



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

ACUS Scholarship Spotlight (April 2014)

Members and Staff of the Administrative Conference are leaders in their respective fields in the realm of administrative scholarship. Highlights of recent 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.

Professor James Ming Chen, Public Member

James Ming Chen, Pinwheel of Fortune (draft Feb. 2014).

Professor Chen demonstrates how “international environmental law can be mapped along prospect theory’s risk-seeking axis”, and how Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 183 L. Ed. 2d 450 (2012) is a “distinct illustration of prospect theory.” The paper argues that the “law of intellectual property and health care, as illustrated through international law on biodiversity conservation and through the leading constitutional controversy involving universal health care coverage, appears to privilege private risk-seeking behavior over risk management through public policy.”

James Ming Chen, MSU Legal Studies Research Paper No. 11-29, An Agricultural Law Jeremiad: The Harvest Is Past, the Summer Is Ended, and Seed Is Not Saved (Jan. 2014).

Professor Chen discusses how seed-saving in the agricultural sector is not only unnecessary, but farmers buying seeds every year is likely a necessity. “Intellectual property law concerns the progress of science and the useful arts. Collateral economic and social damage, in the form of affronts to the agrarian ego, is of no valid legal concern”.

Professor Susan E. Dudley, Public Member

Susan E Dudley, Applications of Behavioral Insights to Government Regulation (draft May 2013).

Professor Dudley writes that the incorporation of behavioral insights into government programs could create better public policy overall. The paper goes on to explore how behavioral insights are actually being “applied, particularly in the regulatory arena, and whether the focus on deviations from strict rationality by individuals operating in a market environment has neglected to appreciate that individuals acting in their capacity as government decision-makers may also be subject to bounded rationality and cognitive biases.”

Professor E. Donald Elliott, Senior Member

E. Donald Elliott & Charles W. Tyler, Administrative Severability Clauses (draft Dec. 2013).

Professor Elliot encourages agencies to use severability clauses in administrative regulations so regulations are not as damaged by the process of judicial review. In



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addition to encouraging agencies to use severability clauses, he encourages courts to defer to severability clauses in administrative regulations.

Professor Jody Freeman, Public Member

Jody Freeman, *Network Federalism* (draft Nov. 2013).

Professor Freeman's article presents an alternative conception of power arrangement known as "network" federalism. "The network analogy best captures three key features of how certain contemporary governance systems actually work: authority is divided among different levels of government, dispersed across institutions at the same level of government and shared among both public and private actors. The Article explores the example of U.S. electricity regulation, which divides authority between the Federal Energy Regulatory Commission and state public utility commissions; disperses relevant power across multiple agencies at each level of government; relies on private bodies to oversee system reliability and establish critical operational standards; and deputizes non-profit regional organizations to coordinate, control and monitor the electricity system."

Jody Freeman & David B. Spence, *Old Statutes, New Problems*, U. PA L. REV. (forthcoming Feb. 2014).

Professor Freeman discusses how agencies are being forced to use statutes designed for old problems to address new problems. She describes how "Congress is increasingly absent from the policymaking process, and fails to regularly update statutes in the face of social, economic and technological change. This leaves agencies to adapt old statutes to new problems."

Jody Freeman & Kate Konschnik, *U.S. Climate Change Law and Policy: Possible Paths Forward*, in GLOBAL CLIMATE CHANGE AND U.S. LAW, 2nd ed. (forthcoming Jan. 2014).

In chapter 23 of the book Global Climate Change and U.S. Law, Professor Freeman discusses the progress made in recent years on climate change issues and the next steps in the legal realm as to climate change. She goes on to list some of the possible legal means by which an improved climate change outcome is possible.

Professor Lisa Heinzerling, Public Member

Lisa Heinzerling, *The FDA's Plan B Fiasco: Lessons for Administrative Law*, GEO. L. J., (forthcoming Sept. 2013).

Professor Heinzerling discusses the FDA's stumble when it failed to unconditionally allow emergency contraceptive without a professional's permission. "With every new stratagem, the agency dug itself deeper into an administrative law hole: inventing policies on the fly, grasping at tangents, shrouding the truth, cowering before illegitimate political demands. This article provides the first detailed and up-to-date analysis of how the FDA's treatment of emergency contraception violated basic tenets of administrative law."



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Professor Michael E. Herz, Public Member

Michael Herz, *'Data, Views, or Arguments': A Ruminantion 22 WM & MARY BILL RTS _* (2013)

Professor Herz examines the Administrative Procedures Act (APA) and dives into the reason behind soliciting comments from a public who may be uninitiated as to the particulars of a rule. The article unpacks the words “data, views, arguments” found in the APA’s section on comments when it comes to what commenters, especially lay commenters, have to contribute to rulemaking.

Michael Herz, *Using Social Media in Rulemaking: Possibilities and Barriers* Cardozo Legal Studies Research Paper No. 417 (Dec. 2013).

Professor Herz’s “study reviews how federal agencies have been using social media to date and considers the practical and legal barriers to using social media in rulemaking, not just to raise the visibility of rulemakings, which is certainly happening, but to gather relevant input and help formulate the content of rules.” “The notice-and-comment process for federal agency rulemaking has now changed from a paper process to an electronic one. Expectations for this switch were high; many anticipated a revolution that would make rulemaking not just more efficient, but also more broadly participatory, democratic, and dialogic.”

Professor Ronald M. Levin, Public Member

Ronald M. Levin, *Administrative Judges and Agency Policy Development: The Koch Way*, 22 WM. & MARY BILL RTS. J. 407 (2013).

Professor Levin writes on the late Charles Koch and his contributions to the field of administrative law. Professor Levin focuses on “an article that Charles wrote about the role of administrative judges as policymakers.” The essay goes on to describe the role of adjudication in making policy judgments.

Dean Alan B. Morrison

Alan B. Morrison, *Revisiting Judicial Activism: The Right and Wrong Kinds*, 7 Advance 133 (2013).

Dean Morris writes this as an update to an earlier Issue Brief articulating a “theory of appropriate and inappropriate judicial activism.” This latest brief includes the three latest terms of the Supreme Court. The new brief includes “discussions of (1) the Affordable Care Act case, (2) the ruling setting aside the statutory formula for determining which jurisdictions must obtain pre-clearance of changes in their election rules under the Voting Rights Act, and (3) the ruling striking down the Defense of Marriage Act (DOMA) and the non-decision on the validity of California’s Proposition 8 precluding same-sex marriages.”

Alan B. Morrison, Susan N. Herman, Robert M. O’Neil, Ronald K.L. Collins, Robert D. Richards, & Adam Liptak, *Panel Discussion on Recent U.S. Supreme Court Free Speech Decisions & the Implications of These Cases For American Society*, 76 ALB. L. REV. 781 (2013).



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David W. Ogden, Public Member

Peter B. Hutt II, Anna Dolinsky, David W. Ogden & Jonathan G. Cedarbaum *Fixing the False Claims Act: The Case for Compliance-Focused Reforms*, U.S. Chamber Institute for Legal Reform (Oct. 2013).

Mr. Ogden's article points out some of the failures of the False Claims Act (FCA), and how it can be improved to not only recover funds but also to prevent waste. He proposes three categories of reforms to improve the FCA to encourage the prevention of fraud.

Professor Richard J. Pierce, Public Member

Richard J. Pierce, *Who Should Determine Whether an Agency's Explanation of a Tax Rule is Adequate?* 63 DUKE L.J. _ (forthcoming 2013).

"This essay is Professor Pierce's contribution to the annual Duke Law Journal symposium on administrative law." "He argues that courts should not require IRS and Treasury to comply with APA section 553 as that section has been interpreted by courts. He describes the many ways in which courts have dramatically expanded the requirements of APA section 553. He argues that courts should not be encouraged to apply the judicial version of APA section 553, as opposed to the original version Congress contemplated, to tax rules because to do so would so "interrupt the flow of revenues as to jeopardize the nation's fiscal stability" in violation of the Anti-Injunction Act. Professor Pierce argues that the courts should continue to refuse to allow pre-enforcement review of tax rules to discourage courts from applying the unduly demanding judicial version of APA section 553 to tax rules."

Professor Arti K. Rai, Public Member

Arti K. Rai, *Improving (Software) Patent Quality Through the Administrative Process*, 51 HOUS. L. REV. 503 (2013).

Professor Rai's "article, to be published in a Symposium on intellectual property and information law in the administrative state, argues that even an agency as institutionally constrained as the U.S. Patent and Trademark Office ("PTO") could implement a portfolio of pragmatic, cost-effective quality improvement strategies. The argument in favor of these strategies draws upon not only legal theory and doctrine but also new data from a PTO software examination unit with relatively strict practices."

Arti K. Rai, *Biomedical Patents at the Supreme Court: A Path Forward*, 66 STAN. L. REV. ONLINE 111 (2013).

Professor Rai discusses two Supreme Court cases, *Mayo v. Prometheus* and *AMP v. Myriad*. Both cases "provoked justifiable anxiety for those concerned about biomedical innovation, particularly in the area of personalized medicine. While acknowledging significant limitations in the Court's reasoning in both cases, this Essay sketches a reading that is consistent with the results and innovation-friendly."



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Dean Emeritus Richard L. Revesz, Public Member

Richard L. Revesz, *Quantifying Regulatory Benefits*, 102 CAL. L. R. _ (forthcoming 2014).

Dean Revesz discusses the ways an agency can measure benefits of a regulation even when those benefits are not readily quantifiable. In addition, he compares quantifiable and nonquantifiable benefits and how they are considered by courts. Finally, he outlines the government's shift to a focus on benefits that are quantifiable.

Richard L. Revesz, *Rethinking Health-Based Environmental Standards* 89 N.Y.U. L. REV. _ (forthcoming 2014).

In this article, Dean Revesz “argues that health-based standards, which are one of the principal approaches to setting the stringency of environmental requirements in the United States, exhibit two serious pathologies: the stopping point problem and the inadequacy paradox. The stopping point problem arises because there is no coherent, defensible way for EPA to set the permissible level of pollution based on health considerations alone. Moreover, contrary to the commonly accepted view, the NAAQS have generally been set at levels that are less stringent than those that would result from the application of cost-benefit analysis, giving rise to the inadequacy paradox.”

Richard L. Revesz & Kirti Datla, *Deconstructing Independent Agencies (And Executive Agencies)*, 98 CORNELL L. REV. 769 (2013).

In this article, Dean Revesz systematically surveys the administrative agencies for a broad set of indicia of independence — removal protection, multi-member structure, partisan balance requirements, budget and congressional communication authority, litigation authority, and adjudication authority — to answer that question. It also examines the functional differences between independent and executive agencies.

Richard L. Revesz & Michael A. Livermore, ENVIRONMENTAL LAW AND ECONOMICS, (Francesco Parisi ed., forthcoming Jan. 2014).

THE GLOBALIZATION OF COST-BENEFIT ANALYSIS IN ENVIRONMENTAL POLICY (Richard L. Revesz & Michael Livermore eds. 2013).

Professor Alasdair Roberts, Public Member

Alasdair Roberts, *Migration: The Real Challenges*, __PUB. ADMIN. REV.__ (forthcoming 2014).

Professor Roberts reviews Paul Collier's book Exodus: How Migration Is Changing Our World. Professor Roberts says that Collier “attempts to provide policymakers with tools for thinking about these questions. But the project is not entirely a success. Collier has missed the big story about migration in the new millennium.”



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Alasdair Roberts, *How Railroads Changed American Government*, in PUB. ADMIN. REV. (forthcoming 2014).

Professor Roberts reviews *The Great Railroad Revolution : The History of Trains in America* by Christian Wolmar. Professor Roberts highlights the aspects of Wolmar's book which discuss the effects of the railroad on the American government as well as describing how government innovation was invaluable to the development of the railroad.

Alasdair Roberts, *Large Forces: What's Missing in Public Administration* (Nov. 2013).

Professor Roberts begs the question: "What's missing in the study of American public administration? Two things. First, a recognition of the importance of research on the subject of administrative development. And second, an appreciation of the importance of large forces in determining the path of administrative development. In short, we need a broader conception of what is contained within the domain of public administration scholarship."

Alasdair Roberts, *THE END OF PROTEST: HOW FREE-MARKET CAPITALISM LEARNED TO CONTROL DISSENT* (2013).

Professor Roberts examines why it is there were not the same level of protest as there were in other countries given the scale of the economic crisis here in the United States. He goes on to discuss the means that the countries have at their disposal to prevent or put down protests such as larger police forces and strong central banking.

Alasdair Roberts *The Rise and Fall of Discipline: Economic Globalization, Administrative Reform, and the Financial Crisis*, in HANDBOOK EM ADMINISTRAÇÃO PÚBLICA (M. Asensio ed., 2013).

Professor Jonathan Siegel, Special Counsel

Emily S. Bremer & Jonathan R. Siegel, *Clearing the Path to Justice: The Need to Reform 28 U.S.C. § 1500*, 65 ALA. L. REV. 1 (2013).

Professor Siegel and Ms. Bremer discuss the unfairness of 28 U.S.C. § 1500's prohibition on "the United States Court of Federal Claims from exercising jurisdiction over a claim if the plaintiff has the same claim pending in another court. This apparently sensible rule causes considerable trouble because a 'claim' is understood to include all claims based on the same operative facts, and Congress has required that certain types of claims against the United States must go to different courts. Therefore, a plaintiff with multiple claims against the United States may neither be able to bring the claims together in one case nor split them into separate cases."



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Peter Strauss, Senior Fellow

Peter Strauss, *In Search of Skidmore*, Columbia Law School Public Law & Legal Theory Working Paper No. 13-355 (2013).

Professor Strauss reviews the holding of recent Supreme Court case *City of Arlington v. FCC* and compares it to the history of administrative law cases leading up to this decision. Professor Strauss looks specifically how the court's latest decision erodes the principles expressed in 1944 in *Skidmore v. Swift & Co.*

Professor Jonathan Rose, Senior Fellow

Jonathan Rose, *Becoming a Legal History Teacher*, 53 AM. J. LEGAL HIST. 478 (2013).

Professor Rose's essay recounts his legal history teaching experience. Teaching legal history was a departure from his earlier experience teaching traditional law school classes. Professor Rose discusses the learning experience of teaching this unique class.



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Paul Verkuil, ACUS Chairman

Paul R. Verkuil & Jane E Fountain, *The Administrative Conference of the United States: Recommendations to Advance Cross-Agency Collaboration under the GPRA Modernization Act*, 74 PUBLIC ADMIN. REV. (Jan. 21, 2014).

Chairman Verkuil's article in the Public Administration Review provides a short overview of the Administrative Conference of the United States and its mission. In addition, the article focuses the Conference's recommendation in "December 2013 focused on highlighting tools to help agencies address (real and perceived) legal barriers to cross-agency collaboration under the Government Performance and Results Act (GPRA) modernization Act of 2010 and encouraging agency attorneys and other agency staff to aid such collaboration. The underlying study for this recommendation examines institutional, legal, and managerial challenges to collaboration across agencies in the federal government and with their partners in state and local governments."

Paul R. Verkuil, *An Essay on Due Process and the Endowment Effect*, 22 WM. & MARY BILL RTS. J. 563 (2013).

Chairman Verkuil, in his essay on the endowment effect, seeks to address the issue of "why...those receiving various kinds of government benefits [are] favored procedurally over those seeking them." Chairman Verkuil also discusses how "full procedural rights for beneficiaries of government benefits could have a perverse effect—by working to the disadvantage of those who have not yet received them."

Emily Bremer, ACUS Attorney Advisor

Emily Bremer, *The Unwritten Administrative Constitution*, 65 FLA. L. REV. ____ (forthcoming 2014).

Ms. Bremer "argues that administrative law provides an unwritten constitution governing federal administrative agencies. American administrative law is illuminated law through the lens of constitutional theory, and particularly principles of British constitutionalism. This Article shows that administrative law rules, though not formally entrenched, perform essential constitutional functions where the written Constitution has little or no application. These functions include constituting government agencies, determining institutional boundaries, establishing the government-citizen relationship, and protecting fundamental values."

Emily Bremer, *On the Cost of Private Standards in Public Law*, 63 U. KAN. L. REV. ____ (forthcoming 2014).



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Emily Bremer, *A Critical Evaluation of Loan Repayment Assistance as a Means of Promoting Access to Justice*, in *BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE FOR AMERICANS OF AVERAGE MEANS* (S. Estreicher & J. Radice eds., Cambridge University Press, forthcoming 2014).

Reeve Bull, ACUS Attorney Advisor

Reeve Bull, *Building a Framework for Governance: Retrospective Review and Rulemaking Petitions*, __ ADMIN. L. REV. __ (forthcoming 2015)

Mr. Bull discusses “retrospective review of agency regulations, whereby agencies revisit existing rules to determine whether they remain appropriate in light of changed circumstances. The Obama Administration has embraced the principles of retrospective review, issuing three executive orders on the subject, and it has trumpeted billions of dollars in economic savings resulting from those efforts” Also, the article demonstrates how “collaborative solutions are largely underutilized as a result of regulatory inertia.”

Reeve Bull, *Developing a Domestic Framework for International Regulatory Cooperation*, LAW & CONTEMP. PROBS. (forthcoming 2015)

Mr. Bull discusses non-traditional trade barriers and how some regulatory barriers only exist for historical reasons. “This article builds upon the important developments represented by Administrative Conference Recommendation 2011-6, EO 13,609, and existing international regulatory cooperation efforts undertaken by individual agencies and international trade promotion bodies such as the US-EU High Level Regulatory Cooperation Forum. It begins by analyzing the historical disparities between different nations’ regulatory regimes, using the United States and European Union as illustrative examples. It calls upon the insights of behavioral economics to explain why such disparities have emerged and persisted over time and why nascent efforts at international cooperation, including EO 13,609, are inadequate to eliminate them.” The article then considers “a potential solution, which fills in many of the interstices of EO 13,609 and promotes a more comprehensive framework for achieving enhanced regulatory cooperation.”