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**In Defense of Vagueness**

**by**

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Seth Cooper's important and well-written July 2016 Free State Foundation *Perspectives*, [\*FCC's Vague "General Conduct" Standard Deserves Closer Legal Scrutiny\*](#), (1) criticizes the general conduct standard in the FCC's net neutrality Report and Order (upheld by the D.C. Court of Appeals) and (2) grounds that criticism in a preference for bright-line rules and dissatisfaction with case-by-case adjudication of specific disputes based on general principles. This article takes no position on the first point. Instead, it focuses on the second point – the presumption that bright-line rules are preferable, which has increasingly become the criterion for assessing the actions of administrative agencies. But it is an unexamined premise that, in my view, undesirably narrows the tools available to administrative agencies as they cope with new trends and new technologies and the issues they raise. The hostile presumption against case-by-case decision-making is particularly inappropriate in dynamic fields, like those within the FCC's jurisdiction.

It is patently in the public interest for administrative agencies to promote certainty in regulating the private sector by clear rules-of-the-road. Except when it is not. It is not desirable when (1) the rules are crafted in a fast-changing environment when the agency cannot discern with sufficient certainty what the contours of a bright-line rule should be or (2) when agencies should take action based on the particular circumstances of each case. It is in those instances where the flexibility of general principles applied in the context of specific circumstances is preferable to bright-line rules.

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Two competing legal theories dominate Western jurisprudence: civil law based on the codes of imperial Rome that survived in ecclesiastical laws through and beyond the Middle Ages and were re-imposed on most of Europe by Napoleon's invading armies. The second is common law which thrived in the United Kingdom, perhaps because it reflected that culture's preference for pragmatism and its distrust of government by edict, handed down from on high, and remote from local realities. Common law was brought to this country by English settlers in the 17th and 18th centuries. It was well-suited for the new, widely diverse and rapidly changing conditions to which the colonists needed to adapt.

In the 18th and 19th centuries, as the country continued to expand into new terrain and confronted different cultures and faced new political challenges, the flexibility of the common law and its implementation in the form of case-by-case rulings were particularly suitable for resolving disputes and building a body of case law that would guide the conduct of private parties in the future. One of the greatest expounders of the genius of the common law was the American jurist, Oliver Wendell Holmes. Daniel Boorstin in *The Seekers*, p. 263, described Holmes' classic, *The Common Law*, as the "manifesto of a new American school of jurisprudence." In it Holmes wrote: "The life of the law has not been logic; it has been experience." And lessons of experience often emerge from specific cases.

It was against this legal background that the country turned to establishing and giving both responsibilities and authority to administrative agencies on the federal, state, and local levels, to oversee rapidly expanding private-sector activities with important ramifications for the general public. One reason for the emergence of administrative agencies was the perceived need to bring expertise to bear on these specialized fields. The ever-widening scope of private-sector activity, as a practical matter, left government with no choice but to create agencies with specialized expertise to oversee these fields, though subject to judicial and legislative oversight.<sup>1</sup>

If administrative agencies are an evil, they are a necessary evil. Neither legislators nor the courts can be expected to handle the crushing demands that agencies now shoulder, let alone with the same experience and expertise. Neither leaving matters to the "free" marketplace nor massive deregulation is acceptable, though often applauded in political rhetoric. Further, the ever-quickenning pace of change often requires continuing familiarity with arcane technologies in fields like the food and drug industries, the environment, nuclear power, and communications.

The need for regulatory agencies to carry out their mandate by adjudication, rulemaking, and other tools of government was well understood when they were founded and when the Administrative Procedure Act was enacted in 1946. And for a substantial period thereafter, legislatures and courts, by and large, understood and respected the need for agency flexibility to use a variety of mechanisms to make appropriate decisions, including case-by-case decision-making, as well as rulemaking.

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<sup>1</sup> I have contended that the executive branch, through its appointment power and its role in submitting policy recommendations to the agencies, plays an important role in agency decision-making. [\*The Administrative Process, the Legislative and Executive Branches, Net Neutrality, and Disclosure\*](#), Jonathan Blake, Free State Foundation, December 22, 2015.

Thus, Justice Frankfurter in the *NBC* case of 1946 extolled the appropriateness of the “vague” public interest standard embedded in the Communications Act of 1934. *National Broadcasting Co. v U.S.*, 319 U.S. 190 (1943). There, Commission action was challenged on the grounds that “the standard of ‘public interest’ governing the exercise of the powers delegated to the Commission by Congress is so vague and indefinite that . . . the delegation of legislative authority is unconstitutional.” *Id.* at 225. The Court upheld the FCC’s authority because Congress accorded it “expensive powers” “in a field of regulation which was both new and dynamic.” *Id.* at 219.

Similarly, James Madison, generally credited with leading the transition from the fatally weak Articles of Confederation to the long-resilient U.S. Constitution which preserved the country and the gains of the Revolutionary War, felt deeply disappointed by the ambiguities contained in the Constitution drafted and endorsed by the special Constitutional Convention in 1787. But as the state-by-state ratification process rolled out, he came to extol these ambiguities as a strength of the Constitution, in important part, because they would be fleshed out in the context of the new experiences the country would confront in the future. *The Quartet*, Joseph Ellis, p. 172 (“this was probably Madison’s greatest creative insight – the multiple ambiguities embedded in the Constitution made it an inherently ‘living document’”).

In another article, I have noted the gradual falling away from the consensus about administrative law following the passage of the Administrative Procedure Act. The article attributed responsibility for this unfortunate trend to all three major parties to the process – the agencies themselves, Congress in its legislative and oversight roles, and the courts. In my view, these three parties have increasingly failed to understand and respect each other’s roles – a respect that is required for the proper functioning of the administrative process.

Mr. Cooper’s article is a recent example of this trend in its strong presumption that bright-line rule-making is preferable to case-by-case decision making. Too often Congress does not appreciate that the agency has an adjudicatory role in addition to its rulemaking role and that this role may be a more appropriate tool in certain circumstances. Twenty-five years ago, I mentioned to one able and conscientious FCC Commissioner with a Congressional background that the FCC had adjudicatory authority. The conversation took place after she had already served as a Commissioner for three or four years. She was surprised by my comment because the Commissioners focused so predominantly on their rulemaking responsibilities. Some of the recent battles within the FCC and Congress over FCC procedures may also reflect an unconscious presumption that Congressional procedures should be the model for FCC procedures. But, of course, Congress is not an adjudicatory body and the FCC is both an adjudicatory and a rulemaking entity, and properly so.

The FCC’s general “good conduct” standard in its net neutrality decision may well serve the public interest *because* it will enable the FCC in a relatively new and fast-changing field to develop interpretations of that standard in the context of the circumstances of particular cases. The resulting case law would be grounded in Justice Holmes’ “*experience*” and might then evolve into bright-line rules, or might not do so.

The flexibility (or vagueness) of general standards like the good conduct concept also reflects a healthy humility on the part of the administrative agency because it shows a healthy reluctance to impose rigid requirements on the private sector before the agency has had sufficient experience with the facts. Over time, case-by-case decisions may add context and specificity to agencies' decision-making. When new issues arise, regulators may simply lack the experience on which to base an appropriate bright-line rule, but realize that some agency oversight is necessary to protect the public.

General concepts like "reasonable efforts," "arbitrary and capricious," "bad faith," "good faith," "negligence," "recklessness," and "reasonable doubt" abound in the law. Their utility is generally recognized and accepted, even though their application in certain contexts may be controversial and disputed. Quite often, Congress, itself, directs regulatory agencies to apply such general concepts to both individual cases and rulemakings.

Traffic regulations provide a homely example, though a great many other areas of the law provide additional examples. There are laws against "reckless" driving, not more specifically defined than that. But governments also impose specific speed limits and require that cars park no closer to an intersection than a specified distance. Thus, traffic regulation consists of both bright-line tests and more general concepts implemented by decisions tailored to the particular circumstances of the case. The FCC's *Open Internet* order itself is a combination of specific rules and the general "good conduct" test.

In sum, I believe that bright-line regulation is preferable to applying general principles to individual cases in some situations but that, in other circumstances, applying general principles case-by-case is preferable. Thus, criticizing the action of an administrative agency simply because it entails case-by-case determinations is not sufficient. The first step should be to determine whether case-by-case application of general principles or a bright-line rule is more appropriate and second should be to determine whether the agency has properly applied whichever of these two approaches is preferable.

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