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## WHY THE MODERN ADMINISTRATIVE STATE IS INCONSISTENT WITH THE RULE OF LAW

Richard A. Epstein\*

### I. THE CLASSICAL LIBERAL PRESUMPTION AGAINST ADMINISTRATIVE LAW

The subject of this conference is one of immense importance to us all. What constraints, if any, does the elusive but vital conception of the rule of law place on the interpretation of the Constitution, particularly in its relationship to the rise of the administrative state? The usual way to ask this question today presupposes that the rise of the administrative state, which took place inexorably between the founding of the Interstate Commerce Commission in 1887 and the final triumph of the New Deal vision of the Constitution exactly fifty years later, was a legitimate endeavor in response to the changed conditions brought on by the rapid industrialization in the post Civil War period.<sup>1</sup> The creation of what

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<sup>1</sup> See generally JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* (1938).

has been optimistically called “the Fourth Branch” of government necessarily poses challenges on the integration of this fourth branch of government with the other three branches, for which there is explicit textual authority. That task must, as Peter Strauss reminds us on more than one occasion, provide for the separation of functions (which is nowhere stated in the Constitution) in order to achieve the protections against the arbitrary application of power which the separation of powers (which is in the Constitution) was designed to preserve.<sup>2</sup> In effect, the new vision rests on a quid pro quo of constitutional dimensions: we can take away those particular limitations that the Constitution provides so long as we substitute in alternative protections against the concentration of power that work as well as the ones they supplant. The weakness of this argument should, I think, be evident on its face, at least to anyone who does not share the Progressive vision of good government. That vision rests on the key assumption that government officials armed with technical expertise and acting in good faith to advance the public interest can systematically outperform any system of limited government whose major function was to support and protect market institutions.

As I have made clear on many occasions, I do not accept, even today, this vision of the administrative state.<sup>3</sup> First, I do not think that it is possible to shield administrative agencies in highly sensitive areas from various forms of factional and political influence that have little or nothing to do with technical expertise. These risks are, if anything, increased once it is possible to select persons exclusively for their views on a single topic. Now all interested parties can hone in on single issues in selecting key administrative officials. Unlike the situation in choosing people for courts of general jurisdiction, these parties need not be slowed down by worrying whether their favored candidates on one issue will disappoint them on a second. Stated otherwise, expertise is an overrated virtue,

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<sup>2</sup> For a discussion of the phrase, see Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984). He reiterated his position in his conference remarks, which were not published in this volume.

<sup>3</sup> See generally RICHARD A. EPSTEIN, *HOW PROGRESSIVES REWROTE THE CONSTITUTION* (2006).

while the risk of political capture by interest groups and the discord that faction produces is an underappreciated vice.

My more skeptical views are, I believe, more consistent with the general intellectual outlook of the Framers, with their strong classical liberal orientation. The central assumption is that all legal regulation should be examined under a (rebuttable) presumption of error, such that all bills should have to face an uphill battle before they are enacted into law. This presumption rests in part on a general satisfaction with the broad structure of common law principles insofar as they supply orderly rules for most social interaction. The common law rule of occupation or first possession is a good baseline for the acquisition of unowned property in the state of nature. The prohibition against the use of force or fraud is a good way to protect both person and property, which strongly facilitates market institutions by refusing to treat competitive losses and compensable harms. Next the law of contract allows for the exchange of assets or for cooperation among individuals through various forms of entities and associations. Positive law is uniformly needed to secure these rights, so that no one would think that rules of formality, such as those found in the Statute of Frauds, or rules of recordation would fail to overcome the presumption against legislation. These sensible precautions reduce the risk of error and double dealing and increase the reliability of voluntary transactions, without showing favoritism to any select group of private actors. But much legislation, obviously, does not assume that welfare-maximizing form, so the task of articulating a good set of constitutional constraints is to weed out those statutes that undermine the basic structure of property, contract and tort rights, from those which are designed to secure its systematic and sensible implementation.

In making these claims, I am taking exception to the characterization of the common law that Jeremy Waldron attributes to Jeremy Bentham, as a "barbaric" set of rules that any sensible legislature would be anxious to undo.<sup>4</sup> Indeed, quite the opposite is true historically; many common law rules are not creatures of the arbitrary will of English judges but date back to Roman times. Their overall survival on the matters that they dealt with are quite high in some areas — partnerships and bailments, for example, even if those

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<sup>4</sup> See JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* 17 (1999).

rules proved less successful in other areas, such as agency or third party beneficiaries. I take it for granted that just about any rule that alters these doctrines in an incremental way faces no serious intellectual obstacle. Surely, no extravagant reading of the Constitution prohibits their adoption.

Yet once more systematic forms of regulation are at stake, then we do run the risk that legislatures will dismantle worthwhile common law conceptions. There are two distinct approaches to deal with this problem. The first of these is to extend systematic rights-based protection to contracts, the free exercise of religion, and private property—all of which turn out to be more complicated than any simple declaration of rights might suggest, and to which I shall turn briefly in due course. The second approach is to work by way of indirection. The idea is to adopt structures that make it more difficult to pass and implement legislation, in the uncertain hope that this more arduous process will be more likely to weed out factional reforms of dubious merit than genuine social improvements.

With all filters of this sort, there are two kinds of errors. The first involves passing legislation that ought not to see the light of day; the second is the bottling of legislation that ought to pass. Separation of powers and checks and balances are best seen as devices that rest on a global judgment that the errors of going too fast are more dangerous than those of going too slow. Our proper understanding of how administrative agencies fit within our basic constitutional structure should start with this presumption against state action.

In order to develop these themes, this essay shall proceed in three parts. In the first part, I shall address the institutional question of whether the Constitution provides, in its basic structures, for the creation of independent administrative agencies, as was held in the important Supreme Court decision in *Humphrey's Executor v. United States*.<sup>5</sup> I believe that this question should be answered in the negative, but that the point, while true, does not carry with it as much weight as one might suppose, given the attenuated nature of Presidential control of administrative agencies located within the executive branch. Questions of the rule of law do not end with the creation of these independent agencies. It also has much to do with the

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<sup>5</sup> 295 U.S. 602 (1935).

level of judicial oversight. I address these questions in Part II, and conclude that the level of deference afforded to administrative agencies under current law is also inconsistent with any strong conception of the rule of law. Yet even if this conclusion does not return us to the idea of a limited government, for that requires, as I argue in Part III, a renewed substantive commitment to the principles of freedom of association and contract whose rejection paved the way for the rise of the modern administrative state. Taken together, however, the overall conclusion is clear: the administrative state gives rise to a peculiar blend of bureaucratic rule and discretion that does not comport with the historical conception of a rule of law, and its central concern with the control of arbitrary power.<sup>6</sup> This nation has surely done well with the protection of people from arbitrary arrest and seizure of property. It has done far less well in setting the rules which allow the state to impose restrictions on the *use* and *disposition* of labor and property, where arbitrariness is a common feature of both our legislative and administrative system.

## II. DOES THE CONSTITUTION PROVIDE FOR INDEPENDENT ADMINISTRATIVE AGENCIES?

The common view on this question is that the Constitution, especially as it has evolved over time, is comfortable with the creation of administrative agencies. One of the most notable defenders of this position is Peter Strauss. Strauss, who is very much steeped in the modern administrative law tradition, takes a far cheerier view of the basic issue. I dissent from that position, and believe that the strong structural protections found in the original Constitution should not have been swapped out for a mess of administrative porridge. In my view, the modern switch to the full-blooded administrative state was not done in order to make the older system work better. It was to make it work differently. The obvious inquiry is whether the structural constraints of the separation of powers (and checks and balances) regime place explicit or implicit limitations on the growth of government that the newer system of functional separation removes. The answer to that question has to be "yes, it does."

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<sup>6</sup> For my discussion of this principle in greater detail, see Richard A. Epstein, *Beyond the Rule of Law: Civic Virtue and Constitutional Structure*, 56 GEO. WASH. L. REV. 149 (1987); RICHARD A. EPSTEIN, WHAT DO WE MEAN BY THE RULE OF LAW? (2005).

I am doubtful that the effective use of executive departments to enforce statutes under the 1787 regime would lead to the same size or ambition of government we have now. One main reason why the administrative agencies are said to be left “independent”—a term that needs some real explication—of the President is that Congress wishes to create a system whereby its own powers can be delegated in ways that do not lead to a corresponding increase in the scope of Presidential power. Congress often takes this course so it can have the best of both worlds: an increase in the size of government activities that it desires for substantive reasons, without the concomitant increase in the scope of Presidential Power, which Congress fears. The expansion of the administrative state leads to both an increase in the size of government and certain skewing in the direction of Congress in favor of more meddlesome approaches. If it were otherwise, then we would not see these agencies proliferate as they did throughout the 20<sup>th</sup> century. And so the question is fairly asked, how do we get there?

The first path is to claim that the Constitution authorizes the creation of independent agencies with aggregated powers of a legislative, executive, and judicial nature. That argument fails so long as it depends on any form of originalism, by which I mean an effort to figure out the proper legal solutions to particular disputes from text, structure, or function that is embedded in the original Constitution. This view of the subject matter does not commit us to any form of literalism, or formalism; nor does it ask us to understand how the system was put together independent of the purposes which it serves or the perils that it has to run. Rather, it looks at the document as a coherent whole to be construed in the light of the impulses that led to its adoption. In dealing with the three major constitutional branches, the text itself points to a system whereby the tripartite division is meant to be rigid in law, so as to forbid any conscious amalgamation or transference of the powers initially assigned to each branch of government.

Stating the position in this fashion does not deny the evident difficulties in assigning particular functions to one branch of government or to another. Indeed, it was clear from the time of the First Congress that the implementation of innocuous powers carried with

it an unavoidable need to delegate at least some key management decisions to the executive branch. Thus Congress has the power "to establish Post Offices and post Roads."<sup>7</sup> There is no question that this power loomed much larger in the grand scheme of things at the time of the Founding than it does today.<sup>8</sup> It is doubtful that this power requires the legislation to indicate where each Post Office is to be situated, or the precise route that any Post Road has to take. It may well be that a Congress will make those stipulations, but it hardly follows that it is duty-bound to do so. From the earliest times howls of protest were raised against the thought that legislation had to bog itself down on these small matters of managerial detail that were not proper objects of legislation.<sup>9</sup> It seems clear, as Peter Strauss has rightly insisted, that there is some play in the interstices on matters of this size, and that the appropriate approach for dealing with them is one that, roughly speaking, tries to follow the distinction that modern corporate law draws between matters left to the discretion of the executive officer and those which are necessarily and properly (the choice of terms here is not just coincidental) left to the discretion of the Board of Directors. An insistence on the principle of separation of powers is not meant to displace sensible principles of management, even if it is designed to keep Congress from appointing its own members to carry out the laws, or from delegating to the President the entire power to designate post roads wherever he likes and for whatever reason he deems appropriate.

If someone looked for an instructive analogy from the private law, the one that I would suggest is the tripartite common law distinction between trespassers, licensees, and invitees, which, albeit rough at the edges, turns out to be rigid in law. That is, you do not allow for blended results in the categories precisely because that gives too much freedom in the way in which the law is administered as a whole.<sup>10</sup> And so it is here. If judges fight to keep

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<sup>7</sup> U.S. CONST. art. I, § 8, cl. 7.

<sup>8</sup> See 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1119-42, 1144-45 (1833).

<sup>9</sup> See DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789-1801 (1997).

<sup>10</sup> See *Robert Addie & Sons (Collieries) Ltd. v. Dumbreck*, [1929] A.C. 358 (H.L.) (appeal taken from Scot).



the lines distinct, then they will be wary of efforts to substitute a supposed separation of functions for a more rigid separation of powers. But once they become committed to tolerate or encourage intrusive interventions in the economy, then they will acquiesce in the use of the larger set of administrative tools needed to get the task done.

#### A. THE NECESSARY AND PROPER CLAUSE

One question that sometimes arises is whether there is some textual warrant for the creation of the independent administrative agencies. The most common candidate for all this is sometimes found in the “Necessary and Proper” clause, which provides that the Congress shall have the power “[t]o make all laws that shall be necessary and proper for carrying into execution the foregoing Powers, and all other Powers vested by the Constitution in the Government of the United States or any Departments thereof.”<sup>11</sup> I regard the effort to take this critical savings clause and use it as a wedge for creating the administrative state as tempting but ultimately unsound.<sup>12</sup> The mischief started on this point with the case of *McCulloch v. Maryland*, where Chief Justice Marshall insisted that necessary and proper did not mean first “necessary” and then “proper,” but “appropriate.”<sup>13</sup> Through a long and complex history, this led to a reduction in the level of scrutiny given to government actions from what was functionally an intermediate level of scrutiny to one of rational basis, whereby any advantage that you find from the proposed scheme—here greater expedition and/or expertise—is sufficient to overcome any structural objections to the creation of the new agency. But if we read the two words as separate and binding constraints, they do not transform the basic structure. It is hardly necessary for any recognized function to circumvent the

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<sup>11</sup> U.S. CONST. art. I, § 8, cl. 18.

<sup>12</sup> Compare Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994), with Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994). My sympathies, it should be evident, run with Calabresi and Prakash.

<sup>13</sup> *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819) (“Let the end be legitimate, let it be within the scope of the constitution, and all means which are *appropriate*, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”) (emphasis added).

tripartite division, as conventional administration in the executive branch backed up by enforcement if necessary in the courts is always possible. At a minimum, therefore, the creation of agencies like the National Labor Relations Board with its internal judicial component is constitutionally prohibited. It is hardly proper to turn the constitutional system on its head in order to subvert its particular arrangements, given the profound effects that this maneuver could have on both the size and the mission of the federal government.

#### B. THE OVERSIGHT POWER

The evidence offered against this structural argument is not, I think, sufficient to meet the underlying concerns. Peter Strauss discusses the instructive incident whereby President Andrew Jackson sought to obtain the removal of United States funds from the Bank of the United States<sup>14</sup> (whose constitutionality was upheld in *McCulloch v. Maryland*).<sup>15</sup> The relevant statute provided that the funds of the United States should be kept in that bank “unless the Secretary of the Treasury shall at any time otherwise order and direct.”<sup>16</sup> It seems clear from the text of the statute that, if the statute is constitutional, the President does not have the personal power to remove the funds from the Bank of the United States. So the first point to ask is whether the Congress has the power to so locate the exercise of that power in the treasury department. I think that Peter Strauss is correct when he says that the recognition of the independent place of “departments” in the Necessary and Proper Clause makes this an appropriate exercise of legislative power. The President, as he points out, shall “take care that the laws be faithfully executed,”<sup>17</sup> where the force of the word “be” is to indicate that, in some instances at least, his power is by indirection, or as Strauss terms it, through “oversight.” It should be immediately noted that these oversight duties do not exhaust the scope of Presidential power, which surely includes such independent matters

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<sup>14</sup> LEONARD WHITE, *THE JACKSONIANS: A STUDY IN ADMINISTRATIVE HISTORY 1829-1861* 34-35 (1957).

<sup>15</sup> *McCulloch*, 17 U.S. at 437.

<sup>16</sup> An Act to Incorporate the Subscribers to the Bank of the United States, ch. 44, § 16, 3 Stat. 266, 274 (1816).

<sup>17</sup> U.S. CONST. art. II, § 3, cl. 4.

as his role as commander-in-chief. Yet on the matters of execution, it is correct to note that the "take care" clause does not say that the President shall faithfully execute the laws, as if the entire job is his to do so by himself. Rather, his job is to see to it that the laws be faithfully executed,<sup>18</sup> which involves some measure of discretion by other individuals who work within his office, subject to the President's oversight.

That same conclusion is, moreover, supported by a clause that has long caused difficulty in interpretation. Article II, § 2, sandwiches between the President's position as Commander-in-Chief and his power to grant reprieves and pardons, a provision that says "he may require the Opinion, in writing, of the principal Officer in each of the executive departments, upon any Subject relating to the Duties of their respective Offices."<sup>19</sup> One possible reading of this clause is consistent with the strong version of the unitary executive, whereby the President can take on any and all executive functions personally. The President, in order to exercise his powers, should be in a position to ask for information from his subordinates. But that view does not carry the day, for it does not explain why this sound practice of asking for written reports needs an explicit constitutional warranty. After all, the President, if armed with all powers of the executive office, could just require his chief officials to submit opinions in writing, and then impose whatever he sees fit when and if the officer does not comply.

Accordingly, the inclusion of this provision makes sense if the division of power within executive departments is something that the President cannot nullify with a stroke of the pen. The more sensible reading of this provision is therefore that the President has to be given the right to demand this information in order to exercise his oversight power over department heads to be sure that they exercise their own powers, received from Congress, in ways that are consistent with his vision of office. Note that the President in this regard may only impose this demand on principal Officers, and not demand it of inferior Officers (neither term is defined). And at this point, his only option is, I think, to sack the official and then go

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<sup>18</sup> See Peter Strauss, *Overseer or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 704-705 (2007).

<sup>19</sup> U.S. CONST. art. II, § 2, cl. 1.

through the confirmation process to select the substitute. It is not to give a direct order to the principal Officer to do his bidding. This form of indirect control is, moreover, not confined to this exercise of power. In connection with the President's role as Commander-in-Chief, for example, he does not have the power to call the militia into the active service of the United States.<sup>20</sup> Rather the power applies when (in the passive voice) the militia is called into the active service of the United States,<sup>21</sup> and the power is given to Congress (on strong separationist principles) to "provide for the calling of the militia to execute the laws of the Union," even though it cannot do so itself.<sup>22</sup> Strauss is surely correct to say that the rejection of multiple or collegial executives does not give the President an unfettered control over all operations inside the executive branch.<sup>23</sup>

This structure of rights matters in Jackson's confrontation with his Secretaries of the Treasury. The first and second of these, Louis McLane and William Duane, claimed that they could only honor the President's request if they had reasons by which it was appropriate for them to do so. Peter Straus endorses this reading. On one point at least, I dissent. I think that the phrase "at any time" imports a complete choice in the Secretary of the Treasury as to whether to leave the funds in or to take them out. But for these purposes, that point of statutory construction does not matter. Either way, the Secretary can leave the funds in Bank of the United States, at which point the President has no power to countermand that order, given the division of powers in the Executive branch. But Jackson could, and did, fire his Secretary for not following his wishes; indeed, he did it twice, until Roger Taney, of later fame as the Chief Justice of the Supreme Court, filled the office and did as Jackson

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<sup>20</sup> See U.S. CONST. art. I, § 8, cl. 11 ("The Congress shall have power . . . [t]o declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water . . ."); U.S. CONST. art. I, § 8, cl. 15 ("to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions"); U.S. CONST. art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual service of the United States . . .").

<sup>21</sup> U.S. CONST. art. II, § 2, cl. 1 ("when called into the actual service of the United States").

<sup>22</sup> U.S. CONST. art. I, § 8, cl. 15. Note the verb "execute" here carries its plain meaning of "to carry out."

<sup>23</sup> See Strauss, *supra* note 18, at 703.

requested. It would therefore be most odd to use this example as a case to establish the independence of principal Officers, in the sense of persons whom the President can remove from office only upon a showing of cause, narrowly construed to relate to either probity or competence. But note that even if the President can sack any principal Officer at will, the price he pays is not purely political. The President has the grim task of getting the Senate to confirm his successor. The explicit check on the power to hire operates as an implicit check on the power to fire.

The most telling point about this incident is that it operates as a counterexample to the claim that the Constitution allows for the creation of independent agencies—that is, those whose personnel the President cannot dismiss at will. Of course, as Strauss notes, the members of this Fourth Branch of government are not fully independent of the President, either on the nomination or dismissal side. That point, however, has never been a source of controversy. The question is whether the President can fire the administrator at will if he disagrees with that policy, as Andrew Jackson did. On this issue, I take it that the Senate cannot require the President to keep any of his standard cabinet officials in office if he grows disenchanted with their policies. President Jackson was clearly within his rights when he sacked both McLane and Duane. So where then does the entire structure of Article II admit to a division in the ranks of various executive branch departments and officers, such that some officers in some departments can be dismissed only for cause while others may be dismissed at will? Strauss insists that the Congress cannot by statute abrogate the power of the President to dismiss for cause, narrowly defined, one assumes, in ways that do not allow him to dismiss them for fundamental policy disagreements. But that limitation on Congressional power is nowhere evident in the text, so the burden therefore is on others to explain why a shadowy distinction should be introduced into a text when it is undisputed that all traditional officers can be dismissed at will. And even if that distinction could be defended, it is hard to see how the inclusion of what are called quasi-judicial powers can be smuggled into these administrative agencies under any reading of the Necessary and Proper Clause. If it be argued that the modern administrative state would grind to a halt if all administrative figures served as the pleasure of the President, the real question is why. Unless we have some very strong reason to think that key administrators are better

attuned to major policy issues than the President, we have to guess as to whether the performance in office will be better with protection from dismissal, if Congress so decrees, than without it. I am not sure that anyone could hazard a guess as to which is true, given the political and reappointment constraints that weigh heavily on the President even in the absence of independent administrative agencies. I therefore conclude that although the magnitude of the effects is uncertain, their direction is clear. The creation of the independent administrative body (i.e. the rejection of at-will dismissal) will increase the size and power of the administrative state in ways that classical liberals would find unacceptable.

### III. LAW VERSUS DEFERENCE IN THE ADMINISTRATIVE STATE

#### A. THE WORLD OF MANY FACTORS

The proliferation of these administrative agencies, however, starts from the assumption that these agencies are a part of the modern constitutional order. Accordingly, the rearguard battle that we have to fight today is whether the same kind of judicial discipline applies to the output of administrative agencies as it does to the combination of work that follows the usual patterns of Congressional legislation and Presidential enforcement. My initial reaction to this problem does not start with the legal issues addressed by Professor Strauss. Nor does it arise from any experience with administrative law from the top-down perspective of an appellate lawyer. Rather, it comes from my erratic engagement with administrative agencies, both executive and independent, as they deploy their power to make rules and to grant or deny permits under their broad range of delegated powers in a wide range of different settings. De facto, the use of these powers is unreviewable within the courts. In this regard, the increase in the number of statutory factors to be taken into account in making an agency decision may help inform the exercise of administrative power. But most importantly, it also helps insulate it from effective judicial review. Rare is it that a dozen factors will point in the same direction, so the agency which inclines in one direction instead of the other will always be able to point to at least one feature of the statutory framework that supports its conclusion. The goal of simple rules for the complex world is far removed from the standard run of agency business. Indeed, the rapid expansion of federal power under the commerce

clause and the concomitant weakening of both economic liberties and property rights have amplified the power of both executive and independent agencies, so much so that the independent agencies (even if unconstitutional, as I have argued) do not today constitute the main threat to the rule of law. That place of honor must be assigned to the substantive expansion of administrative discretion, particularly on questions of law.

The key question is what, if anything, can be done through the formal controls of administrative law to counter these tendencies. On this issue, my initial observation is that there is a sharp distinction between various rulemaking activities and the constant run of permit controls. On the former, the older model of full and fair process seems to apply before there is any deviation from the standard common law rules on property rights. But from that fact it hardly follows that all rulemaking procedures are in derogation of the common law, for many involve the switch between various regulatory regimes that confer major power on various agencies. For these, it is always hard to decide whether to vest any presumptive legitimacy in the status quo ante.

#### B. RULES AND PERMITS

The situation is, however, quite different with respect to the permit power, where far stronger conclusions can be reached. The classical liberal theory on this question follows the standard presumption of the older courts of equity, which holds that injunctive relief should not normally be issued unless there is a clear showing of some form of imminent harm to the person or property of others. The argument here is that any laxer standard invites major errors. In stopping certain activities from ever getting started, the aggressive use of the permit power removes the possibility that the ordinary citizen or firm can modify its business activities in ways to avoid serious harms to others. Relaxing the permit power does not mean that all activities can be undertaken without some proof of insurance or financial solvency; nor that damages actions cannot lie for completed harms; nor that an injunction cannot be allowed down the road, once the imminence requirement is satisfied. Most critically, the current regime imposes massive costs in front-end examinations that have to be undertaken in *all* cases, even if the dangers of pollution, say, will manifest themselves only a tiny

fraction of the time. Yet the opportunities for political collusion within the system are great, for no matter how remote the risk of harm, alert competitors routinely use permit denials as ways to snuff out their competition. Nor can one count on judicial review under current standards to cure the problem of delay: "sue me" is music to the ears of any regulator who is chary about granting permission. The dangers to the rule of law in the federal system are manifest in these cases. From the classical liberal perspective, a full court press should be mounted to defang the current permit power which plays so dominant a position on environmental and pharmaceutical issues, for example.

### C. CHEVRON DEFERENCE

A second point on which the classical liberal position takes strong issue within the current practices of the administrative state is the deference that the Supreme Court shows toward rulemaking in the administrative state under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, which in ambiguous cases (itself an ambiguous term) affords deference to administrative agencies on matters within the scope of their own jurisdiction.<sup>24</sup> I regard this as a dangerous trend in administrative law. The first point concerns the initial application of this rule to determinations of agency jurisdiction. Typically, determinations of jurisdiction involve the resolution of complex factual issues over which some claim of administrative expertise is credible. Far more often, the question involves the construction of key statutory language that determines the scope of the federal power. On these legal questions, deference to administrative agencies ignores the danger that good bureaucrats will be more intent on expanding their power than behaving like disinterested experts whose first allegiance is to the rule of law. We have a fundamental norm that no person should be judge in his own cause. Why then do we not insist on a parallel norm about the jurisdictional reach of administrative agencies whose members constantly worry about power and budget?

Admittedly, this inexcusable diffidence on jurisdiction does not originate with *Chevron* (which in fact involved an administrative

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<sup>24</sup> 467 U.S. 837 (1984).



determination that made a lot of sense, even without deference). That honor probably belongs to *Crowell v. Benson*, whose muddled opinion took a tolerant view toward the agency's assertion of the jurisdiction of a federal workers compensation tribunal for long-shoreman and harbor workers.<sup>25</sup> But whatever the origin, the practice of letting agencies determine their own scope leads to incredible flip-flops in the assertion of federal power. One example will have to suffice here. In *Rapanos v. United States*,<sup>26</sup> the United States Supreme Court had to decide the scope of the grant that the Congress gave to the Army Corps of Engineers under the Clean Water Act to govern the "waters of the United States," and the scope of the phrase "navigable waters" in the statute.<sup>27</sup> The initial interpretation of this phrase, both under the commerce clause,<sup>28</sup> and under the original regulations issued under the Act,<sup>29</sup> talk about waters (not puddles) that did support or were capable of supporting navigation. But under pressure, the Corps, arguing that the previous definition was too narrow, expanded the definition of "waters of the United States," so that by the time of *Rapanos*, the new definition of the "waters of the United States" covered "[a]ll interstate waters including interstate wetlands;"<sup>30</sup> "[a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce;"<sup>31</sup> "[t]ributaries of [such] waters,"<sup>32</sup> and "[w]etlands adjacent to [such] waters [and tributaries] (other than waters that are themselves wetlands)."<sup>33</sup> Why not just say all the land in the state of Michigan counts as waters of the state? The initial point here is to note that this question is

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<sup>25</sup> *Crowell v. Benson*, 285 U.S. 22 (1932). For criticism of the decision, see DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY 1888-1986*, 214-15 (1990). For a "desuetude" of the older distinction, see LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 53-54 (2d ed. 1988).

<sup>26</sup> *Rapanos v. United States*, 547 U.S. 715 (2006).

<sup>27</sup> 33 U.S.C. §§ 1311, 1342(a).

<sup>28</sup> See *The Daniel Ball*, 77 U.S. 557 (1871).

<sup>29</sup> See 39 Fed. Reg. 12119, *codified at* 33 CFR § 209.120(d)(1) (1974).

<sup>30</sup> 33 C.F.R. § 328.3(a)(2) (2004).

<sup>31</sup> *Id.* § 328.3(a)(3).

<sup>32</sup> *Id.* § 328.3(a)(5).

<sup>33</sup> *Id.* § 328.3(a)(7).

one of straight definition. No amount of expertise could justify the broader definition under any conceivable interpretive standard. Yet, the huge change in scope (which is only possible given the modern definition of “commerce among the several states,” a term that is similarly perverted) was done exclusively by administrative decision, without any Congressional reconsideration.

That maneuvering is in my view wholly inconsistent with the rule of law—first to grant administrative agencies that level of discretion, and second to shield such fanciful extensions of jurisdictional power from strong Congressional rebuke. A four-person bloc on the Court, led by Justice Scalia, found that this reading was impermissible under *Chevron*,<sup>34</sup> but a group of four others, led by Justice Stevens, solemnly disagreed, leaving Justice Kennedy’s enigmatic fifth vote to resort to ad hoc factual inquiries that are again wholly inconsistent with the rule of law. The navigable waters of the United States do not include wetlands and uplands, and to make, as Justice Kennedy insists, the ultimate inquiry turn on a fact-dense inquiry adds to the power of the Corps to add yet another layer of delay and cost, which gives it a de facto veto power over all development, given its ability to impose immense costs and intolerable delays of processing permits.<sup>35</sup> After all, the criminal penalties are swift and sure, and litigation is precarious at best. The entire process, moreover, changes, if we follow the classical liberal position, by allowing the Army Corps to enjoin activities only after the landowner’s actions have either caused or threatened immediate harm to navigable waters, leaving the states to deal with other potential forms of nuisance, preferably under the same norm of imminent harm. The tyranny of the administrative agency is effectively neutralized by altering that one critical rule.

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<sup>34</sup> *Rapanos v. United States*, 547 U.S. 715, 718-57 (2006) (plurality opinion).

<sup>35</sup> *Id.* at 2214 (“The average applicant for an individual permit spends 788 days and \$271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and \$28,915—not counting costs of mitigation or design changes.”) (citing David Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 NAT. RESOURCES J. 59, 74-76 (2002)).

## D. ADMINISTRATIVE AGENCIES AND TRIAL COURTS

This basic approach does not solve all problems, but it points the way to a reduction of the iron grip that agencies exert over the lives of ordinary people in a system of boundless discretion that effectively precludes meaningful judicial review in the vast majority of cases. It also renders far less important the constant squabbles of learned administrative law scholars over the level of deference that should be offered to different types of activities. My own view is that agencies should be treated with no greater deference than trial courts. The abuse of discretion standard remains the correct check on evaluations of factual evidence that agencies collect in reams. The usual rule holds that the occurrence of specific events and actions that did or did not take place, like the speed of a vehicle on an intersection collision, is only reviewed for clear error. These are normally questions in which finders of fact are given wide discretion, so long as the usual rules on admissibility and prejudice are observed. Mixed questions of fact and law should be subject to judicial review on the same basis as those determinations made by trial judges.<sup>36</sup> One such question is whether the pattern of conduct “amounts to negligence;” since the trial court draws a legal conclusion from these admitted facts, these decisions are subject to higher standards of appellate review, which usually boil down to a form of intermediate scrutiny: the inferences drawn cannot be against the clear weight of the evidence. These decisions receive more scrutiny than questions of pure fact, but more deference than pure questions of law. For example, it is commonly understood that the question of whether contributory negligence is a partial or total defense to an ordinary negligence action is reviewed on a *de novo* basis, without any deference to the trial court.

I see no reason why this tripartite categorization should not be vigorously applied to the full range of administrative action, where it yields a very different approach from the United States Supreme Court, which pays virtually no attention to the traditional tripartite fact/law decision, and attaches much more weight to the

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<sup>36</sup> See generally JAMES FLEMING ET. AL., *CIVIL PROCEDURE* § 7.10 (5th ed. 2005) (describing how jury nullification sometimes involves a finding of law by a jury).

distinctive culture of administrative law with its panoply of rule-making, interpretive regulations, and opinion letters. Stated otherwise, the current approach to administrative law pays much attention to what is now termed “Chevron Step 0”, which asks the simple question of whether the *Chevron* deference used in notice and comment rulemaking should be applied to various forms of administrative action.<sup>37</sup> In my view, this leads to a systematic excess of judicial deference to administrative action, inconsistent with the rule of law. Consider here two Supreme Court cases that have attracted much attention.

One should start with pure questions of law. In *Christensen v. Harris County*,<sup>38</sup> the Court declined to give much deference to an opinion letter from an administrator in the Department of Labor’s Wage and Hours Division, on the proper construction of an obscure but vital statutory provision of the Fair Labor Standards Act that allowed, under some circumstances, local government units to require their employees to accept compensatory time off in lieu of overtime wages—an issue that no classical liberal would allow any regulator ever to decide. The Court was right to hold that this administrative order should not be entitled to *Chevron* deference.<sup>39</sup> But in accordance with the current administrative law paradigm, it held that it was “‘entitled to respect’ . . . but only to the extent that those interpretations have the ‘power to persuade,’”<sup>40</sup>—under the Court’s 1944 decision in *Skidmore v. Swift & Co.*, a 1944 decision that marked the Court’s early effort to consolidate its learning on the newly dominant administrative state.<sup>41</sup> But again, why give *any* deference at all: “We granted certiorari on the question ‘whether a public agency governed by the compensatory time provisions of the Fair Labor Standards Act of 1938, 29 U.S.C. §207 (o), may, absent a preexisting agreement, require its

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<sup>37</sup> See, e.g., Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 873-89 (2001); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006) (discussing ambiguities in the current law).

<sup>38</sup> *Christensen v. Harris County*, 529 U.S. 576 (2000).

<sup>39</sup> *Id.* at 587.

<sup>40</sup> *Id.*

<sup>41</sup> *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

employees to use accrued compensatory time.”<sup>42</sup> Wholly missing was any explanation of why this pure question of law should not be subject to de novo review, in which any agency expertise counts only insofar as its arguments are independently persuasive, without any artificial presumption in their favor.

The *Skidmore* standard was applied with greater fidelity in *United States v. Mead Corp.*, where the question pertained to the agency determination of whether certain “day planners” should be treated as “bound diaries” under the Harmonized Tariff Schedule of the United States.<sup>43</sup> *Mead* refused to afford the full measure of *Chevron* deference to a decision of the Headquarters Office of the Customs Services to which Congress had not delegated to the authority “to make rules carrying the force of law,” on this classification question.<sup>44</sup> *Skidmore* seems, if anything, a bit too generous in this case. The classification question here straddles the line between pure question of law and mixed questions of fact and law, but looks more like the former, since there is no dispute of what a day planner is. So even *Skidmore* deference looks questionable. Why? Just what is there in this classification determination that is beyond the ken of a court that is fully briefed by the two sides? Remember, on appellate review, the question is *not* whether a court (let alone the Supreme Court) can figure out how to resolve these questions from scratch. They can not even do that in complex patent cases over which they exercise both trial and appellate jurisdiction. The question is whether and what they can learn from argument, a skill at which lawyers excel. That ability means that the greatest protection of the rule of law rests in using customary standard appellate review to all decisions that come from these agencies.

Even if these principles are followed, it is still difficult to prevent powerful forms of administrative drift. My favorite example

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<sup>42</sup> *Christensen*, 529 U.S. at 582 n.3 (citing *Christensen v. Harris County*, 526 U.S. 926, 927 (1999)).

<sup>43</sup> *United States v. Mead Corp.*, 533 U.S. 218 (2001).

<sup>44</sup> *Mead*'s “day planners” fell under an HTSUS heading for “[r]egisters, account books, notebooks, order books, receipt books, letter pads, memorandum pads, diaries and similar articles.” *Id.* at 224. The question was whether it fell under a subcategory, for (1) “[d]iaries, notebooks and address books, bound; memorandum pads, letter pads and similar articles,” on which the tariff was 4 per cent or “[o]ther” items, on which no duty was imposed. *Id.*

involves the application of Title IX's prohibition against sex discrimination to intercollegiate athletics.<sup>45</sup> The basic statute is a garden variety civil rights law that looks to address primarily outright efforts to exclude women from certain programs. It reads, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . ." <sup>46</sup>

The original statute also contains, even in its present form, an explicit provision, largely forgotten, that forbade any form of preferential treatment, which was then neatly counterbalanced by a further provision that allowed statistical evidence to prove discrimination.<sup>47</sup> The statutory scheme is capable of straightforward application on whether women can be excluded from science Ph.D. programs or men from dance class. But clearly it does not quite fit the problem of athletics where the sex differences matter. No one insists on integrated basketball teams, let alone ones selected exclusively on athletic merit. On that score separate but equal, not perfect integration, is an obvious norm for both intercollegiate and intramural sports, even if subject to complications based on the differential revenue streams for men's and women's sports. But even that ideal makes no sense in connection with football for which there is no viable women's equivalent. The entire matter therefore had to be adjusted through regulations issued through the Office of Civil Rights in the Department of Education, which expand the scope of the original statutory prohibition as follows:

(b) Separate teams. Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection of such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular

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<sup>45</sup> For a fuller statement of my views, see Richard A. Epstein, *Foreword: "Just Do It!"*, 101 MICH. L. REV. 765 (2003).

<sup>46</sup> 20 U.S.C. § 1681(a) (2000).

<sup>47</sup> *Id.*

sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.<sup>48</sup>

But what should be done to deal with sports that have both men's and women's teams for which there is not quite the same demand or popularity? Within any kind of well organized institution, the effort is always to make sure that the last dollar on one program produces as much internal benefit as the last dollar spent on another. Given the persistent differences in demand, well-run private institutions would expect to see more men participate in these programs than women. Similarly, these same institutions should devote more resources to those programs that generate more revenues, which would accentuate the men/women gap in intercollegiate sports. But to recognize those simple propositions is to withdraw Title IX from the area of intercollegiate sports. To avoid that prospect the Regulations now seek to regulate these manifest sex differences rather than to impose any unworkable criterion of sex-blind identity.<sup>49</sup> In turn these regulations will

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<sup>48</sup> 34 C.F.R. § 106.41(b) (1995).

<sup>49</sup> *Id.* § 106.41(c) ("Equal Opportunity. A recipient which operates or sponsors inter-scholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

- (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
- (2) The provision of equipment and supplies;
- (3) Scheduling of games and practice time;
- (4) Travel and per diem allowance;
- (5) Opportunity to receive coaching and academic tutoring;
- (6) Assignment and compensation for coaches and tutors;
- (7) Provision of locker rooms, practice and competitive facilities;
- (8) Provision of medical and training facilities and services;

necessarily introduce a fair amount of administrative discretion, which will attract inevitably some form of judicial deference. And so one moves on to the last stage, which seeks to deal with the chronic imbalance between men and women in intercollegiate sports, by imposing tests that are attainable, in practice only by the Service Academies that have mandatory sports participation for all students. The relevant Policy Interpretation reads:

- (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
- (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
- (3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.<sup>50</sup>

At this point, the move from statute to regulation is apparent, as its chief de facto effect is to close down men's programs such as wrestling or swimming in order to maintain the balance when there is insufficient demand for women's sports. The administrative law question is what weight, if any, should be given to this Policy Interpretation after *Mead* and *Christensen*. We do not have a direct answer to that question, but we do know that the one

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- (9) Provision of housing and dining facilities and services;
  - (10) Publicity.”).

<sup>50</sup> Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979) (codified at 45 C.F.R. pt. 86).



sustained challenge to the Policy Interpretation, in *Cohen v. Brown University*,<sup>51</sup> led to a crushing defeat for Brown University, which had raised it.

The Policy Interpretation represents the responsible agency's interpretation of the intercollegiate athletics provisions of Title IX and its implementing regulations.<sup>52</sup> It is well settled that, where, as here, Congress has expressly delegated to an agency the power to "elucidate a specific provision of a statute by regulation," the resulting regulations should be accorded "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."<sup>53</sup> It is also well established "that an agency's construction of its own regulations is entitled to substantial deference."<sup>54</sup> As the Supreme Court has explained, "because applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, we presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers."<sup>55</sup>

Applying these principles, *Cohen II* held that the applicable regulation, 34 C.F.R. § 106.41 deserves controlling weight; that the Policy Interpretation warrants substantial deference, and that, "because the agency's rendition stands upon a plausible, if not inevitable, reading of Title IX, we are obligated to enforce the regulation according to its tenor."<sup>56</sup>

I make no secret of my steadfast opposition to Title IX. It should be promptly repealed on the simple grounds that colleges and universities are better able than any government agency to perform the needed balancing act. We—that vague collective "we"—trust them to run affirmative action programs. Why not trust them here? But for these purposes, the lesson to be learned is that the lax standards of review derived from *Chevron* are utterly inconsistent with the rule of law, if by that we mean, most

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<sup>51</sup> *Cohen v. Brown University*, 101 F.3d 155 (1st Cir. 1996) (Bownes, J). Chief Judge Torruella dissented.

<sup>52</sup> 44 Fed. Reg. at 71,413.

<sup>53</sup> *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 844 (1984).

<sup>54</sup> *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 150 (1991).

<sup>55</sup> *Id.* at 151.

<sup>56</sup> *Cohen v. Brown University*, 101 F.3d 155, 173 (1st Cir. 1996).

modestly, that administrative agencies should be constrained by the statutory grant that gives them their authority. This important social episode shows that the modern administrative state is also inconsistent with the rule of law in yet a more profound sense. One central tenet of the rule of law is that it allows voluntary associations like colleges and universities to engage in acts of self-government so long as they do not violate the constraints about the use of force and fraud against third persons. The more sobering lesson from the administrative state is that it does as badly in regulating the internal affairs of voluntary institutions as it does, chiefly through its permit processes, in deciding when to intervene to prevent the occurrence of uncertain harm to strangers or neighbors. Fixing the mistakes within the fabric of administrative law will help ease the tensions. But the larger problems that remain are those which stem from a single cause: the excessive scope of government action in what was once a nation of limited government and strong property rights.