

# Is Our Modern Administrative State Unmoored from the Morality of Law?

By Ted Hirt

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## A Review of:

The Dubious Morality of Modern Administrative Law, by Richard A. Epstein (Manhattan Institute 2019), <https://www.amazon.com/Dubious-Morality-Modern-Administrative-Law/dp/1538141493>

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## Note from the Editor:

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## Other Views:

- Cass R. Sunstein & Adrian Vermeule, *The Morality of Administrative Law*, 131 HARV. L. REV. 1924 (2018), available at <https://harvardlawreview.org/2018/05/the-morality-of-administrative-law/>.
- Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 141 (2017), available at <https://harvardlawreview.org/2017/11/1930s-redux-the-administrative-state-under-siege/>.
- Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908 (2017), available at <https://www.yalelawjournal.org/article/the-origins-of-judicial-deference-to-executive-interpretation>.

As we approach the seventy-fifth anniversary of the 1946 enactment of the Administrative Procedure Act (APA),<sup>1</sup> judges, practitioners, and academics continue a vigorous debate on the current state of administrative law.<sup>2</sup> How should Congress and the federal courts respond to criticisms of administrative agency overreach? In *The Dubious Morality of Modern Administrative Law*, Professor Richard A. Epstein joins this debate, addressing fundamental questions on the legitimacy of modern administrative law.<sup>3</sup>

Epstein brings to this task impressive credentials. He is the Laurence A. Tisch Professor of Law at the New York University School Law, the Peter and Kirsten Bedford Senior Fellow at the Hoover Institution, and the James Parker Hall Distinguished Service Professor of Law Emeritus at the University of Chicago Law School, where he is a Senior Lecturer. He has written over 20 books and numerous articles on law and other subjects. Epstein applies decades of expertise in both law and economics to his careful dissection of administrative law issues.

In his classic work, *The Morality of Law*, the late Professor Lon L. Fuller argued that “the moral framework for evaluating the rule of law should be independent of any assessment of the substance of the rules in question.”<sup>4</sup> Fuller explained that adherence to such a moral framework creates reciprocity between the citizen and the government as to the observance of such rules.<sup>5</sup> In their 2018 article, *The Morality of Administrative Law*, Professors Cass Sunstein and Adrian Vermeule recognize that many critics of the modern administrative state have relied on Fuller’s principles in expressing concern about abuses of agency power.<sup>6</sup> The authors explain that various judge-made doctrines enable the courts to monitor and correct agency deviations from Fuller’s principles.<sup>7</sup> They argue that in the “real world” of modern American administrative law, the problem is not the failure of the rule of law, but an insufficiency in agency application of the

1 Pub. L. No. 79-404, 80 Stat. 237-44 (1946) (codified in various sections of title 5, United States Code).

2 See, e.g., JOHN MARINI, UNMASKING THE ADMINISTRATIVE STATE: THE CRISIS OF AMERICAN POLITICS IN THE TWENTY-FIRST CENTURY (2019); PETER J. WALLISON, JUDICIAL FORTITUDE: THE LAST CHANCE TO REIN IN THE ADMINISTRATIVE STATE (2018); JOSEPH POSTELL, BUREAUCRACY IN AMERICA: THE ADMINISTRATIVE STATE’S CHALLENGE TO CONSTITUTIONAL GOVERNMENT (2017); PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014).

3 RICHARD A. EPSTEIN, THE DUBIOUS MORALITY OF MODERN ADMINISTRATIVE LAW (2019).

4 *Id.* at 19 (citing LON L. FULLER, THE MORALITY OF LAW 153 (1964)).

5 See Fuller, *supra* note 4, at 39-41.

6 Cass R. Sunstein & Adrian Vermeule, *The Morality of Administrative Law*, 131 HARV. L. REV. 1924, 1927-28 (2018).

7 *Id.* at 1940-51, 1957-60, 1973-76.

principles.<sup>8</sup> They also caution that Fuller’s principles must be balanced against an agency’s “institutional role and capacities, resource limitations, and programmatic objectives,” which means that agencies may need to use “open-ended standards,” proceed on an ad hoc basis, or apply managerial judgment and make difficult economic allocations in resolving issues.<sup>9</sup>

Epstein’s book is framed in part as a response to Sunstein and Vermeule’s article. Epstein squarely rejects their conclusion, arguing that Fuller’s “steely insistence on legal coherence, clarity, and consistency, coupled with his strong condemnation of retroactive laws, does not mesh with modern administrative law.”<sup>10</sup> In assessing the morality of administrative law, Epstein addresses “basic rule-of-law considerations” from both a theoretical and historical perspective.<sup>11</sup> He describes how the APA differs from ordinary rules of civil procedure, and he analyzes how administrative law has been applied to various substantive fields of law, including environmental, public power, and civil rights laws.<sup>12</sup> Epstein also tackles some of most pressing issues in the debate over administrative law reform, including the nondelegation doctrine and various forms of judicial deference to agency interpretations of federal law. He does not address the constitutionality of administrative law, although he notes that some judges and commentators have voiced “grave constitutional doubts” about it.<sup>13</sup> Epstein opines that administrative agencies “do many things well,” and that the “overall picture is not uniformly bad,” but he says “there is much space for improvement” in the operation of administrative law.<sup>14</sup>

#### I. ADMINISTRATIVE LAW IN A MORAL FRAMEWORK

Epstein evaluates the morality of administrative law according to the rubric set forth in Fuller’s *The Morality of Law*, which outlines the “minimum requisites” of the rule of law.<sup>15</sup> Fuller enumerates eight ways a regime can violate the rule of law:

1. failing to enact rules at all, which results in ad hoc decision-making
2. failing to publicize the law or inform the affected party about the rules that it was expected to observe
3. enacting retroactive laws (unless “curative”—a narrow exception)
4. failing to make rules understandable

5. enacting contradictory rules
6. enacting rules that require conduct beyond the power of the affected party
7. creating such frequent rule changes that the affected party cannot adjust its activities to them
8. failing to maintain congruence between a rule as announced and its actual administration<sup>16</sup>

Epstein notes that Fuller placed special emphasis on the evil of retroactive laws, which he called a “monstrosity.”<sup>17</sup> Epstein also supplements Fuller’s principles with several maxims derived from Roman law, such as the principles that decision-makers must act impartially and that a tribunal must hear from both sides of a controversy.<sup>18</sup>

Fuller’s principles, Epstein explains, are “nonsubstantive rules” that should have “universal appeal across the political spectrum.”<sup>19</sup> Rule of law principles also can support substantive rights, such as property and contract rights, by maintaining law that is “constant over time” and not changeable based on social or economic pressures in the society.<sup>20</sup> For example, strong rules of freedom of contract help preserve stability and certainty in the legal framework because parties agree to binding norms, reducing disputes in the legal system.<sup>21</sup> In contrast, government intervention “opens the door” to interference with freedom of contract, diminishing private rights.<sup>22</sup> And when the state regulates private property or contracts without providing just compensation for government takings of property, the state has eroded substantive rights even more, because it is not paid any price for the cost of its interference.<sup>23</sup>

#### II. THE EVOLUTION OF ADMINISTRATIVE LAW

Epstein provides a very brief outline of the evolution of administrative law in the United States.<sup>24</sup> At the time of the Founding, it was understood that delegations of authority by the three branches would occur.<sup>25</sup> The enumeration of congressional powers in Article I, section 8 of the Constitution did not preclude delegations of authority, but the Founders did not think Congress should delegate its power lightly. For example, the issue of the establishment post roads and post offices occupied Congress’s attention in 1791.<sup>26</sup> Ultimately, a proposal

8 *Id.* at 1973-74.

9 *Id.* at 1968-70, 1976-78.

10 Epstein, *supra* note 3, at 1.

11 *Id.* at 7.

12 *Id.* at 7, 99-107, 111-17, 137-48, 192-205.

13 *Id.* at 10, 88, 214 (citing *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J. concurring) (questioning scope of agency powers conferred through *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) and other cases).

14 *Id.* at 1, 7.

15 *Id.* at 12.

16 *Id.* at 19-20 (citing Fuller, *supra* note 4, at 38-39).

17 *Id.* at 20 (citing Fuller, *supra* note 4, at 53).

18 *Id.* at 21.

19 *Id.* at 22.

20 *Id.* at 22-24.

21 *Id.*

22 *Id.* at 25.

23 *Id.* at 26-28

24 *Id.* at 33-58.

25 *Id.* at 33-34.

26 *Id.* at 40-41.

to delegate that decision to the president failed.<sup>27</sup> Epstein views this as an important indicator of Congress's desire to maintain its legislative prerogative and not delegate its authority, even where the Constitution might allow it.<sup>28</sup>

During the nineteenth century, the federal government had few "core functions"—e.g., handling government contracts, disposing of public land, administering patents and copyrights, and imposing taxes and tariffs—and there were few controversies that implicated administrative law principles.<sup>29</sup> Epstein states that when Congress delegated authority to levy a tariff, it used a "clear directive to which the overall system had to conform."<sup>30</sup> Courts applied rule of law principles when they adjudicated rate-making decisions and cases involving the contractual liabilities of railroads.<sup>31</sup>

In 1935, the Supreme Court rejected a broad delegation of power Congress had made in the National Industrial Recovery Act of 1933.<sup>32</sup> The NIRA provided for over 500 codes of conduct to be issued upon presidential approval and the reports of several administrative agencies, with the goal of restoring the nation's economy in the wake of the Great Depression.<sup>33</sup> Chief Justice Charles Evan Hughes explained that the codes were to prescribe conditions of "fair competition," a term that was not defined, but which extended beyond the more limited common law concept of "unfair competition."<sup>34</sup> Chief Justice Hughes contrasted the new, open-ended grant of authority with that made in the earlier Federal Trade Commission Act, in which Congress prohibited "unfair methods of competition" and relied on the Federal Trade Commission (FTC) to determine what methods were unfair in individual adjudications, with its decisions subject to judicial review.<sup>35</sup> Epstein observes, however, that although *Schechter* struck down a broad delegation of congressional authority, it implicitly approved a broad exercise of FTC power that was "ripe for abuse" and "unmoored from both the law of misrepresentation and the law of antitrust."<sup>36</sup>

Epstein expounds on the *Schechter* decision to drive home several points. First, he disagrees with scholars like Sunstein who have argued that *Schechter* was a break from decades of broad congressional delegations that were not overturned by courts.<sup>37</sup>

Epstein responds that previous delegations of authority had been clear and constrained in scope and had been upheld in "relatively narrow circumscribed opinions."<sup>38</sup> Before the New Deal period, the doctrine "exerted such a powerful effect on legislatures" that they followed it without "judicial compulsion."<sup>39</sup>

Second, *Schechter* illustrates the difference between the pre-New Deal legal regime that relied on common law definitions and the "progressive conception" that enacts ambitious schemes that seek to regulate things like "market failure in the inequality of bargaining power that it claims exists even in competitive markets."<sup>40</sup> The New Deal was a "watershed moment" that vastly increased the federal government's reach at the expense of constitutional protections for contract and property rights.<sup>41</sup> Congress asked agencies to regulate a vast swath of economic activity.<sup>42</sup>

Epstein also explains that although nineteenth and early twentieth century courts gave some deference to agency interpretations of statutes—such as an agency's interpretation of a statute delineating retirement benefits for government employees—the agencies at the time limited themselves by applying the "custom" and the "accumulated weight" of past agency practice.<sup>43</sup> That early deference was not as broad as the deference given to agency decisions after the 1984 decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, under which courts defer to an agency's interpretation of an ambiguous statute as long as the interpretation is reasonable.<sup>44</sup>

Epstein argues that several contemporary scholars have overstated the nature and extent of the deference that courts gave to agencies in the pre-*Chevron* era.<sup>45</sup> In the areas of public land grants and taxation, Epstein discerns modest deference to agency decision-making.<sup>46</sup> In reviewing the application of tariff laws, for example, courts understood that the president and his agents could only act within limits prescribed by Congress and that, within those limits, they could make judgments as to the application of the tariff laws to specific factual circumstances.<sup>47</sup>

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27 *Id.* at 40-42.

28 *Id.* at 41.

29 *Id.* at 42-44.

30 *Id.* at 48.

31 *Id.* at 49-50 (citing *Bd. of Public Utility Comm'rs v. New York Telephone Co.*, 271 U.S. 23 (1926); *Railroad Retirement Bd. v. Alton R.R. Co.*, 295 U.S. 330 (1935)).

32 *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

33 Epstein, *supra* note 3, at 51-54.

34 *Id.* at 53 (citing *Schechter*, 295 U.S. at 531-32).

35 *Schechter*, 295 U.S. at 532-33.

36 Epstein, *supra* note 3, at 55.

37 *Id.* at 51 (citing Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000)).

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38 *Id.*

39 *Id.*

40 *Id.* at 52, 54.

41 *Id.* at 58-59.

42 *Id.* at 51, 59.

43 *Id.* at 44-45.

44 *Chevron*, 467 U.S. at 842-43.

45 Epstein, *supra* note 3, at 44 (citing Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 141 (2017); Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908 (2017)).

46 *Id.* at 44-46.

47 *Id.* at 46-48 (citing *Field v. Clark*, 143 U.S. 649 (1892)).

III. FLAWS IN MODERN ADMINISTRATIVE LAW

Epstein contends that several features of modern administrative law violate Fuller’s principles or Epstein’s own criteria for a moral legal regime.<sup>48</sup>

A. Delegations of Congressional Power

Epstein criticizes the futility of the modern nondelegation doctrine, under which Congress lawfully can delegate authority to agencies if the reviewing court can discern an “intelligible principle” for the agency’s exercise of that authority.<sup>49</sup> When Congress delegates authority to agencies to implement a legislative objective through open-ended statutory terms like the “public interest, convenience, and necessity,” courts have very limited ability to invalidate such standards or to substitute a narrower set of terms.<sup>50</sup> Ultimately, it becomes too difficult for Congress to restrict administrative agencies that have been given broad powers over the economy.<sup>51</sup> As a result, agencies can weaken the operation of competitive markets and undermine property rights.<sup>52</sup>

Epstein also is skeptical of broad delegations to agencies of authority to distribute benefits to private individuals or entities.<sup>53</sup> Epstein says that Fuller was “uneasy” about how his rule of law principles could apply to situations in which the government grants benefits to private firms or to individuals, such as air traffic routes or portions of the radio spectrum.<sup>54</sup> The allocation of public resources to private entities makes the government subject to charges of favoritism; the solution is to conduct an auction or use another market-based mechanism to allocate those resources.<sup>55</sup> This method of allocation is superior to vague statutory directives such as that contained in the Federal Communications Act—to advance the “public interest, convenience, and necessity.”<sup>56</sup>

Epstein acknowledges that broad delegations may be appropriate in some circumstances.<sup>57</sup> Congress, particularly in times of emergency, may delegate broad powers to agencies, particularly when such powers will be temporary.<sup>58</sup> And Congress also may delegate authority when decision-making will involve

case-by-case resolution of the substantive law standards.<sup>59</sup> But Congress must make policies, not evade its responsibility to do so.<sup>60</sup> Epstein rejects the notion that the expansion of federal power over the past 75 years has made it impossible for Congress to legislate.<sup>61</sup> Congress can still make specific and definitive legal determinations.<sup>62</sup>

B. Agency Bias—Unity of Functions and Adjudications

Epstein argues that the ancient principle of requiring a neutral, unbiased decision-maker is employed by our judicial system, but not in administrative agencies.<sup>63</sup> He explains that the “first constraint” of the rule of law is the citizen’s right to have a case adjudicated by a neutral judge under rules that guarantee the right to be heard.<sup>64</sup> Our judicial system implements this principle in various different ways.<sup>65</sup> The judicial system is typically one of general jurisdiction over a broad class of case types and subjects, which reduces the risk that an individual judge will form strong views on an individual case’s outcome.<sup>66</sup> In more technical areas, such as patents, taxation, and bankruptcy, there are specialized courts, but constraints like panel rotation mitigate possible institutional bias.<sup>67</sup>

In contrast, some agencies unite the rulemaking, prosecution, and adjudication functions “under the same roof,” and other agencies go so far as to concentrate all decision-making in one agency head or a small number of commissioners.<sup>68</sup> Concentrating authority in a single individual unduly enhances agency power and the potential for abuse and favoritism, particularly if the administrative process (e.g., adjudication of regulatory violations) is “truncated” and lacks basic protections such as burdens of proof and cross-examination.<sup>69</sup> For example, when high-level officials are appointed based on political affiliation, the result is decision-making that is driven by policy choices rather than expertise, and by efficiency rather than concern for protecting the interests of regulated entities.<sup>70</sup>

For agencies like the Securities and Exchange Commission, statutory violations are adjudicated by administrative law judges (“ALJs”), with review by the SEC’s own commissioners, and

48 *Id.* at 58-76, 21-22.

49 *Id.* at 67-73.

50 *Id.* at 213.

51 *Id.*

52 *Id.* at 212-13.

53 *Id.* at 73-76.

54 *Id.* at 73-74.

55 *Id.* at 74-75.

56 *Id.* at 75 (citing 47 U.S.C. § 303). Epstein acknowledges that notwithstanding this vague directive, broadband spectrum is “routinely auctioned off” to the highest bidder. *Id.* at 76.

57 *Id.* at 68-71, 73.

58 *Id.* at 68-69 (citing *Yakus v. United States*, 321 U.S. 414, 420-21 (1945) (upholding Congress’s delegation of authority to the Office of Price Administration to set emergency price regulations)).

59 *Id.* at 69-71 (citing *Mistretta v. United States*, 488 U.S. 361, 374-79 (1989) (upholding Congress’s delegation of authority to the United States Sentencing Commission to set federal sentencing guidelines)).

60 *Id.* at 73 (citing *Gundy v. United States*, 139 S. Ct. 2116 (2019) (upholding Congress’s delegation of authority to the Attorney General to determine the applicability of a statute to a specific class of individuals)).

61 *Id.* at 73.

62 *Id.*

63 *Id.* at 59.

64 *Id.*

65 *Id.*

66 *Id.*

67 *Id.*

68 *Id.* at 59-61.

69 *Id.* at 60.

70 *Id.* at 59-60.

serious violations can result in heavy fines and exclusion from the industry.<sup>71</sup> In *Lucia v. Securities and Exchange Commission*, the Supreme Court considered a constitutional challenge to the ALJ appointment process, under which SEC staff, rather than the Commission itself, appointed ALJs.<sup>72</sup> The ALJ in the case, who had an “unbroken record of imposing heavy fines” and life-time bars on industry participation, had imposed \$300,000 in civil penalties and a life-time bar on the owner of the investment company, who challenged the appointment process in his administrative proceedings, contending that the ALJ was an “Officer of the United States” who could not be appointed by SEC staff.<sup>73</sup> The Court held that the ALJ’s appointment violated the Appointments Clause because the ALJ exercised significant authority and discretion in conducting adjudications.<sup>74</sup> Such functions only could be performed by ALJs appointed by the agency head.<sup>75</sup> Epstein notes that although the Commission resolved the appointments problem in response to the *Lucia* decision, the “gaping bias” in the ALJ adjudication system was not addressed.<sup>76</sup> The proper alternative to such arrangements, Epstein contends, would be the adjudication of such cases by an independent court.<sup>77</sup> Epstein points to the Court of Appeals for the Armed Forces as an example of how administrative adjudication can be done justly; that court decides cases in accordance with the rule of law and maintains procedural protections for accused individuals.<sup>78</sup>

### C. Agency Guidance

Agencies also flout rule of law principles by issuing guidance to regulated entities, intending to shape their behavior without enacting regulations through the notice-and-comment rulemaking process prescribed by the APA.<sup>79</sup> Epstein does not quarrel with the use of guidance on “routine housekeeping” matters, such as compliance with agency procedures, but he criticizes agencies’ use of guidance to “stake out aggressive substantive positions” that are not appropriate to documents that are not formally binding.<sup>80</sup> When agencies seek to make policy via informal guidance, the regulated party, while not bound by an actual rule, must evaluate

the risk of not following the guidance and exposing itself to agency enforcement.<sup>81</sup>

Guidance documents also enable agencies to expand their jurisdiction if their authorizing statutes are sufficiently “open-ended.”<sup>82</sup> Epstein criticizes an egregious example of this phenomenon: guidance to colleges and universities that was issued by the Department of Education under the Obama administration (since rescinded) that set out procedures for the resolution of campus-related sexual harassment claims. This guidance was issued pursuant to Title IX of the Education Amendments of 1972, which proscribes discrimination based on sex at educational institutions that receive federal funds.<sup>83</sup> Although the statute did not describe any procedures for the resolution of sexual harassment complaints, the Education Department imposed an elaborate set of procedures on the universities, but without sufficient procedural protections for accused persons.<sup>84</sup>

### IV. THE *CHEVRON* AND *AUER* DOCTRINES AND RETROACTIVITY

How much deference should be given to an agency when it interprets statutes and adjudicates facts?<sup>85</sup> In its 1984 *Chevron* decision, the Supreme Court held that 1) if “Congress has directly spoken to the precise question at issue,” then the reviewing court must apply that “unambiguously expressed intent,” but that 2) if the statute is silent or ambiguous on the question, then the court should defer to the agency’s interpretation of the ambiguous statute, as long as the agency’s interpretation is reasonable.<sup>86</sup> Epstein points out that *Chevron* represents a break from nineteenth century practice, a fact that is sometimes ignored by *Chevron*’s defenders.<sup>87</sup> Epstein considers the various justifications for the *Chevron* doctrine to be “unsound, as a matter of public policy and constitutional law, because they fly in the face” of the rule of law constraints championed by Fuller.<sup>88</sup> Fuller’s principle of consistency is compromised when courts defer to an agency’s “radical changes in position and direction,” particularly on questions of law, as *Chevron* permits.<sup>89</sup> Giving agencies so much discretion “imposes heavy costs of uncertainty on private parties” who are trying to develop investment and business strategies.<sup>90</sup>

Epstein points out that *Chevron*’s supporters do not recognize that the doctrine “represents a marked deviation from the strictures of the APA itself,” which lacks any reference to the word “deference.”<sup>91</sup> APA section 706(a) identifies “a list of

71 *Id.* at 62.

72 138 S. Ct. 2044, 2052-55 (2018) (holding that SEC ALJs are “Officers of the United States” within the meaning of the Constitution’s Appointments Clause).

73 *Id.* at 2050. See U.S. CONST. art. II, sec. 2, cl. 2. (“[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States[.]”).

74 *Lucia*, 138 S. Ct. at 2053-54.

75 *Id.*

76 Epstein, *supra* note 3, at 62.

77 *Id.*

78 *Id.* at 62-63.

79 *Id.* at 63-67.

80 *Id.* at 64.

81 *Id.* at 64-65.

82 *Id.* at 65.

83 *Id.* at 65-67.

84 *Id.* at 66.

85 *Id.* at 85.

86 *Chevron*, 467 U.S. at 842-43.

87 Epstein, *supra* note 3, at 85-86.

88 *Id.* at 86.

89 *Id.*

90 *Id.*

91 *Id.* at 86-87.

explicit controls that reviewing courts should routinely exercise over administrative actions.<sup>92</sup> *Chevron* itself lacks any reference to section 706, despite the fact that it is an administrative law case.<sup>93</sup> Sunstein argues that Congress has broad authority to require courts to defer to agency interpretations of statutes.<sup>94</sup> Epstein disagrees because the APA's statutory command to a reviewing court that it "shall decide all relevant questions of law" implies de novo review.<sup>95</sup> Epstein contrasts that standard of review with arbitrary and capricious review, a more deferential standard that courts often apply when evaluating agency decisions on their merits.<sup>96</sup> Epstein contends that *Chevron* deference violates Article III's mandate of independent judicial review, which is integral to the Constitution's separation of powers structure.<sup>97</sup>

Epstein also questions *Chevron* in practice. It is very difficult to identify what constitutes congressional silence or ambiguity in a statute, so it is not always clear when judges will need to apply step 2 of the *Chevron* analysis.<sup>98</sup> This renders judicial review uncertain and malleable.<sup>99</sup> For judges who favor a large administrative state, *Chevron* "offers a painless and effective way to allow agencies to expand the scope of their activities."<sup>100</sup> Recognizing that statutory gaps and ambiguities may exist, Epstein urges courts to give "the most plausible interpretation that they can glean from all available sources," rather than simply defer to the agency's interpretation.<sup>101</sup> After all, courts typically engage in de novo review of questions of law outside the administrative law context, and statutory interpretation is what judges are trained to do.<sup>102</sup> Courts should apply an "ordinary meaning" rule to all administrative law questions, reading statutes the same way they do in private law contexts.<sup>103</sup>

The current controversy over *Chevron* deference is far from abstract.<sup>104</sup> Epstein describes recent litigation on the meaning of the term "navigable waters" in the Clean Water Act.<sup>105</sup> Federal regulators have interpreted that term to encompass areas that form no part of any system of navigable waters, and some courts

have deferred.<sup>106</sup> They also have contended that their jurisdiction extends to dry land that is separated from navigable waters by several lots that include permanent structures, and to wetlands that supposedly had a "significant nexus" to a river located 120 miles away.<sup>107</sup> Epstein argues that a "single authoritative judicial interpretation" of the term "navigable waters" could have resolved this issue, which would have led to a "more reliable outcome at a lower cost."<sup>108</sup>

The Supreme Court has backed away from applying *Chevron* in several cases that have involved large scale agency interventions in important segments of the national economy.<sup>109</sup> Under the "major questions" doctrine, congressional intent to delegate authority over important segments of the economy to an agency must be clearly expressed, not presumed, and courts should therefore decline to defer to agency interpretations of statutes dealing with major questions of political or economic policy.<sup>110</sup> Epstein welcomes this limit to *Chevron* deference, but he says that there would be no need for it if *Chevron* itself were not a deviation from the "standard interpretive canon," embraced by Fuller, that statutory terms should be given their ordinary meaning whenever possible.<sup>111</sup>

Chief Justice John Roberts' majority opinion in *King v. Burwell*—the principal challenge to the Affordable Care Act—exasperates Epstein's rigorous approach to statutory interpretation.<sup>112</sup> Chief Justice Roberts invoked the major questions doctrine and declined to defer to the Internal Revenue Service's interpretation of the terms "state exchange" and "Federal exchange" in the Affordable Care Act.<sup>113</sup> Yet in spite of this refusal to accord *Chevron* deference, he ultimately upheld the law in order to avoid the dislocations that might occur if the subsidies authorized under the Act could not go forward.<sup>114</sup> Epstein laments that the Court rejected the statutory text in

92 *Id.* at 87 (citing 5 U.S.C. § 706(a)(2)(A)–(F)).

93 *Id.* at 87–88.

94 *Id.* at 88 (citing Cass R. Sunstein, *Chevron as Law*, 107 GEO. L.J. 1613 (2019)).

95 *Id.*

96 *Id.*

97 *Id.*

98 *Id.* at 89–90.

99 *Id.*

100 *Id.* at 90.

101 *Id.*

102 *Id.*

103 *Id.* at 91–97.

104 *Id.* at 99.

105 *Id.* Epstein also develops this thesis of overly expansive agency interpretation of authority through his analysis of cases arising under the Endangered Species Act. *Id.* at 104–07.

106 *Id.* at 99–102. Compare *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131–35 (1985) (deferring to agency interpretation) with *Solid Waste Agency of North Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 171–73 (2001) (declining to defer to agency interpretation).

107 Epstein, *supra* note 3, at 102 (citing *Sackett v. EPA*, 566 U.S. 120, 124 (2012) (agency has jurisdiction over dry land); *Army Corps of Eng'rs v. Hawkes*, 136 S. Ct. 1807, 1815 (2016) (agency has jurisdiction over specific type of wetlands)).

108 *Id.* at 103.

109 *Id.* at 107–21. Epstein discusses several Supreme Court decisions in which the major questions doctrine was, or could have been, invoked. *Id.* at 108–21 (citing *MCI Telecommunications Corp v. AT&T*, 512 U.S. 218 (1994); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000); *Whitman v. American Trucking Ass'n*, 531 U.S. 457 (2001); *Massachusetts v. EPA*, 549 U.S. 497 (2007); *King v. Burwell*, 135 S. Ct. 2480 (2015)).

110 *Id.* at 107. See *Utility Air Group v. Environmental Protection Agency*, 573 U.S. 302, 314 (2014) (citing *Brown & Williamson*, 529 U.S. at 160).

111 Epstein, *supra* note 3, at 107.

112 *Id.* at 120–21 (citing *King*, 135 S. Ct. at 2488–91).

113 *King*, 135 S. Ct. at 2489.

114 Epstein, *supra* note 3, at 120.

order to lead to “better substantive results.”<sup>115</sup> Essentially, the Court was “far less concerned with the supposed ambiguity in the words ‘state exchange’ and much more worried” about the real-world consequences of removing the subsidies at issue from the program.<sup>116</sup> Epstein also argues that judges can easily manipulate the major questions doctrine because “judicial ingenuity allows this concept to mean different things to different people and to be followed by some judges in some cases but ignored by other judges in other cases.”<sup>117</sup> Epstein warns that any hope that the major questions doctrine can “rehabilitate the dubious morality of modern administrative law” is illusory.<sup>118</sup>

Epstein also criticizes *Auer* deference, where courts defer to an agency’s interpretation of its own ambiguous regulation.<sup>119</sup> *Auer* deference lets agencies, rather than the courts, decide how to interpret regulations, and that results in the abandonment of judicial review of questions of law.<sup>120</sup> The result is “too much running room for political appointees with partisan agendas,” an “open invitation to repeated ‘flip-flops’” on rules that govern regulated parties.<sup>121</sup> There is no required consistency in agency rules.<sup>122</sup> Epstein illustrates his argument by describing the litigation that ensued when the Obama administration interpreted Title IX to apply to students in public schools seeking accommodations based on gender identity, rather than biological sex.<sup>123</sup> The lower court reflexively adopted the agency’s position without serious analysis of the statute or its purpose.<sup>124</sup> Epstein points out that this level of agency deference enabled the agency to undertake a major transformation of law without regard to the interests of the schools and affected parents and students.<sup>125</sup>

*Auer* is sometimes equated with the Supreme Court’s 1945 decision in *Bowles v. Seminole Rock & Sand Co.*, but Epstein contends that there is a “huge gulf” between the two decisions.<sup>126</sup> The *Seminole Rock* Court stated that, if the meaning of the words of a regulation was in doubt, a reviewing court “must necessarily look to the administrative construction of the regulation” and

give “controlling weight” to that interpretation unless it was “plainly erroneous or inconsistent with the regulation.”<sup>127</sup> In that case, the Court independently determined that the agency’s interpretation of the price regulation was consistent with the statute and the underlying price regulatory system.<sup>128</sup> Epstein does not object to the *Seminole Rock* formulation per se, but he warns that the opinion should not be over-interpreted to mean that courts should defer to agencies “in cases of evident conflict between the ordinary language interpretation of the statute and that given it by the relevant administration.”<sup>129</sup>

Epstein also believes that the modern administrative state operates at variance with Fuller’s principle of non-retroactivity.<sup>130</sup> Significant changes in the law should be accomplished by the legislature, “or perhaps even judicial decisions on key points of law.”<sup>131</sup> When, instead, an agency applies new rules to actions done in reliance on prior rules, or the agency enacts a prospective rule that requires significant changes in private parties’ behavior, these actions undermine the reliance interests of private parties in knowing and calculating the expected costs of compliance.<sup>132</sup> Courts presume that, given the frequency of reversals of agency positions, regulated entities are “on notice” that retroactive impositions will occur.<sup>133</sup> Defenders of the modern administrative state argue that agencies must have the ability to adapt to changed circumstances, even to the extent of reversing prior rules, but this mindset shifts the risk of change from the public sector to the private sector.<sup>134</sup> Epstein contends that allocating risk this way is unfair in view of an agency’s “greater knowledge of the regulatory, administrative, and policymaking process.”<sup>135</sup>

Epstein acknowledges that agencies should have some discretion in policy making, noting that APA section 706(2)(A) only allows courts to review agency decisions to ensure they are not arbitrary and capricious.<sup>136</sup> The APA allows agencies to exercise their judgment in drawing lines or doing routine administration.<sup>137</sup> The principle can also apply when the executive branch needs to set policy on such vital matters as immigration and the construction of the census, which are assigned to the executive by the Constitution.<sup>138</sup>

115 *Id.* at 121.

116 *Id.* at 120.

117 *Id.* at 107-08.

118 *Id.* at 121.

119 *Id.* at 131 (citing *Auer v. Robbins*, 519 U.S. 452, 458 (1997)). Epstein notes that several members of the Supreme Court are uncomfortable with *Auer* deference. *Id.* at 152 (citing *Kisor v. Wilkie*, 139 S. Ct. 2400, 2425-30 (2019) (Gorsuch, Thomas, and Kavanaugh, JJ., concurring in judgment)).

120 *Id.* at 130, 137.

121 *Id.* at 136.

122 *Id.*

123 *Id.* at 137-39, 141 (citing G.G. ex rel. Grimm v. Gloucester County School Bd., 822 F.3d 709, 721 (4th Cir. 2016), *vacated in part*, 853 F.3d 729 (4th Cir. 2017)).

124 *Id.* at 141-44.

125 *Id.* at 139.

126 *Id.* at 131 (citing *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945)).

127 *Id.* at 133 (citing *Seminole Rock*, 325 U.S. at 414).

128 *Id.* at 131-33.

129 *Id.* at 133.

130 *Id.* at 155.

131 *Id.*

132 *Id.* at 153-54.

133 *Id.* at 155-56.

134 *Id.* at 154.

135 *Id.*

136 *Id.* at 183, 185 (citing 5 U.S.C. § 706(a)).

137 *Id.* at 183.

138 *Id.* at 185.

Epstein does not uniformly favor more judicial authority and less agency discretion.<sup>139</sup> Some reviewing courts have added extra-statutory requirements to the arbitrary and capricious standard, such as by holding that an agency rule may be invalidated if the agency relied on a factor that Congress had not intended.<sup>140</sup> Judicial review then becomes one of “exacting scrutiny,” which exceeds the judicial role assigned by the APA.<sup>141</sup> Epstein disagrees with this gloss on the statute, saying that a “sensible reading” of the arbitrary and capricious standard would allow the agency to prevail unless it had engaged in a “wholesale and knowing disregard of large masses of relevant information” or missed “some important aspect of a problem or offers an explanation that is counter to the evidence.”<sup>142</sup> Where courts have taken a “hard look” at agency decisions, the result has often been the demise of publicly-valuable infrastructure projects such as nuclear power plants and interstate pipelines.<sup>143</sup>

#### V. CAN ADMINISTRATIVE LAW BECOME MORAL?

Epstein laments that no area of modern administrative law meets the “standard requirements of the rule of law.”<sup>144</sup> This failure is closely connected the modern regulatory climate insofar as federal statutes impose “comprehensive systems of government control on the environment, drug development, telecommunications, and labor relations, among other fields,” giving agencies broad powers to intervene.<sup>145</sup> Weak protections for property rights and broad grants of rulemaking authority enable agencies to regulate broad swaths of the economy without sufficient regard for the interests of the regulated entities.<sup>146</sup> The failures of administrative law are a “necessary consequence of the progressive mind-set that has ushered in its modern interpretation.”<sup>147</sup>

What steps might resolve these problems? Epstein concludes that inconsistent application of the APA’s standards for judicial review can be rectified by having all courts reviewing agency actions apply the standards used by an appellate court reviewing a trial court’s decision: questions of law are reviewed *de novo*, while questions of fact are decided under a clearly erroneous standard.<sup>148</sup> If courts just apply the APA, which imposes these two discrete standards, the “constitutional questions will then largely take care of themselves.”<sup>149</sup>

Epstein’s concerns about the overreach of administrative law, however, will not necessarily be resolved by eliminating *Chevron* deference. His objection to the breadth of powers delegated by Congress to agencies requires separate attention.<sup>150</sup> Epstein recognizes that Congress’s ability to “fine-tune” a system of regulation is constrained by its “hazy information about the complications likely to arise down the road” and the difficulty of long-term agency oversight.<sup>151</sup>

Epstein has addressed fundamental questions that should inform our understanding of modern administrative law. He makes a strong case that modern administrative law is not sufficiently moral under Fuller’s definition, but that it can become more moral if specific reforms are pursued. A reader who wants to probe deeper into the morality of modern administrative law will benefit from reading this book.

139 *Id.* at 185-205.

140 *Id.* at 186 (citing *Motor Vehicle Mfrs. Ass’n v. State Farm Ins.*, 463 U.S. 29, 43 (1983)).

141 *Id.*

142 *Id.*

143 *Id.* at 191, 205, 213.

144 *Id.* at 211.

145 *Id.* at 212.

146 *Id.* at 212-13.

147 *Id.* at 214.

148 *Id.* at 213.

149 *Id.*

150 *Id.* at 34-35, 37, 214.

151 *Id.* at 34.

