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## RECENT CASES

ADMINISTRATIVE LAW — DOCTRINE OF EXHAUSTION — NORTHERN DISTRICT OF CALIFORNIA HOLDS THAT EXCLUSIVE REVIEW PROVISION BARS ENDANGERED SPECIES ACT CLAIM IN SUIT OVER PESTICIDE USED ON GENETICALLY MODIFIED HAY. — *Geertson Farms, Inc. v. Johanns*, 439 F. Supp. 2d 1012 (N.D. Cal. 2006).

It is axiomatic that courts can manipulate precedent to reach results that accord with their political or moral judgments about the facts of cases.<sup>1</sup> Of course, a skilled judge will make these results seem inevitable even when the governing law is complex and indeterminate. But such indeterminacy gives rise to a larger, if more subtle, problem: even apolitical judges have an incentive to overharmonize controlling cases, suppressing ambiguity or contradictions in the law. Like an author of literature, a judge must establish authority for himself, and the case law system requires that he do so by following and distinguishing precedent in convincing ways. Yet the resulting opinion may overstate the harmony of controlling precedent with a piecemeal treatment of controlling cases that are not in conversation. Recently, in *Geertson Farms, Inc. v. Johanns*,<sup>2</sup> Judge Breyer of the United States District Court for the Northern District of California dismissed a claim against the Environmental Protection Agency (EPA) alleging that the agency had violated the Endangered Species Act of 1973 (ESA) in setting pesticide tolerances. None of the cases cited by the court dealt with the complete set of issues presented in *Geertson*, but each spoke to one stage of the argument. To navigate this minefield of precedent, the court had to engage a different case for each turn in its reasoning. Although unremarkable by itself, the case serves as an example of the failure of precedential reasoning to dictate a clear answer and thus to meaningfully bind courts.

A group of organic farms and environmental organizations sued the EPA, alleging that in setting the tolerance level<sup>3</sup> for glyphosate, a pesticide used on genetically modified hay, the EPA had violated the ESA by failing to inquire into whether use of the pesticide would adversely affect endangered species.<sup>4</sup> Two statutes might have conferred subject

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<sup>1</sup> See, e.g., CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL? 147 (2006) (“No reasonable person seriously doubts that ideology, understood as moral and political commitments of various sorts, helps to explain judicial votes. . . . [J]udges adhere to the law, but where the law is not plain, judicial convictions play an inevitable role.”).

<sup>2</sup> 439 F. Supp. 2d 1012 (N.D. Cal. 2006).

<sup>3</sup> Tolerance levels are “the maximum levels of pesticide permitted for a food to be considered safe for human consumption and salable on the market.” *Id.* at 1014–15.

<sup>4</sup> *Id.* at 1013.

matter jurisdiction<sup>5</sup>: the EPA acted under the Federal Food, Drug, and Cosmetic Act<sup>6</sup> (FDCA) in setting the pesticide tolerance level, and the plaintiffs alleged that the agency was obligated to conduct an endangered species analysis under the ESA.<sup>7</sup> While the FDCA contained an exclusive review provision — meaning that the plaintiffs would have had to exhaust all administrative remedies before any federal court had subject matter jurisdiction under that statute<sup>8</sup> — the ESA allowed the plaintiffs to file their complaint in federal district court without first seeking administrative review.<sup>9</sup>

The EPA moved to dismiss the complaint for lack of jurisdiction, arguing that the plaintiffs' claim fell within the FDCA's exclusive review provision and that their failure to exhaust the statutorily mandated administrative remedy meant their claim was not ripe.<sup>10</sup> The plaintiffs stipulated that they had not sought review under the FDCA, but they argued that because their claim pertained to the subject matter of the ESA (endangered species) and not that of the FDCA (human health), the ESA's jurisdictional scheme allowing district court jurisdiction took precedence over that of the FDCA.<sup>11</sup> They also sought to avoid the FDCA's exclusive review provision by arguing that their complaint was directed not to any agency *action*, but to the EPA's *inaction* in failing to make the necessary inquiries regarding endangered species.<sup>12</sup> Thus, the plaintiffs argued, theirs was a claim against the procedure, not the substance, of the tolerance determination, so the exclusive review provision did not apply.<sup>13</sup>

The court began its analysis by looking to the Ninth Circuit for guidance. *Northwest Resource Information Center, Inc. v. National Marine Fisheries Service*<sup>14</sup> and *California Save Our Streams Council, Inc. v. Yeutter*<sup>15</sup> suggested that when an agency acts pursuant to one statute, but a claim regarding that action arises under another statute,

<sup>5</sup> *Id.* at 1014–15.

<sup>6</sup> 21 U.S.C.A. §§ 301–399 (West 1999 & Supp. 2006).

<sup>7</sup> 16 U.S.C. §§ 1531–1544 (2000 & Supp. IV 2004).

<sup>8</sup> 21 U.S.C. § 346a(h)(5) (2000) (“Any issue as to which review is or was obtainable under this subsection shall not be the subject of judicial review under any other provision of law.”).

<sup>9</sup> 16 U.S.C. § 1540(c) (2000 & Supp. IV 2004) (“The several district courts of the United States . . . shall have jurisdiction over any actions arising under [the ESA].”).

<sup>10</sup> Defendant EPA's Motion to Dismiss Plaintiffs' Fourth Claim for Relief and Memorandum of Points and Authorities at 8–13, *Geertson* (No. C-06-1075), 2006 WL 1417803. The EPA also sought dismissal for lack of standing. *Id.* at 17–21. The court did not reach the standing issue. *Geertson*, 439 F. Supp. 2d at 1023.

<sup>11</sup> Plaintiffs' Opposition to Defendant EPA's Motion to Dismiss Plaintiffs' Fourth Claim for Relief at 20–21, *Geertson* (No. C-06-1075), 2006 WL 2186709 [hereinafter Plaintiffs' Opposition].

<sup>12</sup> *Id.* at 19.

<sup>13</sup> *Id.* at 19–20.

<sup>14</sup> 25 F.3d 872 (9th Cir. 1994).

<sup>15</sup> 887 F.2d 908 (9th Cir. 1989).

the jurisdiction clause of the former statute controls.<sup>16</sup> But *Washington Toxics Coalition v. EPA*<sup>17</sup> held that when an agency acts according to two statutes, neither has priority over the other, and jurisdiction according to either scheme is appropriate.<sup>18</sup> Comparing the statutes in question, the court noted that in both *Yeutter* and *Northwest*, one of the two statutes had contained an exclusive review provision, whereas *Washington Toxics* had involved two statutes with nonexclusive review schemes.<sup>19</sup> The court concluded that the Ninth Circuit confers trump status on exclusive review provisions but allows jurisdiction according to either of two statutes if both contain non-mandatory jurisdictional schemes.<sup>20</sup> Thus, the court found that the question was whether the FDCA's exclusive review provision applied to the *Geertson* plaintiffs' claim.<sup>21</sup>

Lacking a Ninth Circuit case parsing the language of the FDCA's exclusive review provision, the court turned to persuasive authority in the form of two district court cases. *New York v. EPA*<sup>22</sup> interpreted the same provision of the FDCA that the EPA argued barred district court jurisdiction, and found the explicit *exclusive* review requirement to be difficult to avoid.<sup>23</sup> *American Farm Bureau v. EPA*,<sup>24</sup> in contrast, emphasized the narrowness of the FDCA's exclusive review provision and allowed district court jurisdiction over the matter by finding that the claim was slightly outside the scope of that provision.<sup>25</sup> Because the facts presented to the *Geertson* court most closely resembled those of *New York*, the court elected to follow it.<sup>26</sup> The court cited the reasoning of *American Farm Bureau* — that reading the FDCA's exclusive review provisions closely revealed their narrowness

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<sup>16</sup> See *Northwest*, 25 F.3d at 875 (“The appellants reply that the specific authorization of citizen suits under the [ESA] takes precedence over the jurisdictional provision of the Northwest Power Act. To the contrary, the [ESA] is of a general character governing citizen suits throughout the United States. The Northwest Power Act is explicit in its jurisdictional requirements . . . .” (citation omitted)); *Yeutter*, 887 F.2d at 911 (“[S]ince the claim arises under [the National Environmental Policy Act] and [the American Indian Religious Freedom Act] and not under the [Federal Power Act, which contains exclusive review provisions], SOS claims an independent statutory basis for district court jurisdiction. We find this argument unpersuasive.”).

<sup>17</sup> 413 F.3d 1024 (9th Cir. 2005).

<sup>18</sup> See *id.* at 1032 (“[A]n agency cannot escape its obligation to comply with the ESA merely because it is bound to comply with another statute that has consistent, complementary objectives.”).

<sup>19</sup> *Geertson*, 439 F. Supp. 2d at 1017.

<sup>20</sup> *Id.* at 1018.

<sup>21</sup> *Id.*

<sup>22</sup> 350 F. Supp. 2d 429 (S.D.N.Y. 2004).

<sup>23</sup> *Id.* at 441–43.

<sup>24</sup> 121 F. Supp. 2d 84 (D.D.C. 2000).

<sup>25</sup> See *id.* at 94 (“Congress has carved out specific areas of the FDCA for appellate review which do not encompass all of § 346a.”).

<sup>26</sup> See *Geertson*, 439 F. Supp. 2d at 1020–21.

— and inverted it: “*American Farm Bureau* suggests that the FDCA’s exclusive review provisions, *because* they are narrow, should be read closely and applied only where applicable.”<sup>27</sup>

In its final logical turn, the court grappled with the thorniest aspect of the case: the lack of subject matter coherence between the complaint and the statute with the exclusive review provision. The plaintiffs argued that this lack of coherence made their claim “collateral” to the agency action — an attack on the *process*, not the *substance*, of the tolerance determinations.<sup>28</sup> They invoked the Supreme Court’s suggestion in *McNary v. Haitian Refugee Center, Inc.*<sup>29</sup> that exhaustion is not necessary when a complaint does not address the substance of the agency action. In *McNary*, the Court read the Immigration and Nationality Act’s exclusive review provision “as describing the process of direct review of individual [claims], rather than as referring to general collateral challenges to unconstitutional practices and policies used by the agency in processing applications.”<sup>30</sup> The *Geertson* court, however, cited *McNary* not for this rule, but for the justifications behind the rule.<sup>31</sup> The administrative agency in *McNary* simply did not have the necessary records or factfinding capabilities to evaluate the statutory compliance of their processes,<sup>32</sup> while the EPA, by virtue of its administrative responsibilities irrelevant to the FDCA, was able to meaningfully hear ESA complaints.<sup>33</sup> Thus, the worries of the *McNary* Court were inapposite, and so was its holding.<sup>34</sup>

With these three stages of logical argument, the court engaged in a particular brand of legal complexity: the harmonization of complex precedent. It departed from paradigmatic case law reasoning in three ways. First, when it initially harmonized Ninth Circuit precedent on exhaustion, it engaged in process-of-elimination reasoning, reconciling seemingly contradictory precedent by canceling the portions that conflicted and holding according to the last rule standing. When *Yeutter*, *Northwest*, and *Washington Toxics* are viewed in conversation, they appear to be talking past one another. The court’s conclusion that the Ninth Circuit favors exhaustion only when one statute contains an ex-

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<sup>27</sup> *Id.* at 1018. The Court concluded that the “relevant question” was “not how narrow the exclusive review provision . . . is, but whether the particular claim plaintiffs bring lies within its narrow scope.” *Id.*

<sup>28</sup> Plaintiffs’ Opposition, *supra* note 11, at 18–20.

<sup>29</sup> 498 U.S. 479 (1991).

<sup>30</sup> *Id.* at 492.

<sup>31</sup> See *Geertson*, 439 F. Supp. 2d at 1022.

<sup>32</sup> See *McNary*, 498 U.S. at 496–97.

<sup>33</sup> See *Geertson*, 439 F. Supp. 2d at 1022 (“[T]he EPA has both the expertise and [the] administrative infrastructure to address the merits of plaintiffs’ claims in the first instance. . . . [T]he very statistics that plaintiffs cite to show the danger glyphosate poses to endangered species were authored by the EPA itself.”).

<sup>34</sup> See *id.* at 1023.

clusive review provision is not based on any explicit statement to that effect in the higher court's opinions — Judge Breyer merely inferred it from the fact that *Washington Toxics* was the only relevant Ninth Circuit case that allowed district court jurisdiction as well as the only case that interpreted a non-exclusive review provision.

Second, the court used precedent to determine not the correct reading of the statute, but the correct *method* of reading it.<sup>35</sup> The court relied on *American Farm Bureau* for the fact of its close reading, rather than the results of its close reading. Thus, the court incorporated a possibly contradictory case into the authority for its reasoning.

Finally, to harmonize the result of *McNary* with other case law, the court applied the justification behind the rule rather than the rule itself, accepting *McNary*'s procedure/result dichotomy when at other moments the court rejected such a distinction.<sup>36</sup> Rather than identify a potential disharmony in FDCA interpretation among lower courts, the court carved a slender gap between each contradictory case.

To see how the law in this case was indeterminate, consider a hypothetical line of reasoning based on the same facts, but with a different result:

First, instead of beginning with Ninth Circuit precedent, the court could have started by citing the Supreme Court's decision in *McNary* for the notion that exhaustion of administrative review of an agency decision is only required where the litigants challenge the substance of that particular decision and not the underlying agency procedures. Thus, the court might have concluded that since the plaintiffs had challenged the EPA's failure to consider the effects on endangered species in the process of setting the tolerance levels, exhaustion was not required.

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<sup>35</sup> Professor James Boyd White suggests that a literary reading of judicial opinions can help one to recognize this use of precedent:

For in every case the court is saying not only, "This is the right outcome for this case," but also, "This is the right way to think and talk about this case, and others like it." The opinion in this way gives authority to its own modes of thought and expression, to its own intellectual and literary forms.

JAMES BOYD WHITE, FROM EXPECTATION TO EXPERIENCE: ESSAYS ON LAW AND LEGAL EDUCATION 39 (1999).

<sup>36</sup> For example, *McNary* acknowledged that the statute in question "expressly prohibited judicial review of . . . final administrative determination of [special agricultural worker (SAW)] status," 498 U.S. at 485, yet found district court jurisdiction over "17 unsuccessful individual SAW applicants," *id.* at 487, because they raised "general collateral challenges to unconstitutional practices and policies used by the agency in processing applications," *id.* at 492. This language is in tension with, if not contradictory to, that of the *New York* court with which Judge Breyer agreed: "[Plaintiffs'] attempt to have it both ways by identifying a specific set of tolerances in their pleadings, while insisting in their briefing that their challenge was really to the process rather than the outcome of the determination, is ultimately unconvincing." *New York v. EPA*, 350 F. Supp. 2d 429, 446 (S.D.N.Y. 2004).

Second, instead of finding *New York* to be closely analogous to the *Geertson* dispute, the court could have reasoned that the collateral nature of the attack in the *Geertson* case — the fact that the plaintiffs' claim arose not under the FDCA, but under a separate statute — rendered *New York* inapposite.<sup>37</sup> It could have bolstered this conclusion by pointing out the different subject matter each statute addresses.

Third, instead of harmonizing the relevant Ninth Circuit cases by inferring that the Ninth Circuit allowed exclusive review provisions to trump other statutory grants of jurisdiction, the court could have pointed to another distinction between these cases. The Ninth Circuit, it could have noted, had denied district court jurisdiction when the litigants were attempting an end run around the review provisions of a single statute, as in *Yeutter* and *Northwest*,<sup>38</sup> but had allowed such jurisdiction when the agency acted under two complementary statutes, one of which allowed district court review, as in *Washington Toxics*. The court could have concluded that the statutory relationship in *Geertson* more closely resembled the one in *Washington Toxics* and that it therefore allowed district court jurisdiction.

Perhaps this counterfactual train of thought is weaker than the *Geertson* court's reasoning. But it is by no means plainly wrong. Why did the court elide the ambiguities of the case? One possible answer is that Judge Breyer disfavors district court jurisdiction over environmental cases, as a normative or political preference. But even if the court was neutral as to the outcome of the case, it still had to harmonize complex precedent to both insure against reversal and establish authority for itself in the eyes of the parties and of future litigants. The voice of the district judge is authoritative only so long as it is constrained. This presents a problem not only when the judge, based on his private political or moral values, desires an outcome that is in tension with authority, but also when that authority is in tension with itself. The result is an illusion of harmony, which may prevent appellate-level correction and streamlining. Such forced harmonization preserves complexity in the law and all the transaction costs, inefficiency, and inequality that come with it.<sup>39</sup>

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<sup>37</sup> In *New York*, the plaintiffs brought suit challenging the EPA's failure to reassess pesticide tolerance levels. Their attack was not collateral in that it alleged that the EPA's reassessment procedure violated the FDCA itself. It was also not "collateral" in that the substance of the plaintiffs' claim pertained to human health concerns. See *New York*, 350 F. Supp. 2d at 432–33.

<sup>38</sup> See *California Save Our Streams Council, Inc. v. Yeutter*, 887 F.2d 908, 911 (9th Cir. 1989) ("In essence, appellants seek, through careful pleading, to avoid the strict jurisdictional limits imposed by Congress.").

<sup>39</sup> See Louis Kaplow, *A Model of the Optimal Complexity of Legal Rules*, 11 J.L. ECON. & ORG. 150, 151 (1995) (noting that "[a]ctors seeking to comply with more complex rules may need to expend resources to learn how the rules apply to their contemplated acts" and that actors for whom learning such rules is inefficient will remain ignorant of them).

The study of law and literature may help illuminate the problem of authority in judicial authorship. Professor James Boyd White describes the authority of a judicial opinion as having two dimensions: one that acknowledges the authority of controlling or persuasive texts, and another that claims authority for the court itself in its ability to read and engage those texts correctly. The court must consider the *right cases*, each in the *right way*.<sup>40</sup> Thus, the judge is both reader and writer. The stakes for an appellate court, and especially the Supreme Court, are obvious: a court “not only decides the case but explains why it does so, in ways that are meant to be both predictive and binding in other cases.”<sup>41</sup> But the stakes are high for a district judge as well, as his legitimacy is proportional to how constrained he appears to be.<sup>42</sup>

When a judge sets out to establish authority for himself, he must identify not only the controlling or persuasive cases, but also their meaning — or meanings. Judge Posner argues that discovering the meaning of an opinion, its “paraphrasable content” as distinct from its style, requires little interpretive energy: “I do not ask whether [the study of literature] can assist the interpretation of judicial opinions. The interpretation of a judicial opinion may be difficult but is rarely problematic . . .”<sup>43</sup> Professor White disagrees, placing the meanings of judicial opinions somewhere between the literal and the indeterminate: “These meanings are not simply items of information as plainly on the page as a pebble is in the hand, nor are they the creations of a community of readers . . .”<sup>44</sup> Both commentators miss an important dimension of judicial meaning: that it is often gleaned not from the mind of a single judge writing a single opinion, but from a constellation of precedents that are in tension, not conversation, with each other.

Yet a judicial opinion can hide the dissonance that springs from such a constellation of precedents, creating a false impression of harmony among the cases and therefore a false sense that the law in this

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<sup>40</sup> “The judicial opinion . . . makes two claims of authority: for the texts and judgments to which it appeals, and for the methods by which it works.” WHITE, *supra* note 35, at 40.

<sup>41</sup> *Id.* at 41.

<sup>42</sup> This motivation is also present, perhaps equally so, in the Supreme Court. Although able to overrule itself, the Court is wary of doing so, recognizing the importance for its legitimacy of appearing constrained by precedent. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 865–66 (1992) (“The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make. Thus, the Court’s legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.”).

<sup>43</sup> RICHARD A. POSNER, LAW AND LITERATURE 269 (1988).

<sup>44</sup> JAMES BOYD WHITE, HERACLES’ BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW 82 (1985).

area is “settled.” This practice may discourage an appellate court from taking an opportunity to correct dissonant case law. It also contributes to indeterminacy in the law, because subtle shifts in the way in which the court engages the controlling cases can yield a different result. This indeterminacy frustrates efficiency — which is ironic, given that efficiency is one of the major goals of administrative exhaustion<sup>45</sup> — by increasing transaction costs among litigants, and it may also systematically advantage savvy or wealthy litigants.<sup>46</sup>

Perhaps there is an important distinction between indeterminacy and complexity. Just because an area of law is complex does not mean that there is no right answer to a legal problem within it.<sup>47</sup> But a field of complicated precedent presents choices to an interpreter — for example, the *Geertson* court — and the content and syntax of these choices will affect the outcome of the interpretation. When Professor White observes that, in understanding literary texts, “[a] train of thought, however true, can often be opposed by another, equally true; the best truth we can achieve is therefore one that comprises both,”<sup>48</sup> his observation, but not his prescription, is apt for reading judicial opinions. Because its purpose is to resolve disputes, the legal system demands a single answer. This need for an answer, combined with the common law ethic of appearing constrained by precedent, no matter how ambiguous, tends to obscure troublesome complexity and indeterminacy that an appellate court might wish to cure. These forces may prevent the law from “work[ing] itself pure.”<sup>49</sup>

Although even a slight shift in *Geertson*’s reasoning might have yielded a different result, the machinery is too complex to reproach. The same might happen in the classic case of a judge using legal complexity to bend, stretch, and distinguish precedent to achieve his ends, but *Geertson* suggests a scenario that may be even more disturbing: the legally “correct” answer may not be suppressed for political reasons — it may simply not exist at all. The overharmonization of legal precedent apparent in the opinion obscures this fact and gives the impression that the answer is there, if one is only smart enough to find it.

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<sup>45</sup> See *Woodford v. Ngo*, 126 S. Ct. 2378, 2385 (2006) (citation omitted).

<sup>46</sup> Legal advice about how to navigate a complex regulatory regime costs money, which advantages wealthier litigants. See, e.g., Peter H. Schuck, *Legal Complexity: Some Causes, Consequences, and Cures*, 42 DUKE L.J. 1, 19 (1992).

<sup>47</sup> For example, the tax code is complicated, but not necessarily indeterminate. As Professor Schuck observes, “Tax law, while including many bright-line rules, is quite complex; its rules are dense, technical, and elaborated through a differentiated system of agencies and tribunals.” *Id.* at 5–6.

<sup>48</sup> JAMES BOYD WHITE, *ACTS OF HOPE: CREATING AUTHORITY IN LITERATURE, LAW, AND POLITICS* 148 (1994).

<sup>49</sup> *Omychund v. Barker*, (1744) 1 Atk. 21, 33, 26 Eng. Rep. 15, 23 (Ch.) (argument of Mr. Murray, then Solicitor General of England, later Lord Mansfield) (emphasis omitted); see also LON L. FULLER, *THE LAW IN QUEST OF ITSELF* 140 (1940).