ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

ACUS Scholarship Spotlight (June 2015)

Members and Staff of the Administrative Conference are leaders in their respective fields in the realm of administrative scholarship. Highlights of recent and forthcoming publications by ACUS members in the field of administrative law are presented below. The views expressed in the works below are those of the individual authors and do not necessarily reflect the views of ACUS. This document contains external links to publications hosted on non-ACUS websites.

Dean Emeritus Ronald A. Cass, Council

Ronald A. Cass, *Lessons from the Smartphone Wars: Patent Litigants, Patent Quality, and Software*, 16 MINN. J. L. SCI. & TECH. 1 (2015).

Dean Cass theorizes how current categorical "fixes' to litigation resulting from the smartphone patent wars sweep too broadly. The article goes on to argue that two factors promise improvements. The first, the identity of the enterprise asserting patent rights, already is being used by courts in considering appropriate patent infringement remedies, but Dean Cass argues its use needs to be refined. The second, patent quality, he argues is even more critical to the way the system operates. He writes that addressing the patent quality issue can do more than other reforms to reduce costs without reducing innovation incentives.

Ronald A. Cass, *Overcriminalization: Administrative Regulation, Prosecutorial Discretion, and the Rule of Law*, 15 ENGAGE J. FEDERALIST SOC'Y PRAC. GROUPS (forthcoming 2015).

This article explores differences between criminal law and administrative law, and between statutory and administrative rule generation and application, explaining how differences between administrative law and criminal law play out with respect to criminal enforcement of administrative rules. Dean Cass argues that morphing of administrative law doctrines with criminal law has reduced historic protections for criminal defendants. He calls for changes both to laws and judicially-constructed doctrines to protect against potential abuse of government power.

Ronald A. Cass, *Viva La Deference? Rethinking the Balance Between Administrative and Judicial Discretion*, GEO. WASH. L. REV. (forthcoming).

This article looks at the changes in constitutional limits on the official power of administrative officials, the function of the *Chevron* doctrine, and potential alternatives as a check on discretionary administrative power. Dean Cass concludes that a stronger requirement of actual grants of discretion to administrators is more legally defensible and more consistent with the rule of law.

Professor James Ming Chen, Public Member

James Ming Chen, *Indexing Inflation: The Impact of Methodology on Econometrics and Macroeconomic Policy*, 1 CENT. BANK J. L. & FIN. 1 (2014).

Professor Chen argues that the macroeconomic enterprise of indexing inflation dissolves into an important choice between imperfect methodologies. The article highlights the practical significance of methodological choices made in the course of indexing inflation. Professor Chen also identifies a long-term gap in two competing

indexes' measure of inflation in the United States: the Consumer Price Index (CPI) and the implicit price deflator of the gross domestic product (IPD). Professor Chen recommends that lawmakers adopt the implicit price deflator of the GDP, or some other inflation index that shares its best methodological features, as the best practicable measure of real growth and price change in the national economy.

James Ming Chen, *Αρκτούρος (Arcturus): Protecting Biodiversity Against the Effects of Climate Change Through the Endangered Species Act* (Mich. State Univ., Working Paper, 2014).

Professor Chen's essay describes the use of the Endangered Species Act to protect biodiversity from the effects of climate change. He notes that climate change is driving the anthropocene extinction, the sixth great extinction spasm of the Phanerozoic Eon, and that large-scale habitat destruction puts many plant and animal species at risk of extinction.

James Ming Chen, *Correlation, Coverage, and Catastrophe: The Contours of Financial Preparedness for Disaster*, 26 FORDHAM ENVT'L L.J. 56 (2014).

Professor Chen writes that laws regulating financial preparedness for catastrophe reveal the actuarial suppositions underlying disaster law and policy. Professor Chen explores three facets of catastrophic risk transfer. First, it explores how risk transfer emerges as the preeminent tool for managing risk. Second, the author explores one alternative risk transfer mechanism by which insurance companies have sought to deepen their financial reserves in anticipation of correlated risks. Finally, Professor Chen explores constraints on public intervention into disaster insurance..

Associate Justice Mariano-Florentino Cuéllar, Public Member

Mariano-Florentino Cuéllar, *Administrative War*, 82 GEO. WASH. L. REV. 1343 (2014).

Justice Cuéllar discusses the evolutionary transformation of the American administrative state during and immediately after World War II including the greater exposure among the public to powerful, adaptive federal agencies; newly permissive legal doctrines legitimizing the delegation of legislative authority and routine compliance investigations; new arrangements for mass taxation; White House supervision of agency action; and further entrenchment of procedural constraints meant to shape agencies' weighing of the consequences of official decisions.

Professor Susan E. Dudley, Public Member

Susan E. Dudley & Andrew P. Morriss, *Will the Occupational Safety and Health Administration's Proposed Standards for Occupational Exposure to Respirable Crystalline Silica Reduce Workplace Risk?*, RISK ANALYSIS (forthcoming 2015).

This article briefly reviews OSHA's proposed regulatory approach to standards for occupational exposure to respirable crystalline silica and the statutory authority on which it is based. The authors then evaluate OSHA's preliminary determination of significant risk and OSHA's analysis of the risk reduction achievable by its proposed controls. The article argues that OSHA's proposed rule for exposure standards would contribute little in the way of new information, and concludes with recommendations

for alternative approaches that would be more likely to generate information needed to improve worker health outcomes.

Susan E. Dudley, *Improving Regulatory Accountability: Lessons from the Past and Prospects for the Future*, 65 CASE W. RES. L. REV. (forthcoming 2015).

This article examines efforts by the three branches of federal government to oversee regulatory policy and procedures. It begins with a review of efforts over the last century to establish appropriate checks and balances on regulations issued by the executive branch. Professor Dudley then evaluates proposed regulatory reforms that she argues would hold the executive branch, the legislative branch, and the judicial branch more accountable for regulations and their outcomes.

Susan E. Dudley & Kai Wegrich, *Achieving Regulatory Policy Objectives: An Overview and Comparison of U.S. and EU Procedures*, (George Washington University Regulatory Studies Center Working Paper, with support from the European Union, 2015).

The authors aim to provide a descriptive analysis of procedural differences in regulatory development between the United States and the European Union to serve as a factual basis for understanding the regulatory challenges and opportunities for transatlantic trade. After presenting the procedures in the U.S. and EU, the authors compares how the shared goal of a regulatory system that is evidence based, transparent, and accountable is achieved in the two jurisdictions.

Randall Lutter, et al., *Improving Weight of Evidence Approaches to Chemical Evaluations*, 35 RISK ANALYSIS 186 (2015).

This article reviews key articles in the peer-reviewed scientific literature on the use of weight of evidence (WoE), which is often used by federal and other regulatory agencies in chemical evaluation. The authors find that a hypothesis-based WoE approach, developed by Lorenz Rhomberg et al., can provide a stronger scientific basis for chemical assessment while improving transparency and preserving the appropriate scope of professional judgment.

Steven J. Balla & Susan E. Dudley, *Stakeholder Participation and Regulatory Policymaking in the United States*, (Report for the Organisation for Economic Co-operation and Development, Oct. 2014).

The authors explain the processes through which U.S. regulations are made, implemented, and evaluated, highlighting instruments for stakeholder participation. Their review demonstrates that there are extensive opportunities for stakeholder participation at all stages of the regulatory process.

Susan E. Dudley & Brian Mannix, *The Social Cost of Carbon*, ENGAGE J. FEDERALIST SOC'Y PRAC. GROUPS, July 2014.

This article was based on the author's public comment filed in response to the White House's May 2013 revised Technical Support Document with a new estimate of the "social cost of carbon" (SCC) to be used by various agencies when evaluating the benefits of emissions regulations, energy efficiency standards, renewable fuel mandates, technology subsidies, and other policies intended to mitigate global warming. The authors endorse the administration's efforts to arrive at a uniform UCC but suggest the next step is to seek an international consensus on the value of the SCC

to negotiate a coordinated global policy response, rather than allow agencies to immediately incorporate the SCC into Regulatory Impact Analyses (RIAs).

Susan E. Dudley & Melinda Warren, *2015 Regulators' Budget: Economic Forms of Regulation on the Rise*, (a joint report of the GW Regulatory Studies Center and the Weidenbaum Center at Washington Univ. in St. Louis, 2014).

This report tracks the portion of the Budget of the United States devoted to developing and enforcing federal regulations. It presents the President's requested budget outlays in FY 2015, as well as estimated outlays for FY 2014 as reported in the Budget of the United States Government for FY 2015. Report highlights include findings of modest growth overall, with outlays devoted to economic regulatory activities increasing at a faster rate than those aimed at social regulatory activities.

Professor Cynthia R. Farina, Public Member

Cynthia R. Farina, Mary Newhart & Cheryl L. Blake, *The Problem With Words: Plain Language and Public Participation in Rulemaking*, GEO. WASH. L. REV. (forthcoming 20l5).

The authors examine the effect of the requirement for lengthy or complex rules to include an executive summary requirement, in accordance with guidance issued by the Office of Information and Regulatory Affairs (OIRA) in 2012. Using a dataset of proposed and final rule documents from 2014-2014, the authors conclude that agencies have done fairly well in providing summaries for "lengthy" rules but find mixed success for "complex" rules. Overall, the authors remark on the "stunning failure" of the requirement to produce more comprehensible rulemaking information.

Cynthia R. Farina, et al., *Democratic Deliberation in the Wild: The McGill Online Design Studio and The RegulationRoom Project*, 41 FORDHAM URB. L.J. 1527 (20l4).

This article explores aspirations of democratic deliberation and questions whether it has any relevance to conventional public comment processes. The authors argue that conscious attention to process design can make it more likely that participants will engage in informed, thoughtful, civil, and inclusive discussion. Two action-based research projects are discussed.

Dmitry Epstein, Cynthia R. Farina & Josiah Heidt, *The Value of Words: Narrative as Evidence in Policy Making*, 10 EVIDENCE & POL'Y 243 (20l4).

The authors note that although policy makers today rely primarily on technical data as their basis for decision making, there is a potentially underestimated value in substantive reflections of the members of the public who will be affected by a particular regulation. The article views professional policy makers and professional commenters as a community of practice, and describes their limited shared repertoire with the lay members of the public as a significant barrier to participation. Based on the authors' work with RegulationRoom, they offer an initial typology of narratives—complexity, contributory context, unintended consequences, and reframing—as a first step towards overcoming conceptual barriers to effective civic engagement in policy making.

Professor Jody Freeman, Public Member

Jody Freeman, *Why I Worry About UARG*, 39 HARV. ENVTL. L. REV. 9 (2015).

Professor Freeman argues that, despite the positive light cast by government and environmental groups on the Supreme Court's decision in *Utility Air Regulatory Group v. EPA*, the holding actually signifies a "warning shot" to the Environmental Protection Agency (EPA). She is troubled by the apparent qualification of *Massachusetts v. EPA* by the Court's holding that whether the EPA has authority to control greenhouse gases will be determined program-by-program and opines on the potential implications for currently pending greenhouse gas proposals.

Professor Lisa Heinzerling, Public Member

Lisa Heinzerling, *Classical Administrative Law in the Era of Presidential Administration*, 92 TEX. L. REV. SEE ALSO. 171 (2014) (Response to Daniel Farber and Anne Joseph O'Connell, The Lost World of Administrative Law).

Professor Heinzerling describes the views found in the article *The Lost World of Administrative Law* written by Dan Farber and Anne Joseph O'Connell. That article describes the many ways in which the contemporary practice of administrative law departs from classical doctrine. Professor Heinzerling writes that the court's decision in *Sierra Club v. Costle* created a large fissure within administrative law doctrine itself, wherein agencies must, in order to survive judicial review, apply statutory criteria to the evidence before them, but their decisions need not be motivated by those criteria and that evidence. She believes this is a tension that must be resolved, not accommodated, and that either classical conceptions of administrative law or *Sierra Club v. Costle* has to go.

Lisa Heinzerling, *The FDA's Continuing Incapacity on Livestock Antibiotics*, 33 STAN. ENVTL. L.J. 325 (2014).

Professor Heinzerling describes the Food and Drug Administration's 2013 decision to address the profligate use of antibiotics in livestock by enlisting the voluntary participation of the drug companies that make the antibiotics. She explains that two documents issued in December 2013 reveal the details of the agency's current plans. The first is a final guidance document describing the agency's process for handling drug sponsors' voluntary efforts to phase out certain uses of antibiotics in animal feed and water and to bring the remaining uses under the oversight of a veterinarian. The second is a draft rule relaxing the requirements for veterinarians in exercising this oversight.

Lisa Heinzerling, *Quality Control: A Reply to Professor Sunstein*, 102 CALIF. L. REV. 1457 (2014).

Professor Heinzerling responds to Professor Cass Sunstein's presentation at the 2013 Brennan Center Jorde Symposium at Berkeley Law School on the topic of nonquantifiable and nonmonetizable benefits of regulation in cost-benefit analysis. She argues that the limits of quantification remain severe, explaining and illustrating her critique with reference to rules addressing three social problems: water pollution

and other environmental challenges, the rights of the disabled, and rape and sexual abuse.

Lisa Heinzerling, *Divide and Confound: The Strange Allocation of U .S. Regulatory Authority Over Food*, *in* FOOD AND DRUG REGULATION IN AN ERA OF GLOBALIZED MARKETS (forthcoming Elsevier 2015).

Professor Heinzerling argues that the fragmentation of regulatory authority for the nation's food supply across multiple federal agencies leads to inefficiency and ineffectiveness in the pursuit of a safe food supply. She presents specific examples of what she describes as the scattering allocation of regulatory authority over like products and highlights serious problems that she believes can result.

Lisa Heinzerling, *The Varieties and Limits of Transparency in U.S. Food Law*, 70 FOOD & DRUG L.J. 11 (2015).

A central goal of the federal legal system for food is to ensure the integrity of representations made by sellers of food about their products. Professor Heinzerling argues that the transparency achieved by law is imperfect. She alleges that resource limits at federal agencies charged with regulating food hollow out enforcement programs aimed at false or misleading representations. She proposes three ideas for improving understanding of the nation's food supply: allowance of citizen suits under federal food laws, frank acknowledgment by federal agencies that they cannot adequately enforce these laws, and a good deal more skepticism on the part of consumers toward the reliability and credibility of representations made to them about their food.

Lisa Heinzerling, *A Pen, A Phone, and the U.S. Code*, 103 GEO. L.J. (ONLINE) 59 (2014).

Professor Heinzerling calls on the President and his aides to "put down their pens and their phones and let the agencies do their work." In this article, she presents a counterpoint to then-Professor, now-Justice Elena Kagan's 2001 article *Presidential Administration*. She elaborates on many of the ways in which she says the White House intervenes in the process for developing agency rules.

Lisa Heinzerling, *Inside EPA: A Former Insider's Reflections on the Relationship Between the Obama EPA and the Obama White House*, 31 PACE ENVTL. L. REV. 325 (2014).

Professor Heinzerling focuses specifically on the role that the Office of Information and Regulatory Affairs (OIRA) plays in reviewing the EPA's regulatory output, recounted from her experience as Senior Climate Policy Counsel to EPA Administrator Lisa P. Jackson from January to July 2009, and Associate Administrator of the Office of Policy from July 2009 to December 2010.

Professor Michael E. Herz, Public Member

Michael Herz, *ACUS—And Administrative Law—Then and Now*, 83 GEO. WASH. L. REV. (forthcoming 2015).

This article, written for the George Washington Law Review's ACUS symposium, traces the re-reformation of American administrative law, as well as the field's perpetual concerns, by comparing ACUS's first recommendations with its most recent ones. Professor Herz identifies major themes addressed by recommendations

from ACUS' first three years (1968–1970), and compares these to the major themes addressed in the first three years after ACUS' revival (2010–2013). While many exemplify central issues of the administrative state, more recent recommendations also reflect new developments—helping to shape and define the new era.

Professor Ronald M. Levin, Public Member

Ronald M. Levin, *The REINS Act: Unbridled Impediment to Regulation*, 83 GEO. WASH L. REV. (forthcoming 2015).

Professor Levin provides a critical review of the Regulations from the Executive In Need of Scrutiny Act (REINS Act) passed by the House of Representatives in 2011 and 2013.[1] The proposal has been introduced again in the 114th Congress.[2] Professor Levin questions the constitutionality of the bill, and argues it would create an unmanageable workload for Congress.

Professor Jeffrey S. Lubbers, Special Counsel

Jeffrey S. Lubbers, *It's Time to Remove the 'Mossified' Procedures for FTC Rulemaking*, 83 GEO. WASH. L. R. ARGUENDO (forthcoming 2015).

This paper examines the length of time it took the FTC to issue trade regulation rules before and after the Federal Trade Commission Improvement Act of 1975 and the additional procedures added by the Federal Trade Commission Improvements Act of 1980 (collectively, the Magnuson-Moss procedures). It also measures the time it took the FTC to issue the nine "APA rules." Professor Lubbers argues that the results show that Magnuson-Moss rulemaking takes significantly longer than APA rulemaking, and the FTC should be allowed to use APA procedures in its rulemaking, while giving it the discretion to use procedures in addition to notice and comment when desirable.

President Randolph J. May, Public Member

Randolph J. May & Seth L. Cooper, *Constitutional Foundations of Copyright and Patent in the First Congress*, PERSP. FROM FSF SCHOLARS (The Free State Found., Rockville, Md.), May 8, 2014.

President May writes that the proceedings of the First U.S. Congress inform our understanding of the underlying logic and significance of intellectual property (IP) rights in the American constitutional order. He explains that the First Congress not only passed organic acts that set up the federal judiciary, organized the executive departments, established a revenue system, defined legislative roles in federal affairs, selected the permanent capital of the nation, provided for federal control over territories as well as the admission of new states, and drafted the Bill of Rights; it also passed the first Copyright Act and first Patent Act. He suggests that as the First Congress saw fit to include copyright and patent in its ambitious, historic legislative agenda suggests its members found intellectual property especially important to

[1] H.R. 10, 112th Cong. (2011); H.R. 367, 113th Cong. (2013).
[2] H.R. 427, 114th Cong. (2015).

furthering the new nation's economic, artistic, and technological progress. The paper goes on to suggest that the Passage of the Copyright and Patent Acts also indicates a consensus regarding the legitimacy and efficacy of a pro-IP rights policy—a consensus conspicuously absent when it came to Congressional deliberation on other matters.

Randolph J. May, *Why* Chevron *Deference May Not Save the FCC's Open Internet Order—Part I*, PERSP. FROM FSF SCHOLARS (The Free State Found., Rockville, Md.), Apr. 23, 2015.

Randolph J. May, *Why* Chevron *Deference May Not Save the FCC's Open Internet Order—Part II*, PERSP. FROM FSF SCHOLARS (The Free State Found., Rockville, Md.), May 4, 2015.

In this two part series, President May discusses his view that *Chevron* deference will not save the FCC from challenges to its recent determination that Internet access service should be classified as a telecommunication service—a reversal of its earlier position. He states that the FCC failed to provide the "more detailed justification" necessary to support a change in agency policy when it issued the Open Internet Order in March 2015. Additionally, he reiterates his view that independent agencies, such as the FCC, should receive less deference on review than executive branch agencies.

Professor Nina Mendelson, Public Member

Nina A. Mendelson & Jonathan B. Wiener, *Responding to Agency Avoidance of OIRA*, 37 HARV. J.L. & PUB. POL'Y 448 (2014).

The authors note that concerns have recently been raised that US federal agencies may sometimes avoid regulatory review by the White House Office of Information and Regulatory Affairs (OIRA). This article assesses the seriousness of such potential avoidance and recommends a framework for evaluating potential responses. After summarizing the system of presidential regulatory oversight through OIRA review, the article analyzes the incentives for agencies to cooperate with or avoid OIRA. The authors argue that the optimal response may not always be to try to eliminate the avoidance behavior and conclude that responses to agency avoidance should be evaluated in a way similar to what OIRA asks of agencies evaluating proposed regulations: by weighing the pros and cons of alternative response options (including no action).

Nina A. Mendelson, *The Uncertain Effects of Senate Confirmation Delays in the Agencies*, 64 DUKE L.J. 1571 (2015).

Though Professor Mendelson acknowledges that confirmation delays surely cause significant problems to agencies, she discounts the extent of the problems articulated by some. She suggests there can be some consequential positive effects, such as an increased likelihood that senior civil servants will offer valuable expertise on regulatory decisions; and that these servants will realize a greater opportunity for leadership, thereby reducing turnover in their ranks with benefits to overall agency function.

Nina A. Mendelson, *Private Control Over Access to the Law: The Perplexing Federal Regulatory Use of Private Standards*, 112 MICH. L. REV. 737 (2014).

This article addresses the practice of federal agencies to incorporate privately drafted standards into federal regulations by reference. This article looks beyond the need for regulated *entities* to receive notice of the standards, and assesses the need for regulatory *beneficiaries* to receive notice of the standards, among other considerations. Professor Mendelson argues that ready public access to law is critical to ensuring that federal agencies are meaningfully accountable for their decisions.

Professor Gillian E. Metzger, Public Member

Gillian E. Metzger, *Appointments, Innovation, and the Judicial-Political Divide*, 64 DUKE L.J. 1607 (2015).

Professor Metzger explores the differing judicial and political approaches to innovation with respect to federal agency appointments and separation of powers issues. She addresses the implications for federal administration of a perceived emerging contrast between innovation in the political sphere and the judicial conservatism of the Roberts Court. After discussing the decisions in *Free Enterprise Fund* and *Noel Canning*, she urges the Supreme Court to adopt a more nuanced approach to "better titrate its interventions to constitutional structure" and minimize disruptive effects of its decisions.

Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836 (2015).

Supervision and other systemic features of government administration have long been fundamental in shaping how an agency operates, and their importance is only more acute today. She argues that new approaches to program implementation and regulation mean that a broader array of actors wield broader discretionary governmental authority, underscoring the importance of administration.. Professor Metzger argues that incorporating systemic administration in contemporary U.S. constitutional law is essential to allow the Constitution to perform its functions in ways that are responsive to modern governance.

Gillian E. Metzger, *Through the Looking Glass to a Shared Reflection: The Evolving Relationship between Administrative Law and Financial Regulation*, TRANSNAT'L L. & CONTEMP. PROBS. (forthcoming).

Professor Metzger queries whether administrative law and financial regulation might be thought closely connected, given what she argues is a shared focus on federal regulation. She finds that these fields are divided by opposite precepts and framing principles. Her essay explores the historical contrasts between administrative law and financial regulation.

Gillian E. Metzger, *Administrative Law, Public Administration, and the Administrative Conference of the United States*, GEO. WASH. L. REV. (forthcoming).

Professor Metzger argues that administrative law has long-claimed a close connection to governmental practice. Yet, she claims that as administrative law has grown and matured it has moved further away from how agencies actually function. Professor Metzger shares her view that ACUS represents one of the rare instances in which administrative law and public administration have been linked. She explains that

ACUS is ideally situated to study administrative law's effects on internal agency operations and assess whether—as well as how—administrative law might be used to improve public administration.

Dean Alan B. Morrison, Senior Fellow

Alan B. Morrison, *The Sounds of Silence: The Irrelevance of Congressional Inaction in Separation of Powers Litigation*, 81 GEO. WASH. L. REV. 1211 (2013).

Dean Morrison writes that in a number of significant separation of powers decisions, Supreme Court Justices have relied on Congressional silence to support their conclusion that the President had or did not have the power being challenged. He notes that by using language such as "implied" grants or denials of authority and "congressional acquiescence" in Presidential actions, the Court has utilized congressional inaction to tilt the outcome for or against Presidential power in cases such as *Youngstown Sheet & Tube Co. v. Sawyer*, *Dames & Moore v. Regan*, and *Clinton v. City of New York*. This essay argues that reliance on congressional silence in separation of powers litigation is improper. Dean Morrison maintains that taking silence off the table does not ease the difficulty in deciding separation of powers; rather it forces the Court to return to first principles instead of attempting to divine the meaning of congressional inaction.

Associate Dean Anne Joseph O'Connell, Public Member

Anne Joseph O'Connell, *Shortening Agency and Judicial Vacancies through Filibuster Reform? An Examination of Confirmation Rates and Delays from 1981 to 2014*, 64 DUKE L.J. 1645 (2015).

Using a new database of all nonroutine civilian nominations from January 1981 to December 2014, this article explores the failure of nominations and the delay in confirmation of successful nominations across recent administrations. The author examines confirmation statistics against political metrics and demographics, including a focus on the November 2013 change to the Senate voting rules. She suggests possible explanations for her findings and further avenues of investigation, as well as proposes some reforms.

Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137 (2014).

Professors Farber and O'Connell argue that the reality of the modern administrative state diverges considerably from the assumptions underlying the APA. Statutory and executive directives are delegated to not one, but multiple agencies. Delays in the Senate-led confirmation process often leave agencies without confirmed leaders. The authors claim that court oversight is limited on agency decisions, and practical decision-making authority may rest outside of agencies entirely. The authors propose some possible reforms in all three branches of the federal government to strengthen the match between current realities and administrative law and to further administrative law's objectives of transparency, rule of law, and reasoned implementation of statutory mandates.

Anne Joseph O'Connell, *Bureaucracy at the Boundary*, 162 U. PA. L. REV. 841 (2014).

Professor O'Connell locates and classifies what she calls "the missing federal bureaucracy along the borders of more conventional categories." Examples of organizations that exist outside executive agencies and independent regulatory commissions include: the U.S. Postal Service, Amtrak, and the National Guard, among others. The author theorizes about these components, such as questioning why political actors would create bureaucracy at the boundary and whether their creation serves social welfare or democratic legitimacy objectives. She also examines important legal issues surrounding these other bureaucracies.

Professor Richard J. Pierce, Jr., Public Member

Richard J. Pierce Jr., *The Administrative Conference and Empirical Research*, GEO. WASH. L. REV. (forthcoming 2015).

Professor Pierce's contribution to a symposium on the occasion of the fiftieth anniversary of the Administrative Conference of the United States describes the many ways in which ACUS has contributed to empiricism in administrative law scholarship. He illustrates the value of empirical research by describing the studies that have found that notice and comment rulemaking is systemically biased in favor of regulated firms.

Richard J. Pierce Jr., *The Rocky Relationship Between the Federal Trade Commission and Administrative Law*, (GWU Law Sch. Pub. Law and Legal Theory Research Paper No. 2014-31, 2014).

Professor Pierce's contribution to a symposium in honor of the 100th anniversary of the FTC, describes the problems that FTC has experienced as a result of conflicts between its practices and basic principles of administrative law. He traces those problems to the history of the FTC, including the language of the FTC Act of 1914 and FTC's attempt to implement that statute. He describes the ways in which the conflicts between FTC practices and administrative law handicap FTC's efforts to perform its antitrust mission. He then proposes a combination of changes in antitrust statutes that would allow FTC to perform its antitrust mission more effectively over the next century. Those changes include: (1) repeal sections 5 and 13(b) of the FTC Act; (2) confer on FTC power to issue legislative rules to implement the Sherman and Clayton Acts; (3) confer on FTC exclusive jurisdiction to resolve civil cases that arise under the Sherman and Clayton Acts; and, (4) replace oral evidentiary hearings with paper hearings.

Professor Arti K. Rai, Public Member

Peter S. Menell, Jonas Anderson, & Arti K. Rai, *Taming the Mongrel: Aligning Appellate Review of Claim Construction with its Evidentiary Character in* Teva v. Sandoz (UC Berkeley Pub. Law Research Paper, Working Paper No. 2457958, 2014).

Professor Rai explains that the Supreme Court sought to usher in a more effective, transparent patent litigation regime through its ruling that "the construction of a patent, including terms of art within its claim, is exclusively within the province of the court" in the *Markman* decision. She writes that in the aftermath of this decision, the Federal Circuit adhered to its prior holding that claim construction is a "purely

legal issue" subject to plenary de novo review, downplaying the Supreme Court's more nuanced description of claim construction. She notes that in the post-*Markman* era, the Federal Circuit's adherence to its plenary de novo appellate review standard has been detrimental to accuracy and efficiency in patent dispute resolution. Drawing on the Supreme Court's decision, her brief advocates a hybrid standard of appellate review that would promote more accurate and efficient patent dispute resolution.

Arti K. Rai & Grant Rice, *Use Patents Can Be Useful: The Case of Rescued Drugs*, SCI. TRANSLATIONAL. MED., Aug. 6, 2014, at 248.

The authors note that pharmaceutical firms may forego development of small molecules for which they cannot secure strong "product" or "composition-of-matter" patents. The authors explain that during the time these composition-of-matter patents remain in force, they not only block third parties from marketing the drug for the patentee's use but also block the marketing of new uses discovered by third parties. In contrast, so-called "use" patents, which protect a selected therapeutic use, can often be evaded through "skinny labeling" at the U.S. Food and Drug Administration. Still, despite the apparently limited commercial power of use patents, pharmaceutical firms do seek them, even on relatively small improvements. Consequently, use patents as a category are frequently viewed as covering innovation of only "secondary" therapeutic value. In this article, the authors discuss an important context, relevant to new trends in small-molecule development, in which use patents can have substantial commercial and therapeutic value.

Arti K. Rai, *Competing with the 'Patent Court': A Newly Robust Ecosystem*, 13 CHI.-KENT J. INTELL. PROP. 386 (2014).

In a provocative address, Chief Judge Wood of the Seventh Circuit Court of Appeals suggests exposing the Court of Appeals for the Federal Circuit, created in 1982 to hear all appeals from patent cases, to competition from sister appellate courts. Professor Rai's response, published as part of a Symposium on Chief Judge Wood's idea, argues that competition is indeed desirable. Whether such competition is best provided by other appellate courts is unclear, however. The more tractable approach is to improve competitive input from sources that have already emerged. These include dissenting Federal Circuit judges, parties and amici who are not "patent insiders," and the executive branch.

Dean Emeritus Richard L. Revesz, Public Member

Michael A. Livermore & Richard L. Revesz, *Interest Groups and Environmental Policy: Inconsistent Positions and Missed Opportunities*, 45 ENVTL L. REV. 1 (2015).

This essay examines and explains positions of the principal interest groups over the past four decades with respect to environmental policy goals and instruments. The authors argue that there have been changing preferences of interest groups with respect to cost-benefit analysis and marketable permit schemes. They observe that environmental advocacy organizations initially opposed both, yet have come to see promise in these techniques. The positions of industry groups have also changed, but inversely. The authors argue that during this reversal of diametrically opposite positions, an opportunity for consensus was missed.

Professor Alasdair S. Roberts, Public Member

Alasdair S. Roberts, *Too Much Transparency? How Critics of Openness Misunderstand Administrative Development*, (Suffolk Univ. Law School Research Paper No. 15-25, 2015).

Professor Roberts challenges the view that "habitual calls for more transparency" are actually compounding problems of dysfunctionality in federal government. In this paper, prepared for the Fourth Global Conference on Transparency Research at Università della Svizzera italiana, he explains this view is misguided and based on a misconception about the purposes served by transparency in government.

Alasdair S. Roberts, *No Simple Fix: Fiscal Rules and the Politics of Austerity,* IND. J. GLOBAL LEGAL STUD. (forthcoming 2015).

Professor Roberts writes that fiscal rules were supposed to provide a simple remedy for out-of-control government spending and were predicated on a deep skepticism about the capacity of democratic systems to exercise fiscal self-control. Professor Roberts' article states that after three decades of experimentation, it is evident that advocates of fiscal rules overestimated the capacity of legal instruments to impose discipline on democratic processes. He notes that while certainly many advanced democracies have improved their fiscal performance, fiscal rules have played a small role in this process. Professor Roberts suggests that advocates of fiscal rules drew the wrong lessons from the experience of the 1970s, and underestimated the capacity of democratic systems to respond constructively to fiscal crises.

Jeffrey A. Rosen, Public Member

Jeffrey A. Rosen & Brian Callanan, *The Regulatory Budget Revisited*, 66 ADMIN. L. REV. 835 (2014).

This article presents a review and reappraisal of the concept of regulatory budgeting in light of recent trends in regulation — both in the United States and abroad. The authors outline the academic literature and other commentary on the purpose and design of a regulatory budget, describe Legislative and Executive Branch activity on this issue over the past thirty-five years, and describe the United Kingdom's recent experience with a new regulatory constraint—the "One-in, Two-out" policy—that operates much like an incremental regulatory budget.

Professor Catherine M. Sharkey, Public Member

Catherine, M. Sharkey, *Agency Coordination in Consumer Protection* (NYU School of Law, Working Paper No. 14-23, 2014).

Professor Sharkey writes that the federalization of consumer protection has created thorny issues of agency coordination. She questions how courts should accord *Chevron* deference when multiple federal agencies interpret and enforce the same statute. This article explores two agency coordination strategies that point in opposite directions. The first, a balkanization strategy, attempts to overcome the overlapping agency jurisdiction problem by urging agencies to create separate, non-overlapping spheres of authority to thereby regain *Chevron* deference due the agency that reigns

supreme. Professor Sharkey argues that a second strategy, a model of judicial review as agency coordinator, is more novel and exploits overlapping agency jurisdiction to reach better policy outcomes in situations when agency missions are not in conflict.

Catherine M. Sharkey, *Tort-Agency Partnerships in an Age of Preemption*, 15 THEORETICAL INQUIRIES L. 359 (2014).

Professor Sharkey writes that at the core of the tort preemption cases before the U.S. Supreme Court is the extent to which state law can impose more stringent liability standards than federal law. She states that express preemption cases focus on whether the state law requirements are "different from, or in addition to" the federally imposed requirements. And the implied conflict preemption cases examine whether the state law standards are incompatible (impossibility preemption) or at least at odds (obstacle preemption) with the federal regulatory scheme. Professor Sharkey writes that the preemption cases in the appellate pipeline—what she term the "second wave" of preemption cases—address a separate analytic question. Their focus is less on the substantive aspects of regulatory standards, and more on their enforcement. She proposes a model that suggests that courts facing these new issues should solicit input from federal agencies before resolving them.

Catherine M. Sharkey, *State Farm 'with Teeth': Heightened Judicial Review in the Absence of Executive Oversight*, 89 N.Y.U. L. REV. 1589 (2014).

Professor Sharkey argues that judicial review of certain types of agency determinations should be more stringent because those determinations have not been vetted by executive oversight and are thus less likely to be premised on reasons backed by empirical support. She compares agency cost-benefit analyses and agency conflict preemption determinations in terms of their reliance on underlying factual predicates and contrasts them in terms of the existing framework for executive oversight and judicial review of agency determinations. Professor Sharkey concludes that both contexts reveal what is lost when executive oversight is absent and show how courts can fill that gap.

Professor Peter L. Strauss, Senior Fellow

Peter L. Strauss, *The Administrative Conference and the Political Thumb*, GEO. WASH. L. REV. (forthcoming 2015).

Professor Strauss discusses Professor Richard Pierce's forthcoming article on *The Administrative Conference and Empirical Research*, which celebrates the catalyzing effect the Administrative Conference of the United States has had on hands-on empirical research about administrative law. Professor Strauss contrasts this with Liza Heinzerling's *Classical Administrative Law in the Era of Presidential Administration* which attributes inflexibility in rulemaking to presidential influence via OIRA's administration of regulatory impact analysis requirements. Professor Strauss takes off from Professor Pierce's celebration of ACUS's contribution to empirical research about administrative law and reviews ACUS's distribution of research and recommendation topics. He suggests that ACUS has been hesitant to explore or comment on the role of politics in administrative law—and particularly so where OIRA is concerned.

Conference Staff

Paul R. Verkuil, ACUS Chairman

Paul R. Verkuil, *Deprofessionalizing State Governments: The Rise of Public At-Will Employment*, 75 PUB. ADMIN. REV. 188 (2015).

Chairman Verkuil lends his perspective on the trend of the state expansion of at-will employment in the public sector. He calls for a preservation of the human infrastructure at public employers despite the pursuit of needed improvements in the civil service system.

Emily S. Bremer, ACUS Research Chief

Emily S. Bremer, *On the Cost of Private Standards in Public Law*, 63 KAN. L. REV. 279 (2015).

Federal agencies often give legal effect to privately authored technical standards that the public can access only by paying a fee. The author offers a case study of a recent law that prohibited one federal agency, the Pipeline and Hazardous Materials Safety Administration (PHMSA), from incorporating into regulations or guidance any private standard not freely available to the public online. Ms. Bremer argues that PHMSA's experience strongly suggests that simply mandating free online access to private incorporated standards is unworkable. This multidimensional problem requires a more nuanced solution.

Emily S. Bremer, *A Multidimensional Problem, Comment on* Private Control Over Access to the Law: The Perplexing Federal Regulatory Use of Private Standards, 45 ENVTL. L. & POL'Y ANN. REV. (forthcoming 2015).

In this response to Professor Nina Mendelson's article, Ms. Bremer agrees with the policy goal that private standards incorporated by reference should be made freely available online. Yet, she argues that the issue is more complex than it appears and that a unilateral government solution is unworkable. She points to substantial evidence that public-private collaboration is already working and that it offers the greatest promise for achieving the transparency Professor Mendelson seeks.

Reeve T. Bull, ACUS Attorney Advisor

Reeve T. Bull and Adam C. Schlosser, *Regulatory Science and the TTIP*, REGBLOG (Jul. 14, 2014), http://www.regblog.org/2014/07/14-bull-schlosser-regulatory-science-and-the-ttip.html.

Mr. Bull and Mr. Schlosser discuss the process for achieving greater convergence in the area of scientific policy making in connection with the Transatlantic Trade and Investment Partnership (TTIP). They suggest that TTIP should focus initially on seeking greater cooperation related to risk assessment and only then seek to develop institutions that will allow for greater coordination of risk management. They assert that nothing in the TTIP will change the ability of regulators in the U.S. and EU to

make independent risk management decisions, but will result in a more efficient regulatory environment.

Reeve T. Bull, *Far From Eroding Regulatory Protections, TTIP's Cooperative Regime Could Bolster Sound Regulation*, BLOOMBERG BNA DAILY REP. EXEC., July 23, 2014.

Mr. Bull writes that concerns that the Transatlantic Trade and Investment Partnership (TTIP) will undercut regulatory protections are overblown. He argues that the result will not be a regulatory "race to the bottom," but that TTIP may offer the best hope for the U.S. and the EU to promote a coherent regulatory agenda that will serve as a model for developed and developing nations alike.

Reeve T. Bull, *Public Participation and the Transatlantic Trade and Investment Partnership*, GEO. WASH. L. REV. (forthcoming 2015).

Mr. Bull's article focuses on negotiations on the Transatlantic Trade and Investment Partnership ("TTIP"), currently under negotiation between the U.S. and E.U. He notes that TTIP's aim to facilitate trade primarily by identifying and eliminating unnecessary regulatory disparities is unique from past trade agreements, which have focused chiefly on the reduction of tariffs. Mr. Bull's article explores the existing regulatory frameworks in both the U.S. and EU, highlighting opportunities for public participation and contrasting the two systems, and suggests various reforms that might be considered in connection with the TTIP negotiations, drawing upon best practices under both regimes as well as proposals in the scholarly literature and recommendations of the Administrative Conference of the United States.

Reeve T. Bull, *Market Corrective Rulemaking: Drawing on EU Insights to Rationalize U.S. Regulation*, ADMIN. L. REV. (forthcoming 2015).

Mr. Bull proposes a new, optional track for rulemakings aimed at remedying perceived market flaws, dubbed "market corrective rulemaking." He examines several innovations adopted by the European Union and would adapt these procedures for a U.S. context, drawing from the comparative strengths of both systems. Under market corrective rulemaking procedures, Congress would delegate extensive powers to agencies to correct certain market flaws, but it would impose certain procedural requirements, including pre-NPRM outreach to relevant stakeholders and comprehensive retrospective review, and would require the rulemaking agencies to assess both economic costs and benefits and disruption to existing market forces.

Reeve T. Bull, *Administrative Conference Initiates Project on Federal Permitting and Licensing*, ADMIN. & REG. L. NEWS, Spring 2015, at 26.

Mr. Bull provides background on the impetus for a current ACUS project exploring potential reforms to the licensing and permitting regime. He remarks that despite lack of contentment with the status quo and recent congressional reform proposals, few have examined this topic at any length. The ACUS project seeks to produce a list of factors that legislators and agency officials could consider when designing new permitting regimes or reassessing existing ones, to ensure such regimes are no more burdensome than necessary to achieve stated objectives.

Stephanie Tatham, ACUS Attorney Advisor

Stephanie J. Tatham, *Opinions on ACUS: The Administrative Conference's Influence on Appellate Jurisprudence*, GEO. WASH. L. REV. (forthcoming 2015).

Ms. Tatham examines judicial discussion of publications and recommendations issued by the Administrative Conference in 150 opinions of the Supreme Court, the Court of Appeals for the D.C. Circuit, and in the other U.S. Courts of Appeals. She finds that the Conference's publications and recommendations are naturally more persuasive where they can aid courts in resolving perceived ambiguities and that Conference's influence on the federal judiciary is attributable to its unique ability to illuminate agency processes and procedures through applied research and empirical analysis aimed at improving the efficiency, adequacy, and fairness of federal administration.

Connie Vogelmann & Amber G. Williams, ACUS Attorney Advisors

Connie Vogelmann & Amber Williams, *News From ACUS*, ADMIN. & REG. L. NEWS, Winter 2015, at 26.

At the end of the Administrative Conference of the United States' 50th Anniversary year, Ms. Vogelmann and Ms. Williams provide a recap of the December 2014 Plenary and highlight the three recommendations adopted. They also provide an overview of seven ACUS projects, two of which were considered at the June 2015 Plenary. Finally, they provide a brief update on implementation efforts of Recommendations 2011-5, 2011-6, 2012-6 and 2013-6.[3]

Connie Vogelmann & Amber Williams, *News From ACUS*, ADMIN. & REG. L. NEWS, Summer 2015 (forthcoming).

Ms. Vogelmann and Ms. Williams recap the Conference's 62nd Plenary session, held in June 2015. As this was the final session in Chairman Paul Verkuil's term, the Conference honored his significant achievements at the agency and in the field of administrative law more broadly. The authors also preview four near-complete projects slated for the December 2015 Plenary, and give an overview of several long-term projects in the earlier stages of development.

[3] Administrative Conference of the United States, Recommendation 2011-5, *Incorporation by Reference*, 77 Fed. Reg. 2,257 (Jan. 17, 2012); Administrative Conference of the United States, Recommendation 2011-6, *International Regulatory Cooperation*, 77 Fed. Reg. 2,259 (Jan. 17, 2012); Administrative Conference of the United States, Recommendation 2012-6, *Reform of 28 U.S.C. Section 1500*, 78 Fed. Reg. 2,939 (Jan. 15, 2013); Administrative Conference of the United States, Recommendation 2013-6, *Remand Without Vacatur*, 78 Fed. Reg. 76,272 (Dec. 17, 2013).