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ADMINISTRATIVE Law Stories

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ADMINISTRATIVE LAW STORIES

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ADMINISTRATIVE LAW STORIES

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Editor's Note to Readers

What a privilege it has been to ask administrative law scholars whose work I greatly admire if they would contribute essays to this volume, and to have so many of them agree! However many of their essays you come to read, I know your appreciation for administrative law and administrative law practice will be deepened and concretized by them.

Administrative law, it is hardly necessary to remark, is a protean subject. It engages legislature, executive, agency and court. It extends from regulation of subtle and often hazardous activities affecting health, to regulation of complex economic behavior, to regulation of the incidents of daily living. It uses adjudication and rulemaking in various forms, as well as the persuasive techniques of politics. It occurs at the national, state and local levels in widely varying degrees of formality, before an extraordinary kaleidoscope of institutions. Both how we do it and how we think about it have changed considerably over the century or so it has been an important element in American law school curricula. And where you sit—in the chairs of bureaucrat, protected citizen or regulated industry—can have a great deal of influence over where you will stand on many of its pervasive issues.

In selecting essay subjects for this volume our general purpose has been to make more concrete, to set in context, a number of the issues you are likely to encounter in the standard law school course on Administrative Law by exploring a limited number of cases in depth. In general, these are the canonical cases, but that is not invariably the case. If David Vladeck of Georgetown Law School, one of the country's leading public interest litigators, could be persuaded to annotate his experiences trying to provoke the Occupational Safety and Health Administration into issuing a rule regulating a hazardous industrial chemical commonly used in hospitals (inter alia)—and thus to illustrate the course of a contemporary rulemaking and the political controls over it—the fact that the opinions resulting from his effort did not come from the Supreme Court was hardly a negative. Giving you a sense of what it means to practice administrative law is an important ambition of these pages.

The Table of Contents presents the essays in an essentially arbitrary order. This is the order in which they would come up, *if* you were taking Administrative Law with a professor using the casebook your editor has

helped to create, and *if* his or her syllabus walked you straight through the book, not deviating from its organization. Every one of these essays will provide you with a depth of understanding about its subject that a casebook simply can't provide. They are all good stories.

Yet there are many other ways to organize your thinking about the supplemental values you can find here.

The back story of many administrative law disputes arises out of judicial encounters with extended legislative responses to social problems. A number of these essays explore the political background of the statutes whose administration was at issue in the cases they discuss. Thus, Congress's reactions to the Great Crash of 1929 (and the Crash itself) underlay the litigation that brought Administrative Law students not one, but two cases denominated *SEC v. Chenery Corp.*; and Roy Schotland's essay starts with an account of the financial manipulations to which some have attributed that cataclysm, and enactment of the Public Utility Holding Company Act of 1935. Elizabeth Garrett's essay on *Clinton v. New York* is a study of Congress's efforts to solve its enduring collective action problems when enacting budgetary and tax legislation in voluminous measures that too easily become "Christmas trees" for special interest provisions. Your editor's contribution on *Citizens to Preserve Overton Park* begins with a study of Congress's progressively more demanding efforts to structure consideration of highway location at the local, state and federal level, as the building of the Interstate Highway System revealed its disruptions, that eventually produced that litigation. Jerry Mashaw's account of *State Farm Mutual Auto Ins Co. v. Automobile Mfrs Ass'n* owes much to his understanding of the National Traffic and Motor Vehicle Safety Act and its changes over time.

Perhaps your interest lies in securing a concrete understanding how administrative law is practiced at the agency level, and/or how it is experienced by those who are engaged with it there. Most of these essays are revealing on this score—Professor Schotland's account of the "sporting proposition" that might have but did not resolve the *Chenery* dispute comes to mind—but for some this is a central focus: Professor Vladeck's account, already mentioned, of his client's effort to force rulemaking on OSHA; Craig Oren's account of the EPA rulemaking that underlay *Whitman v. American Trucking Ass'n;* Cynthia Farina's evocation of the dispute in *Mathews v. Eldridge*, in the perspective of applicant *and* state agency *and* federal administrators; your editor's similar effort respecting *Overton Park*; Gillian Metzger's close examination of the difficulties facing the Atomic Energy Commission and those who opposed its licensing nuclear power plants in *Vermont Yankee Nuclear Power Corp. v. NRDC*; Robert Kagan and Rachel VanSickel–Ward's revealing study of the problem of administrative inspections and the Fourth Amendment,

at issue in *Marshall v. Barlow's, Inc.*; Professor Mashaw's evocation of the people involved in the struggles over automobile safety that eventuated in *State Farm.*

A third dimension concerns the litigating strategies of the lawyers who brought these cases to reviewing courts, perhaps especially the Supreme Court, and what we can know about the courts' actions in response. In addition to many of the essays already mentioned—your editor's and Professors Vladeck's and Metzger's, for example—you will find particular attention to these matters in Cynthia Farina's study of *Mathews*, Thomas Merrill's study of *Chevron U.S.A. Inc. v. NRDC* [and Ronald Levin's account of *Abbott Laboratories v. Gardner.]*

Then there is the after-life. What has been the continuing influence of the decisions studied? You will find this question substantially addressed in most of these essays; unsurprisingly, it is a principal focus of Professor Merrill's essay on *Chevron*, Professor Mashaw's consideration of *State Farm*, and Professor Levin's account of *Abbott Laboratories.*

Next, how can we place the decision studied in theoretical approaches to understanding government and its actors? Professor Garrett's essay reaches out to the perspectives of public choice; Professor Farina's "sees" the *Mathews* case through the eyes of several distinguished scholars as well as the many stakeholders in the dispute; Professor Mashaw brings his rich understanding of the political science literature to bear in his study of *State Farm.*

Introductions like these often include paragraph precis of each article. In this volume, those are placed at the beginning of each article. Instead, let us end these introductory notes with two tables suggesting other possible thematic organizations:

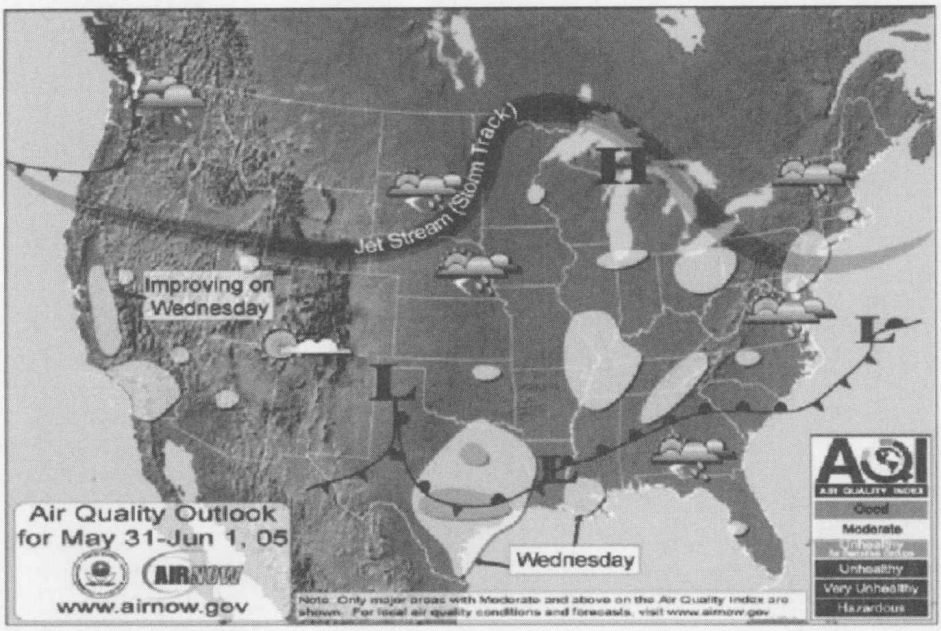
I. Chronology

The classic cases of the New Deal	Schotland, SEC v. Chenery—A Sporting Proposition
The reformation of American Administrative Law in the '60's and '70's	Levin, Abbott Laboratories Strauss, Citizens to Preserve Overton Park Metzger, Vermont Yankee Kagan & Van Sickle–Ward, Marshall v. Barlow's
Standards transformed—the 1980's	Mashaw, State Farm Merrill, Chevron Farina, Mathews v. Eldridge Vladeck, ETO rulemaking
Recent developments	Oren, Whitman Garrett, Clinton v. New York

II. Procedural Focus of the Action

Informal agency action	Strauss, Overton Park
Enforcement and inspection	Kagan & Van Sickle–Ward, Marshall v. Barlow's Schotland, Chenery
Agency adjudication	Farina, Mathews v. Eldridge
Agency rulemaking	Vladeck, ETO rulemaking Mashaw, State Farm Oren, Whitman Metzger, Vermont Yankee Levin, Abbott Laboratories
Legislating	Strauss, Overton Park Mashaw, State Farm Oren, Whitman Garrett, Clinton v. New York
Presidential involvement	Vladeck, ETO rulemaking Garrett, Clinton v. New York
Judicial review	Schotland, Chenery Merrill, Chevron Mashaw, State Farm Levin, Abbott Laboratories

Peter Strauss
New York, NY June 2005



Professor Oren tells the story of the *Whitman* case, in which the Supreme Court refused to revive the delegation doctrine and instead upheld an Environmental Protection Agency rule requiring extensive efforts to reduce air pollution. His account depicts the rulemaking process to show the fierce political struggle that EPA's proposal evoked. The emphasis on delegation, Professor Oren shows, came less from the parties' litigating strategies than from the D.C. Circuit—indeed, once in the Supreme Court, the challengers to to the rule tried to move away from the D.C. Circuit's approach. Professor Oren also traces the post-Supreme Court history of EPA's rules, and predicts that the issues will likely recur.

1

Craig N. Oren*

Whitman v. American Trucking Associations—The Ghost of Delegation Revived . . . and Exorcised

Whitman v. American Trucking Associations[1] is a marvelous introduction to administrative law. The case demonstrates the breadth of the policymaking power that Congress can give to administrative agencies. More important, *Whitman*'s history shows how heated an administrative agency rulemaking becomes when it concerns a contentious and important issue of public policy. Administrative law, in other words, involves issues that go to the heart of public concern.

Whitman involved a challenge by industry groups to the United States Environmental Protection Agency (EPA)'s decision in 1997 to tighten the nation's air quality standards for two important air pollutants, ozone and particulate matter.[2] The Clean Air Act commands that such standards be set at the levels "that allowing an adequate margin of safety, are requisite to protect public health."[3] A divided D.C. Circuit panel held that this statutory language was too vague to satisfy the delegation doctrine, which requires that Congress lay down an "intelligi-

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1. 531 U.S. 457 (2001).

2. The standard-setting decision was made by Carol Browner, administrator of EPA during both of President Bill Clinton's terms. The case bears Christine Whitman's name instead because, due to President George W. Bush's inauguration in 2001, Ms. Whitman succeeded Ms. Browner as administrator just weeks before the Supreme Court's decision.

3. Clean Air Act § 109(b)(1), 42 U.S.C. § 7409(b)(1) (2000). Unless otherwise indicated, all further statutory citations are to the Act.

ble principle'' for an agency to follow,[4] and that EPA had to supply the principle.[5] In *Whitman*, the Supreme Court unanimously reversed.

Invocation of the delegation doctrine is so rare these days that it is extraordinary that any modern case should hinge on it. How did this happen? What was really at stake? This essay sets forth the case's history so that these matters can be better appreciated.

The Statutory Framework

The Clean Air Act directs EPA to set ''national ambient air quality standards'' for air pollutants that may endanger public health or welfare.[6] Health-based standards, like those involved in *Whitman*, must be achieved around the nation by specific deadlines.[7] These standards determine the amount of protection for people who suffer ill effects—asthma attacks, bronchitis, even premature death—from air pollution. The standards also impose regulatory burdens: the more stringent the air quality standards, the more control must be imposed by the states and by EPA on sources of air pollution—cars and trucks, power plants, industrial facilities, and even familiar consumer products like spray deodorant, hair spray, barbecues and paint. The air quality standards establish the total ''budget'' for air pollution emissions, and much of the remainder of the Act allocates the budget by stipulating what sources must do.

Ever since Congress commanded EPA in 1970 to set ambient air quality standards, the agency has asserted, with the support of the courts, that costs may not be considered in setting the standards' levels.[8] (This is known as the *Lead Industries* doctrine, after the D.C. Circuit decision that first announced it.) Rather, EPA must explain its decisions on the basis of public health alone. In this way, the sponsors of the Act tried to minimize the impact that costs would have on the standards' levels.

Deciding what protects public health is not easy. There is often uncertainty about the precise effects of air pollutants and the levels at which those effects occur. Scientists have not identified ''threshold'' levels at which there is no risk of harm. Rather, individuals vary greatly

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4. See J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

5. See American Trucking Ass'ns v. United States EPA, 175 F.3d 1027 (D.C. Cir.1999), *modified* 195 F.3d 4.

6. See Section 108(a)(1), 42 U.S.C. § 7408(a)(1) (2000).

7. See, e.g., Section 172(a)(2), 42 U.S.C. § 7502(a)(2) (2000).

8. See Lead Industries Ass'n v. EPA, 647 F.2d 1130, 1148 (D.C. Cir. 1980), *cert. denied* 449 U.S. 1042.

in the level that causes an effect. Nor is there any obvious way either to decide which effects constitute the kind of effects on health that the standards must protect against, or to calculate the "margin of safety" the statute requires. The agency must therefore make a policy decision about whom should be protected and from what.

Congress has given little guidance on these questions. The Senate Report accompanying the 1970 legislation stressed that the standards should protect "representative samples" of sensitive populations such as bronchial asthmatics.[9] But the report left unanswered how EPA was to decide whether a given group is a sensitive population.

Nor did Congress specify which effects should be considered to be effects on "health" that the standards should try to prevent. Rather, Congress left it to the EPA Administrator to make what Senator Edmund Muskie, the sponsor of the 1970 legislation, called a "pragmatic judgment" about how to cope with the absence of thresholds and with the disruption that would be caused if the standards were set at zero.[10] As Muskie acknowledged, the concept of a threshold was an "oversimplification" to allow the setting of standards on the basis of public health and so to force the development of better control technology.[11] The upshot, though, is that the standard-setting language grants EPA vast discretion to decide what will protect public health.

The difficulties of decision-making are great. In the early 1980s, a group of EPA staffers briefed then-Administrator William Ruckelshaus about the health and welfare damage caused by particulate matter. He asked how he should go about setting the air quality standards. A leading agency lawyer explained to him that he had broad discretion. Ruckelshaus was displeased. "I don't want to know what I can get away with, I want to know how to make the decision!"[12]

Control through Procedure

While EPA has broad substantive discretion, standard-setting decisions must run a complicated gauntlet. (EPA prepared in the late 1970s a 20–stage flow chart showing the process it followed for setting and revising the standards.)[13] A key role is played by the agency's Clean Air

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9. S. REP. No. 91–1196, at 10.

10. 123 Cong. Rec. 18643 (1977).

11. Senate Committee on Public Works, Subcommittee on Environmental Pollution, *Executive Branch Review of Environmental Regulations*, 96th Cong. 1st Sess 343 (1979).

12. Cf. R. SHEP MELNICK, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT 259 (1983) ("Explaining why the administrator chose a particular standard is as much a job for a psychologist as for a political scientist or physician.").

13. The chart is reprinted id. at 258.

Scientific Advisory Committee (CASAC).[14] Congress established CASAC in 1977 because of concern that the scientific basis for the agency's air quality standards was weak; the House committee sponsors said they believed that a firmer scientific foundation would cause the standards to become more stringent.[15] The sponsors also asserted that CASAC's existence would assist the courts in reviewing challenges to the air quality standards.[16]

CASAC consists of a seven-member committee that must include a member of the National Academy of Sciences, a physician and a representative of state air pollution control agencies.[17] (In practice, it tends to include two of each.)[18] Appointments are formally made by the Administrator, usually of candidates chosen by the staff of CASAC for their distinction in air pollution research. When CASAC is asked to review a particular standard, a panel is formed consisting of CASAC members and consultant members (either from the agency's overall Science Advisory Board or from the approximately three hundred consultants associated with it) to add additional expertise.[19] Panel members are selected to produce a balanced group, and members must file an exacting form designed to reveal financial interests.[20] In promulgating air quality standards, EPA must explain any departure from CASAC's recommendations—a task that is politically as well as technically difficult.[21] CASAC is not shy about critiquing EPA's approaches and conclusions, although relations between EPA and CASAC appear less confrontational than in CASAC's early years.[22]

The air quality standard-setting process begins with the preparation by EPA's National Center for Environmental Assessment (NCEA) of a "criteria document"—usually of multiple volumes—describing the pollutant's effects on health and welfare.[23] The staff who write criteria

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14. For a brief history of CASAC and analysis of its roles, see SHEILA JASANOFF, THE FIFTH BRANCH: SCIENCE ADVISERS AS POLICYMAKERS 101–123 (1990).

15. H. REP. NO. 95–294, at 181–182 (1977) (report accompanying proposed Clean Air Act Amendments of 1977).

16. Id. at 182.

17. See Section 109(d)(2)(A), 42 U.S.C. § 7409(d)(2)(A) (2000).

18. For this and other details about CASAC, I am indebted to Fred Butterfield, the EPA staff official who works closely with the committee.

19. http://www.agiweb.org/hearings/epacat.html (link from the American Geological Institute describing CASAC and its workings).

20. See Science Advisory Board (SAB) Staff Office: Ad Hoc All–Ages Lead Model (AALM) Review Panel; Request for Nominations, 70 Fed. Reg. 9642, 9643 (2005).

21. See Section 307(d)(3), 42 U.S.C. § 7407(d)(3) (2000).

22. JASANOFF, supra note 14, at 12–13.

23. For information on the center, see http://cfpub.epa.gov/ncea/index.cfm.

documents are housed in Research Triangle Park, North Carolina, far from agency headquarters in Washington, and are part of the agency's Office of Research and Development rather than any of EPA's program or policy offices. Thus, the center is doubly isolated from day-to-day politics. Typically, the criteria document goes through several "external review drafts" available to the public before CASAC approves it.

CASAC is involved not only with the criteria document but also with ensuring that the state of the science is accurately described to decision-makers. CASAC approval is thus required of EPA's "staff paper." This is typically a book-length document for the EPA Administrator summarizing the science and advising on the range that should be considered for the standard. After approving the document, CASAC often polls itself on the members' individual preferences for the standard. This poll involves judgements about science policy questions (e.g., to what extent should the existence of scientific uncertainties counsel for or against a tight standard) as well as about the science itself. Like the approval of the staff paper, CASAC's poll is transmitted to the EPA Administrator.

The task of writing the staff paper typically falls upon a group of five to ten staffers within EPA's Office of Air Quality Planning and Standards (OAQPS). The directors of the group are senior staff who have been at EPA since the 1970s and are steeped in institutional history as well as environmental policy and science. While OAQPS is part of the agency's programmatic offices, its location in Research Triangle Park, North Carolina still distances it somewhat from Washington politics.

Lawyers for both industry and environmental groups participate actively. Representatives of groups meet with EPA staff to try to influence their policy views. These groups also typically submit voluminous comments on the proposed criteria document and staff paper, pointing out, for instance, studies that the agency may not have been considered or questioning the inferences that the staff draws from the studies. Sometimes a lawyer will try to convince a client to undertake or finance a study of health effects. A lawyer who works on these matters must become sufficiently adept in science to understand the studies and to convey critiques effectively.

Once the criteria document and staff paper are approved by CASAC, EPA then prepares a proposed rule for publication in the Federal Register, considers typically thousands of comments, and then promulgates a standard. The agency's senior management participates in the standard's consideration, and the final decision is typically made personally by the Administrator.[24] Both the Office of Management and Budget and other governmental agencies become involved; sometimes (as with

24. MELNICK, supra note 12, at 257–59.

the standards in *Whitman*), so too will the President or his immediate staff. Years are required to pass through the process; for instance, it took EPA ten years to revise its standard for particulate matter in the late 1980s.[25]

Starting the Process

EPA often drags its feet on changing the standards. Ozone—one of the pollutants involved in *Whitman*—is a good example. (Ozone is a prime constituent of summertime smog.) In 1982, the agency announced that it planned to begin reviewing the ozone standards it had set in 1978.[26] Six years later, CASAC approved the criteria document and staff paper. EPA took no action.

But environmentalists found a lever. The Clean Air Act requires that the agency review and, if necessary, revise its air quality standards every five years,[27] and allows individuals to bring suit in federal district court to force EPA to carry out this duty.[28] So in 1991, environmental groups brought suit to compel EPA to make a final decision on revising the ozone standards.

The district court gave EPA until March 1, 1993, to make up its mind. On that date, EPA announced it would not alter the ozone standards.[29] The American Lung Association promptly filed suit. The agency obtained a voluntary remand by promising to reconsider its decision. In February 1994, EPA announced that it planned a new revision of the ozone criteria document and the standards.[30] Perhaps EPA would have decided on its own to revisit the ozone standard, but the litigation at least gave agency advocates of revision the argument that "we have no choice," and thus a way to brush aside criticism of the revision. In this way, the ability of the environmental groups to bring suit allowed them to determine the agency's agenda.

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25. See Revisions to the National Ambient Air Quality Standards for Particulate Matter, 52 Fed. Reg. 24,634, 24,636–637 (1987) (outlining the history of the standard's revision).

26. See Air Quality Criteria Document for Ozone and Other Photochemical Oxidants, 47 Fed. Reg. 11,561 (1982).

27. See Section § 109(d), 42 U.S.C. § 7409(d) (2000). See Env'tl Def. Fund v. Thomas, 870 F.2d 892, 900 (2d Cir. 1989).

28. See Section 304(d), 42 U.S.C. § 7604(d) (2000).

29. See National Ambient Air Quality Standards for Ozone—Final Decision, 58 Fed. Reg. 13,008 (1993).

30. See Review of National Ambient Air Quality Standards for Ozone, 59 Fed. Reg. 5164 (1994)