ACUS Scholarship Spotlight (August 2013)

Members of the Administrative Conference of the United States (ACUS) are leading the way forward in administrative law scholarship. Highlights of recent publications by ACUS Members and staff 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, *Creamskimming and Competition*, 48 NEW ENGLAND L. REV. __ (forthcoming 2013).

Professor Chen examines the concept of "creamskimming" in the law of regulated industries and proposes a definition of creamskimming to help regulatory agencies distinguish legitimate objections from efforts to shield incumbent firms from regulation.

Professor Mariano-Florentino Cuellar, Council Member

Mariano-Florentino Cuellar, GOVERNING SECURITY: THE HIDDEN ORIGINS OF AMERICAN SECURITY AGENCIES (2013).

Professor Cuellar examines the origins of the Roosevelt-era Federal Security Agency (which gave rise to the Department of Health and Human Services) and the Department of Homeland Security. His central thesis is that "the impact of public law in our country depends in large measure on how key players go about securing control of the nation's public organizations, and (in turn) on how organizations are then used to define the contested concept of the nation's security."

Mariano-Florentino Cuellar, *American Executive Power in Historical Perspective*, 36 HARV. J.L. & PUB. POL'Y 53 (2013).

Professor Cuellar investigates the historical development of the concept of a unitary executive. He notes that while the idea of a strong executive is usually associated with the Reagan Administration, the concept has roots in the Roosevelt Administration's efforts to reorganize the executive branch.

Mariano-Florentino Cuellar, *Coalitions, Autonomy, and Regulatory Bargains in Public Health Law*, *in* PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE IN REGULATION AND HOW TO LIMIT IT (Daniel Carpenter & David A. Moss eds., 2013).

Professor Cynthia R. Farina, Public Member

Cynthia R. Farina *et. al., Knowledge in the People: Rethinking 'Value' in Public Rulemaking Participation*, __ WAKE FOREST L. REV. __ (forthcoming).

Professor Farina and her co-authors examine rulemaking as a "community of practice" in which rulemaking participation by outside newcomers, even when well informed, differs in kind and form from sophisticated commenters. Professor Farina and her co-authors argue that while it is unrealistic to expect newcomers to adopt the norms and methods of sophisticated commenters, the value of the knowledge newcomers bring to the process "justifies efforts to expand our understanding of the kinds of comments that should 'count' in the process."

Professor Lisa Heinzerling, Public Member

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

Professor Heinzerling notes the central role the Office of Information and Regulatory Affairs (OIRA) plays in the development of the nation's environmental rules. As a former Senior Climate Policy Counsel to the Administrator and Associate Administrator of the Environmental Protection Agency's (EPA) Office of Policy, Professor Heinzerling provides a descriptive account of the interactions between OIRA and EPA. Her aim is to renew the debate over the role of OIRA in agency rulemaking.

Lisa Heinzerling, *Undue Process at the FDA: Antibiotics, Animal Feed, and Agency Intransigence*, 37 VT. L. REV. 1007 (2013).

Professor Heinzerling argues that the Food and Drug Administration (FDA) has a long history of collecting evidence that the routine administration of antibiotics to food animals contributes to the development of antibiotic-resistant infections in people. She notes that the FDA has explained regulatory inaction in this area by claiming that the Food, Drug and Cosmetic Act requires it to hold time- and resource-intensive formal hearings before it can withdraw approval for antibiotics used for promoting growth and preventing infection in food animals. Professor Heinzerling argues that the FDA has the discretion to act under the law without formal hearings.

Professor Ronald M. Levin, Public Member

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

Professor Levin begins by remembering the late Charles H. Koch, Jr., who argued that agency leaders should formulate policy and that the role of administrative judges is to apply policies to the facts of individual cases. Professor Levin observes that over time Professor Koch moved toward a view that sought to define a role for administrative judges in the policy-making process. He then describes and evaluates several of Professor Koch's ideas for the role of administrative judges in making policy.

Professor Nina Mendelson, Public Member

Nina Mendelson, *Private Control over Access to Public Law: The Puzzling Federal Regulatory Use of Private Standards*, 112 MICH. L. REV. __ (forthcoming 2013).

Professor Mendelson observes that federal agencies frequently incorporate private standards into regulations by reference in order to save resources and utilize private expertise. She argues that previous analysis of why the law should be public has focused on notice to regulated entities. However, Professor Mendelson evaluates other considerations, including notice to those who expect to benefit from government programs. She argues that "[f]ull consideration of the importance of public access both strengthens the case for reform and limits the range of acceptable reform measures."

Nina Mendelson & J. Weiner, *Evading OIRA Review*, __ HARV. J. L. & PUB. POL'Y __ (forthcoming).

Professor Gillian E. Metzger, Public Member

Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897 (2013).

Professor Metzger defines administrative constitutionalism to include "the application of established constitutional requirements by administrative agencies" and "the elaboration of new constitutional understandings by administrative actors and the construction of the administrative state." She argues that administrative constitutionalism is a "legitimate and beneficial form of constitutional development." However, she notes that there are accountability challenges posed by administrative constitutionalism, "particularly given the frequent difficulty involved in identifying instances of administrative constitutionalism in action."

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 observes that in cases such as *Youngstown Sheet & Tube Co. v. Sawyer*, *Dames & Moore v. Regan*, and *Clinton v. City of New York* the Supreme Court has used congressional inaction "to tilt the outcome for or against Presidential power." He argues that reliance on congressional silence in separation of powers cases is improper. Instead, Dean Morrison urges the Court to return to first principles in deciding separations of powers cases.

Professor Richard J. Pierce, Jr., Public Member

Richard J. Pierce, Jr., *District Court Review of Findings of Fact Proposed by Magistrates: Reality Versus Fiction*, 81 GEO. WASH. L. REV. 1236 (2013).

Professor Pierce criticizes circuit court decisions that prohibit district court judges from rejecting a finding of fact proposed by a magistrate without holding a new evidentiary hearing. He argues that such decisions are inconsistent with the Magistrates Act of 1968 and a Supreme Court holding that agencies may reject findings of fact made by administrative law judges without holding a new hearing.

Dean Emeritus Richard L. Revesz, Public Member

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

Professor Revesz and Kirti Datla survey administrative agencies for a broad set of indicia of independence in an attempt to answer what constitutes an independent agency. The authors conclude that there is no single feature that defines independence and reject the binary distinction between independent and executive agencies. Instead, the authors argue, "all agencies should be regarded as executive and seen as falling on a spectrum from more independent to less independent." They further argue that based on this understanding, "[a] President can take an action with respect to an agency (assuming it is

within his Article II powers) unless Congress has prohibited that action by statute." Therefore, the authors conclude, there is no legal barrier to extending regulatory review to independent agencies.

Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 Geo. L.J. 1337 (2013).

Professors Revesz and Livermore highlight the role of agency capture to provide a justification for regulatory review of administrative action, which at the federal level is performed by the Office of Information and Regulatory Affairs (OIRA). The authors identify four features of OIRA that can facilitate a role in guarding against agency capture: "its generalist nature; its coordination function; its use of cost-benefit analysis; and a tradition of independent leadership." However, they note that this anti-capture role is undermined by OIRA's focus on the review of agency action, as opposed to agency inaction. Therefore, Professor Revesz and his co-author propose a mechanism for OIRA to engage in review of agency inaction.

Professor Jonathan Siegel, Special Counsel

Jonathan R. Siegel, *The REINS Act and the Struggle to Control Agency Rulemaking*, 16 N.Y.U. J. LEGIS & PUB. POL'Y 131 (2013).

Professor Siegel notes that the Regulations from the Executive in Need of Scrutiny (REINS) Act passed by the House of Representatives in December 2011 would require all major rules promulgated by federal agencies receive congressional approval before taking effect. He argues the Act, while constitutional, "would be hopelessly impractical."

Judge Daniel Solomon, Liaison Representative

Daniel F. Solomon, *Fundamental Fairness, Judicial Efficiency and Uniformity: Revisiting the Administrative Procedure Act*, 33 J. NAT'L ASS'N ADMIN. L. JUD. 52 (2013).

Judge Solomon argues that in order to determine the relative cost of judicial uniformity, Congress should "score" varied proposals for uniformity. Additionally, Judge Solomon argues that to ensure that adjudication under the Administrative Procedure Act is impartial and without outside bias, Congress should apply the Code of Conduct for United States Judges to administrative law judges.

Professor Peter L. Strauss, Senior Fellow

Peter L. Strauss, *Private Standards Organizations and Public Law*, __ WM. & MARY BILL RTS. J. __ (forthcoming 2013).

Professor Strauss observes that regulations governing incorporation by reference have not been revised since 1982, and therefore do not address changes brought about by the digital age as to what it means for incorporated regulations to be "reasonably available." He suggests ways to "respect the general proposition that documents stating citizens' legal obligations are not subject to copyright" while "honoring clear federal statutory policy favoring the use of privately developed standards in rulemaking and respecting the needs standards organizations have to find reasonable means to support the costs of their operations."

Conference Staff

Emily Bremer, ACUS Attorney Advisor

Emily S. Bremer, *Incorporation by Reference in an Open-Government Age*, 36 HARV. J. L. & PUB. POL'Y 131 (2013).

Ms. Bremer notes that when agencies use incorporation by reference the referenced standards are often copyrighted, meaning that citizens may have to pay to see the law. She proposes a collaborative solution to this access problem in which agencies and standards organizations would work together to make incorporated materials more available while still preserving the value of copyrights.

Emily S. Bremer, *Technical Standards Meet Administrative Law: A Primer on an Ongoing Debate*, 65 STANDARDS ENGINEERING, Mar./Apr. 2013, at 1.

Reeve Bull, ACUS Attorney Advisor

Reeve T. Bull, *Making the Administrative State "Safe for Democracy": A Theoretical and Practical Analysis of Citizen Participation in Agency Decisionmaking*, __ ADMIN. L. REV. __ (forthcoming Sept. 2013).

Mr. Bull investigates the normative justifications for increased citizen participation in government decisionmaking. He concludes that increased citizen participation is beneficial in at least certain circumstances. Mr. Bull then advocates the use of advisory committees, including demographically representative panels, to provide public input on agency policy.