this dynamic boundary in a manner that reasonably balances the affected parties' interests." *Id.* "The boundary between public lands and private uplands is the MHWL, which represents an average over a nineteen-year period." *Id.* at 1113. However, "[u]nder Florida common law, the legal effect of changes to the shoreline on the boundary between public lands and uplands varies depending upon whether the shoreline changes gradually and imperceptibly or whether it changes suddenly and perceptibly." *Id.*

As for the Beach and Shore Preservation Act, it also attempts to balance public and private interests in the seashore:

> Like the common law, the Act seeks a careful balance between the interests of the public and the interests of the private upland owners. By authorizing the addition of sand to sovereignty lands, the Act prevents further loss of public beaches, protects existing structures, and repairs prior damage. In doing so, the Act promotes the public's economic, ecological, recreational, and aesthetic interests in the shoreline. On the other hand, the Act benefits private upland owners by restoring beach already lost and by protecting their property from future storm damage and erosion. Moreover, the Act expressly preserves the upland owners' rights to access, use, and view, including the rights of ingress and egress.

Id. at 1115.

The Florida Supreme Court used the doctine of avulsion to conclude that the Act was facially constitutional. It emphasized that, under Florida common law, "when the shoreline is impacted by an avulsive event, the boundary between public lands and private uplands remains the pre-avulsive event MHWL. Consequently, if the shoreline is lost due to an avulsive event, the public has the right to restore its shoreline up to that MHWL." *Id.* at 1117. As a result, under the Act, "[i]n the context of restoring storm-ravaged public lands, the State would not be doing anything under the Act that it would not be entitled to accomplish under Florida's common law." *Id.*

Moreover, the doctrine of accretion simply did not apply in the context of the Act. The Florida Supreme Court emphasized that "the right to accretion under Florida common law is a contingent right. It is a right that arises from a rule of convenience intended to balance public and private interests by automatically allocating small amounts of gradually accreted lands to the upland owner without resort to legal proceedings and without disturbing the upland owner's rights to access to and use of the water." *Id.* at 1118. However, none of the four reasons justifying the right applied in the context of the Act. *Id.* As a result, both the Act and its application were constitutional, and no taking had occurred. *Id.* at 1120–21.

The U.S. Supreme Court granted certiorari to address three issues. First, "[t]he Florida Supreme Court invoked 'nonexistent rules of state substantive law' to reverse 100 years of uniform holdings that littoral rights are constitutionally protected. In doing so, did the Florida Court's decision cause a 'judicial taking' proscribed by the Fifth and Fourteenth Amendments to the United States Constitution?" Second, "[i]s the Florida Supreme Court's approval of a legislative scheme that eliminates constitutional littoral rights and replaces them with statutory rights a violation of the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution?" Finally, "[i]s the Florida Supreme Court's approval of a legislative scheme that allows an executive agency to unilaterally modify a private landowner's property boundary without a judicial hearing or the payment of just compensation a violation of the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution?" Therefore, the novelty of the case—and its interest for administrative law practitioners—may well be its focus on the ability of legal *decisionmakers,* through the interpretation of a statute, to cause

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an unconstitutional taking of private property. As this column goes to press, oral argument is scheduled for December 2, 2009.

Separation of powers principles and the Appointments Clause are at issue in *Free Enterprise Fund v. Public Company Oversight Board*, 537 F.3d 667 (D.C. Cir. 2008), *cert. granted,* 129 S. Ct. 2378 (May 18, 2009). The Free Enterprise Fund, a non-profit public interest organization, facially challenged the constitutionality of Title I of the Sarbanes-Oxley Act, alleging that Act's creation of Public Company Accounting Oversight Board violated the Appointments Clause, separation of powers, and non-delegation principles. 537 F.3d at 668. The D.C. District Court granted summary judgment for the government, and the D.C. Circuit affirmed. *Id.* at 669.

As the D.C. Circuit described the statutory scheme:

> Title I of the [Sarbanes-Oxley] Act established the Board "to oversee the audit of public companies that are subject to the securities laws…in order to protect the interests of investors and further the public interest in the preparation of informative, accurate, and independent audit reports." 15 U.S.C. § 7211(a). The five members of the Board are appointed by the Commission after consultation with the Chairman of the Board of Governors of the Federal Reserve and the Secretary of the Treasury. *Id.* § 7211(e)(4)(A). The Act empowers the Board, subject to the oversight of the Commission, to, among other things, register public accounting firms, establish auditing and ethics standards, conduct inspections and investigations of registered firms, impose sanctions, and set its own budget, which is funded by annual fees. *Id.* §§ 7211(c), 7219(c), (d).

537 F.3d at 669.

The D.C. Circuit first found that the doctrine of exhaustion of administrative remedies did not apply to the plaintiff's challenge, because "because the Fund's constitutional challenges to the Act are collateral to the Act's administrative review scheme.…" *Id.* at 671. Moreover, Free Enterprise Fund did not pursue its non-delegation argument on appeal.

Regarding the Appointments Clause challenge, the D.C. Circuit concluded that the Board members are "inferior Officers" of the United States, whose appointment can be given to some body other than the President and the Senate. It emphasized that the Board members are subject to extensive supervision—far more than an Independent Counsel, which the Supreme Court had concluded was an inferior officer in *Morrison v. Olson,* 487 U.S. 654, 662, 108 S. Ct. 2597, 101 L. Ed. 2d 569 (1988). 537 F.3d at 672-73.

As for the separation of powers argument, the D.C. Circuit emphasized that: "The Supreme Court has long recognized that some types of restrictions on Presidential authority within the Executive Branch are permissible, especially in the case of independent agencies." *Id.* at 679. Moreover, the Board's creation did not unduly intrude into the President's authority, because "[a]lthough the President does not directly select or supervise the Board's members, the President possesses significant influence over the Commission, which in turn possesses comprehensive control over the Board." *Id.* at 681.

The Supreme Court granted *certiorari* to address three issues. First, the Court will address "[w]hether the Sarbanes-Oxley Act of 2002 violates the Constitution's separation of powers by vesting members of the Public Company Accounting Oversight Board ('PCAOB') with far-reaching executive power while completely stripping the President of all authority to appoint or remove those members or otherwise supervise or control their exercise of that power, or whether, as the court of appeals held, the Act is constitutional because Congress can restrict the President's removal authority in any way it 'deems best for the public interest.'" Second, the Court will assess "[w]hether the court of appeals erred in holding that, under the Appointments Clause, PCAOB members are 'inferior officers' directed and supervised by the Securities and Exchange Commission ('SEC'), where the SEC lacks any authority to supervise those members personally, to remove the members for any policy-related reason or to influence the members' key investigative functions, merely because the SEC may review some of the members' work product." Third, if PCAOB members are inferior officers, the Court will determine "whether the Act's provision for their appointment by the SEC violates the Appointments Clause either because the SEC is not a 'Department' under *Freytag v. Commissioner,* 501 U.S. 868 (1991), or because the five commissioners, acting collectively, are not the 'Head' of the SEC." As this column goes to press, oral argument is scheduled for December 10, 2009.

Cases About Administrative Agency Practice:

On October 7, 2009, the Court heard oral argument in *Union Pacific Railroad Co. v. Brotherhood of Locomotive Engineers,* 522 F.3d 746 (7th Cir.), *reh'g en banc denied,* 537 F.3d 789 (7th Cir. 2008), *cert. granted,* 129 S. Ct. 1315 (Feb. 23, 2009). This case involves the reviewability of the National Railroad Adjustment Board's decisions under the Railway Labor Act, 45 U.S.C. §§ 151, *et seq.* This Act sets forth a comprehensive framework to resolve labor disputes in the railroad industry through binding arbitration before the Board and provides that the Board's judgment "shall be conclusive…except…for": (1) "failure…to comply" with the Act, (2) "failure…to conform or confine" its order "to matters within…the [Board's] jurisdiction," and (3) "fraud or corruption" by a Board member. 45 U.S.C. §153(q).

In *Union Pacific Railroad,* the Board denied employees' grievance claims for failure to comply with the Board's rules governing proof that the dispute had been submitted to a conference between the parties, as the Act requires. 5 U.S.C. §152. The Seventh Circuit held that the award must be set aside because the Board violated due process through retroactive recognition of a supposedly "new rule." Specifically, although

the Seventh Circuit agreed with the Board and with the district court "that it has always been clear that the parties must conference, and that they must submit evidence of that fact, it heretofore has not been clear when and how that evidence must be presented." 522 F.3d at 748. As a result, it reversed the district court's decision to uphold the Board's denial, finding "that the Board denied the Organization due process by requiring evidence of conferencing to be presented in the on-property record, a requirement not clearly enunciated in the statutes, regulations, or the collective bargaining agreement of the parties." *Id.*

The Supreme Court granted *certiorari* to answer two questions: (1) "Whether the Seventh Circuit erroneously held, in square conflict with decisions of the Third, Sixth, Tenth, and Eleventh Circuits, that the RLA includes a fourth, implied exception that authorizes courts to set aside final arbitration awards for alleged violations of due process"; and (2) "Whether the Seventh Circuit erroneously held that the Board adopted a 'new,' retroactive interpretation of the standards governing its proceedings in violation of due process." During oral argument, Justices Ginsburg and Sotomayor stressed the apparent fact that different panels within the National Railroad Adjustment Board impose different standards of proof regarding the conferencing requirement, with some panels apparently requiring no proof at all. Justice Stevens, in turn, attempted to elicit an admission from the petitioner that conferencing had indeed occurred. Justice Stevens and Justice Breyer also asked about the need for fair procedures and the specifics of the Board's rules regarding conferencing. Justice Scalia and Chief Justice Roberts, in turn, probed the respondents about the need for procedural defaults and the panel's authority to make rules through adjudication. Chief Justice Roberts also questioned respondents about the Board's authority and the kind of deference that was warranted in the case.

In *Maine Public Utilities Commission v. FERC,* 520 F.3d 464 (D.C. Cir. 2008), *cert. granted sub nom NRG Power Marketing v. Maine Public Utilities Commission,* 129 S. Ct. 2050 (April 27, 2009), the Maine Public Utilities Commission and the Attorneys General of Connecticut and Massachusetts challenged the Federal Energy Regulatory Commission's (FERC's) approval of a comprehensive settlement that redesigned New England's capacity market, asserting that FERC's approval of the settlement was arbitrary and capricious, contrary to law, and beyond the Commission's jurisdiction.

The challenge most relevant to the Supreme Court litigation was the plaintiffs' *Mobile-Sierra* argument. As the D.C. Circuit summarized that argument:

> Under the *Mobile-Sierra* doctrine, "FERC may abrogate or modify freely negotiated private contracts that set firm rates or establish a specific methodology for setting the rates for service…only if required by the public interest." *Atl. City Elec. Co. v. FERC,* 295 F.3d 1, 14 (D.C. Cir. 2002). This doctrine recognizes the superior efficiency of private bargaining, and its purpose is "to subordinate the statutory filing mechanism to the broad and familiar dictates of contract law." *Borough of Lansdale v. FPC,* 494 F.2d 1104, 1113 (D.C. Cir. 1974). Thus, when the parties to a rate dispute reach a contractual settlement, FERC must enforce the terms of the bargain unless the public interest requires otherwise–that is, unless the negotiated rates "might impair the financial ability of the public utility to continue its service, cast upon other customers an excessive burden, or be unduly discriminatory." *FPC v. Sierra Pac. Power Co.,* 350 U.S. 348, 355, 76 S. Ct. 368, 100 L. Ed. 388 (1956). In the instant case, we are presented with a question of first impression: may the Commission approve a settlement agreement that applies the highly-deferential "public interest" standard to rate challenges brought by non-contracting third parties?

530 F.3d at 476-77.

The D.C. Circuit answered its own question "no," concluding that:

> This case is clearly outside the scope of the *Mobile-Sierra* doctrine. As we explained, *Mobile-Sierra* is invoked when "one party to a rate contract on file with FERC attempts to effect a unilateral rate change by asking FERC to relieve its obligations under a contract whose terms are no longer favorable to that party." *Maine PUC,* 454 F.3d at 284. Here, the settling parties are attempting to thrust the "public interest" standard of review upon non-settling third parties who have vociferously objected to the terms of the settlement agreement. As the Supreme Court has noted, "[i]t goes without saying that a contract cannot bind a nonparty." *EEOC v. Waffle House, Inc.,* 534 U.S. 279, 294, 122 S. Ct. 754, 151 L. Ed.2d 755 (2002). The *Mobile-Sierra* doctrine applies a more deferential standard of review to preserve the terms of the bargain as between the contracting parties. *Atl. City,* 295 F.3d at 14. But when a rate challenge is brought by a non-contracting third party, the *Mobile-Sierra* doctrine simply does not apply; the proper standard of review remains the "just and reasonable" standard in section 206 of the Federal Power Act.

Id. at 477-78.

The Supreme Court granted *certiorari* only to hear the *Mobile-Sierra* issue. Specifically, the issue before the Court is: "Whether *Mobile-Sierra's* public-interest standard applies when a contract rate is challenged by an entity that was not a party to the contract."

The Court heard oral argument in this case on November 3, 2009. NRG Power Marketing, the petitioner and one of the parties to the settlement, argued that the *Mobile-Sierra* doctrine does apply to the settlement agreement, only to be greeted by resistance from several Justices who pointed out that NRG was not one of the parties opposing the settlement.

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Chief Justice Roberts, for example, noted "[i]t's a bit much to say that the importance is to preserve the stability of two parties' contract and therefore a third party who didn't sign the contract is bound to the two parties' contract." Similarly, Justice Alito asked, "Is there any other area of the law in which the parties to a contract can, in effect, dictate the substantive standard of the administrative review for challenges raised by nonparties?" With the respondent United States, the Justices debated the proper remedy in the case—actual reversal of the D.C. Circuit or remand to FERC. The Justices also questioned counsel about the practical differences between the *Mobile-Sierra* public interest standard and the statutory "just and reasonable" standard. The government also suggested that the settlement agreement did not establish contract rates that are the subject of the *Mobile-Sierra* presumption. The state respondents also argued that the settlement did not create contract rates, prompting a general discussion with several Justices regarding the exact status of the settlement and the exact holding of the D.C. Circuit.

The Bureau of Immigration Affairs (BIA) is the subject of *Kucana v. Holder,* 533 F.3d 534 (7th Cir. 2008), *cert. granted,* 129 S.Ct. 2075 (Apr. 27, 2009). As the Seventh Circuit described the factual background to this case:

> Agron Kucana, a citizen of Albania, entered the United States as a business visitor in 1995 and did not leave when his visa expired. He applied for asylum but, when he did not appear at the hearing in the fall of 1997, he was ordered removed in absentia. He soon filed a motion to reopen, contending that he had overslept. An immigration judge denied that motion, and in 2002 the Board of Immigration Appeals affirmed. Kucana did not seek judicial review—nor did he comply with the order to quit the United States. In 2006 Kucana filed another motion to reopen, this time contending that country conditions in Albania had deteriorated and that he would be a victim of persecution should he return there. Kucana, who describes himself as a supporter of democracy and free markets, contends that holders of these views are at risk of beatings and murder in Albania. The immigration judge denied this motion, and on appeal the Board held that the IJ lacked jurisdiction, because successive motions to reopen must be filed directly with the Board itself.

533 F.3d at 535-36.

Nevertheless, this seemingly routine review of the BIA's decision raised a fundamental issue regarding the Seventh Circuit's jurisdiction to review the BIA. After amendments in 2005, "the Immigration and Nationality Act (INA) limits federal courts' jurisdiction to review discretionary decisions of immigration officials. Section 242(a)(2)(B)(ii) of the Act, 8 U.S.C. § 1252(a)(2)(B)(ii), provides that no court has jurisdiction to review 'any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.'" *Id.* at 536. Although § 1158(a) deals with applications for asylum, moreover, Kucana's challenge was to a decision not to re-open his case—*not* a challenge to the BIA's decision to deny asylum. *Id.* While the court *could* hear constitutional claims, Kucana raised none. *Id.* at 538. As a result, the Seventh Circuit dismissed the appeal for lack of jurisdiction. *Id.* at 539.

The Supreme Court granted *certiorari* to decide "the scope of the jurisdictional stripping provision of 8 U.S.C. Section 1252(a)(2)(B)(ii) and whether the statute removes jurisdiction from federal courts to review rulings on motions to reopen by the Board of Immigration Appeals." Oral argument occurred on November 10, 2009. Kucana's attorney stressed that the jurisdictional bar was narrow and applied to decisions made discretionary only in certain provisions of the *statute,* whereas BIA's discretion in its reopen decisions derived from a *regulation* authorized pursuant to a different portion of the INA. Justice Kennedy asked several questions regarding the scope of the BIA's discretion in the absence of the regulation, suggesting that its discretion is implicitly statutory. Justice Scalia, in turn, questioned the petitioner's basic logic, wondering why Congress would want to eliminate judicial review of decisions made discretionary by statute but preserve it for decisions made discretionary by regulation. Respondent United States also argued in favor of judicial review, emphasizing the specificity of Congress's withdrawals of federal court jurisdiction in the INA. Justice Breyer, like Justices Kennedy and Scalia, struggled to find a reading of the statute that made sense to him. Justice Kennedy was also concerned about the number of motions to reopen that might be appealed to the federal courts each year. Justices Sotomayor, Ginsburg, and Scalia were interested in the fact that six other federal Courts of Appeal had reached the opposite conclusion from the Seventh Circuit regarding the reviewability of motions to reopen, and Justice Breyer questioned counsel about the apparent anomaly of Congress preserving judicial review for asylum decisions but not for motions to reopen asylum proceedings.

Attorney Fee Awards

In *Perdue v. Kenny A.,* 532 F.3d 1209 (11th Cir.), *reh'g en banc denied,* 547 F.3d 1219 (11th Cir. 2008), *cert. granted,* 129 S. Ct. 1907 (Apr. 6, 2009), the plaintiffs—nine children representing a class of children in foster care in Georgia—brought suit under 42 U.S.C. § 1983, alleging that the foster child services in two Georgia counties were inadequate. The case ended in a consent decree, and the plaintiffs then sought their attorney fees. The Northern District of Georgia calculated the "lodestar" fee award but then added a $4.5 million enhancement to that initial award, based in large part on the high quality of representation that the plaintiffs' attorneys has provided and the results

they had obtained. 523 F.3d at 1217-18. The Eleventh Circuit reversed, concluding that "[t]he district court's $4.5 million enhancement to the $6 million lodestar figure in the present case cannot be squared with the Supreme Court decisions [on attorney fee awards]. The district court did not explicitly mention, much less give full effect to, the strong presumption that the lodestar amount is a reasonable fee and therefore the fee to be awarded." *Id.* at 1225. Moreover, "the district court's reliance on the quality of service and superior performance, which are essentially the same thing, conflicts with the Supreme Court's teachings that those considerations are adequately accounted for" in the lodestar calculation—the number of hours worked multiplied by the attorney's hourly rate. *Id.*

The Supreme Court granted *certiorari* to decide two issues. First, it will examine whether "a reasonable attorney's fee award under a federal fee-shifting statute should ever be enhanced based solely on quality of performance and results obtained when these factors already are included in the lodestar calculation." Second, it will decide whether "an enhancement to the lodestar based on quality of representation and results obtained [is] contrary to [the Supreme] Court's decisions in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 478 U.S. 546 (1986), and *City of Burlington v. Dague,* 505 U.S. 557 (1992), particularly after the lodestar has been reduced for excessive hours billed."

The Court heard oral argument in this case on October 14, 2009. During that argument, the Justices questioned counsel for the petitioners quite closely about the district judge's basis for the attorney fee enhancement and the ability of judges to reward extraordinary performance of attorneys beyond normal market rates based on experience. Justice Sotomayor, in particular, noted that private clients negotiate "bonuses" for attorneys and suggested that judges should be able to do the same, emphasizing in her questioning of the amicus United States that fee-shifting statutes exist in part to help worthy plaintiffs attract competent counsel. The Justices and the attorneys also discussed extensively the possibility of using "pre-enhanced" hourly rates to calculate the lodestar figure.

End the Failed *Chevron* Experiment Now: How *Chevron* Has Failed and Why it Can and Should Be Overruled

continued from page 4

pre-APA practice that makes this so. A court could pronounce an interpretation as within the range of possible interpretations without precluding the agency from adopting another interpretation. Similar to current practice, this would depend on the degree of deference involved in the particular case. A reviewing court could explicitly note when an interpretation is open to future revision by the agency and when it is not, perhaps with a presumption in favor of revision to govern those cases in which the court fails to note the issue.

This flexibility might still, however, be viewed as inconsistent with the APA's apparent assignment of interpretive authority to reviewing courts. As discussed above, it was the narrowness of step one and its view that all ambiguity amounted to an implicit delegation of interpretive power that rendered original *Chevron* inconsistent with the APA. Under original *Chevron*, it was likely that the reviewing court would rarely find that Congress had directly spoken to the precise question at issue, which meant that the vast majority of cases would be decided in the hyper-deferential step two. This seemed, in light of the language of the APA, to be too small a domain for congressional intent. It is also arguable that allowing an agency to change the meaning of a statute is similarly inconsistent with the APA's meaning. In my view, if the reviewing court concludes that a statute can bear a range of meanings, then the court discharges its duty under the APA by confining the agency to interpretations within that range. There is merit, however, to the contrary view, and it may be that if *Chevron* is overruled due to its inconsistency with the APA, then one cost of that action would be that agencies hoping to alter their statutory interpretations would need to persuade courts to allow them to do so under normal stare decisis standards rather than more flexible standards relating to judicial review of agency interpretation. At a minimum, courts should be open to concluding that there is a best answer in an interpretive controversy that the agency and the reviewing court are bound to follow.

Conclusion

After 25 years of bitter experience, the Supreme Court should admit that the *Chevron* experiment has failed. *Chevron* is inconsistent with the APA, has not accomplished its apparent goals of simplifying judicial review and increasing deference to agencies, and has instead spawned an incredibly complicated regime that serves only to waste litigant and judicial resources. Pre-*Chevron* practice was more sensible and easier to administer. Barring that, a simplified regime constructed without the fictional invocation of congressional intent to delegate interpretive power whenever a statute is ambiguous would be more consistent with the APA and the traditional role of courts in judicial review of agency action, easier to administer, and more consistent with the values upon which *Chevron* itself was supposed to be based. The sooner the Court throws in the towel on *Chevron*, the better.

News from the Circuits

By William S. Jordan III[*]

Federal Circuit Says Due Process Attaches at Application for VA Benefits

In two recent decisions, the Federal Circuit held that due process protections apply to the procedures used in deciding upon applications for veterans disability benefits. In *Cushman v. Shinseki*, 576 F.3d 1290 (Fed. Cir. 2009), which addressed this issue at length, Cushman had suffered a back injury, for which he had eventually been given a rating of 60% disability. When he sought total disability, a 1976 assessment ended with the following statement: "Is worse + must stop present type of work." The Board of Veterans Appeals affirmed various denials in 1980. After various additional proceedings, Cushman was finally granted total disability in 1994. He then tried to have his total disability recognized as of an earlier date. While preparing for a hearing in 1997, Cushman discovered that the 1976 assessment had been altered to appear in the 1980 decision record as "Is worse + must stop present type of *work, or at least [ ] bend [ ] stoop lift."* After more proceedings he eventually received total disability as of 1976.

Cushman then claimed that the alteration of his medical record violated his due process rights. Although the Supreme Court had not explicitly addressed the application of the due process clause to a benefit applicant (as opposed to a benefit recipient), the Federal Circuit held that a VA benefit application met the following Supreme Court admonition: "'[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire' and 'more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.'" According to the Federal Circuit, "entitlement to veteran's benefits arises from a source that is independent from the DVA proceedings themselves. [citing VA benefit statutes] **These statutes provide an absolute right of benefits to qualified individuals.**" (Emphasis supplied.) Because VA benefits "are nondiscretionary, statutorily mandated benefits," they constitute a protectable property interest "upon a showing that he meets the eligibility requirements set forth in the governing statutes and regulations." In reaching this conclusion, the court noted that: "Every regional circuit to address the question ... has concluded that applicants for benefits, no less than benefits recipients, may possess a property interest in the receipt of public welfare entitlements."

Unfortunately, the court's reference to "a showing that he meets the eligibility requirements" suggests that the showing would have to be made before due process could attach, which is contrary to the court's ultimate conclusion. The stronger point is that veterans with wartime-related disabilities are entitled to benefits. The entitlement arises at the time of the injury, not at the time of some later showing: "For disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during a period of war, the United States will pay to any veteran thus disabled…" 38 U.S.C. § 1110. Statutory creation of the entitlement is distinct from later administrative recognition of the entitlement. That is why it is important to have due process apply when veterans apply for benefits, not only after the agency has decided that they qualify for benefits.

In *Cushman*, the court rejected an argument that any process concern would have been met by the various proceedings following the original determination. In particular, it noted that all later proceedings were tainted by the original unfairness and by the fact that the initial determination had been given only deferential review throughout. The court also rejected an argument that due process determinations are to be based on the generality of cases, not the particular circumstances. This would be true were the challenge to the decisionmaking scheme, as in *Mathews v. Eldridge*, but not here, where the challenge was to treatment unique to Cushman's situation.

In *Gambill v. Shinseki, 576 F.3d 1307 (Fed. Cir. 2009),* another panel of the Federal Circuit followed *Cushman* in applying due process at the application stage, but it split on the question of whether the agency had violated due process. Gambill had been injured when a trash barrel fell on his head during his military service in 1969-71. He appeared to be in good shape when he left the service in 1971, but he claimed a disability after he was treated for bilateral cataracts in 1994-95. He ultimately claimed a due process violation as a result of the agency's refusal to allow him to submit written interrogatories to a VHA ophthalmologist who had submitted a medical opinion contrary to his interests. The panel split three ways. Judge Linn applied the harmless error principle, holding that Gambill had not met his burden of showing a causal connection between the service injury and the cataracts, so he did not reach the due process issue. Judge Bryson agreed that due process applied, but he emphasized the informal, pro-claimant nature of the VA system, as noted by the Supreme Court in *Walters v. National Association of Radiation Survivors*, in upholding the VA action under the factors in *Mathews v. Eldridge*. Judge Moore agreed that due process attached, but he held that due process required a right to confront a medical opinion contrary to the claimant's interest because that opinion is inherently "adversarial" even if the process is not supposed to be adversarial.

D.C. Circuit Reverses Itself on Exhaustion in Rulemaking and Applies Stringent "Logical Outgrowth" Test

In *CSX Transportation, Inc. v. Surface Transportation Board*, --- F.3d ---, 2009 WL 3400957 (D.C. Cir. 2009), the D.C. Circuit on reconsideration reversed a ruling that challengers had failed

[*] C. Blake McDowell Professor of Law, The University of Akron School of Law; Chair, Judicial Review Committee; Co-Chair, Publications Committee; and Contributing Editor, *Admin. & Reg. Law News.*

to exhaust administrative remedies and struck down the challenged rule because it was not a "logical outgrowth" of the proposal. In the rule at issue, the Surface Transportation Board proposed a simplified method of resolving rail rate disputes that are too small to bring under normal procedures. The "three benchmark" method involves comparing the proposed rate to three benchmark figures. The proposal would have drawn the comparison figures from "the most recent year of waybill sample data," but the final rule drew the comparison figures from the "four most recent years of data."

In a previous decision, the court had held that the challengers had failed to exhaust administrative remedies because they had not challenged the 4-year data rule in a motion for reconsideration, citing *Darby v. Cisneros*. Noting Justice Frankfurter's admonition that, "Wisdom too often never comes, and so one ought not to reject it merely because it comes late," the court acknowledged that "*Darby* stands for the proposition" that when a party challenges a final agency action, courts may not impose an exhaustion requirement "absent a statutory or regulatory requirement to the contrary." In so doing, the court distinguished the exhaustion requirement from the "well-established doctrine of issue waiver, which permits courts to decline to hear arguments not raised before the agency where the party had notice of the issue." Having had no notice of the 4-year rule, the challengers could not have raised the issue prior to issuance of the final rule.

Turning to the "logical outgrowth" challenge, the court rejected the agency's argument that the 4-year rule derived from other changes advocated by the railroads, so they should have been able to foresee that the agency might adopt such a rule. The "mere mention of one-year data for comparison groups" was not enough to give notice that the data source might change significantly. And although the proposed rule "proposed several revisions to the existing system, it nowhere even hinted" that there might be a change in the years from which the comparison data might be drawn.

2d and 5th Circuits Find Global Warming Standing and Justiciability in Federal Nuisance Actions

While Congress dithers, the Second and Fifth Circuits have allowed parties to proceed with federal common law nuisance actions seeking to reduce emission of greenhouse gasses that contribute to global warming. In both *Connecticut v. American Electric Power Co.*, 582 F.3d 309 (2d Cir. 2009), and *Comer v. Murphy Oil USA*, --- F.3d ----, 2009 WL 3321493 (5th Cir. 2009), the courts emphasized that that they had to accept allegations as true and draw reasonable inferences in favor of the parties opposing motions to dismiss. Both courts found standing for the nuisance actions and rejected the argument that the claims were not justiciable under the political question doctrine.

As to the political question doctrine, the Second Circuit in *Connecticut v. AEP* noted that since *Baker v. Carr,* the Supreme Court has held the doctrine to bar litigation with respect to only two types of issues, and then only when the issue was securely anchored in a competing branch of government. The first category, "domestic controversies implicating constitutional issues," includes issues such as impeachment, training of the National Guard, and ratification of constitutional amendments, all of which are textually committed to other branches. The second category, matters touching on the conduct of foreign relations, relates to matters committed to the executive branch. By contrast, the common law of nuisance is normally committed to the courts, and the fact that Congress and the President are struggling with what to do about global warming is not enough to preclude judicial action. Common law standards are judicially manageable, and the absence of legislative action is not enough to prevent the courts from acting. Once Congress and the President act, that picture may change, but at this point, the nuisance claims are justiciable in the federal courts. According to the Fifth Circuit in *Comer*, "whether a question is constitutionally capable of being decided by a federal court depends ultimately on the separation of powers, other applicable constitutional provisions, and federal laws or regulations, not upon federal judges' capability, intellect, knowledge, expertise or training, nor upon the inherent difficulty, complexity, novelty or esotery of the matter to be resolved."

As to standing, *Connecticut v. AEP* is fairly close to *Massachsetts v. EPA*, the Second Circuit recognizing the state's standing as *parens patriae* (due to effects on the entire population and the likelihood that individual plaintiffs could get complete relief) and as a property owner having proprietary standing. The effects of reduced snowpack, beach erosion, and the like constitute injury. At the standing stage, the allegations support a finding that the harm is traceable to the defendant utilities, and redressability is sufficient as long as the result would slow global warming, even if not reversing it. *Comer v. Murphy Oil*, in the 5th Circuit, without a state plaintiff, more clearly finds standing specifically for private landowners (although *Connecticut* does so for land trusts). Again, the court emphasizes a ruling on the pleadings and that the plaintiffs need allege only that the defendants "*contribute* to, rather than solely or materially cause, greenhouse gas emissions and global warming." (Emphasis in the original). The *Comer* court denied standing, however, as to claims of unjust enrichment, civil conspiracy, and fraudulent misrepresentation. Note, however, that Judge Davis, in a concurring opinion, said that he would have dismissed due to an inadequate showing of proximate cause at common law, but he accepted the panel majority's discretion to do otherwise.

D.C. Circuit Splits on Reviewability of IRS Notice

In a highly unusual decision, Judges Brown and Garland of the D.C. Circuit found an IRS Notice reviewable as "final agency action" under § 704 of the APA. *Cohen v. U.S.,* 578 F.3d

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1 (D.C. Cir. 2009). Judge Kavanaugh disagreed, declaring that the action was specifically precluded by statute and that the challenge was not ripe.

Although named for an individual plaintiff who ultimately lost for failure to exhaust his particular claim, this is a lawsuit by major telephone service providers seeking to improve their chances of substantial refunds of a tax that the IRS eventually admitted had been improperly collected. The tax code provides for a tax on telephone use based upon calls whose costs vary with distance and time of transmission. The tax is collected by telephone service providers, who pay it to the IRS. In recent years, technology eclipsed the tax code as service providers stopped charging based upon distance. After losing challenges in five circuits, the IRS finally accepted the proposition that a tax based upon distance and time cannot be collected for costs based solely on time. It then issued Notice 2006-50, announcing the discontinuation of the tax for calls with charges based solely on time and setting out a process for seeking refunds through the 2006 tax return. The Notice stated that those seeking refunds could use a "safe-harbor" provision to receive a certain amount, or they could prove an actual amount of incorrectly collected tax.

The service providers challenged the Notice as "inadequate and unlawful" under the APA. The primary issues for the court, however, were whether review was precluded by the Anti-Injunction Act and Declaratory Judgment Act (which essentially route most challenges to the IRS through tax refund lawsuits) and whether the Notice constituted "final agency action" under § 704 of the APA.

As to the former, the majority held that the preclusive statutes did not apply because the action was not about disputed funds, but about the process the IRS had established to seek those funds. Judge Kavanaugh disagreed on this point, emphasizing that the purpose of the preclusive statutes is to "help assure the efficient administration of the tax system by funneling challenges to the tax laws into one refund procedure and by precluding premature judicial review of disputes involving taxes owed or paid." He considered the APA claim to be an attempt at an end run around those provisions.

As to the question of whether the Notice constituted "final agency action," the majority relied on the two-prong formulation of *Bennett v. Spear*: (1) whether the Notice constituted the "consummation" of the agency's decisionmaking process, and (2) whether the Notice "affects legal 'rights or obligations' or results in 'legal consequences.'" In a confusing formulation, the majority relied upon these factors, which relate to finality, to conclude that the Notice was a "substantive rule that binds the IRS, excise tax collectors, and taxpayers." The question of whether the Notice is a substantive rule, however, is distinct from whether it is a sufficiently final agency action to be subject to judicial review. That question is governed by a somewhat different (although similar) set of considerations, such as those articulated in *American Mining Congress v. MSHA*, 995 F.2d 1106 (D.C. Cir. 1993). The majority may simply have been somewhat sloppy in conflating the two issues, as suggested by the fact that it remanded to the District Court to determine whether the Notice was invalid under the APA. Very likely the ruling is more significant to the IRS and the tax bar because it appears to open a heretofore closed door to challenges other than refund actions against the IRS.

9th Circuit Expounds on Original Appellate Jurisdiction and Standard of Review

The Energy Policy and Conservation Act preempts state energy and water standards for appliances governed by federal energy standards, but it also provides that states may seek a waiver where they can show that state regulation is "needed to meet unusual and compelling State or local ... water interests." When the Department of Energy denied California's petition for a waiver, the state sued in the Ninth Circuit. As a threshold matter, the court rejected DOE's argument that jurisdiction lay only in the District Court. It then held that DOE's denial had been arbitrary and capricious. *California Energy Comm'n v. Dep't of Energy*, --- F.3d ---, 2009 WL 3448422 (9th Cir. 2009).

As to the jurisdictional issue, DOE cited a statutory provision under which jurisdiction lay in the Court of Appeals for a "person who will be adversely affected by a rule prescribed under section 6293, 6294, or 6294." Since the waiver did not fit within that provision, DOE argued jurisdiction was only in the District Court. Although jurisdiction is normally in the District Court unless specifically authorized in the Court of Appeals, the Ninth Circuit concluded that the relevant statutory provisions were not consistent with congressional intent to locate default jurisdiction in the District Court. In addition to the provision quoted above, the statute specifically provided for jurisdiction in the District Court for (1) suits to determine state compliance and (2) challenges to a denial of a petition for rulemaking to amend a standard. The result of these separate provisions was a hole in the statute for challenges to waiver denials. For such unlisted matters, the court concluded that "considerations of efficiency, consistency with the congressional scheme, and judicial economy may be employed to determine whether initial review in the circuit courts best accomplishes the intent of Congress."

Applying those considerations here, the court found that denial of the waiver was closely related to exercise of the authority to adopt the federal energy standard in the first place. In this situation, the courts should construe specific review statutes to reach actions that are "functionally similar" or "tantamount to those specified actions." In addition, the court drew a sharp distinction between rulemaking proceedings, where there is no additional fact-finding, and exceptions to Court of Appeals jurisdiction, where such fact-finding is necessary. For example, a suit to determine state compliance, committed

to the District Court, would require fact-finding beyond the existing record. Since the waiver decision could be reviewed on the existing record, jurisdiction was more appropriate in the Court of Appeals. "We should not presume, without supporting evidence, that Congress would intend to implement a review system that created an entirely duplicative process whereby both the district courts and the circuit courts would review the same fully-developed record under the same legal standards."

Having taken jurisdiction, the Ninth Circuit applied the arbitrary and capricious standard to DOE's decision in a manner that requires an interesting degree of flexibility from the agency. DOE's first problem with California's waiver request was that the California standard was to take effect in 2008, but the federal EPCA mandates a three-year waiting period before a waiver can take effect. Since 2008 was too early to meet the waiting period requirement, DOE rejected the waiver, but the court faulted DOE for failing to consider whether California's arguments could be applied to later effective date for the California regulation. This was unreasonable since the states cannot tell when DOE will act on a waiver request, so they cannot accurately predict the date about which they must make the necessary showing. In effect, the agency must undertake flexible review of a state's waiver request even if the apparent effective date of the state regulation would violate the waiting period requirement. In a sense, the agency must answer the question of whether it is possible to make the waiver system work despite apparent inconsistencies with formal requirements.

DOE also faulted California for failing "to provide the underlying analysis of its assumptions and data inputs." The court disagreed, finding such information in the record. More interesting, the court noted that DOE's regulations required it not to accept a petition that does not contain sufficient information t evaluate the state's request. Having accepted the petition, DOE could not now claim the information wasn't there.

Finally, the court rejected DOE's conclusion that the waiver would result in the unavailability of top-load washers in California (a legitimate basis for denial if it could be sustained). DOE relied on the current unavailability of top-load washers that could meet the standard, and it rejected California's assertion of the likelihood of complying top-loaders as "a conclusionary prediction by an insufficiently expert body." This was not enough under a statutory requirement that DOE determine "by a preponderance of the evidence" that such washers would be unavailable. It probably would not be enough even without that statutory provision. The court's fundamental concern was that the agency had rejected California's assertions, but it had not applied its own expertise to the problem. This was a "clear error of judgment."

D.C. Circuit Refines Arbitrary and Capricious Review

In another decision addressing the arbitrary and capricious standard of review, the D.C. Circuit in *Stilwell v. Office of Thrift Supervision*, 569 F.3d 514 (D.C. Cir. 2009), rejected a challenger's argument that that "OTS failed to present any substantial empirical evidence justifying the new regulation…. The APA imposes no general obligation on agencies to produce empirical evidence. Rather, an agency has to justify its rule with a reasoned explanation." In that case, the agency's concern, "based…on its long experience" was also supported by various comments in the rulemaking record. This principle is not new, but the opinion is a bit unusual in its explicit assertion that the agency need not present empirical evidence supporting its rule.

Recent Articles of Interest

By Yvette M. Barksdale[*]

Robert M. Chesney, *National Security Fact Deference*, 95 Va. L. Rev. 1361 (2009). Drawing upon insights from *"decision rules"* literature, the author argues for a more nuanced, comprehensive, intellectually rigorous analysis of the appropriate scope of judicial deference to executive branch factual determinations in the area of national security. After debunking conventional arguments in support of judicial deference, such as comparative executive institutional competence, the author argues that core values referenced in the decisions rules literature, provide a useful framework to determine when deference is appropriate. These core values include a) *Comparative Institutional Competence and Core Accuracy* (minimizing false positives and negatives), b) *Weighted Accuracy*, and c) *Prudential Concerns,* such as efficiency and the potential collateral impact on other government activities.

Saule T. Omarova, *The Quiet Metamorphosis: How Derivatives Changed the "Business of Banking,"* 63 U. Miami L. Rev. 1041 (2009). The author argues that the recent financial crisis was largely the result of subterranean decisions and policy choices by regulatory agencies, often adopted through agency interpretations and policy guidance. As an example, the author spotlights the Office of the Comptroller of the Currency (OCC) which, the author asserts, deliberately, through the agency's superficially reasoned interpretation of the "bank powers" clause in § 24 (Seventh) of the National Bank Act of 1863, expanded financial actors' ability to traffic in over-the-counter derivatives. These interpretive letters articulated such an overly expansive interpretation of the "business of banking" that they rendered the concept meaningless.

Nelson Lund, *Book Reviews*, 26 Const. Comment 169 (2009) (reviewing Philip Hamburger, Law and Judicial Duty: The Original Understanding). In this review of University of Chicago Professor Phillip Hamburger's book on the origins of judicial review, the reviewer asserts that the concept of judicial review did not originate with *Marbury v. Madison,* but had been a consistent practice in English and American law for centuries before. The English courts had refrained in practice from overturning Acts of Parliament only because Parliament itself exercised both legislative and judicial authority.

Susan Bisom-Rapp, *What We Learn in Troubled Times: Deregulation and Safe Work in the New Economy,* 55 Wayne L. Rev. ___ (forthcoming 2009). Available in Draft at: http://ssrn.com/abstract=1487963. The author uses *"new governance theory"* to review the performance during the Bush Administration of the Occupational Safety and Health Administration (OSHA), and research arm, The National Institute for Occupational Safety and Health (NIOSH), to shed light on occupational safety and health challenges in the new economy. The author contrasts NIOSH's useful advances, particularly in areas such as increased stakeholder involvement, enhanced agency transparency, and accountability, with the strongly ideological, deregulatory agenda of OSHA, located in the Department of Labor.

Jacob E. Gersen & Anne Joseph O'Connell, *Hiding in Plain Sight: Timing and Transparency in the Administrative State*, 76 U. of Chi. L. Rev. 1157 (2009). This article is a thorough analysis of the scheduling of agency action—that is, how agencies decide when to announce, or otherwise publicly release, their actions. Among the authors' discoveries was that agencies' withdrawals of proposed actions were more likely to be strategically timed than were agency initiatives.

Michael Herz, *Law Lags Behind: FOIA and Affirmative Disclosure of Information,* 7 Cardozo Pub. L. Pol. and Ethics J. (forthcoming 2009). Available in Draft at http://ssrn.com/abstract=1495726. This article is a brief renewed critique of the weaknesses of the Freedom of Information Act (FOIA). These weaknesses are exacerbated by the FOIA's failure to 1) keep pace with the digital information age, and 2) impose an affirmative duty requiring agencies to reveal information before they are asked.

[*] Associate Professor of Law, John Marshall Law School, Chicago, IL; and contributing editor *Admin. & Reg. Law News*.

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