It’s not unusual to find alumni and faculty of the Law School figuring prominently in cases that unsettle precedent, fire policy debate, and advance new lines of legal analysis. In fact, professors and alumni from Chicago often find themselves arguing opposite sides of a case, shaping the law by considering all sides of an issue. In the recent headline-making cases profiled in this article, alumni, faculty, and deans squared off against one another as they sought to change the law.
Case #1: Faculty members took increasingly forceful positions regarding the proper application of various constitutional provisions to the City of Chicago's anti-gang loitering ordinance. Amicus briefs were written, articles were published and rebutted, and intense debate resounded on campus.

Case #2: The stunning investment losses and subsequent bankruptcy of California's Orange County brought graduates, a dean, and a faculty member into the fray as the county sued its investment advisors for billions of dollars.

Case #3: Two graduates, a faculty member, and a prominent former faculty member argued the constitutionality of same-sex marriage before Vermont's highest court. The New York Times declared the case to be "the central arena in the United States for the push for marriage between people of the same sex."

Case #4: Everybody seemed to get into the act as lawyers disputed the pros and cons of a long-contested issue in bankruptcy law all the way to the Supreme Court. Not only was a University of Chicago graduate a partner in the bankrupt real estate venture, and not only were many University of Chicago grads among the tenants of the bankrupt property in question—three faculty members, one of them a former Law School dean, participated in the case in a variety of conventional and less conventional roles.

These four cases manifest a diversity of subject matter and viewpoints, ranging from the economics-based legal arguments for which the Law School is perhaps best known to challenges to long-established constitutional doctrine and government policies. "The common link in all these cases," said Dean Daniel Fischel, "is that the people on all sides are creative, they're innovative, they're bold. They're the people others seek out in high-profile, cutting-edge cases. It is symptomatic of what a Chicago education produces—people who are able to think clearly and creatively and communicate their insights effectively in uncharted territory."
From the time that Chicago’s anti-gang loitering law was adopted in 1992 until it was struck down by the Illinois Appellate Court in 1995 as facially unconstitutional, upwards of 42,000 people were arrested under its provisions. Their offense consisted of being in a group of two or more people, one of whom was “reasonably believed” by a police officer to be a gang member, loitering “with no apparent purpose,” and then failing to disperse after being instructed to do so by a police officer.

The law, officially called the Gang Congregation Ordinance, was one strategy Chicago devised to combat the ugly effects of gangs in mainly poor, minority communities, where crime, violence, and a degradation of community life can largely be traced to gangs’ malign influence.

Professor Tracey Meares, ’91, joined by former Chicago professor Dan Kahan, defended the constitutionality of the ordinance as a constructive community-based response to the problem of street crime.

University of Chicago law professors Stephen Schulhofer and Albert Alschuler, on the other hand, opposed the ordinance as giving too much discretion to the police, leaving the way open for violations of civil liberties. The battle then proceeded to the courts, where both sets of professors filed amicus briefs, and it continued in the law reviews and the popular press.

The Illinois Appellate Court initially struck down the law, noting that it “smacks of a police-state tactic.” The Illinois Supreme Court unanimously affirmed the Appellate Court’s decision in 1997, writing, “Such laws, arbitrarily aimed at persons based merely on the suspicion that they may commit some future crime, are arbitrary and likely to be enforced in a discriminatory manner.”

When the case proceeded to the U.S. Supreme Court, Professor Randolph Stone, Director of the Law School’s Mandel Legal Aid Clinic, joined the fray by filing an amicus brief attacking the ordinance.

In June of this year, the Supreme Court affirmed the decision of the Illinois Supreme Court, with dissents from Chief Justice Rehnquist, Justice Thomas, and Justice Scalia. Announcing the Court’s judgment, Justice Stevens observed, “It matters not whether the reason that a gang member and his father, for example, might loiter near Wrigley Field is to rob an unsuspecting fan or just to get a glimpse of Sammy Sosa leaving the ballpark” (City of Chicago v. Morales et al, No. 97-1121).

Dissenting, Justice Thomas argued that the justices should not be blind to the problems the ordinance tried to attack: “By invalidating Chicago’s ordinance, I fear that the Court has unnecessarily sentenced law-abiding citizens to lives of terror and misery.”

Although the Court has handed down its decision agreeing with Schulhofer and Alschuler, the public policy debate is far from over. Meares and Kahan called the reasoning behind the high court’s decision “symptomatic of a jurisprudence that has outlived its own political and social presuppositions.”
They continue to advocate that law enforcers be granted more leeway than courts have previously allowed, provided that there are safeguards to protect against abuse of that discretion. Requiring "hyper-specific" rules to guard against misused discretion is an anachronistic attempt to protect minority citizens, they argue, one that disregards contemporary reality: The two sides continue to dispute both the proper resolution of this specific case and the appropriate guiding constitutional perspective. Looking ahead, Meares believes that the intensity of this discourse will help lead to a better usual or constitutional analysis as we usually have thought about it—that's what made this case so interesting.

"There's no question that they could write something that would be constitutional. I wish they had done that seven years ago."

Stephen Schulhofer

Meares also believes that the law could be rewritten to make it constitutional by including administrative safeguards ensuring that police would enforce the law only to prevent intimidating displays of gang authority. "My belief is that the city ought to be involved in coming up with innovative ways to help communities control crime without communities having to incur the cost of very harsh law enforcement," she said.

Reflecting back on the troubled history of the ordinance, Schulhofer agrees that it could readily be redrafted to pass constitutional muster. "There's no question that they could write something that would be constitutional," he says. "I wish they had done that seven years ago."

Though [the courts'] anxiety about the predictable response of law enforcers to a vague ordinance made sense thirty years ago, that anxiety is less sensible now that law enforcers in America's big cities are accountable to political establishments that more fairly represent African Americans. Uncompromising hostility to discretion is therefore inappropriate because it interferes with the lines of political accountability that are now being established between minorities and the elected branches of government at the municipal level.

Schulhofer and Alschuler take the opposite tack, advocating "the need for citizens and courts to be on guard against the appealing but highly manipulable rhetoric of 'community,' a rhetoric that is increasingly prevalent in contemporary discourse." Schulhofer and Alschuler warn, "Far from serving the needs of the disadvantaged, the concept of community can, in the wrong hands, become another weapon for perpetuating the disempowerment and discrimination that continue to haunt urban America."

MORALE'S

You can read an exchange of views regarding the constitutional and factual issues in the Morales case in the following University of Chicago Legal Forum articles:


Many sources for further consideration are cited in those articles. Meares and Kahan have also just published a book, Urgent Times: Policing and Rights in Inner-City Communities, available now from Beacon Press.
A rising tide may lift all boats, but Orange County, California, and some 200 participants in its investment pool learned what happens when everything rushes down the drain. Swamped by over a billion and a half dollars in 1994 losses from trading in complex debt instruments, the county declared bankruptcy; its treasurer and assistant treasurer pleaded guilty to multiple felony counts of securities fraud and misrepresentation, and investment pool members experienced the perils of inverse floats.

The county and the other pool participants hired as lead counsel James Mercer, '71, and his law partner, J. Michael Hennigan, of the Los Angeles firm Hennigan Mercer & Bennett. They brought suit for $2 billion against Merrill Lynch & Co., the county’s principal financial advisor, for selling “illegal and improper” securities to the county. A score of other investment banks, auditors, and advisors were targeted for future legal claims.

Mercer quickly learned that he was working in unprecedented legal territory, “There were no obvious answers to any of the legal problems we confronted,” he explains. “We had to examine virtually every area of state and federal law concerning governmental borrowing, investment, and budgetary powers, as well as securities regulations, trust law, and other areas too numerous to mention.”

Two factors made matters even more difficult. First, Mercer’s principal witness, the county treasurer, had some potential credibility problems even beyond his felony convictions, after it was widely reported that he consulted an astrologer while making his investment decisions. Second, Mercer was facing a formidable battery of high-powered expert witnesses hired by the defense, including current Law School Dean Daniel Fischel, ’77, and Nobel Prize-winning University of Chicago professor.

“I think the world of Jim Mercer. Jim always does an incredibly good job, and that was particularly true in this case, because Orange County, in my opinion, had a very difficult road ahead of them to prove their case.”

Daniel Fischel
Chicago business professor Merton Miller, who also teaches at the Law School. Mercer and Fischel have opposed each other on several occasions, and that familiarity has bred a bond of mutual respect that has only deepened as a result of this case. "I think the world of Jim Mercer," Fischel said recently. "Jim always does an incredibly good job, and that was particularly true in this case, because Orange County, in my opinion, had a very difficult road ahead of them to prove their case." The sincerity of Fischel's praise is evidenced by his invitation to Mercer to chair the Law School Visiting Committee, which Mercer agreed to do beginning this fall.

Mercer offered two theories in support of the county's claim. First, under both the California constitution and state law, governmental entities were precluded from making such speculative investments. Under this argument, Mercer said, the investments at issue in the case should be considered void. Secondly, even assuming arguendo that such investments were permissible, the specific securities that Merrill Lynch and other defendants advised Orange County to buy were inappropriate.

For the defense, Fischel and Miller contended that it was the county's mismanagement of its investments, not the nature of those investments themselves, that caused its financial problems. Had Orange County officials waited for an appropriate time to sell, they wouldn't have lost any money at all, the two experts said. "They suffered losses on some trades, but they were never bankrupt," Fischel still insists. "Bankruptcy was just a political ploy."

"I have enormous respect for Dan," Mercer counters. "He's thorough, he's thoughtful, he's reasoned. And sometimes he's wrong." In this case, Mercer added with a smile, the position taken by Fischel and Miller was "basically preposterous—based on facts that don't fit reality."

Well might he smile. Last year Merrill Lynch settled the county's suit before trial for $400 million, a figure that surprised many legal experts and Wall Streeters. Soon thereafter, Morgan Stanley Dean Witter and Nomura Securities settled with the county for $116 million, and it was not long before additional settlements were reached, bringing the county's total recovery to $860.7 million.

The last and by far the smallest settlement—$140,000, prompting the headline "S&P Settles for a Song" in a trade magazine—was achieved by Standard & Poor's. Kenneth Vittor, '77, general counsel for The McGraw-Hill Companies, represented Standard & Poor's in the settlement negotiations. S&P was assisted by Professor Randal Picker, '85, who was hired as an expert in the case.

Orange County's bankruptcy still stands as the largest by a government agency in American history. The bankruptcy frightened governments from coast to coast into reexamining their fiscal and investment practices; it cost the defendants many millions in lost fees and even criminal settlements; it changed the practices of affected and unaffected organizations, Standard & Poor's, for instance, said through general counsel Vittor that it will explicitly state in future contracts that it is not a financial advisor, that it is not waiving its First Amendment rights, and that its ratings constitute opinions protected by the First Amendment.

"I have enormous respect for Dan Fischel. He's thorough, he's thoughtful, he's reasoned. And sometimes he's wrong."

James Mercer
Three same-sex couples in Vermont, denied marriage licenses, sued the state and the municipalities that had turned them away. In a case that made its way to the state's supreme court last November, Beth Robinson, '89, represented the plaintiffs, while Eve Jacobs-Carnahan, '86, argued for the state. The court had not yet issued its decision as this magazine went to press (Baker v. State of Vermont, No. 98-32).

The New York Times reported that the case established Vermont as "the central arena in the United States for the push for marriage between people of the same sex."

A ruling favorable to the appellants would make Vermont the only state to permit marriage between gay or lesbian couples. A court in Hawaii had ordered that state to recognize such unions, but Hawaii's citizens then passed a referendum banning them. Under similar circumstances, voters in Alaska also chose to outlaw same-sex marriage. Californians will vote next year on a referendum proposing that marriage be defined solely as a union between a man and a woman. In all, nearly 30 states have enacted bans on same-sex marriage.

At the national level, the 1996 Defense of Marriage Act defines marriage as "only a legal union between one man and one woman." It thereby prospectively denies federal benefits to persons in same-sex marriages, should any state elect to allow such marriages, and it permits states to refuse legal recognition to same-sex marriages endorsed in other states. It also permits the lawful application of the term "spouse" only to "a person of the opposite sex who is a husband or a wife."

Married persons in Vermont enjoy more than 150 state supports and protections—and incur many responsibilities—that are withheld from same-sex couples. The number of federal supports and responsibilities related to marriage exceeds one thousand, Robinson says. The benefits affect, among other things, insurance coverage, medical treatment, pensions, property ownership, and inheritance.

Robinson cites one of her clients, Stacy Jolles, who was blocked from entering a hospital emergency room to visit her critically ill partner, Nina Beck, because they had no legal relationship. Jolles and Beck have a two-year-old son, who Beck says "needs and deserves to know that his parents have a legal connection to one another, as well as to him."

The plaintiffs’ case centers on the common benefits clause of Vermont’s constitution. Robinson describes that clause as “Equal Protection-like,” adding, "It has been interpreted to be a bit more protective of the rights of disadvantaged people than the Equal Protection clause."

In an interesting twist, Professor and Deputy Dean Elizabeth Garrett, and former judge, congressman, and faculty member Abner Mikva, '51, along with others have submitted an amicus brief supporting the plaintiffs—but for different reasons. Garrett and Mikva argue that the court should rule for plaintiffs on statutory grounds and can avoid ruling on the constitutional issue.

Jacobs-Carnahan counters that while Vermont is indeed a “very liberal state,” with broad legislative prohibitions against discrimination based on sexual orientation and a hate crimes law that includes gay and lesbian persons within its protections, the absence of legislation allowing same-sex marriage reflects an intentional decision by the legislature to restrict marriage to partners of opposite genders.

Moreover, she says that because same-sex marriage is an emerging area of social policy, courts must not declare it off limits to legislative policy-makers. The state’s brief cites Justice Souter’s comments in Washington v. Glucksberg (No. 96-110), an assisted-suicide case.
Legislatures . . . have superior opportunities to obtain the facts necessary for a judgment. . . . Not only do they have more flexible mechanisms for fact-finding than the Judiciary, but their mechanisms include the power to experiment, moving forward and pulling back as facts emerge within their own jurisdictions.

Jacobs-Carnahan insists, "For a lot of reasons, the court can't just step in and say, 'We don't like the statute.' In a situation like this, scrutiny is not applied to claims of discrimination based on sexual orientation. In that context, the state's interest in promoting stability in sexual and procreative relations meets the test of plausibility, she told the court.

Both women say that despite the deep feelings regarding this case, they had no problem getting along, helped by the collegial atmosphere of Vermont practice and the mutual respect engendered by their shared University of Chicago Law School background. The New York Times even noted, "there was not a hint of nastiness between the partisans."

The women said they shared a chuckle when it turned out that both were drawing on their Law School experience with Professor Cass Sunstein, even citing law review articles by him in their respective briefs. "We definitely had the best of that one," Jacobs-Carnahan recounts with a smile. "Our articles were more recent than theirs, so we said we were endorsed by a more mature and reflective Sunstein than they were." It turned out that Jacobs-Carnahan's co-counsel had also studied under Sunstein when Sunstein was a visiting professor at Columbia.

The case has attracted more attention than either of the women could recall witnessing before. Robinson, a partner in the Middlebury office of Langrock Sperry & Wool, has practiced in Vermont for six and a half years, and Jacobs-Carnahan has been in the attorney general's office for nine years. Lines for tickets to the supreme court arguments began forming on the snow-covered courthouse steps at 5 a.m., and the hearing was videotaped for subsequent broadcast.

Jacobs-Carnahan says the procedural posture of the case makes it possible that the court will not decide the merits of the plaintiffs' argument. "It's up there right now on a motion to dismiss a complaint that we have never even answered," she said, "so the court might simply remand the case back to the trial court if it doesn't dismiss it entirely."

"A remand would be a win for us," Robinson said. "It would say that we have a constitutional claim, even if there were still facts we'd have to prove to satisfy that claim."

Whatever the court may decide, Vermont will likely continue to be a bellwether regarding same-sex marriage. Both Jacobs-Carnahan and Robinson expect that the losing side will seek a state referendum to overturn the decision.

Interest in the case and its implications is pronounced within the Law School, too. In October, 12 legal scholars participated in a well-attended symposium on same-sex marriage sponsored by The University of Chicago Law School Roundtable.

It turned out that both attorneys were drawing on their Law School experience with Professor Cass Sunstein, even citing law review articles by him in their respective briefs.
A central issue in bankruptcy law—the balance of power between debtors and creditors—was at issue in Bank of America National Trust and Savings Association v. 203 North LaSalle Street Partnership (No. 97-1418). When the case was heard by the U.S. Supreme Court earlier this year, University of Chicago law professors Douglas Baird, Eric Posner, and David Strauss played substantial roles.

Former Law School Dean Baird set aside his general aversion to involvement in litigation to assist the debtor in preparing its case. A principal motivating factor for doing so, he said, was that “the whole dynamics of reorganization turn around who can participate and who sits around the bargaining table, and this case is at the absolute center of that. This is a big, big case.”

Posner agreed that the case was important but took the opposite side. He, along with other law professors, submitted an amicus brief siding with the creditor’s position in the case. The case arose after a Chicago limited partnership defaulted on a $93 million loan from Bank of America. The bank set about foreclosing on the partnership’s only asset, 15 floors of a LaSalle Street office building. The partnership filed for Chapter 11 bankruptcy protection. The property was valued at about $54.5 million, leaving the bank with an unsecured deficiency claim of $38.5 million.

After its first reorganization plan was rejected, the debtor filed a new plan built on a provision that certain of its former limited partners would contribute new capital with a present value of about $4.1 million over a five-year period, in return for which those partners would obtain full ownership of the reorganized debtor. The old equity holders had the exclusive right under the plan to contribute new capital.

“For me, the case represented an opportunity to convince the Court that questions of statutory construction frequently cannot be answered by looking at the words of the statute alone. The larger context and statutory purpose must also be explored.”

David Strauss
When the bank, which would not be paid in full under the debtor’s new plan, objected to the plan, negotiations stalled. The stymied debtor proposed a “cramdown”—that is, the imposition of its reorganization plan despite its rejection by an impaired class of creditors. The bank objected, arguing that since former equity holders, who had only a junior claim, would receive property under the plan while the bank would not be paid in full, the absolute priority rule (the rule that senior creditors must be paid in full before junior creditors are paid) was transgressed and the cramdown should not be permitted.

The debtor responded that the $4.1 million in new investment constituted “new value” that should earn the debtor an exception from the absolute priority rule, under the “new value exception.” The new value exception is not addressed directly in the 1978 Bankruptcy Code and it never has been explicitly affirmed by the Supreme Court, although it is present as dicta in a 1939 opinion, Carr v. Los Angeles Lumber Products Co.

The bankruptcy court accepted the debtor’s new value argument over Bank of America’s objection and allowed the cramdown of the new plan. The District Court and the Seventh Circuit Court of Appeals affirmed the bankruptcy court’s decision. Because two Circuit Courts have allowed “new value” plans that otherwise would have fallen to the absolute priority rule, furthermore, he had the opportunity to collaborate with fellow faculty member David Strauss, also retained by the debtor, whom Baird characterized as both “a treat to work with” and “one of the best lawyers ever.”

For Strauss, the case has important implications that extend far beyond bankruptcy. “For me, the case represented an opportunity to convince the Court that questions of statutory construction frequently cannot be answered by looking at the words of the statute alone. The larger context and statutory purpose must also be explored.”

The Supreme Court’s ruling disappointed those who had hoped it would settle the status of the new value exception. The Court reversed and remanded the case, but did not definitely resolve the question of whether or not a new value exception exists in bankruptcy. Such ambiguous results sometimes occur in litigation. As Baird noted, expressing the view of most commentators, “It’s not obvious from the opinion who won. The meaning of the case will be debated for a long time to come.”

“It’s not obvious from the opinion who won. The meaning of the case will be debated for a long time to come.”

Douglas Baird

while two others have not, the U.S. Supreme Court granted certiorari to resolve the split.

Posner saw the case as an important opportunity for the Supreme Court to endorse the central role of creditors in bankruptcy reorganizations. “It’s their money at stake in the reorganization process, and they should control the outcome.”

For Baird, in addition to the importance of the case, what prompted him to overcome his reluctance to get involved in litigation was that one of the partners of the bankrupt partnership and many of its tenants are Law School graduates.
WHERE THE DEBATES STARTED

Reflecting on his Orange County victories, James Mercer credits his University of Chicago education for preparing him to move the law to a new level. "It was surprising to me," he says, "how often I thought back to my law school days." He says, for instance, that when the statutes and the case law seemed to be going against him, "I was guided by a simple rule I learned in my first-year Elements of Law class with Soia Mentschikoff: 'Where the reason stops, so stops the rule.'"

Mercer also remembers being stuck for an answer in Bernie Meltzer's course, saying, "Professor Meltzer . . . that's a hard question." Meltzer, '37, Mercer recalls, replied, "Life is hard, Mr. Mercer. Life is hard!" Mercer says that was a "wake-up call" he has never forgotten: "Get ready for tough questions. Realize that the satisfaction that comes from practicing law increases with the difficulty of the issues you face."

Beth Robinson concurs. "This was the most rigorous case I have been involved in," she said, "and I was prepared for it by the rigor of my Chicago education."

Mercer says his advice to future lawyers would include an urging to "choose an area that you care about, one that is intrinsically interesting to you." Following that path made a difference for Eve Jacobs-Carnahan as she developed her case in Vermont. "I was interested in issues of concern to women when I was in law school," she says, "so I took Mary Ann Glendon's comparative family law course when it was offered." Glendon, '61, taught the course as a visiting professor. "It turned out to be very valuable to me, but at the time I never would have dreamed that it was something I would use in a constitutional law case," Jacobs-Carnahan said.

Faculty, too, find the freedom to pursue their passions to be a distinctive characteristic of the Law School. Douglas Baird says that when faculty members took opposing sides in LaSalle, they "didn't even blink," even though such opposition might have been a political faux pas at another law school. Baird, who was Law School dean at that time, says "it never even occurred to anyone to ask the question" of whether there might be political repercussions for taking opposing sides in a major case.

For Dean Fischel, rigorous debate remains one of the central aspects of a legal education and of the intellectual life at the Law School.

"As dean, one of my top priorities is to ensure that The University of Chicago Law School will continue to be the place people turn to when they need insightful thinkers to address difficult legal problems." ²²

MORE MEETINGS OF CHICAGO MINDS

It's not only as opposing counsel, nor is it only in the courtroom, that University of Chicago folk encounter each other in news-making cases.

University of Chicago alumni may find themselves facing distinguished jurists with University of Chicago ties, as George Saunders, '69, did when he argued the same case twice before Seventh Circuit Court of Appeals panels that included University of Chicago professors Chief Judge Richard Posner, Judge Frank Easterbrook, and Judge Diane Wood.

Or, they may find themselves in the position of Edward Warren, '69, a lecturer at the Law School, who joined Professor Cass Sunstein at a symposium dedicated to discussing Warren's recent victory in a nationally publicized challenge to the regulatory practices of the Environmental Protection Agency. The symposium was sponsored by the prestigious AEI-Brookings Joint Center for Regulatory Studies and was convened by Christopher DeMuth, '73, President of the American Enterprise Institute.

Saunders, a name partner in the Chicago firm Saunders & Monroe, represents a class of more than 40,000 pharmacies in a case alleging that prescription drug manufacturers and drug wholesalers unlawfully charge pharmacies more than they charge such other big customers as hospitals, nursing homes, and health maintenance organizations.

The case, In re Brand Name Prescription Drug Litigation (No. 99-1167), is big and complex. Settlements exceeding $800 million have already been reached, and more than 100 lawyers have participated. It hinges on the high-powered economic analysis for which the Law School is renowned. As Saunders says, "When you get into big cases involving economics, you're going to find University of Chicago people, because that's an area where the Law School excels."
In July of this year, the Seventh Circuit panel that included Posner and Easterbrook remanded the case to the District Court that is handling the unified claims. On remand, Saunders will have the opportunity to prove that certain of the manufacturers colluded to artificially peg prices to increases in the consumer price index, and that his clients were financially damaged by that anticompetitive behavior.

Saunders says the wisdom and economic understanding of jurists such as Posner, Easterbrook, and Wood elevate the experience of practicing law: “This is a fabulous court. You always have the sense that you have had your day in court, and ultimately that’s what the law is all about.”

It was on May 14 of this year that the D.C. Circuit Court of Appeals ruled for Edward Warren’s client in American Trucking Associations, Inc. v. EPA (Nos. 97-1440 and 97-1441 and consolidated cases). Less than two weeks later, he found himself revisiting that case with Sunstein, EPA head Carol Browner, former White House counsel C. Boyden Gray, and other luminaries at a high-profile symposium organized by DeMuth.

Warren, a partner at Kirkland & Ellis in Washington, D.C., convinced the court that EPA went too far with its regulation revising national ambient air quality standards for ozone and particulate matter. Among other things, Warren had maintained that EPA “had no intelligible stopping point” in its standard-setting process. The court agreed, saying that EPA seemed to feel “free to pick any point between zero and a hair below the concentrations yielding London’s Killer Fog” (which caused 4,000 deaths in one week in 1952).

The ruling was driven by the “non-delegation doctrine.” It was the Legislative Branch that enacted the Clean Air Act under which the regulations are developed, but EPA is an Executive Branch agency. So when EPA made unexplained policy judgments in its rulemaking, it was arguably usurping the constitutional provision that “all legislative powers” belong to Congress.

Warren says, “The best evidence that EPA had no intelligible stopping point for setting those standards is its treatment of the disbenefits of ozone reduction. Under the plain language of the statute, EPA must consider the negative health effects of reducing tropospheric ozone, but it just plain ignored them.” Since ozone has been shown to help prevent cataracts and skin cancer by screening ultraviolet radiation, Warren contended that the small health benefits from reducing ozone emissions might actually be outweighed by the harm done by that reduction. In any event, Warren told the court, such factors had to be considered, and EPA did not do so.

The court agreed, writing, “[I]t seems bizarre that a statute intended to improve human health would...lock the agency into looking at only one half of a substance’s health effects in determining the maximum level for that substance.” EPA was directed to consider all the identifiable health effects of ozone and then create a standard that would result in a net benefit to human health.

In convening the symposium, DeMuth stated that the court’s ruling “could have enormous implications for regulation and the delegation of powers from Congress to federal agencies.” Sunstein faulted the court for its expectation that EPA, rather than the Congress, should provide the basis for setting air quality standards. “The main problem with the Clean Air Act is its assumption that a threshold for safety exists for all pollutants. That is often a myth, and therefore the EPA must make some judgment about how safe is safe, for which the statute provides little guidance.” The ruling, Sunstein said, went beyond previous doctrine because it “commands agencies to develop the means to measure ‘a generic unit of harm.’” “That is dramatic,” he added. “because Congress and the courts have not required the EPA to use that type of measure before.”

EPA’s rule-making process is one thing that likely will be studied at the Law School’s new Center on Civil Justice, which Sunstein founded and codirects with Professor Lisa Bernstein. The general purpose of the Center, according to Sunstein, is to generate “a lot more hard knowledge of how the legal system actually functions, so that we can improve it.” Among the research already undertaken at the Center is a study of EPA’s courtroom win-loss record during different presidential administrations.

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