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Showcase Panel I: What Is Regulation For?

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Transcript*

Showcase Panel I: What Is Regulation For?

*Professor Richard Epstein, Professor Philip Hamburger,
Professor Kathryn Kovacs, Professor Jon D. Michaels,
& The Honorable Britt Grant*

Hon. Britt Grant: Hi, everyone. I think we're ready to get started with our first panel. It's like a family reunion in here, so you'll get to see your good friends after this. Thanks, everyone. My name is Britt Grant.¹ I'm a judge on the Eleventh Circuit Court of Appeals in Atlanta, Georgia. I'm pleased to be here to present our first panel, *What is Regulation For?* These panels have a lot of interesting ideas. It'll give us a lot of starting points and background for so many of the discussions about the administrative state and regulation that we're going to be having over the next few days. There are robust debates, which we will experience first-hand here today about whether the administrative state, in its most perfect form, is a threat to liberty or a guarantor of liberty, whether the direction that the administrative state has gone is a turn away from its originally correct role as a less politically-oriented, policy-making body, or is the inevitable fulfillment of the headless monster that is the fourth branch of government.

Our panelists, again, have interesting and innovative ideas on these topics and more. So, let's go ahead and get started. After introductions, to give you all a path for this panel, I'll introduce in brief each of our panelists, and then each will give a five to ten minute thesis, the backbone of their comments for today. After that, I'll give them a chance to ask each other a few questions. I'll interject as necessary, and then we'll get to the audience for some of your fantastic questions.

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1. United States Circuit Judge, United States Court of Appeals for the Eleventh Circuit.

First, to my left, is Professor Jon D. Michaels.² He is a Professor of Law at the UCLA School of Law where he teaches and writes about administrative law, national security law, bureaucracy, privatization, and the separation of powers. He's a graduate of Williams College, Oxford University as a Marshall Scholar, and Yale Law School. He clerked for Judge Guido Calabresi of the U.S. Court of Appeals for the Second Circuit, and then for Justice Souter. His current book project, I think, is going to be the basis of his remarks today, and it's called *Constitutional Coup: Privatization's Threat to the American Republic*.³

Next, we have Professor Philip Hamburger.⁴ He's a scholar of constitutional law and history at Columbia Law School where he serves as the Maurice and Hilda Friedman Professor of Law. He's also President of the New Civil Liberties Alliance, which is a civil rights organization dedicated to protecting all Americans from the administrative state and other threats to constitutional rights. His books include *Liberal Suppression: Section 501(c)(3) and the Taxation of Speech*,⁵ *The Administrative Threat*,⁶ *Is Administrative Law Unlawful?*,⁷ and among his recent articles is "Chevron Bias"⁸ in the *George Washington Law Review*, which explains how *Chevron* deference⁹ violates due process.

Next is Professor Kathryn Kovacs¹⁰ of the Rutgers School of Law. She's a graduate of Yale University and Georgetown University Law Center. She currently teaches Administrative Law, Natural Resources Law, Environmental Law, and Property. And before joining the Rutgers faculty, she spent 12 years in the DOJ Environment and Natural Resources Division, Appellate Section. And most recently in the government, she was a political appointee serving as Senior Advisor to the Director of the Bureau of Land Management in the U.S. Department of the Interior.

2. Professor of Law, UCLA School of Law.

3. JON D. MICHAELS, *CONSTITUTIONAL COUP: PRIVATIZATION'S THREAT TO THE AMERICAN REPUBLIC* (2017) [hereinafter *Privatization*].

4. Maurice & Hilda Friedman Professor of Law, Columbia Law School.

5. PHILIP HAMBURGER, *LIBERAL SUPPRESSION: SECTION 501(C)(3) AND THE TAXATION OF SPEECH* (2018).

6. PHILIP HAMBURGER, *THE ADMINISTRATIVE THREAT* (2017) [hereinafter *Administrative Threat*].

7. PHILIP HAMBURGER, *IS ADMIN. LAW UNLAWFUL?* (2014).

8. Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187 (2016).

9. *See generally id.* at 1205–15 (arguing that *Chevron* deference is unlawful for two reasons. First, it requires judges to abandon their Article III judicial duty of independent judgment. Second, when the government is a litigant, *Chevron* deference requires judges to favor its legal position, and to disfavor the legal position of the other party, in violation of the due process of law).

10. Professor of Law, Rutgers Law School.

Professor Epstein,¹¹ last but not least, is the inaugural Laurence Tisch Professor of Law at NYU School of Law. He is also Senior Fellow at the Hoover Institution and the James Parker Hall Distinguished Service Professor of Law Emeritus and a senior lecturer at the University of Chicago. His first law school appointment was at the University of Southern California. I will not be able to list all of his publications without taking up our entire time here, so I'll note that his newest book is called *The Classical Liberal Constitution: The Uncertain Quest for a Limited Government*.¹²

With that, I will kick it off to Professor Michaels to get us started.

Prof. Jon Michaels: Thank you very much. It's a pleasure to be here and a privilege to be on this panel. As I see it, there are two principal sets of challenges to the administrative state today. First, there are those who see the modern administrative state as a threat to the constitutional separation of powers.¹³ And second, there are those who are more or less okay with a modern administrative state as a constitutional matter,¹⁴ but they are nevertheless distressed by our administrative state which they see as hopelessly inefficient, sclerotic, or unresponsive. And both camps, by my estimations, are seemingly gaining ground. The first, whom I'll call "constitutional conservatives," are not only influencing but also reshaping academic debates, as evidenced by this panel, but they're also obviously influencing American jurisprudence. And the second camp, whom I will call neoliberal, have been wildly successful in reconfiguring the administrative state along more businesslike lines.

By and large, the liberal response to these challenges has been a bit dismissive, from my perspective. This is especially true with respect to responses to the first camp. Many of my fellow travelers will point to history, settled practices, reliance interests, and long-standing and capacious holdings to essentially tell conservative critics to get over it—the administrative state is here to stay. And as for responses to the second group, many will try to meet the neoliberals halfway. They'll say, "Okay, it's okay in these contexts, but not in these contexts," or they'll appeal to values that are, by my estimation, too abstract or contested—the symbolism of being in the public sphere and

11. Laurence A. Tisch Professor of Law, NYU School of Law.

12. RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR A LIMITED GOVERNMENT* (2014).

13. See, e.g., April Rolen-Ogden, *When Administrative Law Judges Rule the World: Wooley v. State Farm - Does a Denial of Agency - Initiated Judicial Review of ALJ Final Orders Violate the Constitutional Doctrine of Separation of Powers*, 66 LA. L. REV. 885 (2006); Vale Krenik, *No One Can Serve Two Masters: A Separation of Powers Solution for Conflicts of Interest within the Department of Health and Human Services*, 12 TEX. WESLEYAN L. REV. 585 (2006).

14. See, e.g., Rolen-Ogden, *supra* note 13; Krenik, *supra* note 13.

things like that. Or they'll work to refute the businesslike government crowd empirically, documenting waste, fraud, and abuse that, say, privatization or outsourcing engenders.

In both cases, I feel as if my team is playing defense. And this is a mistake. It's a mistake for us because it isn't working. As I said, both camps are gaining ground. But more to the point is a missed opportunity. It's a missed opportunity for folks who believe in the administrative state to reaffirm and strengthen the constitutional bona fides of the administrative state, and to do so in ways that would buoy progressive regulation.

So that's what I've been working on. As Judge Grant mentioned, I'm developing an affirmative constitutional theory of the administrative state that responds to both of these camps, and the crux of my argument is that we have, right now, something—what I call the administrative separation of powers. In brief, I agree that the advent of the modern administrative state involved the collapsing of the traditional separation of powers. And I also agree that that's highly disconcerting. An early phase of modern administration in which essentially lawmaking, law adjudication, and law enforcing powers were given over to largely monolithic agencies was a problematic one, but in short order, we've redeemed and refashioned the constitutional commitment to checking and separating state power.¹⁵

And we did so by disaggregating that administrative power among three sets of rivalrous, diverse stakeholders. Specifically, power was—and today it still is—triangulated among three sets of actors: the presidentially appointed political leaders atop the agencies, the career, politically insulated civil servants who carry out much of the day to day work of the agencies, and thirdly, the public writ large, that's all of us who have been long authorized to participate meaningfully in many facets of administrative government.¹⁶ The triangulation, for me, redeems and revitalizes federal governance in an era far different from that imagined by the Framers.

And to be clear, this triangulation is not just a thin reproduction. I'm not just saying, "Oh, we had three great constitutional branches, and now we have three administrative rivals." I'm not suggesting something as empty or formalistic as that. But rather, there's a lot that connects the old and the new separation of powers; most obviously, the agency heads are apt stand-ins for the president herself, insofar as they are appointed by and answerable to the president. Less apparent, but I think that still has an analogy, is the public writ large, whom I compare to Congress. Like Congress, the public's participation

15. Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515 (2015).

16. Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. REV. 227 (2016).

is multi-polar. It's pluralistic, at times scattershot: at any moment some are favoring and other are disfavoring any given proposal or initiative.

Last, I analogize the civil service to the judiciary. Like the judiciary, the civil service may act as a counter-majoritarian check. But precisely because of its distance from the people, the civil service's legitimacy cannot be taken for granted. Thus, like judges, the civil servants earn their legitimacy through careful, robust engagement, through the articulation of reasons, and through consistency across time and across political movements.¹⁷

The interplay of these three sets of actors ensures that administrative government is the product of broad based and pluralistic buy-in. Specifically, we have two sets of political actors: one that's unitary, like the president, and the other that's heterogeneous, more like the Congress, and a counter-majoritarian one, again, not unlike the judiciary in disposition and orientation. As a result, administrative power, by my light, isn't a runaway train because there are multiple veto points. It isn't a tool of naked presidentialism because the agency heads need to secure buy-in from civil servants and the public writ large. And it isn't a coven of some deep state because the bureaucracy, to an even greater extent, needs support from its rivals, namely, the agency heads and public participants.¹⁸

It is, instead, a rough reproduction of what happens, or what can happen, under traditional constitutional governance with its checks and balances. So, administrative separation of powers, at least, is my answer to those worried about all-powerful, all-concentrated administrative power, which I would agree, were it to exist, would be out of step with our constitutional commitments.

Now, I would like to take a minute to turn to how administrative separation of powers also responds to the neoliberal critique. Administrative separation of powers helps explain why framing administrative government in blunt, businesslike terms is actually on constitutionally shaky footing. Businesslike government seeks, among other things, to replace civil servants with private contractors.¹⁹ Most recently, businesslike government proponents have also been seeking to convert the civil service itself into more of an at-will workforce, which may be justified as keeping up or keeping in tandem with what

17. Michaels, *supra* note 15.

18. Jon D. Michaels, *The American Deep State*, 93 NOTRE DAME L. REV. 1653 (2018).

19. *See, e.g.*, Moore v. State of Alaska, 875 P.2d 765 (Alaska 1994); Jeffrey A. Pojanowski, *Reconstructing an Administrative Republic*, 116 MICH. L. REV. 959 (2018); Donald G. Featherstun, D. Whitney II Thornton, & J. Gregory Correnti, *State and Local Privatization: An Evolving Process*, 30 PUB. CONT. L.J. 643 (2001); David L. Callies & Adrienne I. Suarez, *Privatization and the Providing of Public Facilities through Private Means*, 21 J.L. & POL. 477 (2005).

we'd find mostly in American private sector.²⁰ These efforts, let me just be clear, are overwhelmingly bipartisan, and they're pitched as nonideological, technocratic fixes.²¹ They're ways to speed up and streamline administrative government. So, this critique is really coming from the opposite side of the administrative state from that of the constitutional conservatives.

But think about what these fixes do vis-à-vis the administrative separation of powers. So, let's start with government outsourcing, wherein all sorts of administrative responsibilities are contracted out to the private sector. Again, this is bipartisan, but it's also pervasive. In many instances, the contractors directly replace civil servants.²² All the reasons folks like contractors are also all the reasons why they're constitutionally dangerous. Because they're hired and fired by the agency leadership, they, unlike civil servants, have every incentive to be yes-men and women to the political leadership.²³

Civil servants, by contrast, are servants of the state, not any particular administration.²⁴ They thus provide a meaningful check and do so in Republican and Democratic administrations alike. And it isn't just liberal bureaucrats who check a conservative presidential administration, as some may be seeing today. But Democrats, too, also run into all sorts of problems with civil servants uneasy with hyper-partisan or unsubstantiated directives. Again, the use of contractors weakens one of the important dimensions of the administrative separation of powers, namely that between the political leaders and the civil servants. And this is also true when we talk about converting the civil service into an at-will work force. It would, again, flatten that line of rivalry and consolidate power more in the hands of political leaders.²⁵

Also—just one last point on the contractors—to the extent that responsibilities are being outsourced to private firms and private institutions, that also limits the opportunities for public engagement because the public sector is much more amenable to engagement from members of the public writ large. So to the extent policy is also being driven externally, that limits the degree to which that third set of rivals, the public writ large, is able to participate.

Okay. To sum up, though the administrative separation of powers has been largely overlooked, it is this scheme, this fragmented tripar-

20. Jonathan Walters, *Life after Civil Service Reform: The Texas, Georgia, and Florida Experiences*, GOVERNING MAG., Oct. 2002, at 30–31; J. Edward Kellough & Lloyd G. Nigro, *Dramatic Reform in the Public Service: At-Will Employment and the Creation of a New Public Workforce*, 16 J. PUB. ADMIN. RES. & THEORY 447 (2005).

21. *Privatization*, *supra* note 3.

22. Featherstun et al., *supra* note 19.

23. Jon D. Michaels, *Privatization's Pretensions*, 77 U. CHI. L. REV. 717 (2010).

24. Michaels, *supra* note 15, at 546.

25. Jon D. Michaels, *Privatization's Progeny*, 101 GEO. L.J. 1023 (2013).

tite scheme, that serves as a constitutional salve as it takes a good deal of the sting out of otherwise unitary and, thus, hyper-potent or unfettered agencies. It serves as a constitutional adhesive, binding the administrative state to the underlying and similarly fragmented and triangulated Framers' scheme, and it serves as a constitutional emulsifier, mixing the administrative regime into what Professor Thomas Merrill calls an overarching separation of powers doctrine that is more than the sum of the specific clauses that govern relations among the branches.²⁶ I'll end there.

Hon. Britt Grant: Thank you. Professor Hamburger?

Prof. Philip Hamburger: Well, thank you very much. It's a great pleasure to be here with such a distinguished panel and such a distinguished audience. And I might say, it's particularly a pleasure to follow Jon, whose new book on privatization is very, very interesting.²⁷ As you'll see, I do not agree with some of it, particularly the administrative side of it. But, it's an interesting book. And he's a thoughtful critic of the position taken by those of us who are doubtful about the administrative state.

Now, please forgive me. As a preliminary matter, I just want to mention that the New Civil Liberties Alliance is continuing to hire more lawyers. Our director, Mark Chenoweth, is in the room, and if you're interested, by all means, speak to him. That is, if you're a superb litigator. We've been busy with a wide range of litigation, and where we cannot get standing, where we can't sue, we've been doing other amusing things. For example, we just recently petitioned about 20 agencies to adopt administrative rules barring administrative guidance. That is, we're inviting the administrative state to cannibalize itself.

The movement against administrative power is growing and there will be plenty of opportunities for everyone in this room. I know many of you already are fighting the administrative state, and I encourage everyone here to participate in one way or another. It's going to be fun.

I have two points today. First, administrative power threatens civil liberties. Second, administrative theory is a fig leaf—a fig leaf that covers up the reality of lost freedom.

First, and you've heard this from me before, but I want to reiterate, even if only briefly, that administrative power is a profound threat to civil liberties. No other development in contemporary American law threatens more civil liberties of more Americans.²⁸

26. Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225 (1991).

27. *Privatization*, *supra* note 3.

28. *Administrative Threat*, *supra* note 6, *passim*.

I'm just going to run through an abbreviated list of civil liberties violations—there could be a longer list, this is just the short version.

- Administrative power denies due process, both in the agencies and later in the courts.²⁹ Agencies substitute their faux process for the court's due process. And the courts, essentially, are corrupted by administrative process because they end up also denying due process because of their deference to agency decisions—both on the facts and the law.³⁰
- Administrative power denies jury rights. This begins in the agencies, and again, it is echoed in the courts on appeal.
- In fact, administrative tribunals give government ambidextrous power. On the one hand, the government can proceed in the courts with the full due process of law and all of the other constitutional rights of procedure. Or, on the other hand, it can proceed in administrative tribunals and thereby avoid all of those niceties, those mere formalities.

Administrative power thereby transforms the Constitution's procedural guarantees. It changes the very nature of these rights. No longer are they guarantees. Instead, they have become mere options for power, and our Bill of Rights has thereby been almost entirely eviscerated.

- You might say, "Well, that's just the procedural rights. What about the substantive rights, such as free speech and religion?" Those, too, have been undermined because administrative power and its substitution of faux process for due process is a profound threat to substantive rights. For example, we nowadays have full-scale licensing and other administrative control of speech in about half-dozen agencies. We've revived seventeenth century modes of control; the Star Chamber could not have been more efficient.
- And finally, I want to focus on how administrative power undermines equal voting rights—a loss of freedom that is particularly interesting. This may seem a bit of a puzzle, so I'm going to linger on it.

There have been two preeminent developments in federal law since the Civil War, voting rights and the administrative state. And of course, this is not a coincidence. There is a profound connection between the two. Although educated Americans increasingly welcomed equal voting rights, they had misgivings about the results. People who were less educated than them, the great unwashed masses, came to enjoy political power, and that seemed worrisome to folks

29. The Administrative Threat to Civil Liberties, *CATO SUP. CT. REV.* 15 (2017).

30. *Id.* at 23.

who went to Yale, and Harvard, and Princeton. Princeton, of course.

[Laughter]

Woodrow Wilson—never forget Woodrow Wilson—Woodrow Wilson complained about the diversity of the nation, which meant that “the reformer,” needed to influence “the mind, not of Americans of the older stocks only, but also of Irishmen, of Germans, [and] of Negroes.”³¹ That is the granddaddy of the administrative state speaking. He also said, “in order to get a footing for new doctrine, one must influence minds cast in every mold of race, minds inheriting every bias of environment, warped by the history of a score of different nations, warmed or chilled, closed or expanded by almost every climate of the globe.”³² Rather than try to persuade such persons, Wilson welcomed administrative governance. The people could still have the Republic, but much legislative power was to be shifted out of an elected body into the hands of the right sort of people.

Far from being narrowly a matter of racism, this has been the transfer of legislative power to the knowledge class, to a class that finds authority in their knowledge and that therefore feel empowered to disempower other Americans. But of course, even if it’s just a matter of class—and it hasn’t just been a matter of class, but even if it were—when legislative power is removed from the representatives of a diverse people, there are implications for minorities. So leaving aside Wilson’s overt racism, the problem is the relocation of legislative power a step further away from the people into the hands of a relatively homogenized class. (I know many of us are part of that class, but we at least have false consciousness.) Accordingly, even when administrative power is exercised with solicitude for minorities, it’s a sort of power exercised from above. And those who dominate the administrative state have always been, if not white men, then at least members of the knowledge class.

Administrative power thus cannot be understood apart from equal voting rights. The redistribution of legislative power has gratified the knowledge class, but it makes a mockery of the struggle for equal voting rights. It reduces equal voting rights to a bait and switch, and it confirms how seriously administrative power threatens civil liberties.

31. Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197, 20809 (1887).

32. *Id.*

And all of this brings us back to Jon's comments. He writes a book about a "constitutional coup," and it's a very elegant book, but I wonder why he objects to a small, private coup (if that's the language he wants to use), but not a huge, administrative one. I'm sure he cares about retail assaults on due process, jury rights, equal voting rights, and so forth, but why not care about the wholesale assault on such rights? I suspect he does care but is still evolving his views—I trust so. Administrative power is the primary threat to our freedom, and the apologists for administrative power have said nothing about that, absolutely nothing.

My second point is very simply that administrative theory stands in contrast to administrative reality—indeed, the theory is a sort of fig leaf that covers up the reality. And it's not just me who says this. Daniel Farber and Anne O'Connell—they're not conservatives—say that there is "a gap between theory and practice which leads to an increasingly fictional yet deeply ingrained account of administrative law."³³ That's right, administrative theory is largely fictional. Rather than justify the realities, it disguises them, and not very well.

How is this so? I'm just going to run through a few of many possible examples. We could spend an hour on this, but I don't want to do that to you.

- Let's begin with "nondelegation." Jon very candidly recognizes that it's a "fiction" to say Congress isn't delegating legislative power to agencies.³⁴ And of course, even the word "delegation" is a misnomer: it's a distraction. The Constitution *vests* legislative power in Congress,³⁵ and the reality is that Congress is *divesting* itself of that power. We should all therefore stop using the word "delegation." The Court may use it, but we have to press them to reconsider, for the constitutional language is "vest" and "divest". Once you think about this, the violation of the Constitution becomes painfully apparent.
- Then there's the "intelligible principle" test.³⁶ Congress supposedly uses intelligible principles to guide agencies. But such principles often do nothing of the sort. As Jon says—and again, I appreciate being able to quote him—"This test is flabby."³⁷ That's a bit of an understatement, but I appreciate the thought.

33. See Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1180, 1189 (2014).

34. *Privatization*, *supra* note 3, at 58.

35. U.S. CONST. art. I, § 1.

36. *Hampton v. United States*, 276 U.S. 394, 412–13 (1928) (establishing the intelligible principle test).

37. *Privatization*, *supra* note 3, at 58.

[Laughter]

And of course, Congress often doesn't even offer an intelligible principle. See the *Gundy*³⁸ case, right?

- Administrative power is said to be “democratic.” No kidding, that’s the standard academic justification for it—allegedly because it comes with notice and comment. Oh my! Jon writes that notice and comment is not merely “democratic,” but “meaningful and truly democratic public participation.”³⁹

Well, on this, I just want to rely on Justice Kagan. That’s right, Justice Kagan has written that “notice and comment often functions as charade.”⁴⁰ A charade. That’s her word.

- It also is said—and this comes in some of the theories of our colleagues on this little bench, that agencies are unbiased both in regulation and adjudication. Jon even writes about civil servants as the administrative state’s “judiciary.” Indeed, he writes that “the tenured, expert civil service” have “acted the part of our independent and largely apolitical federal judiciary, insisting on . . . intra-agency commitment to the rule of law.”⁴¹ Really? This is clearly false. The overwhelming majority of the bureaucracy are on one side of the political spectrum. Jon said that civil servants have treated Democratic and Republican administrations alike. Really? Well, I leave you to judge that.
- When we get to administrative adjudication, it’s all the more curious. According to the theory, administrative adjudication is neutral. But, in fact, it is profoundly biased.⁴² ALJs are often chosen to favor their agencies. Their decisions are ultimately reached or reviewable by agency heads, who are political appointees and who adopt administrative rules and set prosecutorial policy. And ALJ procedures are slanted to favor the agencies. An SEC ALJ recently boasted that he has never held against the agency. Indeed, he told this to defendants, trying to get them to settle!⁴³ I won’t

38. *United States v. Gundy*, 695 Fed. App’x. 639 (2d. Cir. 2017), *cert. granted*, 138 S. Ct. 1260 (2018).

39. *Privatization*, *supra* note 3.

40. See David J. Barron & Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 231 (2001) (describing notice and comment as a “charade” and “Kabuki theater”).

41. *Privatization*, *supra* note 3, at 9.

42. Judith K. Meierhenry, *The Due Process Right to an Unbiased Adjudicator in Administrative Proceedings*, 36 S.D. L. REV. 551 (1991).

43. Jean Eaglesham, *Fairness of SEC Judges is in Spotlight*, WALL ST. J. (Nov. 22, 2015) <https://www.wsj.com/articles/fairness-of-sec-judges-is-in-spotlight-1448236970> [<https://perma.unl.edu/CJ5J-SM7J>] (stating that Judge Cameron El-

bore you with all of this. If you want to read more about ALJ bias, read the NCLA's brief in *Lucia v. SEC*.⁴⁴ It's a Brandeis brief documenting layers and layers of bias just at one agency.

- And then, of course, there's the theory about "separation of functions" in agencies. Well, that's not the Constitution's separation of powers. What's more, it's not even the reality of agency operations because there is not really an effective separation of the different government functions within agencies. This is most painfully clear from the fact that agency heads adopt regulations, set my enforcement policy, and finalize or review agency adjudication.

I'm not going to keep on going. You know all this stuff. The two basic points are simple. First, administrative power is a profound threat to civil liberties, and it has to be understood not simply as a separation of powers or as a delegation problem, but as a danger to civil liberties. We need a new civil liberties movement against this threat to our freedom. Second, administrative theory is just a fig leaf, which covers up the reality of lost freedom.

Thank you.

Hon. Britt Grant: Thank you. We'll move to Professor Kovacs.

Prof. Kathryn E. Kovacs: Good morning. Thank you. Thank you for the introduction. Thank you so much for the invitation to be here. I'm really delighted to be one of the only light gray suits in the room. And I feel like being on the jumbotron, I should get up and dance. But instead, I'm going to talk about the Administrative Procedure Act.⁴⁵ So, as Judge Grant pointed out, I practiced law for a long time. I practiced in the government for fifteen years, and that experience puts me at the more practical end of the continuum in legal academia, makes me kind of a weirdo, actually, in legal academia.

So, I take the fourth branch as a fait accompli, and I write about the Administrative Procedure Act of 1946,⁴⁶ which embodies the compromise liberals and conservatives reached to constrain federal administrative agencies. The APA treated the New Deal as a done deal and created a framework for agency procedure and judicial review

liot allegedly "told the defendants during settlement discussions on a case they should be aware he had never ruled against the agency's enforcement division").

44. Brief of the New Civil Liberties Alliance as Amicus Curiae in Support of Petitioners, *Lucia v. SEC*, 138 S. Ct. 2044 (2018) (No. 17-130), 2018 WL 1326145.

45. Pub. L. No. 79-404, 60 Stat. 237 (1946).

46. *Id.* Professor Kovacs's remarks are related to Kathryn E. Kovacs, *Rules About Rulemaking and the Rise of the Unitary Executive*, 70 ADMIN. L. REV. 515 (2018) (arguing that judicial distortions of APA rulemaking procedure have contributed to unilateral presidentialism).

that balances the values of regulatory programs and private interests. Unfortunately, the courts never really implemented the APA as written. I think we should try it.⁴⁷ And today, I'd like to talk about just one aspect of that.

In 1933, of course, Franklin Delano Roosevelt became President and kicked off the New Deal. And of course, that entailed tons of new agencies and regulatory programs that brought with them the question of how to control them. At the same time, agencies in Europe were becoming tools of fascist autocrats, and there was a widespread fear here in the United States that FDR would go down the same road. So, the desire to avoid totalitarianism became one of the driving forces behind administrative reform. Then during the war, the federal bureaucracy exploded and began to impact people's everyday lives through things like rationing and price controls, and the belief that agencies could pave the way for totalitarianism went mainstream. And that concern infused the entire debate on administrative reform from 1933 to 1946. The APA's legislative record is riddled with arguments based on the need to avoid totalitarianism.⁴⁸

Well, the Administrative Law Section of the American Bar Association took the lead in this effort. At the time, it was a very conservative section. Now, it's delightfully bipartisan, multi-partisan. I see a bunch of members in the audience and hope you'll all consider joining us. Two weeks after D-Day, the ABA Ad Law Section bill was submitted in Congress. It was designed as a compromise between the conservative and liberal approaches. And in 1946, 17 years after the first administrative reform bill was introduced in Congress, the APA passed unanimously, and President Truman signed it.⁴⁹ The debate leading up to this moment was lengthy and intense, and the public was involved. It was a truly deliberative process, a really remarkable moment of civic republicanism in our history.

Much of the APA was controversial. It contains lots and lots of compromises and lots of language that's murky at best because that's the only way the bill would pass. But other things in the APA are clear. For one thing, the same standard of review applies to all agencies. No agency should get super deference under the APA.⁵⁰ There was also a consensus that rulemaking should be pretty simple. Congress intentionally left a lot of the rulemaking process to agency discretion in order to encourage rulemaking, to give regulated parties

47. See Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207 (2015).

48. See Kathryn E. Kovacs, *A History of the Military Authority Exception in the Administrative Procedure Act*, 62 ADMIN. L. REV. 673, 68387, 69596 (2010).

49. Pub. L. No. 79-404, 60 Stat. 237 (1946).

50. See Kathryn E. Kovacs, *Leveling the Deference Playing Field*, 90 OR. L. REV. 583 (2011).

more certainty, and to avoid what Congress saw as the separation of powers concerns with courts making the law.

Well, since then, rulemaking has become intensely resource intensive because of additional rules imposed by Congress, by the courts, by the president, and by the agencies themselves. The upshot is it's hard for agencies to make policy in a timely fashion, to respond to new circumstances, and to respond to elections. Government power in the United States can be seen as a hydraulic system. The Supreme Court is often concerned about one branch aggrandizing its power and putting pressure on the other branches. Now we're seeing the opposite. We see a Congress that is abdicating its power. When one branch allows its power to atrophy, another branch will fill the void. If neither Congress nor agencies can make policy efficiently, then the president and the courts will.

So, the difficulty of rulemaking is one of the reasons why presidents have increasingly made policy themselves. Of course, there are other reasons for presidential direct action. Presidents can no longer rely on Congress to make policy. Presidents prefer to take the political credit for policy decisions, and in this tech-crazy and media-savvy world, it behooves a president to take ownership of policy decisions. But also, rulemaking is just too difficult and time consuming. In the very least, if rulemaking were easier, the pressure on the president to make decisions himself would decrease.

Now, this kind of unilateral presidential action is certainly not new. I'm sure most of you remember President Clinton's memos directing agencies to take specific action. You remember President Bush's signing statements. Obama took up both of those tactics and had some thirty-eight czars in the White House. President Trump has taken presidential control to a new level. He makes policy every week that previously would have come from agencies in rulemaking. And in a sense, this is good because it responds to elections. President Trump was elected.

On the other hand, presidential policy making entails little transparency, public participation, or deliberation. There is no requirement that the President obtain feedback from interested parties to hone his policy. Presidential decision-making limits the parties engaged in presidential in policy discussions. Sometimes even the relevant cabinet officer is excluded. There is no way to know who or what he consulted in making his decision. The President is less accountable than agencies. He's often not subject to judicial review, and aside from quadrennial elections in which the President need not even obtain a majority of the vote, he's only removable via impeachment or the Twenty-fifth Amendment. And finally, the President lacks the expertise of agencies.

Now, ideally, Congress would make policy decisions, and I'm an optimist, but I'm also a realist. So, absent that, for all of its flaws, notice-and-comment rulemaking is superior to rule by presidential fiat. Taking agencies out of the policymaking game eliminates one mechanism for checking presidential aggrandizement. Certainly, it's not enough standing alone to make agencies more agile, but it is a necessary component of a balanced government.

So I think—and I'm glad there are so many federal judges in the audience to listen to me today—I think we should stick to the APA. We should preserve the balance Congress struck in 1946. We should hold agencies accountable. We desperately need to update the law, but let's not take agencies out of the game, or we will fall into the trap the APA was designed to avoid.

Prof. Richard Epstein: Thank you very much for the opportunity to be here with old friends and new. It's always a great pleasure to speak to The Federalist Society. The question is what can I do to rile you up a bit?

[Laughter]

And in order to answer that particular question, what I'm going to do is to point out a deep contradiction in the program. The way in which the program gets its mission is through its title, which is to say, "What is Regulation for?" And that title should be understood as inviting a discussion of the aims of regulation and the possibility of its abuse. The body of the text, however, shifts gears and starts to talk about the APA and its internal structures. I think it's fair to say that our first three panelists have fallen into the trap of speaking about the content of the APA and not the general mission of the administrative state. I'm going to fall into a different trap in speaking about the themes raised by the title.

In carrying out this assignment, one of the things that you have to ask, particularly in connection with the New Deal, is what agencies *cannot* do well, that is, you have to identify cases where these agencies should never be used at all. There is no question that the 1946 APA was a kind of a peace treaty in which the post-war political consensus accepted the legitimacy of the administrative state and then tried to prevent some of its great abuses.⁵¹ I am not bound by that sort of paltry convention, and so I shall ask, first, what are the legitimate functions of an administrative state?

And here, I think that it is analytically necessary to divide the world into two substantive cases. Case number one includes cases

51. 5 U.S.C. §§ 551–559, 701–706 (2006).

where competitive markets work, and case number two is for situations where competitive markets do not work. A working competitive market does not mean an utterly unregulated market. It means one that regulates the formalities of contract with statutes of frauds, with recordation statutes, parol evidence rules, and the like. The basic function of the administrative state is to do nothing whatsoever to alter the basic substantive rights, because there's nothing it can do to improve upon what Mother Nature has created—the well-functioning competitive market.

And so if you start looking at the way in which the Roosevelt cartel machine was put into virtually all of the codes of fair competition spawned such notable (albeit counterproductive) agencies as the National Labor Relations Board, the Civil Aeronautics Board, the Motor Vehicle Act, and so forth. These are all things that should simply be outside the ken of the administrative state because, regrettably, they take a competitive market with high output, only to substitute in its place a cartelized market with lower output, higher prices, and a loss of social surplus. The law then adds to the insult by increasing the administrative cost, as it creates massive but unwelcome possibilities for capricious redistribution through the state. Cartels never respond to any intelligible principle that uses redistribution to shrink differentials in wealth. They are there simply there to help their favored groups at the expense of everyone else, including parties who are poorer than the protected groups.

And as far as I'm concerned, if the administrative state does everything wrong for all the wrong reasons, there is no way that a clever administrative lawyer can correct this dangerous state of affairs through a system of notice and comment, hearings, public participation, administrative expertise, and the like. All of those things may be fine under other circumstances, but here, if the game is negative-sum from day one, it is utterly futile to claim that we can improve social welfare by tinkering with its internal details. We should end the initiative once and for all.

The real intellectual urge, then, should be for the systematic deregulation of competitive markets. And indeed, if you go back to the great Chicago economists of the 1940s and 50s, Milton Friedman, George Stigler, and so forth, all grew up in the 1930s when the New Deal experiment was at its height. The reason they wrote with such passion is that they saw a world in which it turned out that competitive industries were turned upside down by administrative regulation. The great tragedy of the APA, by implication, therefore, is that it entrenched these unwise practices against future intelligent reform.

So let me just give a couple of examples of this trend. Start with health care, in which it is possible to distort individual and institutional incentives by installing a system of community rating in a pre-

viously competitive market. That one move can destroy the market for individual health care policies by requiring massive cross-subsidies from the young to the old. Hence that legislative initiative has the ironic consequence of taking those people who have limited means and requiring them to subsidize people who have been able to accumulate wealth for many years. I see no particular virtue in that cross-subsidy, which takes from the relatively poor to help the relatively rich.

Next, the Fair Labor Standards Act⁵² (FLSA) has the same characteristics. The FLSA puts in a minimum wage law. It blocks the low-productivity workers from getting into the workplace in order to protect those with higher levels of skill from wage competition. The law works a huge degree of redistribution, but it generates no long-term social benefit, no matter what rulings the Department of Labor uses to administer another unwise government program.

The question then remains, is there a place in which you need effective administrative states? I think it would be utterly foolish to claim that any society, ancient or modern, can live a world without an administrative state. There are just too many cases in which markets do fail, and it's important to understand exactly what those cases are. One key case involves natural monopolies. It turns out in certain industries, especially with network effects, that a single supplier can outperform multiple suppliers in a market. These efficiency advantages have led lawyers and economists to develop a general formula on how to deal with the twin risks of a dominant firm overcharging and a state regulator confiscating. The key here is the formula already mentioned, one that mentions fair, reasonable, and non-discriminatory rates. It's somewhat difficult to apply in various context, but nonetheless, it's an important notion because it sets the basic intellectual framework for discrete actions, which is to eliminate the deadweight losses associated with monopoly, at an administrative cost that is sufficiently low so as to preserve the prospect that the regulation will induce some net social gain coming out of the operation.

So it is idle to rule some administrative state out of bounds. But the power of the administrative state could be turned to evil as well as benevolent purposes. The social objective is to raise the overall utility of all the individuals governed by the new system, which, a priori, cannot be done with competitive industries. In other cases, the challenge is to create a Pareto improvement whose aggregate gains exceed the administrative costs, both public and private, needed to put that system in place.

With rate regulation, the challenge is to identify various limitations on the power of state administrators that will bring the resulting regulation closer to the competitive ideal. One of the key problems to

52. 29 U.S.C. § 201 (1938).

worry about in this setting is the introduction of implicit cross-subsidies through rate regulation. Given the amount of potential monopoly rents, it is all too easy to try to impose the majority of the cost on one group of users while simultaneously giving the majority of benefits to another class of users. The pre-New Deal cases took that mission seriously because those judges knew that no competitive market created these cross-subsidies, which meant that they should be regarded as off-limits under any permissible regulatory scheme. Hence, in dealing with the regulation of both freight and passenger trains, the system had some wiggle room in the allocation of joint costs, but virtually none with respect to the unique costs allocated to each type of service.

The question of rates is, of course, not the only topic for regulation. Environmental regulation against pollution and similar ills is a key and proper part of the modern agenda. Given that pollution often comes from diffuse sources that cause harm to a large number of people, it is idle to think that the private actions brought under the common law of nuisance, even with recourse to both damages and injunctions, could adequately control these serious externalities. Government regulation works at lower transaction costs to control the problem, so long as administrative discretion does not lead to illegitimate cross subsidies. To control that risk, I take a naïve view of what environmental regulation is supposed to do. It is most unwise to expand the definition of pollution beyond the kinds of wrongs addressed by the common law, namely key types of emissions like noise, stench, garbage, and waste that can generate huge amounts of harms to the land, water, and air. In cases of concentrated losses inflicted by one party against another, private actions are surely part of the remedial picture. But for the more diffuse harms, like tailpipe emissions, exclusive reliance on private rights of action is going to be utterly fatuous.

At this point, the key objective of administrative law is to create a public agency that addresses the emissions that are subject to private actions. The agency then seeks through administrative actions to combine an appropriate mix of damages (now we call them fines) coupled with injunctions (now we call them general prohibitions). At this point, the challenges are technical: what combination of these two forms of sanctions minimizes the loss from the pollution *and* their cost of administration? It is yet another situation where the ideal is to stop regulation when the cost of additional regulation exceeds its additional benefit. Note that this is the same constraint used for ordinary tort actions, which the administrative state now tries to mimic. One implication of this general position is that it is always foolhardy to seek to reduce emissions down to zero. Instead the overall objective is to maximize total useful output that can come from any given level of pollution. For dangerous pollutants like sulfur dioxide and nitrous ox-

ide, a system of tradable permits may well offer a superior outcome to direct regulation.

In environmental law, as in other areas, regulation is always filled with pitfalls and dangers. These schemes can, as with rate regulation, be used to design illegitimate cross-subsidies between firms or even states. Those possibilities lurk everywhere, including the recent efforts of the Obama administration to give a very broad reading to the phrase “best system of emission reductions,” which was rightly rebuffed by the Trump administration. Those Obama extensions contemplated and the use of various technologies from carbon capture (which is outside the scope of the statutory scheme) and the introduction of various control devices on basic equipment (which is squarely within the scope of the legislative mandate). The cross-subsidies come when specific emissions targets are set for each individual state. In all cases, the superior approach is to introduce a neutral system of regulation that takes into account only the net negative effect of certain emissions on the environment. To give some idea of the scale of the potential risks, note that alternative definitions of the “navigable waters of the United States” could be used just to limit discharges into public waters, which makes good sense, or to allow it to impose total limitations on real estate development miles from any navigable water, without demonstrating that any pollutant from these remote sites could even reach a navigable body of water, let alone pollute it. The protection of the environment need not impose huge limitations on ordinary land use and development.

The same risks can arise with efforts to regulate the emission of carbon dioxide in the effort to control risks of global warming. The issue here is never whether one “believes in climate change,” which has been constant both before and after human beings engaged in industrial activities. It is rather whether particular climate changes are attributable to human activities or to natural forces. And even if it is the former, it is far from clear that generation of carbon dioxide is connected to any major form of climate change. To give one example, the melting of the Antarctic ice cap may have profound effects on sea level rise and human welfare. But, if it is attributable to volcanic activity under the ice cap, no regulation of carbon dioxide emissions will have the slightest effect on that particular problem.

So my basic position is that all too often the administrative state simply tries to do too much. If one removes all competitive markets out from its purview, we can then shrink its size, which would allow the nation to concentrate its resources on those particular areas in which regulation is called for, such as rate regulation and environmental protection, where it is critical to pay extensive attention to the design and implementation of the program so that political forces do not force it to deviate from its proper mission. Focusing on that mis-

sion should make it more possible to articulate, to use a familiar phrase, “intelligible standards” that are all too often missing in action. A narrow focus with an improved means-ends relationship is the key to any sensible program of administrative reform. One of the benefits of such a reform would be to ease the task of judicial review of administrative action, which is such a sore point today.

So, to understand administrative law, it is advisable to recall the old conceit about the relationship of civil procedure and substantive law. The key insight is that civil procedures should be understood as adjectival to the substantive law. It is the substantive law that defines rights and their correlative duties, and it’s the adjective law that seeks to minimize the distortion of its principles while developing suitable modes of enforcement. Moving into the public area, administrative procedures become a rough proxy for ordinary civil procedure devices. Understand that relationship and matters will quickly improve. Just one closing example concerns the issue of discovery. In civil procedure, it is critical to make sure that the effort to get reliable information for trial does not become a witch-hunt, so that limits are placed on what can be asked by whom and when. Not so with administrative agencies, which face no serious limitations on the endless inquiries, and consequent delays that are all too much a part of the system. It is all too common in cases on which I have worked with regard to the construction of new plants and pipelines, that extensive delay, covering years, is part and parcel of the fabric of modern administrative law. But here, as with private law, justice delayed is justice denied.

So, the key element is to first get the substance right, then to modify the procedures in the administrative state so as to prevent those abuses similar to those endemic in ordinary private litigation. And by putting that program into place, we could do much better than we’re currently doing today. I regard this as a bipartisan program. When I say bipartisan, I sometimes think it means that it’s a program which is likely to be rejected by both parties.

[Laughter]

Hon. Britt Grant: Thank you all. I’ll confess that I have a few questions of my own that I’m dying to ask scribbled down here, but in order to keep my promise to the panelists, I will give you the opportunity to ask each other questions that have popped into your head during these presentations.

Prof. Kathryn E. Kovacs: I’d love to start, if that’s okay, to ask—I wonder, Richard, if common law itself is not a form of regulation. It is a form of government intervention in the free market. Clearly, in

order for a free market to work, we need some mechanism for dispute resolution. So, I wonder what makes common law judges preferable to agencies whose powers, and procedures, and budgets are controlled by Congress?

Prof. Richard Epstein: Mine is not an argument about whether this country has had bad administrators and/or bad common law judges. You could have both. Too often it is a race to the bottom, and surely this country has had both. Instead, I'm thinking of the common law as a system of substantive rights, one that supports competitive markets, as I've mentioned. But the thought that any society could have a competitive market with no form of regulation whatsoever is slightly crazy, so a common law system that contains a system of contract also has a system of tort law. That tort law is designed to prevent the use of force by one individual against another, and its primary application is typically in the context of disputes between strangers. And so the particular ends that the common law should enforce—the control of trespass, the control of nuisance, and the control of monopoly—establish the proper ends for the administrative state.

So the key element is that no legal system should ever allow its common law and administrative law to embrace in parallel two conflicting sets of substantive rights. A sound common law set of rights stresses freedom of contract. Then along comes the misguided bits of the Civil Rights Act of 1964,⁵³ which in Title VII mistakenly tries to impose comprehensive duties of nondiscrimination in competitive markets. And I would not defend that outcome under a common law regime, in which nondiscrimination duties are offsets to the monopoly power of public utilities and common carriers. I would not want it to come out of a statutory rule. The point here is nobody should understand any common law rule as being abstractly given to mankind by God. The defense of common law principles necessarily requires making a substantive case—which on another occasion, I would be more than happy to do—as to why it is these human rights starting from my favorite period, to wit, Roman law. Moving forward, those principles pretty much set the right balance, which renders it a worthy template for structuring administrative law.

And so the whole theoretical point about is that administrative law ought to take over where there is a breakdown in the common law's enforcement mechanisms, and its function should be to lower the transactions cost to vindicate these particular rights. I say this because the common law had developed the correct set of rights. Nothing is more dangerous than imposing regulations on either labor, capital, or real estate markets that undermine competitive solutions. The ap-

53. 42 U.S.C. § 1981 (1991).

appropriate place for economic regulations are always those situations with a single supplier of goods for which the FRAND obligations⁵⁴—fair, reasonable, and nondiscriminatory—may make sense if properly executed. That was the common law approach for over three hundred years. That should be the administrative law approach today. So, the objective is always perfect translation of rights from the common law to the administrative realm. One incurable problem for the progressives is somebody as ignorant (and learned) as Woodrow Wilson thought he could always initiate new schemes because he knew more than everybody else.

[Laughter].

Prof. Philip Hamburger: So I have a question for my colleagues on my physical right and left.

Prof. Richard Epstein: That does not include me.

Prof. Philip Hamburger: That does not include you, actually, in this case—

Prof. Kathryn E. Kovacs: —I get the left.

Prof. Philip Hamburger: —which is, why are you content with the loss of civil liberties?

Prof. Kathryn E. Kovacs: Why what?

Prof. Philip Hamburger: Why are you content with the loss of civil liberties that comes with the administrative state? If the administrative state essentially guts the procedural rights in the Bill of Rights, and if it increasingly threatens the freedom of speech and the freedom of religion, why are you content with this? If in a host of agencies we are forced to give up our jury rights, our due process rights, the burdens of proof derived from due process, and even the right to have an unbiased decision maker, why are you content with this?

Prof. Kathryn E. Kovacs: I just don't think it's done that.

Prof. Philip Hamburger: Oh, okay.

54. Jeffrey I. D. Lewis, *What is "Frاند" All About? The Licensing of Patents Essential to an Accepted Standard* (June 11, 2014), <https://cardozo.yu.edu/sites/default/files/Lewis.WhatIsFrاندAllAbout.pdf> [<http://perma.unl.edu/3ZTW-UNRB>].

Prof. Jon Michaels: So I, too, would kind of challenge the underlying presumptions that are built into the question. But I would say that to the extent that this ties into one of the larger themes that Philip emphasized in his opening remarks about the relocation of power from, say, more democratic entities to administrative entities, which he cites as starting around the progressive era, I would say a couple of things about that, if I may. First, are these absolute or comparative questions? Are we going to feel differently about state power and be more concerned, of course, about the exercise of state power as opposed to the exercise, of course, of market power?

And so I would start by saying that to the extent there are some intrusions on liberty in this [administrative] space, if you're talking about the access to opportunities for redress, for dispute resolution, for empowerment when the market has failed you, or the state has failed you, are folks who are already disempowered and marginalized, which I think is the group that Philip was referencing in his opening remarks, at least, are they going to have more of an opportunity to have their voice heard in administrative agencies before a Congress, or within the market? And I think I would take the administrative agencies nine times out of ten on that—

Prof. Philip Hamburger:—I could not disagree more.

[Laughter]

Prof. Jon Michaels: I'm not surprised, but I just, I think we're talking about different groups of disempowered and different groups of marginalized Americans.

Hon. Britt Grant: Let me ask you, Professor Michaels, does your theory depend on a supposition that the civil service doesn't politically skew in one direction or the other, or would a different presumption interrupt your conclusions?

Prof. Jon Michaels: Okay, so, and that's come up, so I'm glad that was asked. First of all, I'm not so sure that the bureaucracy as an empirical matter is as skewed as commonly believed. It's—many studies by political scientists have suggested that the median bureaucrat is closer to the median American than are either presidential—the presidents from either set of parties. It doesn't skew as democratic as suggested because there are also many parts of the federal government that skew quite conservative.⁵⁵ But the larger point is simply

55. Chris Cornillie & Mark Lee, *Government Executive 2016 Presidential Poll*, Gov'r EXECUTIVE (Aug. 13, 2015), <http://www.govexec.com/insights/government-executive-2016-presidential-poll-august-13-2015/119144/>; David E. Lewis, "Deep State"

that to the extent that the bureaucracy has been skewed, if that's right, it doesn't have to be that way. It wasn't designed to be that way. It has to do with, presumably, preferences, choices, opportunities, and whatnot.

So to the extent an institution skews in a particular direction, as long as it's open, I encourage, especially there's a lot of students here. We talked—Kati gave a shout out to judges. I'll give a shout out to law students. Go join the government. Go help counter that progressive or democratic tide, and join the EPA, and join the Department of Interior, and tell the liberals where they're getting things wrong and where they're overreaching. So I think the point is whether it's built in. I don't think it's built in. And to the extent it is this way empirically, Congress skews, the courts skew, these things kind of come and go over different moments in time, but they're not inherently so.

Prof. Richard Epstein: Can I get—

Prof. Philip Hamburger: Can I just get—I just have one little bit.

Prof. Richard Epstein: I have a long bit. You have a short bit.

Prof. Philip Hamburger: This will be very short. Then you can have a long bit. I just want to observe the nature of the responses. I'm not going to try to respond to them in detail, I just want to observe what they are. The first response was, "Oh, there is, in reality, no loss in our freedoms." I don't think anybody who has practiced in this field would really conclude that unless they've spent too long in academia. I think there's a lot of second-hand smoke perhaps—

[Laughter]

Prof. Kathryn E. Kovacs: I might be the only one on the panel who actually did practice for 15 years.

Prof. Philip Hamburger: Well, I used to be a tax lawyer, and I must say, the closer you get to this, the more frightening it is. Put simply, the first answer was, I think, a denial of reality. And the second response was a very candid and, welcome concession that, "in fact,

Claims and Professional Government, REG. REV. (Dec. 5, 2017), <https://www.theregview.org/2017/12/05/lewisdeep-state-professional-government/> [https://perma.unl.edu/9T2J-ZKCF]; Eric Katz, *There Are More Republicans in Federal Government Than You Might Think*, GOV'T EXECUTIVE (Aug. 14, 2015), <http://www.govexec.com/oversight/2015/08/thereare-more-republicans-federal-government-you-might-think/119138/> [https://perma.unl.edu/M9Y2-SWX6].

yes, our rights may be lost, but that's okay. The government will take better care of us than we knew." I just want to observe the nature of the answers, that's all. Thank you.

Prof. Richard Epstein: I want to criticize the answers.

[Laughter]

Prof. Philip Hamburger: Division of labor.

Prof. Richard Epstein: I'm not a simple observer. There's the following dichotomy. If you have a competitive market, each individual has a majority of one, and that's a perfect majority. That consumer sovereignty (to take a phrase from the late, great, and neglected William Hutt)⁵⁶ can take resources and devote them to whatever offers on the other side of the market become available, without having to consult and gain the approval of all of his or her fellow citizens. What the administrative state does is it puts all of these individuals into a collectivity. It uses a system of participation that allows the relevant parties to discuss what should happen, and at the conclusion of discussion and debate, it relies on a system of majority vote, or some other collective decision device, to figure out what course of action should be adopted.

This somewhat idealized picture is the classic situation for labor unions and collective bargaining. Alas, it turns out that the dissenters are represented by the majority, and the question is how powerful are the fiduciary duties that are put into place to prevent rank favoritism. The answer to that question is very different if the unions are organized by bargaining unions designated by the state rather than by voluntary formation. So I'll give you one example. Back in the 1920s, there was a great deal of racial segregation in the United States, as I'm sure you're all aware. And there were black unions and there were white unions. And what happened is the employers would play one off against the other, and the black workers roughly did as well as the white workers.

The Railway Labor Act of 1926⁵⁷—a Calvin Coolidge confection—comes along to introduce the notion of union democracy into this tense situation. It does so by putting all workers, white and black, into a single union. The single union is dominated by its white workers, who then enter a master agreement with all of the railroads relegating black workers to inferior positions. And somebody says, "Wait, you

56. See William Harold Hutt, *Economists and the Public: A Study of Competition and Opinion* (1936) (serving as the key work with which to trace the term "consumer sovereignty").

57. 45 U.S.C. § 151 (1996).

can't do this." We then have a case under the theory of fair representation, which was invented for the occasion in *Steele v. Louisville and Nashville Railroad*⁵⁸ in 1944, shortly after Justice Jackson that same year in *J.I. Case v. NLRB*⁵⁹ celebrated the wonderful glories of collective bargaining. And they said, "Yes, you really owe fiduciary duties."⁶⁰

1957 comes along. We have the great case of *Conley v. Gibson*,⁶¹ which you commonly think of as a civil procedure case, but it's a Railway Labor Act case following *Steele*,⁶² because the minority workers in a case parallel to *Steele* are still trying to obtain honest representation from the majority.⁶³ And so the problem that you have, quite simply, is if a black worker has a hostile trustee put into place against his own will representing his interests, he will not be nearly as well off as if he could fashion his own voluntary organizations with congenial colleague, to be created by unanimous consent.

And that's the tradeoff that the administrative state made, and it is a damnable mistake. But there is no defensible way that you could soft pedal it by making the usual appeals: "By next year we'll get better trustees," and "By next year we'll put other people on the National Labor Relations Board." The problem is a fundamental structural error. The best it could do is equal a competitive market—probability .001. The worst it could do is a lot worse than that—probability 99.999.

[Laughter]

Prof. Kathryn E. Kovacs: Well, I guess my thought is that the extent to which the administrative state interferes with fundamental rights depends on what you define as a fundamental right. I take it as a fundamental right that we've all agreed to live as Senator Lee said, under a Constitution that enshrines a manner of disagreeing and learning to live with each other.⁶⁴ And so due process rights may—if your conception of due process rights is at one end of the spectrum,

58. *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944).

59. *J.I. Case Co. v. Nat'l Labor Relations Bd.*, 64 S. Ct. 576 (1944).

60. "Unless the labor union representing a craft owes some duty to represent non-union members of the craft, at least to the extent of not discriminating against them as such in the contracts which it makes as their representative, the minority would be left with no means of protecting their interests, or indeed, their right to earn a livelihood by pursuing the occupation in which they are employed." *Steele*, 323 U.S. at 201.

61. *Conley v. Gibson*, 355 U.S. 41 (1957) (abrogated by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)).

62. *Steele*, 323 U.S. at 201.

63. *Id.*

64. Senator Mike Lee, Opening Address at the National Lawyers Convention: Federalism and Its Alternatives (Nov. 15, 2018) <https://www.lee.senate.gov/public/in->

then you will see the administrative state as interfering with those rights.

My conception of due process rights, I think, accords with Justice Kennedy's, and I feel like he fought a one-man battle for many years to try to bring due process concerns into administrative law. I hope somebody will take up that banner. But his view of due process was not so extreme that it eliminated the possibility of having a fourth branch of the government to assist Congress and the President in administering the law. And I would say that the same thing applies to religious rights, and so on. It depends on what your conception of the right is. I think my fundamental right as an American is to have a government that functions to protect me and to help me live with everyone else in the country, and we've made decisions about how to do that.

Prof. Richard Epstein: May I say a terrible word about Justice Kennedy? His conception of civil rights is so thin that perhaps the worst opinion of his service on the court was *Masterpiece Cake*,⁶⁵ where he had no idea what the substantive rights governing routine business interactions are—who should do or say anything about the defense of religious conscience in a competitive setting. Instead, he picked a narrow ground on which to decide a case, which renders its subsequent application inscrutable. He should have said something much more powerful: “In a competitive market if some people have strong religious beliefs and you do not wish to patronize them, bless you. And if he does not wish to serve you, then bless him. There are many other people nearby who can pick up the slack.” Just how many same-sex couples have run up against a stone wall in trying to organize their weddings or other celebrations?

These are inherent risks. For the moment the state legislature empowers a commission to determine which religious beliefs matter and which ones do not, or the moment you get some federal member of a civil rights commission saying, “Oh, we have decided that you have entered into a commercial transaction no religious overtones or implications,” then the legal system has displaced the judgment of the religious person with collective decree issuing from a hostile body that drowns out a modest exercise of personal liberty. We can live in a society where .01 percent of the people don't want to make wedding cakes for same-sex couples. It's much more difficult to live in a society in which the 99.9 percent majority can say, “We are so concerned with absolute unanimity on all of these contentious points that we're going to reeducate you, fine you, or drive you out of business if you don't

dex.cfm/speeches?ID=712C3522-137C-4389-A219-870A9277DB05 [http://perma.unl.edu/ZWW2-6A8Y].

65. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018).

agree with us.” Justice Kennedy should have taken the opportunity to denounce, in very strong terms, totalitarian rule of the Colorado Civil Rights Commission, which should have let religious people decide what their faith commands and what it does not.

[Applause]

Hon. Britt Grant: Let’s hear from Professor Michaels—I think he will have a different view—and then Professor Hamburger.

Prof. Jon Michaels: So I just wanted to respond a little bit to Philip and Richard on this point about rights and liberty and pick up where I think Kati left off. Just to note where I stand, although it may not be any surprise, I consider rights and liberties to be completely tied up with the ability to have clean air, safe workplaces, economic autonomy, reproductive autonomy. And those, too matter, and those may not be provided for through the vicissitudes of the market. And it again, I think, is a definitional question about kind of what notion of ordered liberty all of us have and where we disagree.

[Laughter]

Hon. Britt Grant: Professor Hamburger?

Prof. Philip Hamburger: Thank you. So first, Jon, I appreciate your concern for a whole host of goods. Your list of goods may be different from that of other people; your list of goods may not be listed in the Constitution, but let’s give you your goods and acknowledge that they matter to you. Would you want those goods to be treated with the solicitousness that due process rights get under the Constitution, or religious liberty, or freedom of speech? And I think we all know the answer. We can all judge that for ourselves.

I want to get back to Kathryn’s comments. She talked about fundamental rights, especially due process. And I want to pick up her line about one end of the spectrum. That’s right. My view of this stands at one end of the spectrum. Which end is that? The Constitution.

[Laughter]

I respect all the Justices. They all are serious individuals pursuing serious ideas, but Justice Kennedy is not “the people.” Justice Kennedy did not write the Constitution. The Constitution is different from what any one Justice—

Prof. Richard Epstein: —He didn’t read it, either.

[Laughter]

Prof. Philip Hamburger: I also want to talk about due process. The phrase “due process” comes out of a series of fourteenth century English statutes. The most detailed was that of 1368, and it was given the heading: “None shall be put to answer without due process of law”—meaning due process in the courts of law.⁶⁶ There were administrative evasions of the courts already then, and the statute was designed to defeat those threats to the process of the courts. This understanding of due process was echoed by American judges. They and the men who drafted the Bill of Rights recognized the history. St. George Tucker quoted the Fifth Amendment and concluded that “due process of law must then be had before a judicial court or a judicial magistrate.”⁶⁷ Chancellor James Kent said the same thing.⁶⁸ And, Joseph Story echoed both Tucker and Kent. In fact, until the administrative state came along, due process was the right to be heard in a court and have the processes of a court, not any substitute.

The modern defense of the administrative process is, “Oh, but it’s fair.” Really? How fair is it? When you get administrative process, you lose the due process of the courts. How fair is that? You appear before an ALJ, who is not really a judge. Whoops. You don’t get a jury. Whoops. There is only limited discovery for defendants. Whoops. There’s discovery for the government even in cases that are criminal in nature. Whoops. The final decisions in administrative cases are not actually made even by the ALJs because the final decision, or review of it, goes to the commissioners. (And, mind you, ALJs have admitted that, in making their decisions, they anticipate what their commissioners will want because they do not want to be reversed. And so—

Prof. Richard Epstein: You’re talking about—

Phillip Hamburger:—Hold on, I haven’t even finished.

Prof. Richard Epstein: All right.

[Laughter]

Prof. Philip Hamburger: Richard, you took the bait on Justice Kennedy. I want to talk about the Constitution.

[Laughter]

66. Observance of Due Process of Law 1368, 42 Edw. 3 c. 3 (U.K.), <http://www.legislation.gov.uk/aep/Edw3/42/3/section/III?view=plain>.

67. 2 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES, Art. 1, § 5 (1803).

68. PHILIP HAMBURGER, THE ADMINISTRATIVE THREAT 31 (2017).

Prof. Richard Epstein: They have nothing in common.

[Laughter]

Prof. Philip Hamburger: So you might say, “But it’s still fair because you get judicial review in the courts.” But when you get to the courts—and you judges in the room, please, please, listen to this—when you get to the courts, what happens to that fairness and due process? Well, the judges will defer to the agency on the law, and where the government is a party in the case, that means the judges are systematically, institutionally biased in favor of the government again, and again, and again. That’s called *Chevron*,⁶⁹ and *Auer*,⁷⁰ and so forth—all of which is the grossest violation of due process. And notice that such bias in favor of one party is barred by the Code of Conduct for United States judges, which requires judges to recuse themselves where they are biased.

Of course, you might assume, “well, I can at least argue on the facts.” Oh, whoops, when you get to court, there’s deference on the facts, too! And you might think at least in a court, you get a jury—but you don’t because it’s all set up so you appeal to a circuit court, where there is no right to a jury.

And then last but not least, there’s the great unspoken elephant in the room. Most companies are never going to appeal from their agency. The cardinal rule—I’ve talked to a lot of corporate counsel about this—is not to fight your agency because they can come back and screw you. The danger of agency retaliation cannot be easily documented because people will talk to you about it in whispers. Even in private, they’ll go into hushed tones because they cannot be seen as resisting their regulators. This fear of retaliation is cultivated by some agencies, and it’s a gross impediment to due process because it means you often cannot get review.

So, I ask you to judge, is this the Constitution? Is this fair? If this is your definition of fairness, then apply it to the rights you love, and then we’ll see how happy you are.

[Applause].

Prof. Kathryn E. Kovacs: I just want to point out that I carry a copy of the Constitution with me at all times.

69. *Chevron, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

70. *Auer v. Robbins*, 519 U.S. 452 (1997).

Prof. Richard Epstein: I wanted to make a slightly different point. There are some pretty terrible judges out there who share many of the values associated—

Prof. Kathryn E. Kovacs: Not you. [Pointing to Britt Grant]

Prof. Richard Epstein: —save you—with the administrative state. For this discussion, it's not here a question of sort of picking the institution. You'll never get one institution that is filled with flawless individuals and another that is filled with people wholly retrograde. What you're trying to do in the abstract is to put together a system of organization which on average will do better than any other, even though in particular cases the actors within it may make mistakes. It is this truth that frames the basic problem with the administrative state. We know what the sensible distribution is, we think, when you're dealing with civil trials, and so forth. You give a great deal of discretion to the trier of fact, whether judge or jury, on particular evidentiary facts. We give less discretion with respect to whether or not the ultimate facts are supported by the evidentiary ones—is there or is there not negligence on the evidence revealed at trial? Finally, we offer no discretion, but require de novo review with respect to the decision of all legal questions.

That structure can carry over to the administrative state if we let it. But in practice the distribution of powers between agencies and courts have gotten all whacked up. If it turns out that an administrative agency denies a new project, the level of judicial review is highly deferential no matter how minor the defect in the program. But that deference disappears if that same agency approves a sensible private project, the courts will give it a hard-look review, in which small errors can doom large projects. The standard is often completely corrosive given our lax rules on standing, under which the strongest objector can now have the largest say on whether or not a major project, either public or private, will take place. And so the rules on judicial review puts the locus of power in the hands of the extreme opponents of any project, even the most sensible ones.

I regard this case as completely different from one where the question before the court is whether the agency acts ultra vires—beyond the scope of its powers. On that question anyone should be able to enjoin illegal acts, which is a very different question of whether the agency exercised sound judgment on cases admittedly within its jurisdiction.

You look at all the nature of the environmental protesters. They're the same guys all the time, and they have a monolithic agenda: if it involves fossil fuels, kill it. Under the misguided hard-look review, they have a very good chance of succeeding. Then on the legal ques-

tions, the courts tend to defer to agencies even when it involves their aggrandizement of power. It is all completely backwards.

So, what then is the proper approach? The simplest way to look at matters is to think of an administrative agency in its adjudicative capacity as operating like a trial court, leaving the Article III courts with appellate responsibilities. And by that test, basically both the two great mistakes are transformative cases in the early Reagan years that are wrong. *Chevron*⁷¹ offers too much deference on questions of law. *State Farm*⁷² imposes too much of a hard look. Justice White's ignorance about how to make automobiles was so colossal that he, in effect, said, "We don't know whether airbags work. Nonetheless, let's put them in every car." Using the model for civil litigation would have avoided that mistake.

One problem with many modern judges is they act like tinkerers in the Wilsonian tradition. They always think that they have something better that they could come up with. They always think that they can devise a scheme better than that which was prepared in accordance with standard industry practices. The problem is not always within an administrative failure. *State Farm*,⁷³ last I looked, was a Supreme Court decision. *Chevron*⁷⁴ was a Supreme Court decision. If justices start with the wrong theory, all too often they will get the wrong result. It should not be the province of academics to celebrate decisions that incorporate systematic error. Rather, we must deplore the judicial mistakes on matters of fundamental structural matters.

Hon. Britt Grant: Professor Kovacs, we've obviously heard sustained and strong disagreement about whether it is, in fact, too difficult for agencies to regulate. But supposing we agree with your theory that it is too hard, could that be a feature rather than a bug in terms of a reflection of the type of tension that Senator Lee said is built into our system overall? A feature rather than a bug, a good part of the process that reflects the difficulty in reaching agreement that's baked into our structure?

Prof. Kathryn E. Kovacs: Oh, sure. And I think that the APA was designed so that rules—agencies couldn't just roll out rules. They do have to go through a notice-and-comment process. I would add a little bit to it now to reflect modern realities, but that process was meant to build in a deep deliberation before the rule is rolled out. I think the problem is that we have a Congress that for, what, 80 years

71. 469 U.S. 837.

72. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

73. *Id.*

74. 469 U.S. 837.

now, has been delegating broad authority and responsibility to make policy to agencies, and yet, the agencies are not able to do that job in an efficient fashion. And in this world, we need policy fast and now, and we expect, when circumstances change, that we get a new rule reflecting those circumstances. We expect that when an election is had that policies will change in response to that election, and yet, the mechanism that our Congress set up to do that is broken.

So what happens is that the system is askew. We have the Supreme Court making decisions that go beyond its expertise. I love the example of the five-member majority in *State Farm*⁷⁵ that said rescinding the rule about those idiotic automatic seatbelts—I love showing my students the video. You remember those seat belts from the 80s, and when you tried to get out of your car in a rush, it would strangle you? And the Court said, “Oh, but you didn’t consider the value of inertia.” Inertia? With seat belts? Those things were never sitting still. So I think that that’s the problem. It was not—yes, there certainly are and should be constraints on agency policy-making, but the system has become askew.

And I think one of the ways to get it back into balance is to convince the courts to try what Congress wanted us to try in 1946, which we’ve never really tried because we have *SEC v. Chenery*.⁷⁶ We have pre-enforcement review, thanks to *Abbott Labs*.⁷⁷ We have all these common law doctrines that came out of nowhere, that came out of pre-APA law, and we’ve never actually implemented the APA as written. I would really love for us to try that.

Prof. Richard Epstein: I agree with this on many—

Prof. Philip Hamburger: [to Professor Kovacs] I appreciate your comments on APA. I want to invite you to consider the possibility of signing briefs against *Chevron* on the grounds that it violates the APA.

Prof. Richard Epstein: That would be wonderful.

[Laughter]

I have another operation. Look, some of the great problems arise because the law tries to get administrative agencies to do what they cannot do. Agencies are good at enforcement. They’re very bad at giving away public goods to private individuals. So when you start with one of the early pre-APA cases, like the 1943 case of *National Broad-*

75. 463 U.S. 29.

76. *SEC v. Chenery Corp.*, 318 U.S. 80 (1943).

77. *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967).

*casting Company v. United States*⁷⁸ that asks how best to allocate the spectrum in accordance with the public interest, convenience, and necessity, there is no metric that lets agencies or courts decide whose favorite friends should get something for nothing. The law needs to establish property rights that can then be put out of bid. But that point eluded Justice Felix Frankfurter, who sported his progressive ignorance of property rights when he insisted that the market couldn't possibly allocate resources when they are scarce. Economics 101 says the opposite.

[Laughter]

I mean, it's just an amazing statement. According to Frankfurter, it is important to let the FCC, or indeed any other agency, do more than set the rules of the road. It is going to determine the composition of the traffic. For the next 75 years, the FCC commissioners have never been able to find the right recipient by administrative deliberation. In the face of that chronic failure, it is time to realize that whenever the government holds a valuable resource in public hands, it has to decide whether it is best to maximize its value by selling or leasing off that asset in whole or in bits and pieces. Market mechanisms dominate administrative procedures in deciding who should control what assets. The administrative state is out of its depth when it abandons its enforcement mission in order to let highly placed officials distribute goodies to well-connected applicants. That practice is an open invitation to corruption and favoritism.

Hon. Britt Grant: Well, we've had all the fun up here, so I trust that this has inspired a lot of questions from our audience. Over here?

Steve Calabresi: Hi, I'm Steve Calabresi. I'm the Chairman of The Federalist Society Board of Directors. And I had a question for—

Prof. Kathryn E. Kovacs: His microphone doesn't appear to be on, for anybody who can do that.

Steve Calabresi:—essentially a separation of powers—the separation of power issue raised by agencies. You have in one building agency commissioners making rules. In the same building, enforcement personnel executing those rules. And in the same building, administrative law judges appointed by the agency deciding cases that are being prosecuted by the agency with a right of appeal to the agency. And this makes a complete mockery of the separation of pow-

78. *Nat'l Broad. Co. v. U.S.*, 319 U.S. 190 (1943).

ers. I think there are two simple reforms which the Supreme Court in a 5–4 decision could impose on the system that would help a lot.

On the problem of agencies having too much rulemaking power, it seems to me that part of the problem is that Congress likes to delegate power to agencies because it doesn't want to have to make hard decisions. And so it's constantly throwing hot potatoes to agencies rather than making hard decisions. I don't think we'll ever get Congress to stop doing that, and I don't think we'll ever get the President to stop signing bills that do that. The courts had been unwilling to use the nondelegation doctrine—apologies, Philip, for using that label—the courts have been unwilling to use the nondelegation doctrine because they can't figure out how to draw a clear line between what delegations are excessive and what aren't.

What I'd like to suggest is a very clear line that could be drawn, and that is any time Congress attaches an unconstitutional legislative veto to a bill, it should be presumed that it's delegating legislative power, and the bill should be struck down and sent back to Congress. *INS v. Chadha*⁷⁹ striking down legislative vetoes was a huge victory for the separation of powers, but it was also a huge victory for the administrative state because all this power that had been delegated since the 1930s subject to legislative vetoes was suddenly no longer subject to legislative vetoes. And looking at whether there's a legislative veto in the statute or not would provide the Supreme Court and other federal courts with a clear line for enforcing the nondelegation doctrine.

With respect to adjudication, I cannot fathom how anyone could think that administrative law judges ought not to be life tenured Article III judges with a right to jury trial. And I cannot fathom the notion that administrative law judges shouldn't be housed in a separate building of administrative courts rather than where they're rubbing shoulders with prosecutors and agency commissioners in the cafeteria. So those are my questions for Professor Michaels.

Prof. Jon Michaels: Yeah. So I'm not sure exactly what the question was other than why do I believe what I believe. But I will say that I have deep misgivings about the politicization of agency adjudicators. If I suggested otherwise, I apologize. I think that agency adjudicators should be much more insulated than they currently are, as evidenced just a couple of weeks ago by the decision in the Veterans Administration to allow some adjudicators to continue in their job and others not to continue. That seemed to fall entirely on partisan lines.⁸⁰ Whether

79. *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983).

80. Lisa Rein, "I've Never Seen These Positions Politicized": *White House Rejection of Veterans Judges Raises Concerns of Partisanship*, WASH. POST (Oct. 23, 2018), <https://www.washingtonpost.com/politics/ive-never-seen-these-positions-politi>

they're housed in the same office or elsewhere, again, I don't have a problem with that, and I think it probably would be healthy for the reasons that Professor Calabresi suggested.

On the legislative veto issue, even if that were a helpful touchstone, it probably would. Even if it were a helpful touchstone, I imagine Congress would pick up on it pretty quickly. So, I don't know how much that would help us if we were truly concerned about overbroad delegations of that sort, given that most members of Congress presumably know now that those provisions would be struck down.

Prof. Philip Hamburger: Just one thought, if I may, about Steve's point concerning ALJs. It's a very serious problem. The solution's not that difficult. By one estimate (this is Bill Funk's), there are 257 non-Social Security Administration ALJs—this being a rough measure of those that may exercise significant binding power. Another estimate is that about 150 ALJs exercise significant binding power. We're not talking about that many judgeships. And of course, one can take a Burkean step by step approach. Imagine if the SEC, under pressure from judges, recognized how prejudiced its proceedings are. Imagine that the SEC were simply to send its cases to court. It only has five ALJs. The burden on the judges spread across the United States would not be that great. It would be a very good experiment in shifting to real judges.

Prof. Richard Epstein: Can I ask one question?

Hon. Britt Grant: Sure.

Prof. Richard Epstein: I disagree with Steve on one point. I quite agree that the current ALJ system with rotating judges, *Lucia*, the situation in *Oil States*,⁸¹ is unforgivable. I have no particular objection to, and in principle, prefer the kind of Article I judges with fifteen-year terms and think that these federal judges should be subject to similar kinds of restraints because I don't see any abuse coming in long-term appointments, and I see having a rotation in offices being something good. And I would rather amend the United States Constitution, for example, to limit Supreme Court judges to eighteen-year terms, something of that sort, to get rid of some of the huge pressure that takes place on the confirmation value battles.

cized-white-house-rejection-of-veterans-judges-raises-concerns-of-partisanship/2018/10/23/f488046a-ce51-11e8-920f-dd52e1ae4570_story.html?utm_term=.0e14af25b9ec [https://perma.unl.edu/SDE8-3DPY].

81. *Oil States Energy Serv. LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365 (2018).

Hon. Britt Grant: Thank you. And we've only got a few minutes left, so I'll encourage all of our questioners to keep your questions brief and make sure that we can get to as many of you as possible.

Art Macomber: I think next time we'll get Steve on a panel. My name's Art Macomber from Coeur d'Alene, Idaho. And briefly, with all due respect to Professor Kovacs from my home state of New Jersey, if New Jersey was sixty-five percent owned by the federal government, you might see fit to change your view on public lands.

My question is on judicial function for Professor Epstein. Professor, in many states, administrative rules are not—they say they don't rise to the level of law. They're not law, they didn't go through the presentment process, the Executive didn't sign them. And my question is to you, as a judge, say a state judge, and I'm confronted with an administrative rule, is this a case where we apply law, or is it a case where we apply equity? Or from a judge's perspective, what is the approach to taking on an administrative rule case? Thank you.

Prof. Richard Epstein: Well, I think if you're talking about a question of law, I would generally favor de novo review on those issues, which is, I think, consistent with the original design of the Administrative Procedure Act. Remember in *Chevron*, this great case of statutory construction, Justice Stevens does not cite the provision, Section 706,⁸² at all.

Hon. Britt Grant: Next question.

Brian Bishop: Yeah. Brian Bishop from the Stephen Hopkins Center for Civil Rights in Rhode Island, and certainly a salute to Philip's recognition of the civil rights issues here. I'd actually like to ask Professor Kovacs and Mr. Michaels if they see a point that Richard has made that judicial review in this case is reversed, that individual cases are subject to extreme precautionary principle advanced with almost limitless standing, whereas the ability to challenge and obtain hard look on the broader regulatory questions has been exceedingly constrained. Could you agree with Richard that that is an area that might deserve address?

Prof. Richard Epstein: What do you think about hard look?

Prof. Kathryn E. Kovacs: I'm not sure I really understand the question, but I can tell you I was employed for fifteen years based on

82. 5 U.S.C. § 706 (1966).

hard look review and the courts. I don't think I agree with you that the ability to challenge government policy is constrained in that way.

Prof. Jon Michaels: Yeah, and I would just say that one of the bases for deference, which isn't always met or satisfied, but one of the bases for deference by my lights is that the process is rigorous. And I know folks can say, "Well, what does 'rigorous' mean?" But it means that there is an extensive record with opportunities for all different viewpoints to be heard, and for those viewpoints to be vetted and presented to political leadership for the generation of rules in those cases.

And so if a challenge comes under those terms, I think it is appropriate for courts to give a look, but not *de novo*, because we pay respect to that [administrative] process that, again, is open and it is one that is both met with political and expert input. You may not like the outcome, but that is the process that engenders the most deliberative framework. And I think that's a lot better than just having maybe no process, just a black box, and then whatever judicial panel you get maybe saying, "Yeah, I like that," or "Yeah, I don't like that, but we're going to substitute our best preference for your best preference."

Prof. Richard Epstein: But look, what happens is the hard look review is imposed in those cases where administrative agencies have actually granted an approval. Now too many courts are willing to fly-peck the case in order to find some factor that should have been considered but was ignored or some factor that was ignored but should have been considered. That approach is a recipe for administrative negation, because in any complex proceeding, a tribunal will always miss something or add something in. Just that approach was used in the recent Montana decision to put the Keystone Pipeline XL on hold because it did not consider the effect of these new pipelines on climate change. The effects have to be miniscule, given the hundreds of thousands of miles of pipeline across the United States, none of which emit carbon dioxide. Yet to ask how this shipment might alter global patterns of fossil fuel usage is to conjure up a recipe to negate all new pipeline construction, which will turn out to be counterproductive because, with all this fuss, there is little or no effort by any of the reviewing courts to look at the benefits of carbon dioxide reduction from taking out of service truck and rail shipment, which by any standard are far more dangerous than the pipelines put into place. The aggressive use of the National Environmental Policy Act in cases of this sort turns into a *de facto* veto of new pipeline construction. This pattern is not an appropriate way to run an administrative state. The correct two part formula remains: *de novo* for questions of law; deference for questions of fact.

Prof. Kathryn E. Kovacs: I just have to take up the Keystone Pipeline point. As a matter of fact, the federal government, federal agencies, win, I think, somewhere in the neighborhood of 75 percent of APA cases, and the problem in the Keystone case⁸³ was not the court fly specking. The problem that the court identified was that the administration changed positions without justifying the change in position.

And that's one of the things we've seen so much in the past year and a half, the administration trying to change policy and getting struck down some, what is it, thirty-eight times now in attempting to change policy because they're not supporting the decision enough. And yes, I think agencies should have to justify their decisions, but I do agree with Richard about hard-look review. The Supreme Court has never used that term. I think the courts of appeal should probably get the message. Arbitrary or capricious was meant to be quite deferential.

Prof. Philip Hamburger: I just want to observe what Kathryn said earlier, that when there's a change of election, the President should be able to get his policies carried through quickly.

Hon. Britt Grant: I shall now exercise my moderator's prerogative and move to the next question.

Questioner 3: Yeah, I was wondering to what extent the psychology of the regulator comes into play? And what I mean by that is I spend my days litigating for and against decisions of a particular state agency in my home state that is almost exclusively populated by engineers and scientists. And no offense to engineers and scientists, but I tend to find that by education, training, and temperament, they're particularly resilient to the idea that deliberative processes can come up with a better solution to problems. They tend to grab a solution and stick with that, and they view the APA and the due process requirements as merely check boxes on the way to get to where they ultimately want to go, and not as the notice, and the hearing, and the deliberative process to try to get to a better decision or to consider alternative viewpoints. And so I'm just curious—how do you create a structural system whereby you get the benefit of their expertise and their knowledge of the agency, but actually temper that so that they're not just checking off the boxes of the APA rules and the due process requirements?

83. *Indigenous Env'tl. Network v. Dep't of State*, 347 F. Supp. 3d 561 (D. Mont. 2018), order amended and supplemented, No. CV-17-29-GF-BMM, 2018 WL 7352955 (D. Mont. Dec. 7, 2018).

Prof. Philip Hamburger: That's a profoundly important question. I think we can question expertise. Expertise is usually old science. We all know about expert bias, right? Experts fall in love with their area of knowledge, and they don't adequately consider other matters. The solution to all of this, I think, is to distinguish between expertise and expert decision making. The administrative state has been justified on grounds of expertise, and it's assumed that experts should therefore decide. But though we need scientific input, whether that's expertise is a different matter, that doesn't mean experts should decide.

And we have a solution to this, oddly enough. It's actually up to date, even if old. It's called the Constitution. We can have agencies filled with experts—hopefully more expert than those who have produced orange rivers and the like—but we should have expert input rather than expert decisions. Experts can draft bills if they wish and just send them up to Congress to decide. And then we will get decision-making that is more balanced and more responsive to the people.

Hon. Britt Grant: Do you have a response?

Prof. Jon Michaels: Yeah. So I'll just say that I think that's right to focus on there's certain technical aspects where, for instance, lay participation wouldn't be particularly useful. And in those cases, one way to think about this is that what are the private interests that are mobilized to care about a particular technical question? And one of the issues to think about is are those private interests better able to be heard and dealt with within an administrative proceeding or within a legislative proceeding?

And my general sense of this, and my general take on this is that agencies are much more amenable to hearing from all different sides on an issue, particularly because of judicial review, because someone's going to say, "Well, why didn't you take into consideration this comment?" or "Why didn't you take into consideration this position," which the legislature never has to justify. And secondly, as it turns out that we do have a Congress, but that Congress is beholden to special interests of a money sort, and so it's not clear that everyone would get the same fair shake. I could submit comments on rules every single day. I can't get a meeting with members of Congress, probably, any day.

Hon. Britt Grant: We have time for one last brief question with a brief answer.

Mark Chenoweth: Mark Chenoweth with the New Civil Liberties Alliance. I wanted to come back to Professor Hamburger's earlier

question to Professor Michaels and Professor Kovacs and just narrow it a little bit. And that's to ask why are you comfortable with the loss of civil liberties in administrative adjudication? He went through all of the things that you lose. There's no jury. You can't even contest constitutional problems with the prosecutions being brought against you. There's no federal rules of evidence, et cetera, et cetera. There's also no expertise with administrative law judges. None of the five ALJs at the SEC practiced securities law before they became judges at the SEC. That's crazy, right? So there's no positive tradeoff with expertise. Why are you willing to give up all of the due process rights in order to have administrative adjudication when we could just get rid of those 200 administrative law judges and put all these cases into Article III courts?

Prof. Kathryn E. Kovacs: Well, the Supreme Court has decided that post-deprivation process is sufficient. Now, I think that it's been a very long time since the Supreme Court has taken procedural due process doctrine to task. The way agency adjudication has developed and the role that—and this gets back to the earlier question about separation of functions within agencies, an issue that Congress hasn't addressed since 1976, I agree that post-deprivation process is sufficient in most cases. If the—

Mark Chenoweth: —Then the process is the punishment because it takes a decade—

Prof. Kathryn E. Kovacs: —And I take—

Mark Chenoweth: —and no one can afford it.

Prof. Kathryn E. Kovacs: And Philip's point is well taken that a lot of litigants may be afraid to go to court because it gets them on the bad side of the regulating agency, but I do think that procedural due process doctrine is ripe for a new look from the Supreme Court, and I sure wouldn't be surprised to see it.

Prof. Richard Epstein: One sentence on this, which is what you do is you take all the adjudicative function outside the administrative agencies and to put them into either Article I or Article III Courts. Period. Nothing else will do.

[Applause].

Prof. Kathryn E. Kovacs: Look, there are good reasons why Congress—

Prof. Richard Epstein: —Not in this case.

Prof. Kathryn E. Kovacs: —put these adjudications into agencies, including not just adjudications about public rights—

Mark Chenoweth: —But why does the agency get the choice to go to Article III courts? How about you let the defendant have the choice about going to Article III courts—

Prof. Kathryn E. Kovacs: —But it's not the agency's choice, it's Congress's. It's Congress that made the decision to do this and the Supreme Court that gave it its blessing.

Prof. Richard Epstein: So both take a pass on a serious structural issue.

Hon. Britt Grant: This question is a great example of our commitment to debating ideas freely here. I think we've done a lot of that on this panel, and I thank you all for your attention. Thank you to all of our panelists. And those of you who have questions, I hope you'll approach them outside and pose them.