Chair's Message: "Rulemaking as Politics," Thirty Years On

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“Rulemaking as Politics,” Thirty Years On

The last few decades have seen a surge in "citation studies." No doubt these are driven in part by the ease with which citations can now be counted—as elsewhere, we value what we can measure rather than measuring what we value. And simply counting citations can be misleading, overlooking things such as the percentage of times the citation begins with, say, "But see" or "the source of this error was." Still the quality and influence of an article or opinion do have some correlation with the number of times it is cited. And our field does well in such studies in that we can lay claim to the most-cited Supreme Court decision of all, Chevron.

At the opposite end of the spectrum from Chevron are, I fear, Chair's Messages. These quarterly efforts are not written for the ages. But this issue of the News marks the 30th anniversary of a Chair's Message that deserves study and citation, and has perhaps only become more interesting with the passage of time. I thought I would mark the anniversary by returning to that message from a distinguished predecessor and offering a few comments in light of subsequent developments.

Section Chairman Antonin Scalia entitled his Spring 1982 Message Rulemaking as Politics.¹ His topic was the relationship between rulemaking and democracy; "unless I miss my guess," he wrote, "we have entered a period in which the relationship will be probed and tested, if not precisely defined." He was certainly right about that—both the "probed and tested" part and the "not precisely defined" part.

Chairman Scalia's basic point was that agencies "may make some decisions in rulemaking not because they are the best or the most intelligent, but because they are what the people seem to want." This principle, he complained, was being undercut by a cluster of doctrinal developments. Laxer rules on ripeness and standing meant that politically influenced rulemakings were more likely to be subject to judicial review; courts were asserting greater control over the rulemaking agenda and agencies' practical ability to forgo, abandon, or repeal rulemakings in light of political considerations; the arbitrary and capricious test was shifting from a loose rationality requirement to the hard look; and new legislative and judicial requirements of transparency were eliminating the "sine qua non of political accommodation, confidential negotiation."

Scalia's point was not that all rulemaking is or should be political; often an agency has a technocratic task to which political considerations are irrelevant. But actions taken under broad delegations—for example, to manage the airwaves “in the public interest, convenience and necessity”—were properly informed by political judgments. The challenge, he acknowledged, was distinguishing the two settings.

The article appeared after the D.C. Circuit decision, but before the Supreme Court's grant of certiorari, in State Farm. Chairman Scalia invoked that case in his conclusion:

More needs to be done to bring the political, accommodationist, value-judgment aspect of rulemaking out of the closet. When NHTSA comes to reconsider the passive-restraint rule . . ., and if it chooses to adhere to its prior course, it would be refreshing and instructive if, instead of (or at least in addition to) blowing smoke in our eyes with exhaustive technical and economic data, it said flat-out: "It is our judgment that people should not be strapped in cars if they don't want to be; nor should they have to spend substantial sums for air-bags if they choose otherwise." A political judgment, the retribution or reward for which will be meted out by Congress, or at the polls, but not in the courts.

So what happened? In the short term, the Scalia position failed to carry the day. The air bags case went not back to NHTSA but, instead, up to the Supreme Court. A year after the Scalia article was published, the Supreme Court rejected exactly the approach he urged.² However, the vote was close, and Scalia's approach found support in a dissent by Justice Rehnquist. The dissent does not cite the Scalia article but one suspects Rehnquist had seen it (though that suspicion may just be Section Chair delusions of grandeur). Rehnquist, pointing out that the agency's enthusiasm for the passive restraints rule had ebbed and flowed with changes in presidential administrations, urged that the Court accept the most recent reassessment precisely because it reflected a dominant national opinion expressed through the electoral process.³ Strikingly, Justice White's opinion for the Court did not contradict Justice Rehnquist's description of the political setting or conclude that it was outweighed by other factors. Rather, he ignored it altogether, implicitly deeming the politics of the rescission irrelevant.

But State Farm was not, of course, the end of the story. Just a year later came Chevron, which resonates powerfully with Scalia's message. Like State Farm, Chevron involved a deregulatory policy shift by the new administration, but in this case the Court accepted the change, emphasized agencies' electoral accountability (as well as their expertise), and got out of the

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¹ Antonin Scalia, Chairman's Message: Rulemaking as Politics, 34 ADMIN. L. REV. v (1982). I did check, incidentally, and this article has been cited 27 times in the legal literature (though zero times in judicial opinions). Not exactly John Rawls territory, but probably a Chair's Message record.


³ Id. at 59 (Rehnquist, J., dissenting in part).
way. *Chevron* is perhaps the Court's most honest opinion about the breadth of congressional delegations, a frank recognition that the legislature has left some questions of policy, or value, or politics undecided, as Scalia emphasized.

In the intervening decades, *Chevron* has flourished while *State Farm* has been in eclipse, at least in Supreme Court opinions. In the lower courts the picture is more complex. A number of commenters, including Elena Kagan, Christopher Edley, and Kathryn Watts, have endorsed something like the Scalia position. This has been a period of increased presidential authority and centralization, a key aspect of which is an emphasis on the president's status as the one elected official with a national constituency. An essential, though not the only, argument for presidential control is that it legitimates discretionary agency decisions that are non-technical and involve values and preferences.

The specific doctrinal proposition Chairman Scalia pressed, however, remains contested. Is it "reasoned decisionmaking" if an agency does something simply because the White House, or Congress, or certain Members of Congress wants it to? This question is remarkably unsettled. *Massachusetts v. EPA* suggests that the answer is no. As Jody Freeman and Adrian Vermeule have written, that opinion is in the *State Farm* tradition. 5

FCC v. Fox Television Stations, 4 on the other hand, arguably points the other way, though really the issue split the justices right down the middle. A statute prohibits television broadcast of "indecent" material. Certain four-letter words are "indecent," but the FCC had a longstanding position that a single, unscripted, fleeting expletive was permissible. During the second Bush Administration (and thus with a new Republican chair), and under significant congressional pressure, the Commission changed its position; under the new policy, even fleeting expletives were prohibited. In a 5-4 decision, the Court held that the change was not arbitrary and capricious. As in *State Farm,* one question was whether a relevant (or perhaps even sufficient) justification for the change was changed preferences in the White House and/or Congress. Writing for four justices, Justice Scalia explicitly noted the political factors behind the change and essentially endorsed them. The opinion does not cite his 1982 *Chairman's Message,* but it is no surprise that the two had the same author.

Justice Breyer, on the other hand, insisted that the "law grants . . . independent administrative agencies broad authority to determine relevant policy. But it does not permit them to make policy choices for purely political reasons nor to rest them primarily upon unexplained policy preferences." 6 "Where does, and why would, the APA grant agencies the freedom to change major policies on the basis of nothing more than political considerations or even personal whim?" For Breyer, then, "politics" is a dirty word, to be uttered, at least by judges, not even fleetingly.

And where was Justice Kennedy, the fifth vote? He joined almost all of Justice Scalia's opinion, but not the portion where Scalia disagrees with Justice Breyer about the role of politics. And Kennedy's own opinion skirts that question. 7

So we must stay tuned. However, one important change, a change that Chairman Scalia could not have anticipated in 1982, brings an added dimension to this perennial debate. That is the shift to electronic rulemaking.

Moving rulemaking on-line creates the opportunity (to date, generally unrealized) for large-scale public participation. If an agency can (indeed should) make decisions that reflect "what the people seem to want," as Chairman Scalia put it, then arguably e-rulemaking enables it to do so with new found accuracy and fervor. Most lay comments do not tell the agency anything it does not already know other than indicating something about public opinion, but they do accomplish that. For that reason, more than one observer has expressed concern that mass public commenting could transform rulemaking from a process of gathering information and arguments into a sort of referendum. That possibility is generally decried. But if rulemaking "is" politics, why not have a referendum via notice and comment?

Three reasons come to mind. First, even a large number of comments may be an inaccurate guide to public opinion since they may be unrepresentative. Second, as Chairman Scalia said, rulemaking is not always or only politics; in some settings political accommodation and value judgments are out of place. Third, in a representative rather than direct democracy, the existing mechanisms for accommodating public preferences, i.e. White House and congressional oversight, may be more appropriate, if not constitutionally required. Suppose large-scale lay comments support a different approach than that favored by the White House; what should the agency do? I have complete confidence that Chairman Scalia and Professor Scalia and Justice Scalia would all say that the agency should follow White House preferences. In the 1982 article he stated that "[w]hen I say 'what the public wants' I refer not to the latest Gallup poll, but to the manifestations of the popular will through the political process." Substitute "the weight of public comments" for "latest Gallup poll" and the proposition stands.

The exact role of politics in rulemaking is yet to be resolved. E-rulemaking makes the question more salient, and more difficult, than ever. 8 But, as Chairman Scalia pointed out, the problem exists independently of the technology of rulemaking, and what really makes it so hard is that the relationship is not constant. Like so much else in law, the answer, frustratingly, is "it depends." 9

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8 Those who are interested in the particular question of the role of the public in rulemaking will want to attend the Section's Spring Meeting in Princeton, New Jersey, which will include a panel devoted to just this topic on April 20. Details can be found elsewhere in this issue.