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## **The Perilous Position of the Rule of Law and the Administrative State**

by

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### **The Rule of Law in Distress**

Recent scholarship in the academy has turned again to an intensive study of the rule of law in the modern administrative state, a topic which I have addressed in detail in my book *Design for Liberty: Private Property, Public Administration, and the Rule of Law*.<sup>1</sup>

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1. RICHARD A. EPSTEIN, *DESIGN FOR LIBERTY: PRIVATE PROPERTY, PUBLIC ADMINISTRATION, AND THE RULE OF LAW* (2011). For a very different take, see JEREMY WALDRON, *THE RULE OF LAW AND THE MEASURE OF PROPERTY* (2012).

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One way to view this question is to treat it as a definitional matter. That approach, however, is not a fruitful one, for the concept of a rule of law is today not essentially contested today. Professor Shane gave a perfectly accurate definition,<sup>2</sup> one to which I subscribe but for which I claim no originality. Many of the essential elements of the modern account are found in the *Second Treatise of Government* by John Locke.<sup>3</sup> That vision is then further elaborated in the same form, more or less, by Lon Fuller in his book *The Morality of Law*.<sup>4</sup> The elements of this definition of the rule of law speak of known, consistent, and certain rules that are applied prospectively by neutral judges to the cases before them. The key virtue of this definition is its generality; its application does not commit any defender of the rule of law to any particular substantive view of which laws are desirable, nor does it presuppose some distinctive relationship of individuals to the state or of individuals to one another. It therefore offers a minimum condition that is consistent with, and constituent of, any just and efficient legal regime.

When the discussion turns to the modern social democratic state, however, there are deep tensions between the rule of law and the rise of the modern administrative state. In making this claim, I stress the term “modern” to direct attention to the new generation of administrative agencies that began in the United States with the adoption of the Interstate Commerce Act of 1887,<sup>5</sup> which was the major legislative achievement of its time. Woodrow Wilson’s progressive administration continued the proliferation of administrative agencies, including the creation of the Federal Trade Commission in 1914.<sup>6</sup> Over the next twenty-five years, the establishment of such agencies as the Federal Radio Commission of 1926<sup>7</sup> (which morphed into the Federal Communications Commission in 1934),<sup>8</sup> the Securities and Exchange Commission in 1934,<sup>9</sup> the National Labor Relations Board in 1935,<sup>10</sup> and Acts such as the Fair Labor Standards Act of 1938 continued the modern trend.<sup>11</sup>

These modern agencies must be contrasted with the types of administrative agencies in England<sup>12</sup> and in the early United States<sup>13</sup> that were responsible for administering

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2. See Peter M. Shane, *The Rule of Law and the Inevitability of Discretion*, 36 HARV. J.L. & PUB. POL’Y 21, 23 (2013) (“The Rule of Law be understood as the ‘ascendancy in our constitutional system of a certain culture of argumentation or interpretation.’”) (internal quotation marks omitted) (citations omitted).

3. John Locke, *Second Treatise of Government*, in TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 100 (Ian Shapiro ed., 2003).

4. LON L. FULLER, *THE MORALITY OF LAW* (2d ed. 1969).

5. Interstate Commerce Act of 1887, Pub. L. No. 49-41, ch. 104, 24 Stat. 379 (repealed 1995).

6. See Federal Trade Commission Act of 1914, Pub. L. No. 63-203, ch. 311, 38 Stat. 717 (codified as amended at 15 U.S.C. §§ 41–58 (2006)).

7. Radio Act of 1927, Pub. L. No. 69-632, ch. 168, 44 Stat. 1162.

8. Communications Act of 1934, Pub. L. No. 73-416, ch. 652, 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C. (2006)).

9. Securities Exchange Act of 1934, Pub. L. No. 73-291, ch. 404, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a–78pp (2006)).

10. National Labor Relations Act of 1935, Pub. L. No. 74-198, ch. 372, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151–169 (2006)).

11. Fair Labor Standards Act of 1938, Pub. L. No. 75-718, ch. 676, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201–219 (2006)).

12. See, e.g., Noga Morag-Levine, *Common Law, Civil Law, and the Administrative State: From Coke to Lochner*, 24 CONST. COMMENT. 601 (2007) (outlining competing models of the early European administrative state).

prisons, schools, voting and tax rolls, motor vehicle licenses, and the large set of other ministerial duties that government agencies must discharge in any developed society. Against this backdrop, it is an imprudent exaggeration to say that all public administration must necessarily conflict with the rule of law. There has been in recent years much corruption in the distribution of vehicle licenses in Illinois;<sup>14</sup> however, it is not just conceivable, but also eminently possible, for that state to run an efficient vehicle licensing system. The same is true of the first aggressive application of the modern administrative state, which involved the evolution and maturation of the system of ratemaking in the period from around 1887 through the end of the Second World War.<sup>15</sup>

Most forms of rate regulation did not generate any significant tension with the rule of law because the defined purpose of the system gave tolerably clear direction to its operation. To put the point in its simplest version, if a competitive market exists, regulators need not intervene to ensure its sound operation. In contrast, if a monopoly existed, as was common with such industries as telecommunications, electric power, and railroads,<sup>16</sup> regulators were forced to determine which techniques would best be able to limit the firm to a reasonable risk-adjusted rate of return without wrecking the industry in question.<sup>17</sup> Accordingly, regulators struggled to avoid two perils at once: They could not confiscate the invested capital in the industry by cutting rates too severely and they could not sanction the collection of monopoly profits by cutting rates too little.<sup>18</sup> In practice, it turns out, that standard is relatively operational. What was and still is striking about this endeavor is that judges in the 1910s and 1920s by and large made accurate decisions of fair rates of return, even though their grasp of modern economic theory was not as solid as that of today's judges.<sup>19</sup>

At the other extreme lie cases in which the necessary operation of executive power precludes any major role for the rule of law. Nobody thinks that application of the rule of law allows Congress and the President to decide when to declare war on a foreign nation. Even the more humdrum problem of prosecutorial discretion, in which decisions on what charge to bring depends on the facts of a particular case, is very difficult to constrain through external sanctions. In addition, it is commonly understood that there is an important class of decisions that necessarily become deeply political, at which point consultation and similar virtues—all of which Professor Shane is correct to stress—play an irreducible role. Between these poles, though, lies a key middle class of situations involving the large administrative agencies of the Progressive Era that gave rise to the modern arena of administrative law. It is in this middle class of large administrative

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13. See, e.g., Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1 (1983) (exploring the pertinence of administrative deference to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)).

14. See Andrew Zajac & Flynn McRoberts, *Operation Safe Road: License scheme led to wider investigation*, CHI. TRIB., Dec. 18, 2003, [http://articles.chicagotribune.com/2003-12-18/news/0312180299\\_1\\_driver-s-licenses-plates-applicants](http://articles.chicagotribune.com/2003-12-18/news/0312180299_1_driver-s-licenses-plates-applicants).

15. See RICHARD A. EPSTEIN, *PRINCIPLES FOR A FREE SOCIETY: RECONCILING INDIVIDUAL LIBERTY WITH THE COMMON GOOD* 298–304 (1998).

16. See *id.* at 301.

17. See *id.* at 307–09.

18. For a comprehensive discussion of these techniques, see *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307–16 (1989).

19. For a discussion of the ups and downs, see EPSTEIN, *supra* note 15, at 279–318.

agencies where the level of discretion, while not that of an executive officer or a prosecutor, is great enough to generate some real uneasiness about compliance with the rule of law.

## The Growth of the Federal Government

Professor Shane is right when he says that Congress is every bit as prone to rent-seeking political corruption as any administrative agency, which is to some degree insulated from political pressures.<sup>20</sup> All sides of the political spectrum understand that taming Congress is an ongoing endemic problem that resists easy solution.<sup>21</sup> A large portion of the problem, however, stems from constitutional choices made regarding the scope of Congress's power in the first place. Once the scope of Congressional power was expanded by the Supreme Court's broad readings of the Commerce Clause, few, if any, constraints remained on the issues that Congress could confront.<sup>22</sup> Congress is no longer confined to worrying about such distinct problems as regulating interstate commerce; it now has a blanket license to do almost anything it wants by way of regulation.<sup>23</sup> As the space Congress occupies grows, the door opens to the risk of faction and intrigue.

As the power of Congress continued to grow, most discernible protections of private property and economic liberty found in the Constitution were also overrun by the same progressive impulse. It is important to understand how this change came about. One explanation of this phenomenon, to which Professor Barron referred,<sup>24</sup> is contained in Professor Richard Stewart's important paper about the reformation of administrative law.<sup>25</sup> Professor Stewart pointed out correctly that the older system of administrative law worked against a regime of strong property rights, where discretion was relatively limited.<sup>26</sup> In contrast, as he added in a later paper, the great New Deal compromise or settlement was: property rights are out and participation rights are in.<sup>27</sup> The role of the administrative state now is to determine exactly how those participation rights can be used and effectuated through deliberation.<sup>28</sup> Unfortunately, once property rights are

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20. Shane, *supra* note 2, at 22–23.

21. See, e.g., Thomas B. Edsall, *Putting Political Reform Right Into the Pockets of the Nation's Voters*, N.Y. TIMES, Dec. 14, 2011, <http://www.nytimes.com/2011/12/15/books/republic-lost-campaign-finance-reform-book-review.html> (reviewing LAWRENCE LESSIG, *REPUBLIC LOST: HOW MONEY CORRUPTS CONGRESS-AND A PLAN TO STOP IT* (2011)); Mickey Edwards, *The Unraveling of Government*, CAMPAIGN SPOTS, N.Y. TIMES, (Sept. 27, 2012, 11:49 PM), <http://campaignstops.blogs.nytimes.com/2012/09/27/the-unraveling-of-government/>.

22. See, e.g., *Katzenbach v. McClung*, 379 U.S. 294, 300 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 253–55 (1964); *Edwards v. California*, 314 U.S. 160, 173–74 (1941); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 3 (1824).

23. See, e.g., *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2578–79 (2012).

24. David Barron, Professor, Harvard Law Sch., Remarks at the Thirty-First Annual Federalist Society National Student Symposium (Mar. 2, 2012) (transcript on file with the Harvard Journal of Law & Public Policy).

25. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975).

26. *Id.* at 1669–70.

27. See Richard B. Stewart, *U.S. Administrative Law: A Model for Global Administrative Law?* 68 LAW & CONTEMP. PROBS., Summer 2005, at 63, 74–75.

28. See *id.* at 74–75 (describing current agency deliberation and rulemaking procedures).

removed, or even diluted, the rights and duties of the government and private parties become an open question.

Start with local governments. Suppose that a small group of nine people arrayed like a tic-tac-toe board will deliberate about whether the plot of land located in the center should be kept open so that the others can have better scenic views from their own plots. The vote could easily be eight to one against preserving the party's right to develop the plot in the same fashion as his eight neighbors. They would never reach that result if the regulation required them to compensate that party for his losses, but if the new restriction is treated as a "mere regulation" of property, compensation is not required. More deliberation thus leads to the successful formation of coalitions that will strip the owner of that central plot of land of his development rights, even if the gains to the other eight are less than his losses. Deliberation only exacerbates the dangers of the weak rights structure of the administrative state; deliberation cannot cure any fundamental mistakes in the articulation and the speculation of rights.

Moreover, allowing administrative agencies to defer enforcement when its rules pinch too much will not cure the erosion of private property and economic liberty. In this regard, Professor Barron shows too much optimism about government by waiver.<sup>29</sup> Waiver introduces yet another component of discretion that poses difficulty for the rule of law. To give one example, consider the "mini-med" plans that McDonald's and other companies have put in place for workers, but which cannot meet various rules concerning their permissible level of administrative costs.<sup>30</sup> The government, fearing that the system will implode, grants waivers of these regulations. These waivers go to some companies, but not to others.<sup>31</sup> Furthermore, the waivers are of uncertain duration, and they are given without any statement of reasons. There is every reason to believe that these waivers will be doled out in ways that advance the political position of those in a position to grant them, with a Democratic administration favoring union plans over employer plans and "blue" states over "red" states—and a Republican administration the reverse. The waiver is not created by what Professor Barron refers to as some complex path-dependent explanation.<sup>32</sup> It is created when public legislation endows individuals with a set of positive rights that are financially unsupportable. The government must then waive onerous conditions to keep the legislation alive. What government officials do not want to do is to get out of the rights business altogether.

It should be clear, therefore, that the major constitutional transformations of federalism and property rights necessarily cede to Congress a larger realm of government that is subject to few legal constraints. One early sign of this shift in judicial attitudes was the pivotal case of *Nebbia v. New York*,<sup>33</sup> which sustained the actions of New York's Milk Control Board in using the criminal law to enforce a system of *minimum* prices for the

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29. See Richard A. Epstein, *Government by Waiver*, NAT'L AFF., Spring 2011, at 39, available at [http://www.nationalaffairs.com/doclib/20110317\\_epstein.pdf](http://www.nationalaffairs.com/doclib/20110317_epstein.pdf).

30. See Janet Adamy, *McDonald's May Drop Health Plan*, WALL. ST. J., Sept. 30, 2010, <http://online.wsj.com/article/SB10001424052748703431604575522413101063070.html>.

31. See Epstein, *supra* note 29, at 46–47.

32. See Barron, *supra* note 24, at 51.

33. 291 U.S. 502 (1934).

dairy industry.<sup>34</sup> *Nebbia* meant that the Supreme Court was quite happy to allow Congress and the States to become cartel factories,<sup>35</sup> effectively allowing interest groups to use political influence to secure gains which, in a saner world, would be per se violations of the antitrust laws. The earlier synthesis started to unravel. This paradox becomes perfectly evident in the operation of the agricultural agencies and their allocations,<sup>36</sup> and with the National Labor Relations Board and mandatory collective bargaining,<sup>37</sup> which make the perpetuation of monopoly profits their end.

## Discretion in the Federal Communications Commission

The operation of government with enhanced powers invites the use of government discretion. A well-known Supreme Court decision about the delegated authority of the Federal Communications Commission (FCC), Professor Shane's chosen agency, illustrates this principle.<sup>38</sup> *National Broadcasting Co. v. United States* was a case which technically involved the breakup of the National Broadcasting Corporation (NBC) and its blue and red network into two networks, one of which became the American Broadcasting Corporation (ABC) and the other of which remained NBC.<sup>39</sup> The statutory question before the Supreme Court in *National Broadcasting Co.* involved the definition of the phrase "public interest, convenience, or necessity"<sup>40</sup>—the standard that Congress gave to the FCC for determining how to allocate frequencies.<sup>41</sup>

Justice Frankfurter, the author of the majority opinion in *National Broadcasting Co.*, was not inclined to limit the FCC to the modest task of defining frequencies that private parties could utilize without interference from each other.<sup>42</sup> He, like James Landis, another famous Harvard figure, extolled the expertise and impartiality of administrative agencies.<sup>43</sup> The central issue in *National Broadcasting Co.* was as follows: Is the job of the FCC to make sure that property rights are consistent so that there is no interference between one station and another?<sup>44</sup> Justice Frankfurter, in the most confident terms, stated that it was quite clear that in regard to this particular statute, the Court was obligated not only to let the FCC set the rules of the road, but also to determine the composition of the traffic:

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34. See *id.* at 506, 539.

35. For an estimate of the thousands of business practices that were required or prohibited by National Recovery Administration directives that organized various industry-wide cartels, see GARY DEAN BEST, *PRIDE, PREJUDICE, AND POLITICS: ROOSEVELT VERSUS RECOVERY, 1933–1938*, at 79 (1991).

36. See, e.g., Nicholas D. Kristof, *Farm Subsidies That Kill*, N.Y. TIMES, July 5, 2002, <http://www.nytimes.com/2002/07/05/opinion/farm-subsidies-that-kill.html>.

37. See, e.g., *Employer/Union Rights and Obligations*, NATIONAL LABOR RELATIONS BOARD, <http://nrlb.gov/rights-we-protect/employerunion-rights-obligations> (last visited Nov. 20, 2012).

38. See Peter M. Shane, Professor, Ohio State Univ. Moritz College of Law, Remarks at the Thirty-First Annual Federalist Society National Student Symposium 12 (Mar. 2, 2012) (transcript on file with the Harvard Journal of Law & Public Policy).

39. 319 U.S. 190 (1943).

40. *Id.* at 194.

41. *Id.* at 216.

42. See, e.g., Felix Frankfurter, *The Task of Administrative Law*, 75 U. PA. L. REV. 614, 617, 619 (1927).

43. See JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* (1938).

44. 319 U.S. at 209–10.

Yet we are asked to regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other. But the Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic. The facilities of radio are not large enough to accommodate all who wish to use them.<sup>45</sup>

But how does anyone in government decide to set the composition of the traffic? To Justice Frankfurter, it was not possible to create a series of frequencies and then to sell them to the highest bidder, be it a private citizen or firm. Creating these frequencies and policing the interferences would require some modest administrative system, but the overall cost of its operation, both public and private, would likely not reach one percent of the complex system now in place with his blessing.

As is often the case in administrative proceedings, Justice Frankfurter decided that it was impossible for the Court to determine the appropriate standards, so he remanded the case back to the FCC to determine the assignment of these frequencies.<sup>46</sup> Unfortunately, during the sixty-nine years between 1943 and 2012, none of the countless efforts to figure out the appropriate system of allocation has succeeded. The various approaches that have been adopted have thus introduced into the system a level of discretion that places real pressure on rule of law values.<sup>47</sup> For example, would local broadcasting be more important than diverse forecasting,<sup>48</sup> broadcasting, and everything else?<sup>49</sup> This uncertainty resulted in comparative hearings that allowed multiple supplicants to plead their respective cases.<sup>50</sup> The final decisions were largely non-reviewable except on technical procedural grounds, as establishing a normative framework to solve the problem that Justice Frankfurter delegated to the FCC—but could never accomplish himself<sup>51</sup>—proved to be impossible.

What should have happened? The moment the frequency is allocated to a party, the question becomes whether it is assignable. The answer is, of course it is freely assignable once it has been given to an individual institution. As a result, all the rents from the bidding would go to the person who won the lottery the first time around and who sold the frequency to somebody else. But the second assignee does not get a permanent interest in the frequency because the process requires the party who received the initial assignment to go through a license renewal on a periodic basis,<sup>52</sup> which only injects more cost and some long-term uncertainty into the system. To be sure, one risk of the property-rights solution to frequency allocation is that it could result in oligopoly ownership by a few major companies who broadcast to mainstream

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45. *Id.* at 215–16.

46. *Id.* at 216–19, 224–25.

47. See, e.g., *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973); *Commc'n's Inv. Corp., v. FCC*, 641 F.2d 954 (D.C. Cir. 1981).

48. See, e.g., *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994).

49. See *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 781–82, 806 (1978); see also *Nat'l Broad. Co.*, 319 U.S. at 203, 217–18.

50. See Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393 (1965); In the Matter of Request for Declaratory Ruling by Fletcher, Heald and Hildreth, 75 F.C.C.2d 721 (1980).

51. See *Nat'l Broad. Co.*, 319 U.S. at 216–19, 224.

52. See 47 U.S.C. § 309(h) (2006) (detailing forms and conditions of station licenses).

audiences, eliminating some fringe groups.<sup>53</sup> Instead of creating a sensible system of antitrust regulation for frequencies, though, Justice Frankfurter conferred huge amounts of discretion on an administrative agency whose *raison d'être* is the disregard of stable systems of property rights.

Left to their own devices, private broadcasters could have solved the concerns about minority voices being denied access to the frequency spectrum. An interesting example is that of *Cosmopolitan Broadcasting Corporation v. FCC*,<sup>54</sup> in which Cosmopolitan found its own way to let minority voices onto the spectrum, within the FCC licensing system; it turned itself into a leasing agency for timeslots on its station.<sup>55</sup> What that innovation meant, in effect, was that anybody could buy the frequency between one and two o'clock in the afternoon on a Tuesday. We now can have a Greek show, after which we can have a Turkish show, and then we can have any other show, in any other time slot, by someone willing to lease the appropriate time slot. Subleasing solved the problem of enabling minority voices to be heard. But despite this seemingly desirable result, the FCC lifted Cosmopolitan's license.<sup>56</sup> Why? Because when the station adopted the subleasing strategy, the Court found that it did not discharge the specific statutory task that the Federal Communications Act conferred upon it, namely, to make conscientious personal decisions as to how the frequency ought to be used.<sup>57</sup>

Such decisionmaking as to how scarce resources should be used is extremely costly because of the necessary level of discretion it entrusts to agencies, without any clear sense of how such discretion is to be used. The implicit premise of Mr. Landis's defense of the modern administrative state is that the abundance of agency expertise could meet whatever challenge was put before them.<sup>58</sup> In truth, any experts in this area would abandon the entire licensing venture as unworkable in light of its intrinsic difficulties. Nonetheless, the FCC was forced to lurch forward despite the absence of an orderly body of knowledge or the possibility of acquiring one. Agency expertise instead became a cover for agency delay or agency bias.

### **Administrative Agencies: Implementation versus Adjudication**

The issue of agency expertise fares no better with the National Labor Relations Board (NLRB). The President appoints the chairman of the NLRB.<sup>59</sup> The four remaining seats are divided by custom between the two major political parties.<sup>60</sup> The NLRB is devoted to "safeguard[ing] employees' rights to organize" and use unions as bargaining

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53. See *FCC Frequency Assignment Databases*, FCC, <http://transition.fcc.gov/oet/info/database/fadb.html> (last visited Nov. 20, 2012); *United States Frequency Allocations*, NTIC, <http://www.ntia.doc.gov/files/ntia/publications/2003-allochr.pdf> (last visited Nov. 20, 2012) (showing breakdown of U.S. frequency allocations).

54. 581 F.2d 917 (D.C. Cir. 1978).

55. *Id.* at 919.

56. *Id.* at 928.

57. *Id.* at 919–22, 931.

58. See Charles H. Koch Jr., *James Landis: The Administrative Process*, 48 ADMIN. L. REV. 419, 427 (1996).

59. 29 U.S.C. § 153(a) (2006).

60. See Joan Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935-2000*, 61 OHIO ST. L.J. 1361, 1372 n.42 (2000).

representatives.<sup>61</sup> Expertise is hard to come by for a mission that should never be undertaken in the first place—to cartelize labor markets. Once experts with strong views on both sides of the question are chosen, though, it becomes nearly impossible, especially in politically charged times, to have the kind of neutral opinions that Locke’s and Fuller’s conception of justice would otherwise require.<sup>62</sup>

In general, I am not unduly troubled by the creation of independent agencies that do the same kind of implementation work as executive agencies. But the common practice of adjudication within these agencies raises a different problem altogether, for it is very dangerous under rule of law principles to let an agency litigate matters that involve the implementation of its own agenda. On matters of constitutional design, the correct solution is to declare that only independent courts, preferably courts of general jurisdiction, should decide those issues, precisely because these judges will not suffer from powerful pre-commitments on the only set of issues that they are called upon to litigate.<sup>63</sup> Nor do I think that this matter can be effectively controlled by various forms of judicial oversight. Professor Barron takes some hope from the use of citizen suits to control administrative action.<sup>64</sup> But all too often this approach makes things worse, not better. I am a strong defender of the principle that standing rules ought not to block anybody from challenging a statute that is *ultra vires*.<sup>65</sup> But the moment we allow parties to resort to litigation to challenge particular administrative outcomes that are clearly lawful, all too often the privilege is used by outliers who seek to upset what might well be a consensus opinion. So, instead of moving back toward the median voter on key issues dealing with the management of public resources, decisionmaking becomes—through citizen suits—all too polarized.

In a similar vein, I am uneasy with Judge Kavanaugh’s suggestion that better action by administrative law judges can control the problem of administrative discretion.<sup>66</sup> Although the work of the District of Columbia Court of Appeals has advanced mightily from the freewheeling days of the 1970s, when administrative law became an art form unto itself,<sup>67</sup> there is only so much that sensible judges can do to control the problem of excessive administrative discretion.

Here are some examples. First, it is doubtful that judicial oversight of administrative action can do much in dealing with the Food and Drug Administration (FDA) for slowing

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61. See *What We Do*, NATIONAL LABOR RELATIONS BOARD, <http://nlrb.gov/what-we-do> (last visited Nov. 20, 2012).

62. See Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 469–70 (2008).

63. See, e.g., Melanie Trottman, *Pick for Labor Board Opposed by Business*, WALL ST. J., Jan. 28, 2011, <http://online.wsj.com/article/SB10001424052748703399204576108432052942332.html>.

64. See Barron, *supra* note 24, at 45.

65. See generally Richard A. Epstein, *Standing and Spending—The Role of Legal and Equitable Principles*, 4 CHAP. L. REV. 1 (2001).

66. See Brett M. Kavanaugh, United States Circuit Judge, U.S. Court of Appeals for the District of Columbia Circuit, Remarks at the Thirty-First Annual Federalist Society National Student Symposium 66–68 (Mar. 2, 2012) (transcript on file with the Harvard Journal of Law & Public Policy).

67. See GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 253–55 (5th ed. 2009) (outlining the judicial approach of Judges David Bazelon, Harold Leventhal, Carl McGowan, and Skelly Wright).

down new drug applications.<sup>68</sup> Further, that action would be futile, for it would only slow matters down further, and force the parties to engage in indirect maneuvers in an effort to speed the process along. Second, the prospect of judicial review is of little comfort to companies like Boeing, who settled its dispute with its unions before the matter reached the NLRB.<sup>69</sup> Third, in similar fashion, universities turn somersaults to avoid censure from the Office of Civil Rights in the Department of Education, which can be enforced by administrative action for which there is no effective judicial review.<sup>70</sup> The agency's power is expanded first by a modest statute<sup>71</sup> which is relatively innocuous, then by an administrative rule,<sup>72</sup> and lastly by an "Intercollegiate Athletic Policy Interpretation."<sup>73</sup> These major transformative actions take place "under the radar," where the fear of sanctions effectively keeps challenges from reaching the appellate courts, lest the sanctions be all the heavier.

### Going Forward – or Backward

It is perhaps only wishful thinking to believe that we can return to a pristine era in which these basic principles—known, consistent, and certain rules applied prospectively by neutral judges—apply. But at least we should be conscious and aware of the odd anomalies that arise when administrative remedies undermine the very objectives that they are supposed to achieve. A recent case, charmingly called *Association of Irrigated Residents v. EPA* illustrates how an unthinking administrative state poses unnecessary risk to common-law rights.<sup>74</sup> Why are these citizens irritated? In fact, located near their residences are a group of animal farms which emit healthy doses of stench into the air, all of which were tortious at common law going back to the thirteenth century with remedies of both damages and injunctions.<sup>75</sup> Now the rise of the administrative state reduces that level of protection in the area where it is needed most by prohibiting citizen suits. Why are such suits prohibited? Because we have administrative expertise in this area. That administrative expert is the Environmental Protection Agency (EPA); it knows exactly how to handle these cases, or so we are told, so it can determine whether the various emitters engaged in wrongs that violated the statutory minimums.<sup>76</sup> The EPA

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68. See, e.g., Richard A. Merrill, *Regulation of Drugs and Devices: An Evolution*, 13 HEALTH AFF., Summer 1994, at 47, 65 ("[T]he law under which the FDA functions is structured to reward caution and facilitate delay.")

69. See Steven Greenhouse, *Labor Board Drops Case Against Boeing After Union Reaches Accord*, N.Y. TIMES, Dec. 9, 2011, <http://www.nytimes.com/2011/12/10/business/labor-board-drops-case-against-boeing.html>.

70. See, e.g., Marjorie A. Silver, *The Uses and Abuses of Informal Procedures in Federal Civil Rights Enforcement*, 55 GEO. WASH. L. REV. 482, 573 (1987) ("If OCR terminated federal financial assistance, and the recipient had not availed itself of all avenues of review but nonetheless sued to enjoin the termination, it is unlikely that the court would consider the merits de novo; the doctrines of exhaustion of administrative remedies and collateral estoppel would likely bar further consideration of the merits.")

71. Education Amendments of 1972, Pub. L. No. 92-318, §§ 901–907, 86 Stat. 235, 373–75 (codified as amended at 20 U.S.C. §§ 1681–1688 (2006)).

72. 34 C.F.R. § 106.37(c) (2012).

73. Policy Interpretation of Title IX Education Amendments of 1972, 41 Fed. Reg. 71,413 (Dec. 11, 1979).

74. 494 F.3d 1027 (D.C. Cir. 2007).

75. *Id.* at 1028; see also, e.g., Janet Loengard, *The Assize of Nuisance: Origins of an Action at Common Law*, 37 CAMBRIDGE L.J. 144, 144–46 (tracing the common law origins of nuisance to the reign of Henry II).

76. See *Ass'n. of Irrigated Residents*, 494 F.3d at 1031.

admitted that it was not sure how to measure the actual amount of pollution, so instead it entered into a deal with the farmers: If the farmers paid a small fine to the EPA, it would in turn suspend immediate actions against and block common-law suits until the EPA finally determined whether the farmers were liable and the amount of damages, if any, to be paid.<sup>77</sup> That arrangement gives the farmers every incentive to draw out the EPA's investigation as long as they possibly can so that they do not have to internalize the costs borne by other people choking while they raise their animals.<sup>78</sup> Preemption by the administrative state thus destroys common-law rights.

Even this brief sketch illustrates this uneasy proposition about administrative agencies. In all too many settings they intervene when they should stay their hand, which is true about much of what transpires in the FCC and NLRB. In other cases, the EPA blocks common-law and equitable remedies that should be routinely allowed. These ad hoc motions put ever greater strains on the rule of law, which leads me to this somber assessment—that much of the work of the administrative state is at cross-purposes with both sound public policy and the rule of law.

The Free State Foundation is a non-partisan Section 501(c)(3) free market-oriented think tank located in Rockville, Maryland.

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<sup>77</sup>. *Id.* at 1029.

<sup>78</sup>. *Id.* at 1038 (Rogers, J., dissenting) (noting that the EPA's proposed measurement methodologies could take "five, twenty, or even thirty, years" to develop).