

## Michael Eric Herz

Arthur Kaplan Professor of Law  
Benjamin N. Cardozo School of Law  
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### EMPLOYMENT

1988-  
date Arthur Kaplan Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University. Previously Full (1993-2010), Associate (1991-1993), and Assistant (1988-1991) Professor.

Vice Dean, 2006-2009  
Senior Associate Dean, 1996-2000

Co-Director, Israeli Supreme Court Project, 2014-2018

Director or Co-Director, Floersheimer Center for Constitutional Democracy, 2004-2015

Courses taught: Administrative Law, Climate Change and the Law, Constitutional Law I, Constitutional Law II, Criminal Law, Elements of Law, Environmental Law, Environmental Policy Seminar, Governing in the Digital Age, Land Use Regulation, Legislation, Property, Supreme Court Seminar

Chaired the Strategic Planning Committee (2005-2006), the Self Study Committee (2002-2003), and the Ad Hoc Committee on the Future of the Law School (1996-1997); at various points, in most cases more than once, chaired the Appointments, Adjunct Appointments, Clerkship, Clinical Appointments, Educational Policy, Rules, and Steering (promotion and tenure) Committees; served as a member of each of those committees and of the Long Range Planning and Academic Standards Committees; member of the Yeshiva University Sustainability Task Force (2008-2015)

Fall 2018 Scholar in Residence, Columbia Law School  
New York, NY

2011-  
2012 Visiting Research Scholar and Fellow, Program in Law and Public Affairs,  
Woodrow Wilson School, Princeton University

- Fall 2013 and five prior semesters Adjunct Professor, NYU School of Law  
Taught Administrative Law; Advanced Administrative Law; Legislation and the Regulatory State
- Spring 2009, Spring 2005 Adjunct Professor, Columbia School of Law  
Taught Environmental Law
- 2005-2006 Visiting Professor, NYU School of Law  
Taught Advanced Administrative Law, Administrative & Regulatory State, Public Interest Environmental Law Practice, Constitutional Law
- Fall 2002, 2003, 2004 Visiting Professor of Public and International Affairs, Princeton University  
Co-taught Environmental Regulation: Law, Economics, and Public Policy
- 2000-2001 Visiting Professor, NYU School of Law  
Taught Administrative Law, Environmental Law, Advanced Environmental Law
- 1985-1988 Staff Attorney, The Environmental Defense Fund, Inc., New York, NY
- 1983-1985 Law Clerk to the Honorable Byron R. White, Associate Justice, United States Supreme Court
- 1982-1983 Law Clerk to the Honorable Levin H. Campbell, Chief Judge, United States Court of Appeals for the First Circuit

## EDUCATION

- J.D., 1982 University of Chicago Law School, Chicago, IL  
Top 5%; Order of the Coif; *Law Review* Comment Editor
- B.A., 1979 Swarthmore College, Swarthmore, PA  
English major; graduated with Honors; Phi Beta Kappa

## PUBLICATIONS

### Books:

ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES (Wolters Kluwer, 8th ed. 2017) (7th ed. 2011) (with Stephen Breyer, Richard Stewart, Cass Sunstein, and Adrian Vermeule)

A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES (American Bar Association, 2d ed. 2015) (co-editor with Richard Murphy and Katherine Watts) (1<sup>st</sup> ed. 2005, co-editor with John F. Duffy)

THE CONTENT AND CONTEXT OF HATE SPEECH: RETHINKING REGULATION AND REMEDIES (co-editor with Peter Molnar) (Cambridge University Press 2012)

ELEMENTS OF LAW (Lexis/Nexis, 2d ed. 2010) (1st ed. 1994) (with Eva Hanks & Steven Nemerson)

### Articles and Book Chapters:

*E-Rulemaking's Democratic Transformation -- Anticipated, Actual, and Potential*, 3 INTERNATIONAL JOURNAL OF OPEN GOVERNMENTS 195 (2016), <http://ojs.imodev.org/index.php/RIGO/article/view/62/153>

*Chevron is Dead; Long Live Chevron*, 115 COLUMBIA LAW REVIEW 1867 (2015)

*ACUS—and Administrative Law—Then and Now*, 83 GEORGE WASHINGTON LAW REVIEW 1217 (2015)

*Judicial Review of Statutory Issues Outside of the Chevron Doctrine*, in A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES (Michael Herz, Richard Murphy, & Kathryn Watts eds., 2d ed. 2015)

*Using Social Media in Rulemaking: Possibilities and Barriers*, Administrative Conference of the United States (2013), available at <http://ssrn.com/abstract=2371406>

*"Data, Views, or Arguments": A Ruminantion*, 22 WILLIAM & MARY BILL OF RIGHTS JOURNAL 351 (2013)

*Some Thoughts on Judicial Review and Collaborative Governance*, 2009 JOURNAL OF DISPUTE RESOLUTION 361

*Purposivism and Institutional Competence in Statutory Interpretation*, 2009 MICHIGAN STATE LAW REVIEW 89

*Law Lags Behind: FOIA and Affirmative Disclosure of Information*, 7 CARDOZO JOURNAL OF INTERNATIONAL & COMPARATIVE LAW 577 (2009)

*The Role of One Religiously Affiliated Law School*, 49 JOURNAL OF LEGAL EDUCATION 136 (2009)

*Les Grands Débats Autour du Droit de l'Environnement aux États-Unis*, in DROIT ET ENVIRONNEMENT, POUVOIRS NO. 127, at 87 (2008)

*Judicial Review of Statutory Issues Outside of the Chevron Doctrine*, in A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES (John F. Duffy & Michael Herz eds. 2005)

*Abandoning Recess Appointments?: A Comment on Hartnett (and Others)*, 26 CARDOZO L. REV. 443 (2005)

*The Rehnquist Court and Administrative Law*, 99 NORTHWESTERN LAW REVIEW 297 (2004)

*Rulemaking*, in DEVELOPMENTS IN ADMINISTRATIVE LAW AND REGULATORY PRACTICE, 2002-2003, at 129 (Jeffrey Lubbers ed. 2004)

*Harnessing Information Technology to Improve the Environmental Impact Review Process*, 12 NEW YORK UNIVERSITY ENVIRONMENTAL LAW JOURNAL 18 (2003) (with Michael B. Gerrard)

*Nearest to Legitimacy: Justice White and Strict Rational Basis Scrutiny*, 74 UNIVERSITY OF COLORADO LAW REVIEW 1329 (2003)

*The Uneasy Case for DOJ Control of Federal Litigation*, 5 UNIVERSITY OF PENNSYLVANIA JOURNAL OF CONSTITUTIONAL LAW 558 (2003) (with Neal Devins)

*Rulemaking*, in DEVELOPMENTS IN ADMINISTRATIVE LAW AND REGULATORY PRACTICE, 2001-2002, at 147 (Jeffrey Lubbers ed. 2003)

*Washington, Patton, Schwarzkopf, and . . . Ashcroft?*, 19 CONSTITUTIONAL COMMENTARY 663 (2002)

*How The Electoral College Imitates the World Series*, 23 CARDOZO LAW REVIEW 1191 (2002)

*The Supreme Court in Real Time: Haste, Waste, and Bush v. Gore*, 35 AKRON LAW REVIEW 185 (2002)

*Reading the Clean Air Act after Brown & Williamson*, 31 ENVIRONMENTAL LAW REPORTER 10151 (2001)

*The Consequences of DOJ Control of Litigation on Agencies' Programs*, 52 ADMINISTRATIVE LAW REVIEW 1033 (2000) (with Neal Devins)

*Judicial Review*, in DEVELOPMENTS IN ADMINISTRATIVE LAW AND REGULATORY PRACTICE, 1998-99, at 45 (Jeffrey Lubbers ed. 2000)

*The Battle that Never Was: Congress, the White House, and Agency Litigation Authority*, 61 LAW AND CONTEMPORARY PROBLEMS 205 (Winter 1998) (with Neal Devins)

*The Legislative Veto in Times of Political Reversal: Chadha Reconsidered in Light of Current Events*, 14 CONSTITUTIONAL COMMENTARY 319 (1997)

*Structures of Environmental Criminal Enforcement*, 7 FORDHAM ENVIRONMENTAL LAW JOURNAL 679 (1996)

*"Do Justice!": Variations of a Thrice-Told Tale*, 82 VIRGINIA LAW REVIEW 111 (1996)

*Employee Trip Reduction and Low-Emission Vehicles*, in 1 NEW YORK ENVIRONMENTAL LAW SERIES: AIR & WATER POLLUTION 13:501, 13:601 (1995)

*An Introduction to American Environmental Law*, 4 TILBURG FOREIGN LAW REVIEW 327 (Tilburg University, The Netherlands, 1995), reprinted in 1995 GLOBAL ENVIRONMENTAL LAW ANNUAL 35 (1995)

*Rediscovering Francis Lieber: An Afterword and Introduction*, 16 CARDOZO LAW REVIEW 2107 (1995)

*The Attorney Particular: The Governmental Role of the Agency General Counsel*, in GOVERNMENT LAWYERS: THE FEDERAL LEGAL BUREAUCRACY AND PRESIDENTIAL POLITICS 143 (Cornell W. Clayton ed., 1995)

*Justice Byron White and the Argument that the Greater Includes the Lesser*, 1994 BRIGHAM YOUNG UNIVERSITY LAW REVIEW 227

*Parallel Universes: NEPA Lessons for the New Property*, 93 COLUMBIA LAW REVIEW 1668 (1993)

*Imposing Unified Executive Branch Statutory Interpretation*, 15 CARDOZO LAW REVIEW 219 (1993)

*Choosing Between Normative and Descriptive Versions of the Judicial Role*, 75 MARQUETTE LAW REVIEW 725 (1992)

*Deference Running Riot: Separating Interpretation and Lawmaking Under Chevron*, 6 THE ADMINISTRATIVE LAW JOURNAL OF THE AMERICAN UNIVERSITY 187 (1992)

*Judicial Textualism Meets Congressional Micromanagement: A Potential Collision in Clean Air Act Interpretation*, 16 HARVARD ENVIRONMENTAL LAW REVIEW 175 (1992)

*United States v. United States: When Can the Federal Government Sue Itself?*, 32 WILLIAM & MARY LAW REVIEW 893 (1991)

*Textualism and Taboo: Interpretation and Deference for Justice Scalia*, 12 CARDOZO LAW REVIEW 1663 (1991)

*Environmental Auditing and Environmental Management: The Implicit and Explicit Federal Regulatory Mandate*, 12 CARDOZO LAW REVIEW 1241 (1991)

*The Air Toxics Dilemma: Whither Section 112?*, 1990 ANNUAL SURVEY OF AMERICAN LAW 135

*Permitting and Review for MSW Incinerators*, in RECYCLING AND INCINERATION: EVALUATING THE CHOICES 246 (Richard A. Denison & John Ruston eds., 1990)

*Wetland Preservation and Restoration: Changing Federal Priorities*, 7 VIRGINIA JOURNAL OF NATURAL RESOURCES LAW 221 (1988) (with James T.B. Tripp)

Comment, *Forfeiture Seizures & the Warrant Requirement*, 48 UNIVERSITY OF CHICAGO LAW REVIEW 960 (1982)

#### **Shorter Pieces and Book Reviews:**

*Preface*, in DEVELOPMENTS IN ADMINISTRATIVE LAW AND REGULATORY PRACTICE, 2011 (Jeffrey Lubbers ed. 2012)

*Chair's Messages*, ADMINISTRATIVE AND REGULATORY LAW NEWS (each issue, 2011-2012)

*Dean Verkuil*, 32 CARDOZO LAW REVIEW 2173 (2011)

*Agencies, Courts, and Statutory Purpose*, 31 ADMINISTRATIVE & REGULATORY LAW NEWS 8 (Spring 2006)

Entry on *New York Times v. United States*, THE ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES (Paul Finkelman ed. 2006)

*Rulemaking*, in DEVELOPMENTS IN ADMINISTRATIVE LAW AND REGULATORY PRACTICE, 2004-2005 (Jeffrey Lubbers ed. 2006) (with Richard Stoll & Katherine Lazarsky)

*Robert Dahl's How Democratic is the American Constitution?: An Introduction, with Notes on the Electoral College*, 26 CARDOZO L. REV. 2515 (2005)

*A Blackletter Statement of Federal Administrative Law*, 54 ADMINISTRATIVE LAW REVIEW 17 (2002) (Assistant Chief Reporter for project with multiple authors)

*Introduction to A Blackletter Statement of Federal Administrative Law*, 54 ADMINISTRATIVE LAW REVIEW 5 (2002) (with Paul Verkuil & John Duffy)

Book Review, THE NEW YORK LAW JOURNAL (July 27, 1999), p. 2 (reviewing Jethro Lieberman, *A Practical Guide to the Constitution*, and Kermit Hall, *The Oxford Guide to U.S. Supreme Court Decisions*)

*Case Analysis of Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 8 JOURNAL OF ENVIRONMENTAL LAW 179 (London: Oxford University Press, 1996)

*The Application of Federal Laws to Congress*, 50 THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 270 (1995) (for the Committee on Federal Legislation)

*The Answer Is: Perhaps*, 2 NEW EUROPE LAW REVIEW 137 (1994) (reviewing Christopher Stone, *The Gnat is Older Than Man*)

Book Review, 63 QUARTERLY REVIEW OF BIOLOGY 110 (1988) (reviewing Thomas Hoban and Richard Brooks, *Green Justice*)

### **Miscellaneous:**

*Why Kavanaugh Should Not Attend the White House Ceremony*, N.Y. TIMES, Oct. 8, 2018, <https://www.nytimes.com/2018/10/08/opinion/kavanaugh-white-house-ceremony.html>

*Do Not Forget to Wear a Hat*, THE REGULATORY REVIEW, Aug. 28, 2017, <https://www.theregreview.org/2017/08/28/herz-do-not-forget-hat/>

*We Are All Publicists Now*, THE REGULATORY REVIEW, May 3, 2016, <https://www.theregreview.org/2016/05/03/herz-we-are-all-publicists-now/>

*The challengingly uncategorizable Recess Appointments Clause*, SCOTUSBLOG, July 15, 2013, <http://www.scotusblog.com/2013/07/167445/>

### **SELECTED ACADEMIC PRESENTATIONS**

Panelist, “The Rise of Fake Comments in Rulemaking,” Symposium on Mass and Fake Comments in Rulemaking, Administrative Law Review, American University, October 5, 2018

“Participation, Democracy, and the Electronic (non)Revolution in Rulemaking,” University of Chicago Law School Public Law and Legal Theory Workshop, April 18, 2016

Testimony before the United States Senate Committee on Homeland Security and Governmental Affairs Subcommittee on Regulatory Affairs and Federal Management, “Examining Agency Use of Deference, Part II”, Washington, DC, March 17, 2016

“Rulemaking Outreach through Social Media – Stimulating or Corrupting Public

Comment?," Citizen Participation and Collaboration in Promoting Open Government, XIVth International Symposium on the Law and Governance of the Information Society, The Sorbonne, Paris, France, March 8, 2016

"Participation, Democracy, and the Electronic (non)Revolution in Rulemaking," Emory Law School Faculty Colloquium, February 24, 2016

"Participation, Democracy, and the Electronic (non)Revolution in Rulemaking," UConn Law School Faculty Colloquium, February 10, 2016

"Participation, Democracy, and the Electronic (non)Revolution in Rulemaking," Seton Hall Law School Faculty Colloquium, February 3, 2016

"The New *Chevron* Skeptics," 18<sup>th</sup> Annual Federalist Society Faculty Conference, New York, NY, January 8, 2016

"EPA Regulation of Greenhouse Gases: Executive Overreach or Faithful Agency?," Law in the Public Service, Princeton University, November 11, 2014

"Comment on Administrative Licensing and Regulatory Reform," New Approaches to International Regulatory Cooperation, NYU School of Law, February 28, 2014

"Data, Views, and Arguments': A Ruminantion," Symposium in Honor of Charles Koch, William and Mary School of Law, March 15, 2013

"Information as a Regulatory Tool," David Bradford Lectures, Program in Science, Technology, and Environmental Policy, Princeton University, March 26, 2012

"Democracy Deficit or Democracy Surplus? Agency Rulemaking in an Electronic Age," Program in Law and Public Affairs Seminar, Princeton University, February 15, 2012

"Proportionality in Administrative Law," Conference on Proportionality in Theory and Practice, Cardozo School of Law, September 26, 2012

Comments on Lemos, "State Enforcement of Federal Law," Cardozo Law School Faculty Scholarship Conference, September 12, 2010

"Judicial Review in a Regime of Collaborative Governance," Symposium on Collaborative Governance: The Future of Regulation, American University, April 2, 2009

"Institutional Design and the Internal Separation of Powers," Symposium on "Executive Power: New Directions for the New Presidency?," Emory Law School, February 12, 2009

"The Role of Religiously Affiliated Law Schools," Presidential Panel Discussion, Annual Meeting of the Association of American Law Schools, San Diego, CA, January 8, 2009



“Institutional Capacity and Statutory Purpose: Does the Who Affect the What of Statutory Interpretation?,” Symposium on Administrative Statutory Interpretation, Michigan State University, November 11, 2008

“Recent Developments in Rulemaking,” 2005 Administrative Law Conference, ABA Section of Administrative Law & Regulatory Practice, Washington, DC, November 2005

“Recent Developments in Rulemaking,” 2004 Administrative Law Conference, ABA Section of Administrative Law & Regulatory Practice, Washington, DC, November 2004

“The Rehnquist Court and Administrative Law,” Symposium on the Rehnquist Court, Northwestern University School of Law, Chicago, IL, April 23, 2004

“Comments on the Constitutional Law of the Appointments Process,” *Jurocracy and Distrust* (symposium on the federal judicial appointments process), Cardozo School of Law, New York, NY, March 22, 2004

“Recent Developments in Rulemaking,” 2003 Administrative Law Conference, ABA Section of Administrative Law & Regulatory Practice, Washington, DC, November 2003

“Nearest to Legitimacy: Justice White, Equal Protection, and Nondeferential Judging,” Symposium on Justice White and the Exercise of Judicial Power, University of Colorado School of Law, January 24-25, 2003

“Recent Developments in Rulemaking,” 2002 Administrative Law Conference, ABA Section of Administrative Law & Regulatory Practice, Washington, DC, October 18, 2002

“Bill Mazerowski, the 1960 Pirates, and George W. Bush,” Symposium on Law and Baseball, Cardozo School of Law, April 30, 2001

“The Electoral College and the World Series,” Votes and Voices: Reevaluations in the Aftermath of the 2000 Presidential Election, Cardozo School of Law, April 26, 2001

“American Environmental Law,” Conference on Current Issues in American and European Law, with members of the European Court of Justice, NYU School of Law, April 16, 2000

“Why and How to Regulate to Protect the Environment,” Yeshiva University Academic Colloquia Series, November 24, 1999

“Recent Developments in Judicial Review,” 1999 Administrative Law Conference, ABA Section of Administrative Law & Regulatory Practice, Washington, DC, October 15, 1999

“Teaching Legal Method,” Legal Methods Colloquium, Emory University School of Law, October 5, 1998

“Nondelegation and the Legislative Process,” Symposium on “The Nondelegation Doctrine from Constitutional and Policy Perspectives,” Cardozo School of Law, March 19, 1998

“Federal and State Environmental Initiatives,” Colloquium on “Comparative Approaches to the Enforcement of Environmental Regulations,” NYU School of Law, March 6, 1998

“Recent Developments in Judicial Review,” Program on Recent Judicial and Legislative Developments in Administrative Law and Regulatory Practice, ABA Section of Administrative Law and Regulatory Practice, Washington, DC, October 17, 1997

“‘The Warfare Over Litigation Authority’: DOJ, EPA, Congress, and Assigning Lawyers’ Tasks,” Faculty Workshop, Vanderbilt School of Law, September 26, 1996

“Environmental Crimes: Theory and Practice,” Symposium on “Recent Developments in Environmental Crime,” Fordham Law School, February 29, 1996

“The Uneasy Case for Department of Justice Control of Federal Government Litigation,” Faculty Workshop, Marshall-Wythe School of Law, College of William & Mary, January 19, 1996

“‘Do Justice’: Variations of a Thrice-Told Tale,” Faculty Workshop, Emory University School of Law, September 28, 1995

“Case Management Seminar for DEC Administrative Law Judges,” sponsored by the NYS Bar Association, Environmental Law Section, September 30, 1994

“Employee Commute Options,” 1994 Transportation Law Workshop, Cardozo Law School, April 7, 1994

“NEPA Lessons for the New Property,” Faculty Workshop, NYU School of Law, January 1993

“NEPA Lessons for the New Property,” Faculty Workshop, Cardozo School of Law, November 1992

“Executive Branch Legal Interpretation,” Symposium, Cardozo Law School, November 15, 1992

Moderator and lead organizer, “The Role and Procedures of the President’s Council on Competitiveness,” New York City Bar Association, May 19, 1992

Co-organizer, panelist, and moderator, “Corporate Governance and the Environment: Beyond the Transactional Audit,” Cardozo Law School, September 17, 1990

## OTHER ACTIVITIES

### Administrative Conference of the United States

Senior Fellow, 2017-date

Public Member, 2010-2017

Consultant, *The Use of Social Media in Rulemaking*, 2012-2013

### American Bar Association, Section of Administrative Law and Regulatory Practice

Chair, Section Fellows, 2015-date

Immediate Past Chair, 2012-2013

Chair, 2011-2012

Chair Elect, 2010-2011

Vice Chair, 2009-2010

Member of the Council, 2005-2008

Co-Chair, Annual Administrative Law Conference, 2006, 2007

Chair or Co-Chair, Committee on Rulemaking, 2002-2006

Assistant Chief Reporter, Administrative Procedure Act Project, 1998-2003

Vice Chair, Committee on Judicial Review, 1996-2010

### Contributing Editor for Administrative Law, JOTWELL, 2009-date

### Association of the Bar of the City of New York

Committee on Federal Legislation, 1993-1996

Committee on Administrative Law, 1990-1993

Chair, Environmental Law Subcommittee

Committee on Environmental Law, 1987-1990

### U.S. Congress, Office of Technology Assessment, Advisory Panel for Municipal Solid Waste Assessment (1988-89)

Member of the bars of the State of New York, the U.S. Supreme Court, the U.S. Court of Appeals for the D.C. Circuit, and the U.S. District Courts for the Southern and Eastern Districts of New York and the Eastern District of Michigan