



GW Law Faculty Publications & Other Works

Faculty Scholarship

2017

Primary Jurisdiction: Another Victim of Reality

Richard J. Pierce Jr

George Washington University Law School, rpierce@law.gwu.edu

Follow this and additional works at: http://scholarship.law.gwu.edu/faculty_publications

 Part of the [Law Commons](#)

Recommended Citation

Pierce, Richard J., Primary Jurisdiction: Another Victim of Reality (2017). GWU Law School Public Law Research Paper No. 2017-28; GWU Legal Studies Research Paper No. 2017-28. Available at SSRN: <https://ssrn.com/abstract=2952401>

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarly Commons. It has been accepted for inclusion in GW Law Faculty Publications & Other Works by an authorized administrator of Scholarly Commons. For more information, please contact spagel@law.gwu.edu.

ABSTRACT

In this essay, Professor Pierce describes some of the many ways in which our traditional understanding of administrative law is being contradicted by reality, introduces yet another doctrine that has been overtaken by the new reality, and suggests ways in which teachers and scholars should react to the rapidly changing reality of administrative law.

Primary Jurisdiction: Another Victim of Reality

Richard J. Pierce, Jr.¹

Introduction

This essay has three parts. First, I discuss some of the growing literature that describes and explains some of the many ways in which traditional administrative law doctrines and practices have become obsolete and irrelevant. Second, I describe yet another doctrine that has been overtaken by reality—the century old doctrine of primary jurisdiction. Finally, I describe and discuss some of the potential ways in which legal institutions, scholars and teachers can respond to the yawning gap between the real world in which agencies make decisions and the doctrines we have long used to describe and analyze that world.

The Scholarship

¹ Lyle T. Alverson Professor of Law, George Washington University.

Much of the best scholarship in administrative law published over the last few years has identified and discussed the large and growing disconnect between the way we have long understood the process of agency decision making and reality. Dan Farber and Anne Joseph O’Connell’s article “The Lost World of Administrative Law” is a good example.² They describe administrative law as based on “assumptions [that] call for statutory directives to be implemented by an agency led by Senate-confirmed presidential appointees with decision-making authority. The implementation is presumed to be through statutorily mandated procedures and criteria, where the final result can then be reviewed by the courts to see if the reasons given by the agency at the time of the action match the delegated directions.”³

Farber and O’Connell then explain why each of those longstanding assumptions no longer fits reality: Agencies now spend as much time implementing presidential directives as they do implementing statutes. As Farber and O’Connell put it, “The primacy that administrative law places on congressional mandates, therefore, diverges from the realities of modern agency action, where presidential directives can have equal importance with statutes to agencies.”⁴

The assumption that a statute is implemented by a single agency applies to a modest and diminishing proportion of agency actions. An increasingly large number of important statutes are implemented not by one agency but by a combination of agencies.⁵ Jody Freeman and Jim Rossi have described some of the many ways in which the new congressional practice of conferring the

² Daniel Farber & Anne Joseph O’Connell, *The Lost World of Administrative Law*, 92 *Tex. L. Rev.* 1137 (2014). See also Abbe Gluck, Anne Joseph O’Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 *Columbia L. Rev.* 1789 (2015).

³ *Id.* at 1154.

⁴ *Id.* at 1156.

⁵ *Id.* at 1156-57.

power to implement a statute on multiple agencies changes the methods of implementing the statute and the approaches that courts must take when they review the actions agencies take to implement those statutes.⁶ One of the many effects of joint implementation necessarily is to increase the role of the White House, since it must coordinate the actions of the multiple agencies.⁷

The assumption that agency actions are taken by “Officers of the United States” who have been confirmed by the Senate is not consistent with reality in many cases. A large and growing number of agency decisions are not made by Officers who have been confirmed by the Senate. About 25 per cent of the time, the office of the agency head is vacant when the agency makes the decision and the decision is actually made by an “acting” officer who was never confirmed by the Senate.⁸ Even when the agency is headed by a Senate-confirmed Officer, the actual decision in the most important cases is often made by some unidentified and unidentifiable White House employee who is unlikely to have been confirmed by the Senate.⁹ That de facto replacement of Senate-confirmed agency heads with unidentified members of the White House staff takes place through the process of review of major agency rules by the Office of Information and Regulatory Affairs (OIRA) within the white House Office of Management and Budget (OMB).¹⁰

The assumption that agencies use the procedures mandated by the Administrative Procedure Act (APA) is also false in many cases. Agencies use APA procedures to make decisions in a modest

⁶ Jody Freeman & Jim Rossi, Agency Coordination in Shared Regulatory Space, 125 Harv. L. Rev. 1131 (2012).

⁷ Id. at 1173-81.

⁸ Farber & O’Connell, *supra*. Note 2, at 1158.

⁹ Id. at 1159-60.

¹⁰ Id. at 1162-73.

and diminishing proportion of cases. The APA requires an agency to use the notice and comment procedure to issue substantive rules. Yet, agencies did not use the notice and comment procedure in 44% of rulemakings, including 35% of major rulemakings, during a recent seven-year period.¹¹

The mismatch between assumptions and reality also applies to the agency reasoning process, the agency fact-finding process, and to judicial review of agency actions. In major rulemakings, it is not at all clear that the reasons stated by the agency as the basis for its decision bear any relationship to the actual reasons for the decision. The text of a major rule is often written by, or at least significantly changed by, White House employees who have had scores of off-the-record meetings with representatives of regulated firms.¹² As Farber and O’Connell put it, through this process “political considerations can shape agency decisions in ways not permitted or imagined by the explicit terms of the statute.”¹³ The largely invisible role of anonymous White House employees in the decision making process also compromises the ability of reviewing courts to determine whether the agency has provided reasons that are statutorily permissible and sufficient to support its action.¹⁴

Farber and O’Connell are not alone in their efforts to expose gaps between our general understanding of administrative law and reality. Scores of recent empirical studies of the doctrines courts say they use to review agency actions have found massive inconsistencies in

¹¹ Id. at 1160-61.

¹² Id. at 1168-69.

¹³ Id. at 1167.

¹⁴ Id. at 1167-73.

judicial decision making and little relation between the doctrines the courts say they apply and their actual decision making patterns.¹⁵

Emily Hammond and I identified additional gaps between administrative law doctrines and reality in an article in which we attempted to apply administrative law doctrines to the Clean Power Plan (CPP), the most important rule any agency has ever issued.¹⁶ We identified two serious problems with the application of administrative law doctrines to major rules like the CPP. First, a judicial decision on the merits is likely to have little practical effect. The important decisions are whether to grant a stay of the rule pending the outcome of the review proceeding and, assuming a court rejects the rule on the merits, whether the court includes vacatur in its remand order.¹⁷ The second problem we identified is the poor fit between the doctrines courts typically apply when they address the merits of a dispute and the highly polarized political environment in which agencies make decisions.¹⁸

The fate of EPA's controversial mercury rule illustrates the extent to which judicial decisions with respect to remedies render judicial decisions on the merits largely irrelevant. As soon as EPA issued the mercury rule, numerous owners of coal-fired electricity generating units filed petitions for review and motions to stay the rule pending the outcome of the review proceeding. The courts denied the motions for a stay. That decision turned out to render the dispute on the merits irrelevant as a practical matter.

¹⁵ Richard Pierce, What Do the Studies of Judicial Review of Agency Actions Mean? 63 Admin. L. Rev. 77 (2011).

¹⁶ Emily Hammond & Richard Pierce, The Clean Power Plan: Testing the Limits of Administrative Law and the Electric Grid, 7 Geo. W. J. En. & Env. 1 (2016).

¹⁷ Id. at 8-12.

¹⁸ Id. at 3-8.

The Supreme Court held the mercury rule invalid and remanded the proceeding to the D.C. Circuit.¹⁹ The first decision the D.C. Circuit had to make was whether to vacate the rule pending the outcome of the proceedings on remand. All but one of the petitioners changed sides and urged the court not to vacate the rule that they had convinced the Supreme Court to reject.²⁰ The petitioners informed the court that they had already taken expensive and irreversible steps to implement the rule during the pendency of the review proceeding. One of those steps was to persuade state regulators to allow the utilities to recover the high costs of compliance with the rule from ratepayers. If the D.C. Circuit vacated the rule, the petitioners might well be forced to absorb the high costs they had already incurred to comply with the rule since they would no longer be able to argue to state regulators that they were required to incur those costs. Thus, the steps the parties had to take during the lengthy period in which the courts considered the merits of the agency action rendered the dispute with respect to the merits moot as a practical matter. The well-known consequence of the judicial decision to deny a stay of the mercury rule undoubtedly helps to explain why the Supreme Court issued its unprecedented stay of the CPP.²¹ Courts do not like to be confronted with the reality that their decisions on the merits of a dispute are irrelevant. They now seem to understand that their decisions to grant or deny a stay often have that effect. That is a problem, however, since the criteria to grant or deny a stay of an agency action are not designed to be a substitute for the much more deliberative process of deciding whether the action is valid.

¹⁹ Michigan v. EPA, 135 S.Ct. 2699 (2015).

²⁰ Brief of Industry Respondents in the D.C. Circuit on remand from Michigan v. EPA (May 6, 2016).

²¹ North Dakota v. EPA, No. 15A793 (Feb. 9, 2016).

The problem we identified with the doctrine the Court ordinarily would apply to resolve the merits of the dispute with respect to the CPP is rooted in the modern phenomenon of extreme political polarity. We identified two provisions of the Clean Air Act (CAA) that can easily be interpreted either to support a holding that the CPP is valid or to support a holding that it is invalid.²² If the Court were to uphold the CPP by applying the *Chevron* doctrine,²³ it would hold that the CPP is valid because the agency interpretations of those two ambiguous provisions are “reasonable” interpretations of an ambiguous statute.²⁴ That would create a situation in which the next President might well rescind the CPP based on his (technically, the agency’s) adoption of the opposite interpretations of the ambiguous provisions of the CAA. Most Democrats share President Obama’s enthusiastic support for the CPP, while most Republicans share the powerful antipathy toward the CPP that the Republican nominee for President has expressed.

It makes no sense for the “law” on which the validity of major agency actions depends to change with every Presidential election. Yet, that is increasingly the most likely result of applying the *Chevron* doctrine to agency interpretations of ambiguous provision of agency-administered statutes. The decades-old *Auer* doctrine²⁵ is already having that effect in important contexts like labor law, where agency interpretations of ambiguous agency rules now change dramatically after every Presidential election that yields a change in the party that controls the White House.²⁶

Primary Jurisdiction—Another Casualty of Reality

²² Hammond & Pierce, *supra*. Note 16, at 4-5.

²³ *Chevron v. NRDC*, 467 U.S. 837 (1984).

²⁴ *Id.* at 5-8.

²⁵ *Auer v. Robbins*, 519 U.S. 452 (1997), reaffirming the holding of *Bowles v. Seminole Rock*, 325 U.S. 410 (1945).

²⁶ Deborah Eisenberg, *Regulation by Amicus: The Department of Labor’s Policy Making in the Courts*, 65 Fla. L. Rev. 1223 (2013).

The Supreme Court first announced and applied the primary jurisdiction doctrine in 1907.²⁷

The Court described and explained the doctrine well in a 1956 opinion:

[P]rimary jurisdiction applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.²⁸

The doctrine furthers several important purposes.²⁹ It allows an issue to be resolved by the institution Congress chose to perform that function. It allows an issue to be resolved by an institution with superior subject matter expertise. It leads to uniformity with respect to federal law. It leads to interpretations of statutes, rules, and tariffs that fit well with other interpretations and that allow an agency to implement a regulatory regime in a coherent and efficient manner.

Invocation of the primary jurisdiction doctrine has one major disadvantage. It has the potential to delay resolution of the dispute before the court. In recent years courts have expressed increasing concern about that effect of primary jurisdiction.³⁰ They have become reluctant to invoke primary jurisdiction because of its potential to create serious delay in resolving disputes that courts have responsibility to resolve in a timely manner. That reluctance to invoke primary jurisdiction has increased significantly as a result of increases in delay in the agency decision

²⁷ *Texas & Pacific Railway Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907).

²⁸ *United States v. Western Pacific Railroad Co.*, 352 U.S. 59 (1956).

²⁹ For detailed discussion of the doctrine, see II Richard Pierce, *Treatise on Administrative Law* chapter 14 (5th ed. 2010).

³⁰ See *id.* at chapters 12 and 14.

making process, decreases in agency resources that often force agencies to devote their scarce resources to tasks that they consider more urgent than resolution of issues referred to them by courts, and judicial recognition that courts cannot force agencies to reallocate their scarce resources to conduct the lengthy and resource-intensive proceedings required to use adjudication or rulemaking to resolve an issue a court has referred to the agency through invocation of primary jurisdiction.

Judicial invocations of primary jurisdiction have become rare. Courts increasingly rely on a functional alternative that often yields prompt results that meet the needs of courts without requiring agencies to divert scarce resources from tasks they consider more urgent. Courts routinely ask agencies to submit amicus briefs in which the agencies apprise courts of their interpretations of agency-administered statutes, rules, and tariffs. Agencies typically respond promptly and affirmatively to those requests.³¹

It is much easier for an agency to adopt and announce its interpretation of an ambiguous statute or rule in an amicus brief than to announce its interpretation in an adjudication or a rule. The APA requires agencies to use decision making procedures that are time-consuming and resource-intensive when they adjudicate a dispute or issue a rule.³² By contrast, the APA imposes no mandatory procedures on the process of adopting and announcing an interpretation of a statute or rule in an amicus brief. The agency can, and often does, use an informal decision making process that allows it to address an issue definitively and promptly in an amicus brief. Courts

³¹ E.g., *In re Morgan Stanley Information Fund Securities Litigation*, 592 F.3d 347, 361-2 (2d Cir. 2010). See generally Eisenberg, *supra*. Note 26.

³² 5 U.S.C. §§553-557. See Pierce, *supra*. Note 29 at chapters seven and eight.

routinely substitute the effective and expeditious amicus brief process for the traditional process of referring an interpretative issue to an agency through invocation of primary jurisdiction.

The Supreme Court has repeatedly approved of this procedure and has consistently held that an agency interpretation of a statute or rule first adopted and announced in an amicus brief is entitled to deference from a court.³³ The Supreme Court has not been consistent with respect to the degree of deference it requires lower courts to accord to interpretations adopted in amicus briefs, but both the Supreme Court and lower courts seem to accord agency interpretations adopted in amicus briefs the same degree of deference they accord to interpretations adopted in adjudications and rules.³⁴

The modern practice of substituting amicus briefs for primary jurisdiction raises an important question. If courts value the burdensome and time-consuming procedures they require agencies to use when they adopt an interpretation of a statute or rule in an adjudication or a rule, why do they allow, and even implicitly encourage, agencies to adopt interpretations in amicus briefs based on a procedure that may consist of nothing but a brief meeting between an agency official and an agency lawyer? No court has yet addressed that question. It is clear, however, that the century-old doctrine of primary jurisdiction has joined the many other administrative law doctrines that are no longer viable in today's conditions.

What Should We Do As Scholars?

³³ *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1,14-15 (2011); *Chase Bank v. McCoy*, 562 U.S. 195, 208-216 (2011); *Long Island Care at Home v. Coke*, 551 U.S. 158, 101 (2007); *Auer v. Robins*, 519 U.S. 452, 461-62 (1997).

³⁴ E.g., *In re Morgan Stanley Information Fund Securities Litigation*, 592 F. 3d at 361-62.

It is easy to identify the steps scholars should take to address the growing gaps between administrative law doctrines and reality. We should continue to identify and to document those gaps and then to suggest the kinds of changes in law that will create a better fit between doctrine and reality, given the values and goals we ascribe to the administrative state. We should follow the lead of Farber and O'Connell and approach that task with explicit recognition that any change necessarily will have a variety of effects, some of which are unintended adverse effects.³⁵ Through that means we will provide maximum assistance to the government institutions that must decide whether to make a suggested change.

There are many proposed changes that have already been identified in the literature. The polar extremes are anchored by the REINS Act that House and Senate Republicans have sponsored in the last two sessions of Congress³⁶ and by my proposal to eliminate completely the role of courts in reviewing agency actions.³⁷

The REINS Act would render any rule issued by an agency ineffective unless and until Congress enacts the rule as a statute.³⁸ The practical effect would be to withdraw rulemaking power from agencies and to turn every agency rule into a recommended statute. That proposal is based on the belief that it is too easy for agencies to issue rules. My proposal to eliminate judicial review

³⁵ Farber & O'Connell, *supra*. Note 2, at 1173-89. See also Gluck, O'Connell & Po, *supra*. Note 2, at 1835-65.

³⁶ S. 226 and H.R. 427, Regulations from the Executive in Need of Scrutiny Act of 2015, 114th Cong. (2015-16).

³⁷ Richard Pierce, A Comparison of the Cultures and Performance of a Modern Agency with a Nineteenth Century Agency, in *American Administrative Law for the Inside Out*, forthcoming in 2016 from Cambridge University Press (Jerry Mashaw & Nicholas Parrillo, ed.)

³⁸ See sources in note 36 *supra*.

of agency actions is based on the opposite belief—that courts have made it too difficult for agencies to issue, amend, or rescind rules.³⁹

Every other proposed change in administrative law will be plagued by the problem that is illustrated so starkly by the contrast between the REINS Act and my proposal. Any proposed change will be based at least implicitly on the beliefs, goals and values of the proponents of the change. Since those beliefs, goals and values vary greatly, it is impossible to make any change without first identifying the beliefs, values and goals of the change and anticipating the objections of those with different beliefs, goals and values.

This process can be illustrated with reference to some of the many less dramatic proposals for change. The courts' implicit decision to replace the primary jurisdiction doctrine with amicus briefs provides a good starting point. The first step in evaluating this change in practice is to recognize that it has taken place and to identify the basis, if any, on which it might be defended. No institution of government has yet taken that step, so that is an appropriate initial task role for scholars.

The practice of replacing primary jurisdiction with amicus briefs necessarily is based on the implicit belief that delay in the judicial decision making process is less tolerable than delay in the agency decision making process. Courts regularly compel agencies to use procedures that are resource-intensive and time-consuming when they review agency decisions to act in adjudications or rulemakings.⁴⁰ Yet, courts pressure agencies into abandoning those procedures

³⁹ Richard Pierce, *Seven Ways to Deossify Agency Rulemaking*, 47 Admin. L. Rev. 59 (1995).

⁴⁰ See Pierce, *supra*. Note 29, at chapters eight and nine.

in favor of much less demanding procedures when an agency's use of its usual, judicially-imposed procedures would result in delay of a judicial decision.⁴¹

Perhaps that stark dichotomy is justified because delay in judicial decision making imposes greater costs on society than delay in agency decision making. If that is true, the institution that is acting on the implicit basis of that belief—the judiciary—should make that belief explicit and should explain the basis for that belief. If the courts cannot provide an adequate explanation for the belief that underlies their new practice, they should abandon the practice. If courts believe, as I do, that delay in agency decision making imposes costs on society that are comparable to the costs imposed by delay in judicial decision making, courts should either abandon the practice of asking agencies to adopt interpretations of statutes and rules in amicus briefs or reduce significantly the resource-intensive and time-consuming procedures they require agencies to use when they adopt interpretations of statutes or rules in the process of adjudicating a dispute or issuing a rule. Courts then should make and explain that choice, recognizing the inevitable tradeoffs implicit in that decision.

Justice (then Professor) Breyer's proposal to de-emphasize the role of judicial review of major rules and to rely primarily on aggressive review of major rules by a broader version of OIRA provides another good illustration of the tradeoffs in the pursuit of competing values that we must confront when we consider any major change in the doctrines or practices that traditionally have shaped the field of administrative law.⁴² Professor Breyer's proposal was based in part on

⁴¹ Text *supra.*, at notes 27-34.

⁴² Stephen Breyer, *Breaking the Vicious Circle* 59-72 (1993).

his skepticism about the net benefits of the process of judicial review of major rules⁴³ and in part on his belief that White House review of major rules can confer net benefits on society if it is structured in a way that reflects all of the goals of regulation.⁴⁴ Farber and O’Connell almost certainly would find the Breyer proposal objectionable. They are highly critical of the role of the White House in the rulemaking process and they fear that it is reducing the efficacy of the process of judicial review—a process that they obviously value highly.⁴⁵ Some institution of government must choose between the changes urged by Breyer and the changes urged by Farber and O’Connell.

I will summarize the case for three modest changes—doctrinal simplification, restoration of the original meaning of APA section 553, and expansion of the scope of OIRA review to “independent agencies” —before I turn to a discussion of the question that most troubles me. How should we incorporate the large and increasing disconnect between doctrine and reality in the classroom?

Doctrinal Simplification

Scores of empirical studies of judicial review of agency actions have exposed massive inconsistencies in the ways that courts apply the six most frequently invoked review doctrines and between the ways that the doctrines are stated and the results of their application.⁴⁶ The studies suggest that there is little difference among the doctrines and that the courts have created an unduly complicated and incoherent doctrinal regime that provides a misleading

⁴³ Id. at 57-59.

⁴⁴ Id. at 59-72.

⁴⁵ Farber & O’Connell, *supra*. Note 2, at 1159-84.

⁴⁶ Richard Pierce, *The Future of Deference*, forthcoming in *Geo. W. L. Rev.* in 2016; Pierce, *supra*. Note 15.

description of the ways in which they actually make decisions. The empirical studies provide powerful support for David Zaring’s proposal to simplify review doctrine by replacing the six doctrines courts say they apply today with a single doctrine—a court will uphold an agency action if, but only if, the agency can support its action based on a reasonable interpretation of the applicable statute, a reasonable interpretation of the evidence before the agency, and a reasonable explanation of the value of the rule.⁴⁷

Restore the Original Meaning of APA §553

Another large body of scholarship has explained how a trio of judicial opinions issued during the period 1972 to 1974 converted the simple efficient notice and comment procedure the APA requires an agency to use to issue a rule into an extraordinarily expensive, time-consuming and cumbersome process that contains a powerful bias in favor of regulated firms.⁴⁸ Court decisions overruling those opinions would enhance efficiency, reduce bias in the rulemaking process, encourage agencies to make greater use of the notice and comment procedure, and allow agencies to issue much-needed rules, as well as to amend or rescind rules that have become obsolete and counterproductive, in a timely manner.⁴⁹

Apply OIRA Review to Independent Agencies

⁴⁷ David Zaring, *Reasonable Agencies*, 96 Va. L. Rev. 135 (2010).

⁴⁸ E.g., Richard Pierce, *The Administrative Conference and Empirical Research*, 83 Geo. W. L. Rev. 1564, 1571-74(2015); Kimberly Krawiec, *Don’t “Screw Joe the Plumber”*: the Sausage Making of Financial Reform, 55 Ariz. L. Rev. 53 (2013); Wendy Wagner, et. al, *Rulemaking in the Shade: An Empirical Study of EPA’s Air Toxic Emissions Standards*, 63 Admin. L. Rev. 99 (2011); Richard Pierce, *Waiting for Vermont Yankee II, IV, and V: A Response to Beerman & Lawson*, 75 Geo. W. L. Rev. 902 (2007).

⁴⁹ Pierce, *supra*. Note 37; Pierce; *supra*. Note 39.

A third body of scholarship has shown that the most important effect of OIRA review of major rules issued by executive branch agencies has been to improve dramatically the quality of the economic reasoning in agency decision making.⁵⁰ Not surprisingly, studies have found that rules issued by “independent agencies”—which are exempt from OIRA review—reflect economic reasoning that is significantly and systematically lower quality than the economic reasoning that underlies rules issued by executive branch agencies.⁵¹ That literature provides powerful support for Senator Portman’s proposed extension of OIRA review to major rules issued by independent agencies.⁵²

Of course, like all proposed changes in the traditional administrative law doctrines and practices that have become increasingly obsolete in today’s conditions, the three changes I support would draw well-supported criticism from many directions because they necessarily sacrifice some values to further other values.

Thus, many scholars would oppose Zaring’s proposed simplification of review doctrine because they believe that the six traditional doctrines continue to reflect real differences in judicial decision making that further a variety of values. Many members of Congress would oppose the Zaring proposal because they believe that all of the deference doctrines should be replaced by a requirement that courts engage in de novo review of all agency actions.⁵³

⁵⁰ Richard Pierce, *The Regulatory Budget Debate*, 19 *NYU J. L. & Pub. Pol.* 249 (2016); Michael Livermore, *Cost-Benefit-Analysis and Agency Independence*, 81 *U. Chi. L. Rev.* 609 (2014).

⁵¹ Curtis Copeland, *Economic Analysis and Independent Regulatory Agencies*, Report to the Administrative Conference of the United States (2013).

⁵² S. 1607, *Independent Agency Analysis Act of 2015*, 114th Cong. (2015-16).

⁵³ H.R. 4768, *Separation of Powers Restoration Act of 2016*, 114th Cong. (2015-16).

Many scholars would oppose my proposed restoration of the original simple and efficient version of notice and comment rulemaking because they believe that the much more demanding process of review created by the judicial decisions of the 1970s have improved both the quality of agency decision making and the efficacy of judicial review of agency decisions.⁵⁴ Many members of Congress would oppose my proposal because it would make it easier for agencies to issue rules, while they believe that it is already too easy for agencies to issue rules.⁵⁵

Farber and O’Connell are among the many scholars who oppose Senator Portman’s proposed extension of OIRA review to major rules issued by independent agencies because they believe that OIRA review of major rules issued by executive branch agencies already creates intolerable problems that include introduction of illegitimate factors into agency decision making and frustration of the efforts of courts to engage in effective review of agency actions.⁵⁶ Many members of Congress oppose Senator Portman’s proposal both because it would reduce the power of members of Congress to influence rules issued by “independent agencies” and because many members would like to replace OIRA application of cost-benefit-analysis with a “regulatory budget” that would prohibit an agency from issuing any rule that imposes additional costs even if its benefits would vastly exceed its costs.⁵⁷

The new world in which modern conditions have rendered most of our traditional ways of thinking about the administrative state unrealistic and irrelevant provides ample opportunities for scholars to play constructive roles in helping government institutions identify and evaluate

⁵⁴ E.g., Farber & O’Connell, *supra*. Note 2, at 1159-84.

⁵⁵ This belief is illustrated by the REINS Act, discussed in text at notes 36-39 *supra*.

⁵⁶ Farber & O’Connell, *supra*. Note 2, at 1159-84.

⁵⁷ Pierce, *supra*. Note 50, at 251-52.

the need for changes in the legal environment of administrative law. I have confidence that the many talented young scholars that are now writing in the field will respond well to that challenge. I am less confident in the ability of administrative law teachers to devise effective ways of introducing our students to the constantly evolving world of administrative law.

What Should We Do As Teachers?

The increasing disconnect between everything we have traditionally believed about administrative law and today's realities presents major challenges to teachers of administrative law. Here are some of my tentative suggestions for ways of addressing those challenges.

First, we should continue to teach the basics, including doctrines that many of us believe to be obsolete and practices that are frequently honored in the breach. Second, we should describe the ways in which those practices and doctrines have been modified or compromised in recent years. Third, we should introduce our students to the reality that every doctrine and practice has a variety of good and bad effects, and that every potential change in doctrine or practice necessarily will have good and bad effects.

Our efforts to meet the challenges in the class room should be shaped by our recognition that our students will play three quite different roles in their professional lives. First, they will be called upon to represent clients before agencies and courts. In that capacity they must be prepared to make arguments based on the ways in which agencies and courts describe their decision making processes, even if we, and our students, are skeptical that agencies and courts actually act on the basis of the doctrines they say they apply.

Second, our students will be called upon to advise clients about the actions that agencies and courts are likely to take in various circumstances. In that capacity they must be able to ignore or to discount the value of the applicable doctrines if they believe that agencies and courts do not act on the basis of the doctrines they say they apply. In some circumstances the advisory role will require them to make predictions based on factors that agencies and courts deny that they use but that studies find to have powerful predictive effects. Thus, for instance, we know that the Department of Labor is likely to act in dramatically different ways in Democratic and Republican Administrations and that the political and ideological beliefs of judges and Justices influence their decision making in some important contexts. Since we know those realities, we owe it to our students to share that knowledge with them even if it induces some degree of cynicism.

We can offset the cynicism we create through that educational process by emphasizing another important part of the reality of the world in which they will practice law. No matter what doctrine a court says it is applying when it reviews an agency decision, all courts invariably base their decisions primarily on—(1) the strength of the support for the action in the language and structure of the statute; (2) the strength of the evidentiary support for the action; and, (3) the persuasiveness of the agency’s reasoning in support of the action.

The most difficult challenge we face in the classroom is to help our students understand the need to make changes in the legal environment in which agencies function and the difficulty of the process of evaluating proposed changes because all changes have good and bad effects.

CONCLUSION

Administrative law doctrines and practices are changing so dramatically and so rapidly that the understanding of administrative law that today's administrative law teachers and scholars have long embraced bears little relation to reality. This dynamic environment provides a cornucopia of opportunities for scholars to identify the many changes and to evaluate the competing ways in which legal institutions can react to the changes with new doctrines and practices that provide a better fit with the evolving reality. It also presents major challenges to the process of teaching administrative law.