EXECUTIVE ACTION: ITS HISTORY, ITS DILEMMAS, AND ITS POTENTIAL REMEDIES

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ABSTRACT

Concerns about the rule of law in the modern administrative state can be fully understood only in their historical context. After the Norman Conquest, the national government of England was controlled entirely by the king, although the nobility exercised substantial powers within their assigned areas. The king subsequently created two institutions, the common law courts and the legislature (Parliament), in part to extend his control over the nobles. These institutions gradually acquired independent power and reduced the authority of the monarchy. They did not do so, however, by imposing controls, or standards of behavior, on the king's executive authority. Rather, they reduced his authority, taking command of one field after another. In the process of defining and justifying their newly developed roles, the courts and the legislature established procedures and decision-making standards for their own actions that embodied the rule of law.

Thus we, as heirs to English legal and constitutional thought, know how to impose the rule of law on judicial and administrative action. But we have not inherited any standards for executive action; our historical experience teaches us how to limit its scope but not how to control its content. The Administrative Procedure Act reflects this historical and cultural lacuna. It contains elaborate standards for adjudication, modeled on judicial procedure, and at least rudimentary standards for rulemaking, modeled on legislative procedure. But it provides no standards for executive action, and in fact, does not even recognize such action as a category. We know it now as informal adjudication, an obvious misnomer that does not appear in the language of the Act, but has been concocted by observers based on the Act's implicit structure.

This introductory essay attempts to unify the incisive and illuminating discussion that the articles in this symposium provide about our lack of standards for executive action. Pretrial diversion agreements (Arlen), executive waivers (Price), guidances (Epstein) and the control exercised by Presidential signing statements (Rodriguez, Stiglitz & Weingast) are all examples of a general category of executive action (DeMuth) that raises rule of law concerns due to this lack of standards. After describing the problem, and setting it in its historical context, the essay ends by considering substantive standards (rationality), supervisory institutions (the ombudsperson) and procedural mechanisms (a revised Administrative Procedure Act) that might be employed to impose legal standards on this essential but troublesome mode of public governance.

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The "rule of law" refers, most often, to standards of morality that we regard as applicable to government behavior. But any effort to apply these standards to modern administration is unlikely to succeed unless it is grounded in a deep historical context. The purpose of this article is to do so. It will argue that our political experience, running back about a thousand years, fails to provide us with a conceptual framework for applying the rule of law to executive action in general and to the modern administrative state in particular. The inability to recognize this failure produced a gaping lacuna in the Administrative Procedure Act (5 U.S.C. §§ 551-706), one that has confused and addled the entire field since the statute was enacted. While a variety of thoughtful repair efforts have been suggested over time, it seems unlikely that we will be able to fully evaluate those particular efforts, or devise effective solutions for the general problem, until we understand its historical context. History itself will not provide a solution, but it will suggest the general contours that the solution will necessarily assume.

It may seem paradoxical to invoke such temporally remote events to address a contemporary issue like the rule of law in the administrative state. The reason why it is necessary to engage in this inquiry is epistemological, at both the pragmatic and the conceptual level. Pragmatically, the idea that we can devise innovative solutions to existing governmental problems by theory or by speculation is a misconception born of the seductive lambency of thought. Scholars and policy analysts can certainly conceive of impressive and sometimes even plausible reforms, but implementing real changes in our mode of governance is a different matter. It does not depend on the conceptual availability of the change that is proposed, but on the ability of large numbers of social actors, with varied backgrounds and conflicting attitudes, to accept, internalize and reliably enact a different mode of behavior in a sustained and coordinated manner. This can only be achieved by connecting with the deeply embedded, chthonian forces that underlie our institutions and determine their dynamics. T o identify these forces, we need to place these institutions in their historical context; we need to understand their origins, their evolution, and their current level of development.

What is true for institutions is also true for the principles that we apply to them. While we currently debate the basic meaning of fairness, and the rule of law, in the administrative context, we possess a high level of consensus about the application of that same principle to civil trials. This is not surprising; we have been discussing, debating and assessing civil trial procedure for at least 800 years.[1] Our current rules and understandings are thus the product of long

1 Prior to the thirteenth century, contested facts in ordinary legal actions were determined by the ordeal, typically either water or hot iron. See Bartlett (1986). When the Lateran Council of 1215 forbid priests to officiate at these trials (for the doctrinal reason that it is wrong to demand a miracle

historical experience and have become so culturally embedded that they are regularly duplicated in non-judicial settings, extensively employed for dramatic effect in popular literature and used as reference points in satire.[2] Americans grow up knowing what a trial is, and whether a particular version can be considered fair or not. Contrast this with administrative procedure (aside from trial-like adjudications, of course). Even educated people rarely have more than a rudimentary sense of how regulatory agencies function. In this case as well, historical context can assist us in identifying sources of knowledge and culture experience that can be mobilized to define our conception of fairness in the relatively novel and unfamiliar institutional setting of the administrative state.[3]

Conceptually, the epistemological problem lies in the immediacy of administrative issues. Being the dominant mode of governance in our era, regulatory law and practice is inevitably immersed in current controversies. For some people, regulation is the necessary means of dealing with the injustices of our social and economic system; for others, it is often the source of injustice in a social and economic system that would resolve its problems more effectively without such intervention. The normative haze that results from these conflicting perceptions creates serious difficulties for us in perceiving the nature of modern administrative government and evaluating possible reforms. It is, quite simply, difficult to know whether our judgments are based on a priori assumptions, whether our predictions are projections of our assessments or our preferences. Here again, history can provide assistance by connecting current issues with older ones that time has drained of their emotive content. The role of the monarch, the status of the common people, and the unity of the Church were once matters of towering, ferocious conflict, but we can look back on them with an equanimity—and draw lessons from them with an objectivity—that we

of God, and the pragmatic reason that the natural inclinations of the litigants were leading to the corruption of the priesthood), England began to use juries, previously restricted to delivering indictments as triers of fact. See Baker (2005). This [symposium] is thus appearing on the 800th anniversary of jury trials in Anglo-American law.

2 It is hardly necessary to list the myriad works of popular literature that center on judicial trials, and assume extensive familiarity with trial proceedings to produce their effects. Similarly, even children have little trouble perceiving the satirical humor in the tart-theft trial that ends Alice's Adventures in Wonderland ("'Give your evidence,' said the King; 'and don't be nervous or I'll have you executed on the spot.' ") or in the mouse's tale ("Fury said to the mouse, That he met in the house, 'Let us both go to law: I will prosecute *you*–. . 'Said the mouse to the cur, 'Such a trial, dear sir, With no jury or judge, would be wasting our breath.' 'I'll be the judge, I'll be the jury,' Said cunning old Fury, 'I'll try the whole case and condemn you to death.'" Carroll (1960, pp. 105, 37).

3 This article is partially based on my more general effort to trace the relationship between government and private morality. Rubin (2015).

cannot possibly apply to the less momentous but more immediate question of whether we need to modify the Clean Air Act.

1. THE HISTORY OF EXECUTIVE ACTION

The modern state began with the development of feudal monarchies in the tenth and eleventh centuries. Prior to that time, European rulers remained committed to ideas of governance derived from the Roman imperium. Centralized imperial control in Western Europe had ended over the course of the fifth century, but—quite understandably—no one at the time realized that this was an irreversible event.[4] The dominant view was that the Western Empire, which had been governed separately from the Eastern Empire since Diocletian (Goldsworthy 2009) was simply undergoing a difficult period from which it would recover. Charlemagne's coronation as Roman Emperor in 800 was thus seen as the revival of the Empire, and it was only after the collapse of the rickety structure that he had held together through force of personality that people began to grapple with the reality of Rome's demise.[5]

This realization first dawned on people in the area of modern France, one of the three north-south slices into which Charlemagne's empire had been carved by the Early Medieval practice of partible inheritance.[6] The rulers of the other major slice, which included modern Germany,[7] had the misfortune to retain the imperial crown, and would cling stubbornly to the imperial model at the expense of effective state building until the nineteenth century (Barraclough 1984; Lopez 1967, pp. 318–21). The French themselves struggled with the new idea of feudal monarchy, but it was implemented precociously—and for present

4 See Brown (1989); Geary (1988); Goffart (1980). Gregory of Tours, the well-educated Gallo-Roman bishop who wrote the history of sixth century Francia, never mentions the fall of Rome in his account. Gregory of Tours (1974). This is not to deny that real changes occurred as a result of the barbarian invasions, see Heather (2006), Ward-Perkins (2005), but only to note that the events of the fifth century were interpreted differently by people at the time than they are today.

5 See Collins (1999); Holland (2008); Lopez (1967). Lopez describes the Carolingian Empire as a "frail giant."

6 By the Treaty of Verdun (843). Collins (1999, pp. 350–51); Wickham (2009, pp. 427–44). For maps showing the division, see Lopez (1967, p. 97), Wickham (2009, p. xxxvi). These north-south divisions produced the modern configuration of European nations; Merovingian and Carolingian Francia divided its territory in an entirely different way.

7 In addition to these two slices, the Treaty of Verdun created a central portion which broke apart when its ninth-century ruler, Lothar II, died without an heir, and thus did not produce a modern nation. See Wickham, 420–22. Despite this early demise, its imprint continues to the present in the independence of the Netherlands, Belgium, Switzerland and northern Italy from France or Germany, and, until relatively recent times, in the independence of the Franche-Comté, Piedmont, Savoy from France and the Holy Roman Empire, and in the contested status of Alsace and Lorraine throughout the subsequent twelve centuries.

purposes most relevantly—when a French duke, William, conquered England in 1066. William immediately declared himself the feudal lord of all the landholders in England, both his Norman allies whom he installed in place of many Anglo-Saxon nobles, and those Anglo-Saxons nobles whom he permitted to remain. He proceeded to build a new type of central administration on this feudal foundation, supplementing feudal levies with mercenaries and feudal fees with newly-devised ways of raising revenue (Bartlett 2000; Douglas 1967; Thomas 2007).

There were, at the time, two forces in English society that were prepared to act as countervailing forces to the King's authority—the Church and the nobility. Their actions are quite properly described as a power struggle, with each making use of the resources at its disposal, and seeking support from other groups, to advance its position. Such opposition is predictable and close to universal; what is important for present purposes are the specific types of claims that these oppositional forces advanced, their justification for limiting the king's authority. Both the Church and the nobility were ferociously insistent on their own independence, which they supported with various appeals to justice and custom. In addition, both sought to limit the power of the king by imposing standards on the way in which he carried out his royal office.

This is clearest in the case of the Church, which demanded that the king act according to the rules laid down by God, rules that the Church, of course, possessed the authority and expertise to interpret. John of Salisbury, considered by many to be the West's first political scientist (Berman 1983, pp. 276–77; Canning 1996, p. 111; Luscombe & Evans 1988, pp. 306–26), was a cleric who assisted Thomas Becket in his role as archbishop of Canterbury, and who subsequently became bishop of Chartres.[8] In his famous book, *Policraticus*, he both supports the right of revolution against an unjust king and insists that the king's subordinates must honor their feudal bond and remain loyal to him.[9] He can adopt these apparently contradictory positions because he believes that God is the ultimate judge of king's performance. A king who violates God's rules for royal behavior is a tyrant, a disciple of the devil. As a moral matter, he has thus forfeited his claim to obedience. If he retains such a claim as a matter of feudal law, he will nonetheless be judged by God, and go to hell. St. Thomas Aquinas, in the *Summa Theologica*, adopts a more sophisticated but largely equivalent position. People have the right to rebel against a tyrant, he maintains, and if they hesitate to do so, because rebellion always involves risks, they can be

8 For John's biography, see Nederman (2005, pp. xvi–xviii).

9 John of Salisbury (1990, pp. 190–231). Policraticus is also famous for its image of the state as a human body. See Rubin (2005a, pp. 39–43).

assured that the tyrant will be punished in the afterlife.[10] Ambrogio Lorenzetti's *Allegory of Good and Bad Government*, which can still be seen in Siena's city hall, provides a vivid visual depiction of this religiously-based view, with the good king sitting in state and surrounded by the virtues, while the bad kind sports a set of horns and a pair of vicious fangs.[11]

The position of the nobility, which had a dense and varied relationship with the monarchy, is somewhat more difficult to categorize. Attention naturally focuses on the Magna Charta, the agreement that the nobility imposed on King John in 1215 and that was successively re-issued by subsequent monarchs (see generally Holt 1992). The document is typically read as advancing the rights and liberties of the nobility against the king, the opening salvo in a long process by which the famous rights of Englishmen were established and expanded. But this may be what Herbert Butterfield characterizes as a Whig interpretation of history (Butterfield 1965; Bloch 1964, pp. 35–47). Many of the rights that Magna Carta secured were customary ones, restorations of the past rather than adumbrations of the future. Read in context, they can be viewed as imposing standards of behavior on the king, rather than declaring rights that limit his authority.[12] The most famous chapter of the document, for example, reads as follows: "No free man shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by lawful judgment of his peers or by the law of the land." [13] There is no mention of rights in this passage, no reference to specific due process protections; rather, it declares the proper behavior of the monarch when punishing his subordinates.

While such standards of behavior can be seen as specifications of the religious prohibition against tyranny – and the extent to which medieval people thought in religious terms cannot be over-estimated – they can also be regarded as impositions of a behavioral code that was specific to the nobility. This was the code of chivalry. Chivalry involved a wide range of rules, and it certainly changed over time, but one of its most essential and enduring features was a

10 St. Thomas Aquinas (1947, I-II, Q.96, rep. 3; II-II, Q. 42, art. 3, rep. 3; Q. 104, art. 6, rep. 3); see generally Sigmund (1993, pp. 217–31).

11 For further discussion of the theme in medieval thought, see (Black (1992, pp. 148–55); Canning (1988, pp. 462–64); Rubin (2008)).

12 The general consensus is that the idea of human rights or natural rights did not exist at the time the document was written; the earliest thinker who might be credited with the development of this conception is the early fourteenth-century nominalist, William of Ockham. See Black (1992, pp. 71–78); Dunbabin (1988, pp. 510–12). A more plausible originator is the conciliar theologian Jean Gerson, who worked in the late fourteenth and early fifteenth centuries. Tuck (1979, pp. 25–30).

13 Magna Carta, 1215, c. 39, reprinted in original Latin and English translation in Holt (1992, 448. 461 (Cii text)).

scrupulous regard for the privileges and dignities of noble persons.[14] A defining example was Edward, the Black Prince, respectfully serving dinner to King Jean of France after having demolished his army and taken him prisoner at Poitiers (Seward 1978, p. 94). In the Arthurian literature that constitutes our most vivid depiction of the chivalric ideal, Arthur himself is variously portrayed, but his most constant characteristic is the gracious regard he displays toward his heroic knights, as illustrated by the oddly egalitarian seating pattern of the Round Table, his deference to Gawain, and his tragic trust in Lancelot.[15]

These efforts to control the king by imposing standards on his behavior failed to survive. The simple reason is that the two institutions that attempted to deploy them lost out in their power struggle with the monarchy during the course of the High Medieval and Early Modern eras. The Church, which reached an apogee of political influence through the Gregorian reforms, Emperor Henry II's confession at Canossa, the Crusades and the Cluniacs (see generally Davis 1970, pp. 226–83; Holland 2008; Logan 2013, pp. 98–121), was severely wounded by the Great Schism, and then fully subordinated to the state during the Reformation (Chadwick 1964; Logan 2013, pp. 294–326 (the Avignon Popes and the Great Schism); MacCulloch 2003; Rollo-Koster 2015). The nobility lost its military importance due to the increasing use of mercenaries and conscripted commoners, and lost its military security with the development of cannons that could level castle walls. As time went on, its members traded local independence for participation in the increasingly powerful and prestigious central government, leaving their drafty, isolated strongholds to serve as courtiers or administrators at the royal palace (Elias 1994, p. 257; also Dewald 1996).

In some Early Modern regimes, most notably France and Spain, the declining influence of the Church and the nobility left a power vacuum that led to royal

14 See Bloch (1961, pp. 283–319); Fichtenau (1984, pp. 135–56); Duby (1977, pp. 59–80, 94–111, 158–70). The alliance between the nobility and the urban merchants reflected in the text of the Magna Carta, see Holt (1992, pp. 55–60), confirms the view that chivalry was mainly concerned with the efforts of the nobility to separate itself from the peasantry (some of whom were free and prosperous by this time) and not from the city dwellers; in fact, there were urban knights (Le Goff 1985, pp. 151–76).

15 All presented in classic form in Mallory (1993). The Round Table is first mentioned by Wace, a twelfth century Norman cleric, then expanded on by Layamon, and slightly later English cleric and poet. See Wace and Layaomon (1976). It is explicitly described as designed to treat the knights equally. This has the feel of either propaganda or wishful thinking on the part of the nobility; it is hard to imagine any real English king relinquishing his position of precedence prior to the time when the popularity of Arthurian legend made everyone anxious to imitate him. Gawain's role, and King Arthur's deference to him, appears in the Sir Gawain and the Green Knight (1975), as well as other stories. The first account of Lancelot's love for Guinevere is Chretien de Troyes' Lancelot (The Knight of the Cart), see Troyes (1993), but its tragic consequences were not explored until later, and appear fully in Mallory (1982, pp. 625–741). For a general discussion of Arthur's attitudes and personality as it emerges from the Arthurian literature, see Goodrich (1986).

absolutism. But in England, obviously of greatest relevance for our own legal and political experience, two other forces arose to mount more formidable and lasting challenges to the king's authority. Both were originally created by the monarchy itself in its struggle with the nobility. The first were the common law courts, royal judges established by Henry II in the latter part of the twelfth century. Henry's immediate goal was to resolve the conflicting land grants that had been issued by Stephen and Maude during the civil war that preceded his accession, and to add the fees and fines that accompanied medieval justice to the royal treasury. But the longer-term goal, which he fully intended, was to impose a uniform (thus "common") law in place of confused, overlapping multitude of baronial, manorial and hundred courts that existed at the time (Hogue 1986; Pollack & Maitland 1968, v. 1 at 136-61; Warren 1973, pp. 317–61).

The success of this initiative can be properly described as spectacular, but its ultimate result was to undermine the royal authority it was intended to augment. Having been granted authority to devise their own procedures and craft their own substantive provisions—Henry's concerns being limited to civil order and monetary receipts—the common law judges gradually extended their independence from the local courts to a newly asserted independence from the king.[16] They did so by invoking custom, which, as usual, was interpreted or invented to serve contemporary purposes. They claimed, sincerely perhaps but fancifully for sure, that the common law dated back to pre-historic times, granting it a greater venerability and thus, according to the dominant values of the era, a greater legal legitimacy than a monarchy that could claim no older origin than the Norman Conquest.[17] Gradually building alliances with the remnant of the nobility's resistance to the monarchy and, perhaps more importantly, with the emerging mercantile classes that needed regular and predictable dispute resolution services, common law judges were able to secure their claim to be the dominant and proper guardians of the law they were in fact inventing. When the confrontation between the Stuart monarchy and the English people broke out in the early seventeenth century, Sir Edward Coke, freely invoking

16 In this process, they were aided by the high nobility. Originally, tenants-in-chief did not have access to Henry II's newly created common law courts. Instead, as direct vassals of the king, their property rights were subject to royal disposition. The kings, and particularly John, used this authority to extort vast sums from the tenants-in-chief whenever they became involved in property disputes. Many of the provisions of the Magna Carta are designed to end this royal authority and to provide instead that the leading nobles, like the minor nobility, would have access to the common law courts for resolution of their disputes. See Holt (1992, pp. 123–87).

17 Coke (2003, pp. 1: 39-40, 150-57); *id.* at 40: "If the ancient Lawes of this noble Island has not excelled all others, it could not be but some of the severall Conquerors and Governors thereof; That is to say, the Romanes, Saxons, Danes, or Normans ... would (as every of them might) have altered or changed the same." See Pocock (1987).

pre-historic custom and the Magna Carta,[18] was able to declare that the common law courts were truly independent of the monarchy, and to secure their independence by making them the guardians of English liberties.[19]

Parliament was, of course, the second institution that challenged and ultimately defeated royal authority. First convened by Edward I as a means of raising additional taxes by consent from both the old nobility and the newly emerging cities, it too was able to unify these disparate sectors of society and give voice to the rising mercantile class. Like the judiciary, it simultaneously established its independence and expanded its jurisdiction, in this case by asserting the authority to control the imposition of taxation and then to control the expenditure of those tax revenues, and thus of public policy in general (Butt 1989; Maddicott 2010). Insisting on recognition as a partner of the king in government, it then joined the common law courts in opposition to the Stuart monarchy (Smith 1999, generally and 243; Stone 1972; Foxley 2015). The account of its rise to full control of governmental policy is virtually synonymous with the seventeenth and eighteenth century history of England. For present purposes, all that needed be noted is that Parliament struck savagely but prematurely in the English Revolution, executing the king and establishing a quasi-religious dictatorship (Ashley 1974; Worden 2009); that it rallied, after the dictatorship collapsed and the Stuarts were restored, by deposing them more gently and nominating a new monarchy;[20] that under the extraordinarily skillful stewardship of Robert Walpole it was able to re-establish its revolutionary dominance on more irenic and secure foundations (Hill 1989; Leonard 2011, pp. 7–30); that it secured the principle of parliamentary administration when all the ministers resigned together with Lord North in 1783 (Chester 1981, pp. 69–122; Leonard 2011, pp. 166–87; Mackintosh 1977, pp. 70–73; Wasson 2009, pp. 72–78); and that it reduced the king's expenditures from the principal purpose of taxation to a minor budget item in the time of Pitt the Younger (Chester 1981, pp. 123–68; Leonard 2011, pp. 219–43; Trevelyan 1965, 3: 77–78). By the nineteenth century, the monarchy's major role was to provide a nickname for a particular time period and its style of architecture; by the twentieth century,

18 Coke (2003, pp. 2: 755–914) (Coke's commentary on the Magna Carta); see *id*., at 84973 (commentary on Ch. 29, which in Coke's version was the "law of the land" and sale of justice provisions).

19 Jentleman's Case, 6 Reports 11a, reprinted in Coke (2003, pp. 1: 157–60) (King appoints judges but judges determine their own decisions after appointment); Prohibitions del Roy, 12 Reports 63, reprinted in *id.* at 478–81 (King may not decide a case at law); Proclamations, 12 Reports 74, reprinted in *id.* at 486–90. See *id.* at pp. xxv–xxvi (Introduction by Sheppard); Bowen (1990).

20 Trevelyan (1965); Vallance (2008). In the aftermath of the Glorious Revolution, Parliament's role in managing the government of Britain expanded dramatically (Horowitz 1977).

even that function was gone, and its remaining role was to sustain salacious gossip columns.[21]

For present purposes, what is striking in this obviously cursory survey of English constitutional history is that these new forces—the judiciary and the legislature—did not attempt to control the king by imposing standards of behavior on him, as the Church and the nobility had attempted to do. Rather, they gradually but insistently limited his authority. Step-by-step, they established their own authority to make law, by incremental dispute resolution in the judiciary's case and by positive fiat in Parliament's. At the same time, Parliament took control of central government finances and, through this medium, both domestic and foreign policy.[22] English kings retained their prerogatives, and continued to declare them in grandiose language, but those prerogatives were limited to an increasingly narrow scope until they were ultimately reduced to the trivial management of a few residences and rural retreats. By the end of the eighteenth century—the time when the USA was defining itself and its form of government—England, now Britain, was ruled by its legislature and its judiciary.

2. THE PROBLEM OF EXECUTIVE ACTION

We can now turn to the Administrative Procedure Act. The APA emerged from the controversy surrounding the massive governmental changes that were instituted by President Franklin Roosevelt and the heavily Democratic Congress as part of the New Deal.[23] Its goal was to place constraints on the administrative agencies that had grown so rapidly during this period and taken on so many new and disconcertingly expansive functions. The APA attempted to achieve this goal by defining the procedures that administrative agencies would be required to follow when carrying out their wide-ranging responsibilities. Two basic modes of administrative action were identified—rulemaking and adjudication—and two levels of procedure were established—formal and informal. The Act then provided for judicial review of agency action to enforce compliance with these procedures and added two general standards to evaluate the quality of agency

21 For the growth of common law authority during the period, see Poser (2013). Common law would gradually yield its primary position as a source of new legal rules in the years following Mansfield, but it would yield this role to Parliament, of course, not to the now-symbolic monarchy.

22 See generally Lemmings (2015), which describes the way that both the common law courts and Parliament became the dominant forces in determining the laws governing the lives of ordinary people in England.

23 For general histories of the Act, see White (2000, 117-21); McNollgast (1999); Shapiro (1986); Shepherd (1996).

decision-making within the scope of those procedures—substantial evidence for formal procedure and a prohibition on "arbitrary and capricious" behavior for administrative action generally.

One way to view the procedural prescriptions of the APA is that it establishes two tracks for administrative action, the formal track and the informal one. If the agency wants to proceed by rule—defined as an action with future effect—then it begins with section 553. It follows the prescriptions of that section by giving "[g]eneral notice of the proposed rulemaking" in accordance with subsection (b). If it is permitted or required to use "informal" rulemaking, then it must proceed to comply with the remaining section 553 requirements. That is, it must "give interested persons an opportunity to participate in the rulemaking" through the comment process specified in subsection (c), and then must publish the rule in accordance with subsection (d).

If however, the agency is required to use "formal" rulemaking, it shifts from the section 553 track to the section 556-557 track after complying with subsection (b). The operative language is the last sentence of subsection (c): "When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 apply instead of this subsection." Section 556 specifies a trial-type hearing and section 557 contains some specifications about the identity of the decision maker, the appeal process, post-hearing procedure and, as provided by a 1976 amendment to the APA, ex parte contacts. Having followed this 556-557 procedure, the agency must then publish the resulting rule in accordance with 553(d), which can be regarded as either a return to its original track or just a defect in the track analogy.

If the agency decides to act by order, that is, to conduct an adjudication, it begins with section 554 rather than section 553. That section contains basic provisions regarding the adjudicatory process, which is defined as agency action that does not enact a rule. The agency then proceeds (via section 555, which is titled "Ancillary Matters" and deals mainly with representation by counsel and service of process) to sections 556 and 557. That is the only track permitted for adjudications; the APA does not offer any alternatives. Since it requires compliance with sections 556 and 557, the "formal" procedural provisions, it is known as "formal adjudication."

As soon as the APA became law, observers realized that there was another way to view its procedural prescriptions. They could be seen as based upon two independent variables, the first being whether the agency was using "rulemaking" or "adjudication" and the second being whether the agency was required to use "informal" or "formal" procedures. This naturally suggests that the procedural provisions can be placed on the social scientists' famous four-box grid for depicting the interaction of two independent variables (Note

1947). In this case, one variable would be whether the action is rulemaking or adjudication, and the second is whether it is formal or informal.

It seems likely that the framers of the APA were thinking in terms of the track analogy, and that it was outside observers who first became aware of the dual variable, or four box grid analogy. The reason is that the four-box grid reveals a curious lacuna in the statute. Procedural requirements are specified for both formal and informal rulemaking, but only for formal adjudication. Nothing is said about informal adjudication and, in fact, the term never appears in the statute at all. But the category of informal adjudication is not merely an artifact of the APA's structure, a theoretically generated but pragmatically non-existent combination like hot rainy days in Palo Alto. It is more like the dark matter in the universe that has not been directly observed but can be predicted from the important role it plays in shaping physical reality. It encompasses all agency action that does not fall within the APA's definitions of a rule or an order. This category, which might also be called executive action, includes resource allocations, empirical research, advice, suggestions, threats, pleas, promises to act, promises not to act, plans, ideas, inquiries, speculations, educational materials, most guidance documents, inspections, demands for information, requests for information and a vast range of other interactions with regulated parties. As is apparent from the list, the overwhelming majority of the agency's activities constitute informal adjudication; it is what the staff does on a daily basis (Strauss 2002, p. 210; Breger 1986, p. 339; Rubin 2003, pp. 107–08, 173–81). Yet the APA imposes no rules on this category of action at all, and does not even identify it as a category.[24]

There are two important caveats to this general observation. The first is that some of the administrative actions that fall within the general category of informal adjudication are in fact adjudications. They determine the rights of private parties, and do so in at least a quasi-adversary setting that, like formal adjudications, is recognizable as an adaptation of a standard civil trial. Immigration removal, or deportation hearings are well-known examples, as are licensing hearings for nuclear power plants. The reason these proceedings are "informal"

24 One possible exception is § 555 (e), which provides that "prompt notice shall be given of the denial in whole or part of a written application, petition or other request of an interested person ... accompanied by a statement of reasons." This appears in a section with the Delphic title "Ancillary Matters." If it is ancillary to formal adjudications, as the other parts of the section suggest (since these refer to service of process, subpoenas and representation by counsel) then the reference is only to petitions filed in conjunction with those adjudications. Several courts, however, have concluded that the Section, and specifically § 555(e), is applicable to all agency actions, which would include informal adjudication. *Roelofs v. Sec'y of the Air Force*, 628 F.2d 594 (D.C. Cir. 1980); *Bowman v. U.S. Bd. of Parole*, 411 F. Supp. 329 (W.D. Wisc. 1976). See Strauss (2002, pp. 210–11).

is simply that there is no explicit statutory statement[25] that subjects them to sections 554, 556 and 557 of the APA.[26] A number of commentators have urged that the APA rules should be applied to them, in whole or part, and pointed out that there would be no conceptual or practical difficulty in doing so (Araiza 2004, p. 1001; Asimow 2004, p. 1041; Krotoszynski 2004; Sofaer 1972; Verkuil 1976). But that is because they actually are adjudications, and can thus be assimilated to the civil trial model that is used for formal adjudication. The second caveat is that informal adjudication is often subject to judicial review under the APA's arbitrary and capricious standard, for the simple reason that all "agency action" is subject to this standard unless explicitly or implicitly excluded.[27] But most informal adjudication does not resemble actual adjudication in the slightest; it would be impossible to apply the trial model to these actions, and it is extremely difficult to understand what the arbitrary and capricious standard means in connection with this vast and varied category of administrative action.

Why did the drafters of the APA fail to address informal adjudication? A variety of disparaging speculations spring to mind, but a more temperate and illuminating answer resides in the historical developments described above. English political experience provided only two models of governmental action that would limit the ruler's plenary authority—legislation and adjudication. These operated by transferring authority away from the ruler and to other institutions. Efforts to establish substantive standards for the ruler's behavior by direct imposition ended with the political defeat of the Church and the nobility. As a result of this defeat, neither the Catholic concept of natural law nor the aristocratic ethos of chivalry were developed in theory or instantiated in practice. Instead, the ruler's authority was gradually diminished by two institutions that were subject to different types of control. The legislature is answerable to the electorate, its members disciplined by the need to stand for re-election on a regular basis. The courts are expected to follow the common

25 For an adjudication to be subject to § 554 and provisions that follow, the statute must generally recite the APA's language that the proceeding is "on the record after an opportunity for an agency hearing." Removal hearings are explicitly excluded, see 8 U.S.C. § 1229a; *Marcello v. Bonds*, 349 U.S. 302 (1955).

26 It is possible to hold that a proceeding is subject to § 554 even if the statute does not use the APA's verbal formula, but the courts have been reluctant to do so. See Dominion Energy Brayton Point LLC v. Johnson, 443 F.3d 12 (1st (Cir. 2006), overruling Seacoast Anti-Pollution League v. Costle, 572 F.2d 872 (1st Cir.), cert. denied, 439 U.S. 824 (1978); Chemical Waste Management, Inc. v. EPA, 873 F.2d 1477 (D.C. Cir. 1989).

27 See Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) (decision is reviewable as long as there is "law to apply"). The Court held that even though no procedures were required, the agency had to justify its decision by making available to the reviewing court whatever record and rationale it created to reach the decision (and not a post hoc justification in response to legal challenge). For a criticism of the decision, see Strauss (1992; 2006, p. 258).

law, a law whose fixed principles were embedded in English legal culture. This was mythology of course, but it was constraining mythology because it produced that practical effect that judges had to follow precedent and could only devise new legal rules by incremental steps supported by explicit justifications.

The ready availability of models for legislative and judicial action, and the absence of an equivalent model for executive action, pervades our entire legal history. The drafters of the U.S. Constitution, of course, replaced the king with an elected President, thus imposing the same kind of constraint on the new chief executive as was placed on the legislators, that is, the political constraint of standing for election. In addition, they continued the English idea that the legislature and judiciary acted independent of the chief executive and limited the executive's range of action, these being the doctrines of separation of powers and checks and balances. But they did not place any specific, substantive constraints on presidential action because they had no basis in the English governmental tradition from which such constraints could be derived. Article II, unlike Article I, is notably short and notably lacking in any particularized procedures or criteria for action.[28] So is Article III, of course, but in this case it is because the procedures and criteria for judicial action were so fully understood. Due to this same lack of behavioral standards, the Framers did not place any constraints on the President's agents, that is, the executive departments; in fact, they consciously chose not to even specify those departments.[29]

28 Rakove (1996, pp. 244–45); Strauss (1984, pp. 596–604); see *id.*at 598: "One scanning the Constitution for a sense of the overall structure of the federal government is immediately struck by its silences."

29 The Founders flirted with the idea of specifying departments, see Farrand (1966, pp. 2: 135–36, 158, 334–37). Ultimately, they decided these matters were better left unspecified, perhaps because they were aware that major changes in the British Cabinet were occurring, see Mackintosh (1977), but were uncertain about what these were. The remnant of their effort is the Opinion Clause ("he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices"). Hamilton regarded the clause as a "mere redundancy." The Federalist No. 74, at 422 (Hamilton) (Isaac Kramnick, ed., 1987). Recently, conflicting interpretations of the Clause have been offered as part of the debate about a unitary executive. See Amar (1996) (supports unitary executive); Calabresi & Rhodes (1992, pp. 1206–07) (supports unitary executive); Lessig & Sunstein (1994, pp. 32–38) (undermines unitary executive); Rosenberg (1989, p. 689) (undermines unitary executive); Froomkin (1987, pp. 800–01) (undermines unitary executive). All such original intent arguments display the usual weakness of these arguments when dealing with major subsequent innovations, like independent agencies: we simply do not know, and cannot know, what the Framers would have thought the proper response to the social and economic transformations of the post-Civil War era should be. It is not even clear whether the Framers were aware of the highly relevant transformation of British government when all the ministers resigned with Lord North in 1783 (over the loss of the American colonies, in fact) thus severing any meaningful analogy between the President and the King. In fact, the Opinion Clause can be seen as supporting the distinction between executive and independent agencies since it grants the President an explicit right to demand information, but not obedience, from every principal officer. This might be seen as the legal basis for requiring independent agencies to submit regulatory

When independent agencies were created, beginning with the Interstate Commerce Commission in the late 1870's, they were, in part, conceptualized as mini-governments, that is, self-contained institutions that would regulate, i.e., govern, all aspects of a particular industry or subject matter.[30] Thus, they had rule-making functions, analogous to legislative action, and adjudicatory function, analogous to judicial action (Strauss 1984, 1987). They also had executive functions, of course, but the same vagueness, the same lack of specification and constraints, was perpetuated. This is reflected in the organic statutes for these agencies, and also in *Humphrey's Executor v. U.S.*, the Supreme Court's 1935 decision declaring that independent agencies, whose presidential appointees could not then be dismissed by the President at will, were not unconstitutional because they were "quasi-legislative or quasi-judicial" in character.[31]

The same conceptual lacuna appears in the APA. Once again, action that resembles legislation (rulemaking) and action that resembles judicial decision-making (adjudication) is subjected to procedural constraints, while executive action—the mode of action in which a chief executive engages—is not constrained, or even identified. It remains a residual category that emerges from the structure of the Act, but has only been identified by the Act's observers. By now, of course, there is a vast academic literature—generally in the field of political science, but increasingly in legal scholarship as well—describing and analyzing this obviously is crucial mode of governmental action. But there is still no systematic characterization of it, and any legal constraints must be improvised by relying on collateral considerations.

Neither rulemaking nor adjudication under the APA is free of difficulties, but there is a general perception that the procedures that the Act provides for these two mechanisms satisfy our basic norms of fairness. The area that seems to be the primary source of concern, not surprisingly, is executive action, where no procedures are prescribed. To some extent, that concern can be described by noting that agency behavior in this area regularly violates our norms. In fact, the problem may be even more severe. Due to the conceptual confusion that attends this mode of action—the difficulty in both characterizing and cataloguing the various agency actions that fall within its ambit—we are not even certain what norms we should apply; we are thus left with a gnawing sense of

plans to OIRA under Executive Order 12, 866, 58 Fed. Reg. 51735 (September 30, 1993) and its predecessors, even though these agencies are not subject to cost-benefit review of their regulations. See Strauss (2002, pp. 101–09).

30 On the origin of the Interstate Commerce Commission, see McCraw (1986, pp. 57–79); Stone (1991, pp. 5–10).

31 295 U.S. 602, 628-29 (1935).

discomfort that may be less definitive that outright condemnation but that is possibly more disconcerting.

The papers in this [symposium], in raising concerns about the legal legitimacy of agency behavior, involve actions that fall within this large, amorphous area of informal adjudication or executive action. Jennifer Arlen's paper focuses on the pretrial diversion agreements that Department of Justice prosecutors (that is, U.S. Attorneys) impose on private firms.[32] In exchange for a promise not to prosecute an asserted violation of the law, the Attorneys have secured both "significant monetary sanctions" and "forward-looking reforms" from the firms involved.[33] The concern Professor Arlen voices is that "empowering individual prosecutors' offices to impose new legal duties on firms, without either genuine ex ante constraints or external oversight of these mandates, pushes federal corporate criminal enforcement beyond the rule of law."[34] If the U.S. Attorneys simply proceeded to bring cases that they thought were meritorious to court, no such criticism could be leveled at them. Their claims that the firm had broken the law would be evaluated in a judicial trial, subject to all the procedural protections that accompany such trials, and that we generally recognize as fair. It is the shift to a negotiation unconstrained by judicial process or pre-established rule—in other words, a shift into the area of informal adjudication—that leads to Professor Arlen's concerns. Pretrial diversion agreements do not fall into this category because of any affirmative feature that they display, but simply because they are agency action that is neither rulemaking nor formal adjudication.[35]

Zachery Price discusses executive waivers, that is, decisions by an agency to excuse a private party from complying with an applicable statutory obligation.[36] In a sense, these are the converse of pretrial diversion agreements, since they grant an indulgence rather than threatening a sanction. They are similar, however, in shifting agency action from one of the traditional categories—in this case legislation—into the realm of informal adjudication. They fall within this realm for the same reason, namely, that they are neither rulemaking nor formal

32 Arlen, p. 231.

33 *Id.* at [manuscript p. 2].

34 *Id.*

35 In this situation, of course, the alternative is not formal adjudication under the APA but rather a criminal trial. All that means, however, is that the agreement is being used in place of the original source of our adjudicatory norms, rather than its administrative scion. The shift to informal adjudication is effectively the same; in fact, it can be safely assumed that other agencies use similar techniques when they can plausibly threaten a firm under their supervision with a formal adjudication that might lead to serious consequences, rather than with criminal prosecution.

36 Price, pp. 235–276.

adjudication. And for Professor Price, they raise similar concerns. While it is acceptable for the legislature that enacts the statute to provide a procedure through which the statute's requirements can be excused, a waiver that the agency grants on its own initiative—and thus falls entirely within the informal adjudication category—is problematic. "Such waivers . . . threaten rule-of-law values insofar as they risk expanding the unchecked discretionary authority of executive officials to establish policy unilaterally."[37]

A third contribution to the symposium, by Richard Epstein, discusses the use of guidance by administrative agencies.[38] As Professor Epstein points out, "guidance is a recently-developed term for a broad range of agency actions that announce the way that the agency is interpreting its statutory mandate, offer advice about how to comply with this mandate and its implementing regulations, or provide information about factual conditions that will affect compliance."[39] In all its forms, guidance possesses an unavoidable compulsive force; unless a regulated party has already adopted a sustained adversarial relationship with its regulating agency, it will be strongly motivated to treat the guidance as a command. Some guidance belongs within the APA category of rulemaking. While it is not adopted through the use of the section 553's notice and comment procedure (since that would make it informal rulemaking, not guidance), it is a rule nonetheless because it is promulgated under one of the exceptions that allow the agency to dispense with that procedure.[40] But many of the actions that are properly considered guidance do not purport to be a rule at all, but simply advice or information. As such, they are informal adjudication. Professor Epstein raises concerns about all forms of guidance, but those that are promulgated under the exceptions to section 553 can be at least partially disciplined by judicial decisions that narrow the exceptions.[41] It is the guidances that fall within the informal adjudication category that most seriously

37 *Id.* at [manuscript p. 5].

38 Epstein, pp. 47–93.

39 *Id.* at [manuscript pp. 2, 25–26].

40 See § 553 (a), (b)(A), (B). For commentary, see Franklin (2010); Funk (2009); Gersen (2007); Manning (2003); Strauss (2001, 1992). Another exception, not specifically provided by the APA but arguably authorized by the "good cause" terminology in § 553, (b)(B) is direct final rulemaking, essentially equivalent to a legislative consent calendar. See Levin (1995); Noah (1999).

41 An alternate approach, recommended by several commentators, is to deny rules that are not adopted with full informal rulemaking procedure the compulsive force that rules would normally exercise. See Funk (2009); Gersen (2007). As the text suggests, however, this would transform these rules into guidance without necessarily decreasing private parties' sense that they were required to comply. See Franklin (2010).

compromise "the standard rule of law values of fair notice, impartiality, consistency, clarity, neutrality and prospectivity."[42]

Christopher DeMuth's wide-ranging account of modern administration focuses on executive practices that are less specific—so much so that we do not even have an agreed-upon name for them. [43] They involve the highly discretionary way in which the modern executive pressures, cajoles, threatens, and negotiates with private enterprises in order to advance governmental goals.[44] While certainly not unknown in earlier eras,[45] this approach moved to a new level in the 1960s and 70s with the dramatic expansion of public regulation into areas such as consumer protection, worker safety, health care and environmental protection. Combining the sorts of threats Arlen describes, the sorts of indulgences that Price describes, and the kinds of guidance that Epstein describes, but combining them into a generalized strategy of regulatory control, federal agencies now dominate decision-making in many areas of the economy, paying little or no attention to legal regularity. The post-New Deal effort to control such behavior through the Administrative Procedure Act proved a slender and inadequate instrument. Cost-benefit analysis, originally part of the Reagan deregulation program, was enthusiastically embraced by presidents from both parties as a supplementary means of control; as DeMuth says, however, "efforts to guide executive government with economics, like the efforts to guide it with law, provided inadequate to the political ballistics propelling its growth."[46] In the most recent phase of this process, federal legislation, far from attempting to constrain discretionary agency action, authorizes and encourages

42 *Id.* at [manuscript p. 3].

43 DeMuth, p. 146.

44 Continental scholarship often uses the term "corporatism," although this may carry the implication that government action is focused on large economic entities, rather than businesses generally. See Aidi (2008); Hartmann & Kjaer (2015); Suarez-Villa (2009). The term is certainly the best description for Franklin Roosevelt's National Industrial Recovery Act, which, as DeMuth points out, was the only federal statute ever invalidated on non-delegation grounds. *A.L.A. Schechter Poultry v United States*, 295 U.S. 495 (1935). The NIRA, in fact, was an extreme form of corporatism, in that it delegated authority to private parties as well as government agencies. This is one reason for the Court's anomalous decision. Another may have been the decreasing popularity of Mussolini after his alliance with Nazi Germany. Mussolini's role in developing modern corporatism is historically interesting, but this is too rebarbative a reference to be of any value in contemporary policy discussions.

45 As one example, the American airline industry was completely restructured by the Post Office under the Hoover Administration. Hoover's Postmaster General, Walter F. Brown, making use of the fact that airline companies' depended on carrying mail as their primary source of revenue, forced these companies to consolidate in order to create a small number of larger corporate entities that would be easier to manage and would have the necessary capital to invest in passenger travel. See Heppenheimer (1995, pp. 33–35); Komons (1989, pp. 202–10); Smith (1942, pp. 156–86).

46 DeMuth, supra note [ ], at [manuscript at 30].

it: the examples given in the paper include the Sarbanes-Oxley Act, the Dodd-Frank Wall Street Reform Act and the Affordable Care Act. It seems almost sinister to characterize such an extensive exercise of authority as informal adjudication, but that is the only category that modern administrative law provides for it—which, of course, is precisely DeMuth's argument.

The final paper in this symposium is an analysis of presidential signing statements by Daniel Rodriguez, Edward Stiglitz, and Barry Weingast.[47] Without putting excessive weight on verbal distinctions, it can be said that when the President signs a bill that has been sent to him by Congress, he is functioning in a legislative capacity granted to him by the Constitution. Signing statements, however, when not merely celebratory,[48] are designed to influence the way that the legislation is implemented, and this is an executive function. Having made this distinction, the authors go on to distinguish between signing statements for statutes that are not implemented by administrative agencies and those that are. In both cases, they express concern, after modeling the effect of these statements, that the President is using them to expand his authority in ways not contemplated by the Constitution. However, when the statute is implemented by the judiciary, rather than by agencies, any influence the signing statement exercises will depend on its ability to persuade judges that it represents a convincing interpretation of the statute, and federal judges are structurally and functionally independent of the President. In contrast, agencies that implement a statute are the hierarchical subordinates of the President or, even if defined as independent, subject to his influence in ways that courts are not. In this case, the signing statement may exercise a more powerful effect, one that Is most likely to be felt in the strategic and discretionary decisions that fall within the category of informal adjudication. As in other papers, the authors are thereby calling attention to the lack of legal rules and standards that guide this type of action, and that—in the case they describe—leave it open to unilateral declarations about statutory meaning by the President that seem to go beyond his constitutionally established authority.

As will be noted, all these papers argue that the forms of executive action, or informal adjudication, that they address violate the rule of law. There are, however, at least two difficulties with this formulation of the problem. The first is that the rule of law is notoriously vague and variable.[49] This is not

47 Rodriguez, Stiglitz & Weingast, pp. 95–119.

48 Celebratory statements, like veto statements, simply give reasons why the President is taking an action that is directly authorized by the Constitution. As the authors point out, this does not raise the sorts of concerns that they are addressing in their paper.

49 For some general and relatively recent discussions of this vast subject, see Bingham (2010); Fuller (1964); Tamanaha (2004); Dorf (1995); Fallon (1997); Raz (1977).

inevitably the case; there are at least some formulations of this standard that are as clear and consistent as can be expected of a normative declaration. One such formulation is that the government must give private parties clear notice in advance of any restrictions on their behavior that will be enforced by penalties of any kind. This is not an impossible standard to impose in certain areas, such as criminal law governing individual conduct. But it is impossible in the administrative context, where the relationship between agencies and regulated parties is ongoing, complex, technical, changing over time and subject to negotiation.[50] In these circumstances, the rule of law dissolves into a morass of uncertainty that can only be escaped by condemning regulatory law in its entirety, as Robert Nozick does (Nozik 1974, pp. 26–30, 88–118). None of the papers in this [symposium] adopt such an extreme position. They all acknowledge the political and social necessity of the regulatory state, and assess their subjects of concern in thoughtful, balanced terms.[51] As a result, however, the rule of law, while easy to invoke, become ferociously difficult to apply.

A second problem with the rule of law approach is that it channels proposed solutions in an unnecessarily conventional direction. When we think of law within the Anglo-American legal tradition, we inevitably think of those institutions that imposed a regime of law on the medieval and early modern monarchy. These are the legislature and the courts, and their means of imposing law, as described above, was to limit and ultimately eliminate the monarch's power. Thus, invoking the rule of law leads naturally to proposals that executive action be reformulated as rulemaking or adjudication. In APA terms, it attempts to control informal adjudication by transferring agency action out of that category and turning it into either informal notice and comment rulemaking or formal adjudication. This does not seem like a promising approach in terms of current practicalities; executive action is too broad, too varied and too intrinsic to the regulatory process to be transformed into such highly structured and often unwieldy procedures. But the approach is even more unpromising from a historical perspective. It represents a return to the past, an effort to increase the

50 For my argument that the rule of law is in fact an outdated way to formulate the demand that government agents act fairly, see Rubin (2005a, pp. 214–26).

51 In his contribution, Christopher DeMuth gives respectful attention to Charles Murray's petulant and ultimately irresponsible call for civil disobedience to public regulation, and to Philip Hamburger's tone-deaf and tendentious use of history. Murray (2015); Hamburger (2014). His own solution is to return authority to the traditional branches through more highly specified legislation and expanded judicial review. But his insightful account of the economic and political dynamics that have lead to the expansion of "executive government" suggests that he recognizes the unlikelihood that this would be a feasible means of exercising control, or that Murray and Hamburger have very much to add.

fairness of our modern form of governance by invoking solutions that were developed at much earlier times for much different circumstances.

The REINS Act,[52] a recent proposal designed to constrain administrative action, suffers from a similar defect. The basic provision of its most recent version is that Congress must explicitly approve any rule adopted by an administrative agency that "has resulted in or is likely to result in an annual effect on the economy of $100,000,000 or more."[53] The explicit purpose of the Act is to restrain the President from taking unilateral action (hence the acronym), but it is not difficult to imagine that the agencies would be strangled by the reins that were intended to control them, given the vast number of regulations that are currently enacted and the difficulty the Congress experiences in getting anything done. This may be the underlying purpose of the Act. What is striking however, is that the sponsors are attempting to achieve either of these purposes by focusing on one of the traditional modes of agency action, rulemaking, and rendering it still more traditional by turning it from quasi-legislation into actual legislation. The REINS Act would have no effect at all on executive action, a mode of agency action that can much more accurately be described as unilateral than the procedurally constrained and judicially reviewed rulemaking process. In fact, the main effect of the Act would almost certainly be to shift agency action away from rulemaking, which would now be enormously difficult to complete, and toward the unregulated realm of informal adjudication. In other words, the one result that the REINS Act is unlikely to achieve is the one that it declares as its intended purpose.

3. SOME POTENTIAL REMEDIES FOR ADMINISTRATIVE ACTION

In addressing the very real problems that executive action creates, and in trying to impose some constraints on it while avoiding unrealistic condemnations of administration in general, we need not resort to the traditional constraints of rulemaking and adjudication procedures. Modern political theory and institutional sociology provide a range of promising alternatives. While not

52 Like many modern statutory proposals, the name is a cute acronym, standing for Regulations from the Executive In Need of Scrutiny. Various versions have been proposed. A recent one, introduced simultaneously in both chambers by Senator Rand Paul and Representative Todd Young is S.226, H.R. 427, 114th Cong., 1st Session (2015).

53 In addition, a regulation would qualify as a major rule if it produces "a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions" or if it produces "significant adverse effects on competition, employment, investment, productivity, innovation" or U.S. international competitiveness. This language tracks the cost-benefit Executive Order, currently 12,866.

traditional, these alternative constraints are promising because they are grounded in history—not the history of medieval or early modern England, but of High Modernity and of administrative governance during that period. I have already suggested two such alternatives elsewhere. The first is a substantive standard (Rubin 2003) and the second is a new supervisory institution (Rubin 2012). I will summarize these two proposed remedies below, and then suggest a third that involves defining new categories of administrative action.

3.1 A New Substantive Standard

As discussed above, the Catholic Church and the feudal nobility failed in their efforts to constrain the power of the monarchy by imposing the substantive standards of natural law and chivalry. They failed because they were soundly defeated in their political struggle with the monarchies, and because the substantive standards they were attempting to impose were deteriorating, in the first case gradually, in the second rapidly. But this does not mean that the idea of employing substantive standards is intrinsically unsound. What is needed, if this approach is to be revived and achieve greater success than its predecessor efforts, is a standard that makes sense in the administrative context and that is grounded in the history that produced this context.

One possible standard emerges from the democratic nature of modern government. It is generally described as accountability, and provides, in essence, that agencies must respond to citizens' desires, that they must be answerable to the citizenry for their actions.[54] This sounds good, but it suffers from irremediable problems. To begin with, the concept of accountability is so vague as to be virtually meaningless; it is more of a slogan than a principle of governance (Rubin 2005b). Second, to the extent that it means anything at all, it conflicts with the principle of administrative expertise. The current fashion to disparage this principle is unrealistic. Does anyone truly believe that government officials who inspect nuclear power plants do not need to be engineers, that those who regulate drugs can dispense with pharmacology training, that U.S. attorneys do not need law degrees, and so forth? One can question whether expertise necessarily produces definitive and uniform answers, but to question expertise itself is to challenge the structure of knowledge that defines the modern world.

The third problem with accountability is that citizens cannot express themselves directly, as they did in ancient Athens. Our government is not correctly described as a democracy, in the sense that the Greek meant when they used this term, but rather as a representative republic.[55] Citizens in general express their

54 For a general discussion of the concept, see Dowdle (2006).

55 For my further views on this point, see Rubin (2001, 2005a, pp. 110–43).

views through elected representatives; particular groups of citizens do so by trying to influence elections, or by trying to influence the representatives who have been elected by means of lobbying. The distortions and disruptions that result are too familiar to require repetition.[56] There is, however, an underlying issue that is worth noting in this context. Even if citizens' views were more accurately transmitted to administrative agents, they would nevertheless need to be translated into hierarchical supervision, which is the principal means by which such agents can be controlled. This would once again create a barrier between the citizens and the agents, and further indicate that accountability cannot be used as a substantive principle for controlling executive action.

A more promising principle can be derived from the concept of administration itself, rather than from the concept of democracy. As Max Weber observed in developing his classic description of bureaucracy, modern administrative government is grounded on the principle of instrumental rationality (Weber 1978, generally and pp. 212–25). The declared purpose of administrative agencies is to implement public policy in the most effective manner. The features of these agencies that Weber identified, including specialized jurisdiction, full-time salaried and credentialed employees, hierarchical organization and continuously maintained files, all derive from the effort to achieve effective implementation (Weber 1978, pp. 217–23). Weber famously attributed the historical development of this principle to Calvinism, specifically the belief that worldly success would signal that one is a member of the elect, and thus chosen by God to be granted salvation (Weber 2002). Less dramatically but also less controversially, he also observed that hierarchical administrative agencies were modeled on modern military forces, and that these forces adopted instrumental rationality because they were in ferocious, deadly conflict with each other, and could not afford to sacrifice effectiveness for sentiment or tradition (Weber 1978, pp. 221–23, 980–82). Whichever explanation one adopts, it seems clear that the principle of instrumental rationality is embedded in our history. More specifically and more importantly, it is embedded in the history of the High Modern era.

As a substantive standard for executive action, instrumental rationality would mean that agency officials should be able to demonstrate that their decisions possess at least a reasonable chance of achieving an identified and acceptable goal. For major matters, this standard might mean that the agency use

56 See generally Berelson, Lazerfield & McPhee (1954) (voting choices determined by social characteristics); Fiorina (1989) (electoral results are dominated by special interest groups); Miller & Shanks (1996, pp. 326–413) (voters base their decisions on the candidates presentation of the issues, rather than on the candidates' proposed or actual solutions); Bartels (1996) (voters are almost completely uninformed about the issues).

the standard procedure that modern policy analysis establishes, that is, to identify the problem, generate alternative solutions, choose the solution that seems most likely to achieve the goal, and implement that solution in a plausible manner (Bardach 2009; Birkland 2005; Ian & Braithwaite 1992; Sparrow 2000; Stokey & Zeckhauser 1978; Weimer & Vining 2004; Wildavsky 1979). Minor decisions would obviously be subject to less elaborate procedures, but the same general standard could apply. For example, targeting a particular regulated party for investigation or inspection should be based on an instrumentally rational strategy that can be articulated, such as complaints received or its use of practices that create specific dangers. An informational brochure promulgated by an agency should be based on some reliable source of information.

Because it is a substantive standard, rather than a procedure, instrumental rationality could be regarded an internal norm of administrative agencies, rather than a means of supervision by an external actor. But the same standard could be used by external actors whose role derives from sources other than the standard itself. The APA (5 U.S.C. § 706(2)(a)), for example, instructs courts to strike down agency action that they regard as "arbitrary and capricious." As I have previously suggested, this otherwise vague and possibly meaningless verbal formulation could be given content by being treated as a demand for instrumental rationality (Rubin 2003, pp. 169–73). Similarly, the difficulty of applying Fourth Amendment doctrine developed for investigating crimes to administrative settings might be resolved by replacing the warrant requirement with a requirement that the agency use an instrumentally rational strategy in selecting targets for inspection. This may, in fact, be exactly what the Supreme Court held in *Marshall v. Barlow's*, the leading decision on this subject.[57]

Similarly, the Executive Order requiring that major administrative rules must be assessed in cost-benefit terms before they go into effect[58] can be understood

57 436 U.S. 307 (1978). In a case involving factory inspections for Occupational Safety and Health Act (OSHA) violations, the Court rejected all the government's arguments for allowing a warrantless search. It held that the Fourth Amendment protects businesses as well as private dwellings, that it applies to civil as well as criminal investigations, that it prohibits warrantless searches, that the Court-established exception to this prohibition for a "pervasively regulated business" must be narrowly construed, and that the need to obtain a warrant would not undermine the goals of the legislative program. Having done so, however, the Court then held that the government could obtain a warrant without a showing of probable cause "in the criminal sense," *id.* at 320. Rather, it would be sufficient to show that "a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources such as, for example, dispersion of employees in various types of industries across a given area, and the desired frequency of searches in any of the lesser divisions of the area" *Id.*at 321.

58 Executive Order 12, 866, 3 CFR 638 (1993). The basic definition of major rules are that they produce "an annual effect on the economy of $100 million or more." *Id.*, § 3(f). This definition of a major

as an effort to impose a standard of instrumental rationality on agency action.[59] In this case, the reviewing body is not a court but another federal agency, the Office of Management and Budget (OMB),[60] which suggests the generality of the standard. One remarkable feature of this Executive Order is that it has remained relatively consistent despite changes in party control of the presidency, and despite the fact that the President has the unilateral and unchallenged ability to change or abolish an executive order.[61] To be sure, instrumental rationality is not the only motivating factor behind the cost–benefit Executive Order and its continuity. As a number of commentators have noted, it has also served as a way for the President to exercise policy control over the complex, sprawling administrative apparatus (DeMuth & Ginsburg 2010, p. 885) (reviewing Revesz & Livermore 2008; Kagan 2001). This seems almost certainly true, but the rationale and discourse through which control is exercised remains significant. The choice of instrumental rationality as the means of control suggests both the appeal of this standard and possibilities for its further development.

3.2 A New Supervisory Institution

As discussed above, the failure of the Catholic Church and the English nobility to impose substantive standards on the monarch did not end the efforts to constrain his power. Instead, new institutions, specifically Parliament and the common law courts, arose to fulfill this function, and were ultimately so successful that they reduced the monarch's power to a nullity. The mechanisms

regulation is the one used in the REINS bill to establish the category of regulations that would require Congressional approval if the bill were enacted.

59 Revesz & Livermore (2008); Adler & Posner (1999); Sunstein (1996). This is not to say that cost-benefit analysis is actually a valid way to achieve rationality in administrative decision-making; it has in fact been widely criticized for failing to do so. See Ackerman & Heinzerling (2002). Rather, the point is that arguments for its validity necessarily rest on its role in achieving instrumental rationality.

60 Within OMB, the Executive Order is administered by the Office of Information and Regulatory Affairs (OIRA).

61 The cost-benefit Order was initiated by Ronald Reagan and unsurprisingly continued by George Bush, See Executive Order 12,291, 3 CFR 127 (1982), supplemented by Executive Order 12,498, 3 CFR 323 (1986). It was then continued with significant but limited modification by William Clinton. Executive Order 12, 866, 3 CFR 638 (1993). George W. Bush was content to keep the Clinton Order in place although he added supplementary provisions at the beginning of his second term. Executive Order 13,422, 3 CFR 191 (2008). Barak Obama revoked these additions, leaving the Clinton Order in place, then added some minor additions of his own. Executive Order 13,563 (2011). Thus, the 35-year long history of Reagan's Executive Order can be fairly described as one of continuity and adjustment.

that appear in the APA to control administrative agencies are modeled on these institutions. But High Modernity has its own history, and need not limit its institutional mechanisms to the ones that dethroned the Stuarts and defanged the Hanoverians. It is worth considering whether there are any modern institutions, with no direct medieval antecedents, that could impose constraints on executive action, rather than relying on the pre-modern and obviously inapplicable idea that such action can be eliminated.

One such institution is the ombudsperson. It was originally developed in Sweden, which is why it has a funny name, and dates from the nineteenth century.[62] An ombudsperson is a government official, or more commonly an agency of such officials, that is organizationally located outside the administrative apparatus and to which private parties who feel aggrieved by the actions of administrative officials can appeal.[63] An ombudsperson's office typically has wide-ranging investigatory authority, which it uses to determine the validity of the complaint. Once it has reached a conclusion, a variety of responses are possible. Ombudsperson's offices typically do not have coercive authority to punish administrative agents for misbehavior or to command them to change their practices, but they are often authorized to provide advice, to report to other authorities, or to publicize their conclusions.[64]

The creation of an ombudsperson does not, by itself, specify the substantive standard that the institution employs. In most cases, ombudsperson's offices have been set up to receive complaints from individuals, with the result that the complaints they receive typically involve discrimination, unfairness or abusive treatment. Because a typical ombudsperson, unlike a court, does not enforce people's rights, either by imposing sanctions or by awarding damages, it possess the flexibility to respond to complaints that are virtually impossible to fit within our traditional construct of legal rights. Consider, for example, the common complaint that individuals voice about standing on line for excessive periods of time in order to obtain a license or a benefit from an administrative agency.[65]

62 See Wahab (1979, pp. 21–36); Gellhorn (1996, pp. 194–95); Scott (1988, p. 298). The original name is "ombudsman" which is awkward enough. Contemporary standards of gender neutrality require the further awkwardness of an additional syllable.

63 For general descriptions, see Buck, Kirkham & Thompson (2011); Gregory & Giddings (2000); Gellhorn (1996); Reif (2004).

64 This is the case in Britain, for example, where the ombudsperson mechanism is particularly well-developed. See Gregory & Giddings (2000a) in Gregory & Giddings (2000b, p. 21); Stacey (1978, pp. 155–61). But some of Britain's ombudsperson's offices have the right to compel production of information and can have recalcitrant parties held in contempt of court.

65 In economic terms, time spent waiting in line is a deadweight loss, and thus inefficient. Stokey & Zeckhauser, (1978, pp. 83–87). In addition, most people find the experience to be excessively annoying. Chebat & Filiatrault (1993); Clemmer & Schneider (1989, p. 87); Taylor (1994).

It would probably be impossible to formulate a legal right to expeditious treatment and, indeed, no such right has ever been established in American law. An ombudsperson, however, could investigate such complaints and take a variety of actions. It could develop an expertise in crowd management (perhaps by consulting with the Disney Corporation) and then advise administrative agencies, or it could issue reports that motivated agencies to take action on their own.

The other contributions to this symposium seem to reflect a greater concern for the mistreatment of business firms than for individuals, but there is no reason an ombudsperson's office cannot respond to these concerns as well. Suppose the FCC had amended its guidance regarding profanity in broadcasting[66] to include the fleeting expletives that it ultimately prohibited by particularized action and that became the issue in *FCC v. Fox Television Stations*.[67] Broadcasters subject to this guidance might complain to the ombudsperson: what exactly was meant, which expletives would be included, how would local stations that lack the bleep-out capacities of the national networks comply, was the guidance intended as obligatory or advisory, was it really a legislative rule that should have been subject to section 553 notice and comment procedure? The ombudsperson could carry out a rapid inquiry, on its own authority, without the procedural and adversarial delays that are inherent in judicial fact-finding or the political and collective action complexities of legislative fact-finding. If it concluded that the broadcaster complaints were justified, it could ask the FCC for a clarification or express the opinion that the guidance was in fact a legislative rule.

With respect to such complaints from regulated businesses, like complaints from individuals, the ombudsperson would have no further authority, that is, it could not compel the agency to alter its approach. But assuming the office had established its credibility, its definitive statement in this context that the agency's action was inordinately vague or procedural defective would be something the agency might be reluctant to ignore. Regulated parties could invoke the ombudsperson's finding when bringing suit against the agency, and might well be able to trigger or intensify legislative oversight on the basis of that finding. These effects depend, of course, on the traditional means of controlling the executive, namely the judiciary and the legislature, and might thus be seen as a reversion to those means that decreases the significance of the ombudsperson. But another interpretation is that the ombudsperson would be able to negotiate

66 *In re Industry Guidance On the Commission's Case Law Interpreting 18 U. S. C. §1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 FCC Rcd. 7999, 8002, ¶9, 8003, ¶10 (2001).

67 566 U.S. 502 (2009).

with agencies "in the shadow of the law."[68] That is, with the threat of the formal but unwieldy devices of litigation and legislative control in the background, devices that both the agency and the regulated parties might prefer to ignore, the ombudsperson's office might be able to establish a more productive dialogue between the two. Over time, such a dialogue might become sufficiently familiar and routine to function as an independent means of making regulation more effective and more fair, even without the legal authority that other controlling institutions exercise.

The classic means for making the ombudsperson independent of the administration is to establish it as an agent of the legislature.[69] State governments and federal agencies that have created ombudspersons offices have sometimes attempted to secure their independence by using the familiar American mechanism of an independent agency or office.[70] In fact, there is a useful precedent in the U.S. for the ombudsperson in its classic form: the Congressional, or Article I agency. Congress has established a number of agencies, located exclusively within its jurisdiction, that serve to provide it with information. They include the Congressional Research Service (CRS), the Government Accountability Office (formerly the General Accounting Office but still the GAO), the Congressional Budget Office (CBO) and the now-defunct Office of Technology Assessment (OTA).[71] To these may be added the House and Senate Legislative Counsel Offices, which—although more traditional and lacking a convenient three-letter acronym—are now also organized in the hierarchical, subject specialized form of an agency. These agencies have been quite successful—in fact, given the recent divisiveness of Congress, remarkably successful—in establishing and maintaining non-partisan reputations.[72] They gather extensive quantities of data and display impressive levels of expertise. The GAO is a particularly good

68 The phrase comes from Mnookin & Kornhauser (1979). It has become a standard element in modern implementation theory.

69 See Al-Wahab (1979, p. 20) ("the term Ombudsman signifies the person (or persons) who is elected by the Parliament as its representative"); Gellhorn (1996, pp. 8, 51, 158, 202–03); Gregory & Giddings (2002).

70 E.g., Older Americans Act of 1965, 42 USC § 3011(d) (ombudsman's office for long-term patient care within Department of Health and Human Services); Brandon, et al. (1984).

71 Bimber (1996, pp. 78–92); Mucciaroni & Quirk (2006).

72 The demise of the Office of Technology Assessment (OTA) might seem to be a counterexample. In fact, OTA was perceived as partisan (favoring the Democrats) when it was first established in 1972. As Bruce Bimber reports, however, OTA was able to remedy this obviously dangerous situation and acquire the same reputation for neutrality as had the other Congressional agencies. Bimber (1996, pp. 50–68). The ultimate demise of OTA was the product of the Contract with America Congress, and specifically its desire to cut the Congressional budget as well as the budget of executive branch institutions. (Bimber 1996, pp. 69–77; Margolis, 1996).

precedent because it investigates executive agencies and reports on their performance.[73] Expanding it into a genuine ombudsperson's office would not require a great deal of institutional re-engineering. What would be required would be authority to interact directly with the public to receive complaints or suggestions, and to interact directly with the agencies to provide information and advice.

3.3 New Procedural Models

One further possibility for a control mechanism that goes beyond the traditional approach is to establish procedural requirements for actions that cannot be modeled as either judicial or legislative decision making. It seems likely that the APA was inadvertently correct in not subjecting the full range of executive action to procedural rules. But there are a number of specific practices that currently fall within the diffuse, extensive nimbus of informal adjudication that might be usefully subjected to procedural requirements. This might be done by executive order, at least for non-independent agencies, but might better be achieved by amending the Administrative Procedure Act. Several new controls and procedures have already been added to the Act, such as a new way to initiate rulemaking (the Negotiated Rulemaking Act)[74] and new disclosure requirements (the Freedom of Information Act[75] and the Government in the Sunshine Act[76]). These are genuine innovations that move beyond traditional notions of judicial and legislative action, but they do not deal directly with executive action.

Any new requirements whose goal is to improve the practice in question, rather than to hobble or destroy it, would need to be fashioned with the particular purposes of the practice in mind. What would be needed, in other words, is to draw upon our historical experience in areas that are not imprinted with pre-modern efforts to control the king. Two promising areas are public policy planning and management theory, which both offer ideas that have been generated by contemporary efforts to deal with our increasingly complex, technological society.[77] One application of these approaches is implementation theory, a socio-legal

73 For general information, see http://www.gao.gov/.

74 P.L. 101-648, 104 Stat. 4969 (1989), codified at 5 U.S.C. §§ 561-570.

75 P.L. 89-467, 80 Stat. 250 (1966), codified at 5 U.S.C. § 552.

76 P.L. 94-409 90 Stat. 1241 (1976), codified at 5 U.S.C. § 552b.

77 Management theory is a school of thought developed during the first half of the twentieth century that advanced the idea of the "scientific" or systematic design of functional organizations, both public and private. For its foundations, see Fayol (1949) (originally published 1916); Mayo (1933) (discussing, inter alia, the Hawthorne experiments); Taylor (1911); Weber (1978, pp. 220–26, 956–1003) (analysis of bureaucracy, written 1911–13); Bendix (1977, 423 n.14). For current approaches, see, e.g., Amin (1994); Markides (1996); Morgan (2006).

discipline that focuses on the way that administrative agencies carry out their statutory responsibilities (Ayres & Braithwaite 1977; Pressman & Wildavsky 1973).

Guidance provides an obvious example of a practice that might be subjected to defined procedures. It is not an English-language term,[78] but rather a translation of a Japanese phrase, *Gyōsei shidō*. Originally, Japanese guidance was a partially informal, but apparently well understood practice in which administrative agencies requested voluntary cooperation from regulated parties. As an aspect of Japan's more cooperative, less adversarial approach to regulation, it received a good deal of positive attention from American commentators (Gellhorn 1996; Lepon 1978), but Japanese regulated parties were apparently less happy about it.[79] In response, the mechanism was subjected to formal legal rules by Japan's Administrative Procedure Act of 1993.[80] Chapter 4 of the Act provides that an agency issuing a guidance must remain strictly within its jurisdictional limits,[81] that it must "make clear to the subject party the purpose and the content of, and the persons responsible for" the guidance,[82] that the guidance must be issued in written form or reduced to written form on request,[83] and, in essence, that the agency may not use threats of action or inaction to compel a regulated party to comply with the guidance.[84]

These rules are useful in establishing the limits of guidance, but what might be even more useful, at least in the American context, is a standardized procedure by which certain types of guidances could be issued. Subjecting guidance to § 553 notice and comment procedure would be the wrong approach, since it would effectively abolish the device. A preferable strategy is to recognize guidance as a

Policy analysis combines management theory with more general insights from political science to propose specific strategies for organizational decision-making, often in a governmental setting. See note [ ] supra (citing sources).

78 This is indicated by its use as a generic noun, introduced by the indefinite article (as in, the FCC has issued "a guidance"), a usage that is not found in English outside the administrative context. We use "guidance" as an abstract noun, in which it is not introduced by an article (Professor Smith gave good guidance to her students.), and as a specific, semi-concrete noun derived from it, in which case it is introduced by the definite article (The guidance that Professor Smith gave John was excellent.), but the usage of "a guidance" only developed when administrative lawyers borrowed the usage of the term from Japan.

79 For an argument that Japan had as much conflict as the U.S., but channeled this conflict into different aspects of the regulatory process, see Litt et al. (1990).

80 Act No. 88 of 1993, available in Japanese and English version at http://www.cas.go.jp/jp/seisaku/hourei/data/APA_2.pdf

81 *Id.*, art. 32.

82 *Id.*, art. 35 (1).

83 *Id.*, (2).

84 *Id.*, arts. 33, 34.

distinctive form of administration, located securely within the realm of executive action, but nonetheless capable of being subjected to procedural rules. These rules must recognize guidance as form of advice, and look to ideas about policy implementation and institutional management to determine their content.

To begin with, the category of guidance would need to be defined. As we generally use the term, it refers to information of general application that the agency provides to regulated parties that relates to, but does not increase, their legal obligations. An agency that wanted to issue such information might be required to identify it as a guidance, thereby putting regulated parties and others on notice regarding the nature and effect of its action. The agency might then be required to make clear which parts of the guidance are designed to restate legal obligations, and which are designed to simply aid the subject audience. The National Highway Traffic and Safety Administration (NHTSA), for example, might issue a brochure that both summarized its adjudicatory decisions under its recall authority and also informed manufacturers of a new safety feature that might be advantageous but is not legally required.[85] The latter would be, in effect, a request for voluntary action. Despite the absence of legal enforcement, it might produce real results through operation of the market; a manufacturer, for example, might advertise that its car included a new safety feature that had been recommended by NHTSA.

Another possible control would be the requirement that when the agency summarizes its adjudicatory decisions in a guidance, it may not alter its decisional law without first amending the guidance. In *Fox Broadcasting v. FCC*, the agency altered its decisional precedent regarding fleeting expletives and, in recognition of the alteration, declared that sanctions would only be imposed prospectively.[86] The Supreme Court upheld the agency's action, reasoning that the agency was required to explain its decision but not required to provide a more elaborate explanation than it would be if it were dealing with a case of first impression, rather than reversing course.[87] The FCC, however, had previously

85 49 U.S.C. § 30118. For a discussion of NHTSA's recall authority and practice, see Mashaw & Harfst (1990).

86 566 U.S. 502 (2009).

87 This was the major source of controversy in the case. Both the majority and dissent agreed that under the prevailing interpretation of the APA's arbitrary and capricious doctrine, i.e., *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29 (1983), the FCC was required to provide an explanation for changing its regulatory stance. Justice Scalia, writing for the majority, held that the change required no more than the same level of justification that a new regulatory policy would require, while Justice Brennan, in dissent, argued that the change required an additional level of explanation. As an abstract matter, the debate is interesting, but it is difficult to see how it would make any difference in reality, that is, how it would be possible to distinguish, in an actual case, between adequately explaining a change and providing an additional explanation for

issued a guidance (identified as such) summarizing the basic rules regarding the use of profanity, including fleeting expletives,[88] and the decision in question was at variance with the guidance.[89] A requirement that the agency amend the guidance first might not only be more fair, but might also render guidance a more effective instrumentality.

A second type of executive action that might be defined as a category and subjected to procedural limits is the inspection. Like guidance, inspections are a means of obtaining compliance with prevailing rules. They may appear to differ from guidance in that they apply legal force upon the discovery of a violation, rather than attempting to obtain voluntary compliance. But it is a rare agency that is given the resources necessary to conduct systematic inspections of all the regulated parties subject to its rules with sufficient regularity to compel obedience. Instead, the agency must make choices regarding the parties it targets for inspection, the frequency of inspection, and the combination of the two, in an effort to require some parties to comply while inducing others to do voluntarily. Quite clearly, these are complex matters involving the use limited agency resources as well as the most promising strategy for implementation. Moreover, the balance among these various factors, as well as the nature of the inspection itself, will vary dramatically from one agency to another. Inspection of a bank to determine its financial stability is distinctly different from inspection of a factory to determine the risks is creates for its employees; one need only consider the different way in which the word "safety" is used in each setting to recognize the range of variation.

While it would thus appear that uniform rules for all administrative inspections would be unwise, if not impossible to formulate, it is certainly possible to require that agencies specify the rules that they themselves will use. Quite often, these rules are already stated in the employee manual; in fact, good managerial practice demands that they either be specified in the manual or inculcated through an equally explicit training protocol.[90] It would therefore not restrict

making that change. In any event, the proposal here is that the explanation that was provided in the adjudicatory decision, and evaluated by the Court in that context, would need to be presented in the guidance first once that guidance had been promulgated.

88 *In re Industry Guidance On the Commission's Case Law Interpreting 18 U. S. C. §1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 FCC Rcd. 7999, 8002, ¶9, 8003, ¶10 (2001).

89 The First Amendment issue that appears in this case has been omitted for purposes of this discussion. While the dissenters' argument that the issue could not be ignored in deciding the case has merit, it can be ignored in using the case as an example, since most administrative guidances will not implicate questions of free speech.

90 An administrative law case that confronted the complex issue of employee manuals, without being able to settle their legal significance, was *Morton v. Ruiz*, 415 U.S. 199 (1974).

the agency's decision making to require that it bring these rules out of the now obscure, inaccessible reaches of its internal practices and into a public document. There is, of course, a danger that regulated parties would strategize against the inspection rules, but there is also the promise that agencies would develop strategies for publicizing these rules in a manner that increases the level of compliance.

Procedural rules might also address the strategy that the agency employs for determining the targeting and frequency of inspections. Here again, it would be unwise to impose uniformity; rather, the demand would be that the agency articulate some acceptable means of making these critical determinations. One obvious possibility, in situations where regular inspection of all regulated parties is beyond the agency's capacity, would be the level of complaints from clients or employees. This might overlap, to some extent, with the operation of an ombudsperson's office. Other acceptable inspection strategies might include the nature of the regulated party's activities (some banks invest in riskier assets, some factories use more dangerous materials), the party's past history of compliance, or even random selection. The leading Supreme Court decision on administrative inspections, *Marshall v. Barlow's, Inc.*,[91] moves in this direction. As noted above, the decision does so in the context of a Fourth Amendment challenge, with the Court holding that a rational plan for determining inspection targets satisfied the Amendment's probable cause requirement.[92] This holding drew a vociferous dissent on the ground that suspension of the requirement was equivalent to authorizing a general warrant, the very abuse that the Fourth Amendment was intended to combat. [93] But a legal requirement that the agency adopt a rational plan for inspections would not be subject to this objection; rather, it would overlap with the above stated idea that instrumental rationality can serve as the substantive standard for all agency action.

Modern implementation theory suggests one other basis for making the determination—the regulated party's ability to demonstrate that it is voluntarily complying with the applicable rules. The more convincing this demonstration, the less the agency needs to carry out inspections of that party's operations. In this case, the reduced inspection level serves as both a rational means of

91 436 U.S. 307 (1978).

92 See p. [ ] supra.

93 Of course, the judiciary would still need to determine whether the agency was in violation of the Fourth Amendment. But an explicitly adopted rule, in addition to satisfying the *Barlow's* majority of probable cause, would also satisfy the dissent's demands that the warrant requirement should not be weakened because the rule, having been explicitly stated, could be reviewed by the courts on arbitrary and capricious grounds.

allocating agency resources and a reward to the regulated party for its tractability.[94] As such, it can function as a particularly effective way to obtain compliance with the statutory rules and their regulatory elaboration. The Occupational Safety and Health Administration (OSHA) in fact achieved such a result with its Maine 200 program.[95] OSHA's Area Director in Maine identified the 200 employers in the state with the highest volume of worker injury claims and offered them the opportunity to develop their own safety plans in exchange for an exemption from regular inspections.[96] Although never fully evaluated, the Maine 200 program seems to have been a notable success. Worker injuries at the 200 identified firms decreased markedly, and OSHA was able to devote its resources to pursuing claims at other firms, more than quadrupling the number of violations it detected on an annual basis.

As a result, the agency to which OSHA belongs, the Department of Labor, decided to implement the approach on a national basis. The program, however, was struck down on procedural grounds by a District of Columbia Court of Appeals decision[97] that illustrates the desirability of a statutory model for inspections. In its decision, authored by Judge Douglas Ginsburg, the Court of Appeals reached out to assert jurisdiction over the Maine 200 Program by holding that it represented the imposition of an Occupational Safety Standard, rather than a regulation.[98] It came to this conclusion by claiming that the Program met the statutory definition of a standard because it imposed new safety requirements more demanding than those required by the Act, even though the entire purpose of the program was to grant cooperating employers less demanding inspections. The Court's reasoning was that the non-complying employers were subject to more frequent inspections,[99] despite the fact that these more frequent inspections were not an explicitly imposed requirement, but merely the consequence of a resource allocation decision that was well within the agency's accepted range of discretion. Having thus asserted that

94 This particular approach has been explored, in the implementation theory literature, in Bardach & Kagan (1982); Scholz (1984).

95 Ash Center for Democratic Governance and Innovation, Harvard Kennedy School, Main Top 200 Experimental Targeting Program, http://www.innovations.harvard.edu/awards.html?id=3693 (visited July 28, 2014).

96 These firms were among the largest in Maine; although representing only 1 percent of Maine employers, they accounted for 30 percent of the employees and, significantly, 45 per cent of the documented workplace injuries. See *id.*

97 *Chamber of Commerce of the United States v. U.S. Department of Labor*, 174 F.3d 206 (D.C. Cir. 1999).

98 *Id.*at 209-11.

99 *Id.* at 209-10.

the Maine 200 program was a Standard rather than a rule, the Court then struck it down for failure to conform to the APA's rulemaking procedure, that is, its power to issue regulations. An explicitly stated procedure for agency inspections would serve to counteract decisions of this kind by providing clear authority for agency's to target inspections on the basis of voluntary compliance.

One final example of a type of informal adjudication that might be usefully subjected to procedural rules is an agency's decision to settle a legal case after it has filed suit. The Pretrial Diversion Agreements discussed in Professor Arlen's contribution to this [symposium] are one example involving criminal prosecutions. In civil cases the agency, as a litigant before a federal court, is subject to the Federal Rules of Civil Procedure, which explicitly authorize the settlement of any civil case.[100] Prevailing government policy on this issue, established by Executive Order 12,778[101] strongly encourages settlement. The Order states: "As soon as practicable after ascertaining the nature of a dispute in litigation, and throughout the litigation, litigation counsel [for a federal agency] shall evaluate settlement possibilities and make reasonable efforts to settle the litigation. Such efforts shall include offering to participate in a settlement conference or moving the court for a conference pursuant to Rule 16 of the Federal Rules of Civil Procedure in an attempt to resolve the dispute without additional civil litigation."[102] However, several substantive federal statutes, most notably the Clayton Act,[103] place restrictions on the relevant agency's discretion to settle cases that it has initiated, and statutes naturally take precedence over an executive order.

Professor Arlen's argument, equally applicable to civil cases, is that current practice "violates the rule of law by granting prosecutors far too much discretion over a form of authority that they generally should not be exercising – duty creation – with little oversight to ensure that discretion is employed to serve public aims."[104] She is aware, however, that reverting to the traditional approach of judicial or legislative control would not provide an adequate

100 FRCP R. 68. For an argument that they do not do so particularly well, and need to be revised in light of the fact that the vast majority of cases settle, see Glover (2012).

101 G.W. Bush, October 23, 1991, 56 FR55,195, October 25, 1991.

102 *Id.*, § 2(b).

103 Section 5 of the Clayton Act, 15 U.S.C. § 16 (b)-(g). The prescribed procedure, reflecting a concern about parallel suits by private parties, is elaborate. It involves filing the proposed settlement with the court, publishing an account of it in the Federal Register and in newspapers, the receipt of public comments, the agency's response to those comments and the review of the comments and response by the court, which can take testimony or appoint a special master, to determine whether the settlement is in "the public interest."

104 Arlen, supra note [231], at [manuscript p. 45].

solution.[105] The current practice of subjecting attorney discretion to centralized control by the Department of Justice is inherently administrative, and thus more modern, but it creates the danger of politicization, and additionally threatens to limit the flexibility or squelch the creativity of the U.S. attorneys.[106]

An alternative solution might be to define the procedures that government attorneys must follow in deciding whether to settle a criminal or civil case. A statute that was detached from traditional models of legislation or adjudication could focus on the realities of this process. It might establish the range of remedies that the attorney was permitted to propose and the extent to which those proposals must be subject to centralized review. For example, the statute might provide that duty creating remedies, Professor Arlen's primary source of concern, could only be proposed in response to some showing by the attorney that there was a basic structural problem within the offending institution that had led to the alleged violation (as opposed, for example to a rogue employee or a mistaken view of specific facts). It might also provide that a certain subset of these duty creating demands must be reviewed by an office within the Department of Justice, and establish procedures to insulate this office from political pressure. Crafting a procedure that adequately constrained discretion without hobbling the important enforcement work of government attorneys would obviously require extensive research and analysis. The point here is that this task should be freed from outdated modes of thought and carried out in light of the pragmatic realities of modern government and the conceptual resources of modern policy making and management theory.

4. CONCLUSION

We are inevitably shaped by our history, but we need not be its victims. Our historical experience imposes certain limits on the range of our conceptions, and considerably narrower limits on the institutions that we can design and operate. Thinking about these limits will not eliminate them, but failing to think about them will render them even more restrictive than they would otherwise be. The reason is that history has cumulative force; 800 years of it is likely to be more influential than a mere hundred or so. By becoming conscious of our history, and thinking about it from a critical perspective, we can shift the balance and draw on more contemporary experience to solve problems

105 *Id.* at [manuscript pp. 40–43, 48]. Professor Arlen argues convincingly that courts lack both the doctrinal basis and the administrative expertise to exercise such control, while Congressional control creates serious dangers of politicization.

106 *Id.* at [manuscript pp. 42–45, 48–49].

that did not arise, or did not demand solutions, in earlier times. In the interest of the public, we are obligated to do so.

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