**Creating Compliance: Exploring a Maturing Industry**

Geoffrey Parsons Miller[1]

Thank you for the invitation to speak at this event.

This conference is living proof of the proposition that compliance, once a virtually unknown topic, is beginning to come of age –as a field of legal practice, as a topic to be taught in law schools, and as a field of research and analysis by academic commentators and thoughtful practitioners.

I hardly need to persuade this audience of the topic of compliance.

I assume many of you are involved in the area from a professional point of view, or are considering careers in the area. Even if you are not involved professionally, all you need to do is to read the headlines. Nearly every week, some topic related to compliance breaks into the front pages of the papers.

In these prepared remarks I will celebrate the growth of compliance, but also raise some significant questions about the compliance enterprise – where it is, and also where it is going.

First, the celebration.

In assessing where we are, it is always useful to understand were we started.

Twenty years ago, compliance was viewed as a backwater, a field with little intrinsic interest and a place where people would go if their careers had not taken them where they wanted. Compliance officers tended to work in cubicles and performed a sort of glorified

---

[1] Stuyvesant Comfort Professor of Law, New York University Law School; Faculty Director, NYU Law School Program on Corporate Compliance and Enforcement; NYU Law School Center for Civil Justice; NYU Law School Center on Financial Institutions; member of the board of directors of State Farm Bank.

bookkeeping task, making sure that forms were filled out and boxes checked, but not playing any sort of strategic role in the management of enterprise.

There were no general courses on compliance taught at leading law schools. There were no text books for attorneys on the topic. There was little appreciation that compliance might be a topic even worthy of study, much less one with intrinsic interest and importance.

The world is very different today.

Compliance is a vibrant field for hiring and is increasingly viewed as a desirable career option. Compliance officer salaries have greatly increased, and compliance departments have exploded in size.

While there is still some of the check-the-box quality to the compliance function – and always will be – the job of compliance has increasingly moved away from a mechanical approach to a risk-based approach.

Chief compliance officers today allocate the resources of their departments based on an assessment of the underlying compliance risks. This means that they must take account in a sensitive way of the basic business pressures facing their organizations. The integration of risk assessment and risk-based strategies has radically changed the perspective and the performance of compliance departments in many industries.

At the same time, compliance officers have experienced a huge uptick in prestige and influence within organizations. In some companies, especially in the financial sector, the CCO is given a direct report to the CEO and sometimes to a board committee such as the Board Audit Committee, Risk Committee, or Compliance Committee.

Compliance officers are also being included in strategic management decisions. Instead of coming in after the key decisions are made and making sure that systems are complied with and boxes are checked, the compliance officer is often consulted before key strategic decisions are made.

Suppose, for example, that a company is considering entering a new market in a foreign country. Unless the company has a lot of familiarity with business practices in that part of the world, it would be wise for it to include the compliance department in the strategic planning process, both with respect to the basic decision whether to enter the market at all, and with respect to the decision of how the firm will structure its operations in the foreign country.

Other initiatives are also underway.

Two years ago the American Law Institute approved a project on “Principles of the Law, Compliance, Enforcement and Risk Management for Corporations, Nonprofits, and Other Organizations.” That project is now in its second preliminary draft and is anticipated to be completed sometime next year.

At the same time, but lagging somewhat behind these developments in firms and markets, academic institutions are beginning to offer courses, degrees, and programs in compliance issues. Some of these academic institutions are law schools.

My school, NYU, started teaching a general compliance class three years ago, and the class now has a firm place in the curriculum.

Other schools have gone further and created specialized advanced degree programs in compliance.

And of course along with these programs have come teaching and learning resources. I cannot resist the temptation to plug my own book, *The Law of Governance, Risk Management and Compliance*, which to the best of my knowledge is the first general book on the topic for law students and for lawyers who want to retool into the compliance field. That book is now going into its second edition, which is projected be available at the end of this coming February.

This area, moreover, is beginning to attract the academic interest of some excellent scholars. The academic study of compliance and related fields has begun to probe into some important and heretofore unexplored areas for legal research.

Of these, the following are particularly notable:

• Behavioral compliance – Donald Langevoort and others are currently engaged in cutting edge research on how legal and private incentives can be employed to motivate people towards good behavior in effective and efficient ways.

• Risk-management and risk analysis – the topic of compliance cannot be separated from that of risk management. Academic lawyers are beginning to examine the risk revolution in administration and are coming to understand just how profound a change is entailed by the move to risk-based strategies of management, compliance, internal audit, external audit, supervision and regulation..

• A new approach to governance that looks past the traditional issues of the powers of the board of directors and of shareholders. Compliance-related governance looks under the hood of complex organizations and seeks to understand their internal governance processes: internal audit, risk-management, the CCO, human resources, and the business line.

• A better understanding of how legislatures and regulators are playing an increasingly normative and directive role in corporate governance: dictating strategies for internal control (for example, requirements for board audit or risk committees), and also, though regulatory guidance, effectively acting as management consultants on steroids who promote quote “best practices” that are mandatory in all but name.

• Perhaps most fundamentally, an understanding that law in action – the real impact of laws and legal institutions on real human behavior – is fundamentally influenced by the compliance function. The compliance department translates the rules promulgated by legislatures and regulators and embodies them in workable standards for behavior that can be understood by people with no real interest or sophistication in the law, and that can be monitored and enforced within the organization.

Compliance, in other words, is a sort of "black box" of the law, in which normative standards are promulgated and enforced within the privacy of complex organizations. Fortunately for researchers, that veil of privacy is increasingly being lifted as compliance operations become the subject of legal proceedings and public consent decrees.

All of these developments, I believe, are reasons for celebration. But even more significant is matter that is hard to demonstrate, but that I believe to be true. The compliance revolution has had a real and beneficial impact on changing norms, attitudes, and practices in firms and markets – changing them for the better, in that there is less rule breaking, less corruption, less abusive behavior, and greater respect for rules and for the rule of law.

Now I said that I would offer celebration but also some words of caution. So to these I now turn.

I'm going to mention four caveats that should counsel for caution in the midst of our celebration about the compliance revolution.

• First, in spite of the advances we have undoubtedly made, companies continue to misbehave, and to do so in egregious and dangerous ways.

• Second, emphasis on reforming corporate culture, which is very much in fashion among thought leaders in the compliance space, may overstate the potential for this approach and perhaps lead to overconfidence that cultural change can fundamentally alter corporate behavior.

• Third, the risk revolution in regulation and internal control, while it has many beneficial features, also poses risks of its own that should be taken into account when designing strategies of internal and external control.

• Fourth, the administrative state, despite its many benefits, has grown so powerful, and has come to exercise so much virtually unchecked power, as to raise troubling questions about its role in a democratic society that values autonomy and individual freedom.

First: *why do companies continue to misbehave in highly problematic ways?*

Even though we have made great progress in enhancing compliance and respect for the law, you can't look at recent events without wondering whether we have made enough.

*Wells Fargo*:

If you are like me, you were amazed and disturbed at the recent revelations that Wells Fargo employees had created nearly two million bogus accounts for real customers.

The Wells Fargo revelations are mind-boggling, and raise some worrisome questions:

• What happened to internal audit?

How could such a vast number of bogus accounts have been created without the systemic problem becoming apparent to internal audit and elevated to higher levels of the organization? These accounts often had a zero balance, and it doesn't require a rocket scientist to know that when you have vast numbers of zero balance accounts, this is at least a yellow flag that bears looking into.

• What happened to human resources?

Apparently thousands of Wells Fargo employees were fired in connection with these activities. How did human resources allow so many people to come on board who were capable of fraudulent activities?

• What happened to compliance?

How is it that the compliance department at Wells apparently failed to connect the dots when so many people had been caught doing the same thing over the course of several years?

• What happened to external audit?

How is it that Wells Fargo's external auditor failed to notice that something was amiss with these bogus accounts?

• How did all three of the internal lines of defense – the business managers, compliance and risk management, and internal audit – seem to break down at this company, even though as a regulated commercial bank it had one of the most up-to-date and thoroughly regulated system of internal controls of any U.S. corporation?

• Most importantly, what happened to the internal culture at Wells? How is it that a bank with a formerly sterling reputation could allow something like this to happen? How could senior management have tolerated 5,000 employees being fired without looking into the root cause of the problem and taking vigorous and proactive measures to address the problem?

*Volkswagen*.

• How could a reputable company, one with a good reputation for compliance and one of the leading automobile manufacturers in the world, have engaged in such a tawdry scheme as devising a concerted effort to cheat on emissions requirements?

• How could so many people at Volkswagen have participated in the fraud, and no one blew the whistle?

• How could Volkswagen's management have considered this to be a good business practice, especially since, as it turned out, the cheat was rather easy to discover and the reputational harm to the company were certain to be – and have been – catastrophic?

*General Motors*

Perhaps equally shocking is the GM ignition switch fiasco, an example of what appears to have been systematic corporate mistakes that ended up costing lives and endangering the public welfare.

Here again, you want to ask questions:

• How is it that the engineers at GM – presumably some of the best automotive engineers in the world, did not recognize that known problems with ignition switches could disable the air bags and greatly increase the risk to human life?

• How is it that GM management didn't identify the problem and take swift action to rectify it?

• Why did GM management tolerate a culture in which problems like the ignition switch issues could be ignored or swept under the rug.

It is disturbing that problems such as these arose in three of the world's largest and most sophisticated companies – all of them, moreover, firms that had enjoyed very good reputations prior to the problems coming to light.

Second set of concerns: *Are we placing too much hope on reforms to corporate culture?*

My second set of concerns has to do with the idea -- enthusiastically embraced by many thought leaders in the compliance world -- that the most important key to improving compliance is to reform corporate culture.

Nearly everyone agrees that there was something wrong with attitudes and behaviors in the financial services industry in the years before the crisis. Nearly everyone also endorses the proposition that inappropriate risk-taking and disdain for regulation contributed to the excesses characteristic of those years. And there's broad consensus that a respectful attitude towards risk management and compliance can help protect against another crisis. There's a lot of merit in these ideas.

But whenever one observes this sort of piling on, it's useful to ask what we're missing.

The principal force shaping culture in the banking industry is neither regulation, nor bureaucratic jawboning, nor sermons from CEOs. These do have an influence. But macroeconomic conditions are more important.

The irresponsibility displayed by bankers and regulators during the 2000s grew out of the easy money conditions of those times, just as the market turmoil associated with the bursting of the housing bubble in 2008 fueled the current enthusiasm for probity. It was macroeconomic conditions, not corporate culture, which had the greatest influence on how people behaved during the bubble period, or on how they have behaved since.

If this is true – that macroeconomic conditions are the most important drivers of corporate culture – then we should not be overly sanguine about the potential for regulatory of self-imposed reforms of corporate culture.

Thomas Kuhn's famous study of scientific revolutions observes that researchers trained in one paradigm rarely abandon their way of thinking in the face of contrary evidence. It is the younger generation who embrace the new paradigm. The same may be true for risk and compliance in the financial world. It's not easy to teach old bankers new tricks. Durable reform of banking culture may need to await the maturation of a younger generation of bankers schooled in different ways of thinking.

Even if efforts at cultural reform are effective and durable, moreover, we should be cautious about the potential downsides.

Corporate managers should not be clones or puppets. The energy, intelligence and imagination displayed by those who profited from the credit bubble were good attributes, even if they were directed in the wrong way. The instruments these people invented or exploited – credit default swaps, collateralized debt obligations, structured financial transactions, and the like – didn't cause the crisis and are not intrinsically toxic. They create risk, but if properly controlled they also hold promise to materially enhance consumer welfare.

It's tempting to yearn for a return to mid-twentieth century finance – a world where banks didn't fail and market volatility was low. But a consumer of today, if transported to that golden age, would not be very happy with the quality or cost of the financial services she received.

Banking in those days was a government-sponsored and government-enforced cartel in which depository institutions enjoyed local monopolies and access to free money. Bankers wore regimental ties, teed off at three, and prided themselves on never doing anything for the first time. That culture gave value to probity and moderation, but it was not one we should wish to revive.

Banking today faces existential threats on both sides of the balance sheet. Fintech firms and peer-to-peer lenders promise fast, cheap, and nimble financing. Meanwhile, block chain technologies threaten banks' traditional hegemony in payments services.

Banks must respond effectively to these challenges. Proposed reforms to banking culture would accomplish little if they created dinosaurs that cannot adapt when the next asteroid strikes the financial world.

Thoughtful commentators such as Thomas Baxter of the New York Fed recognize that proposals to improve banking culture are not panaceas. Baxter and other thought leaders are careful to qualify their support of the cultural approach with recognition of its limitations.

But these grace notes of caution can easily be missed in the drumbeat of enthusiasm for cultural reform.

We should proceed with efforts to improve attitudes and norms in the banking sector. But we should do so with recognition that our ability to change culture is limited, that overconfidence in actions being taken can be as dangerous as failing to act at all, and that no matter how attractive the idea of cultural reform might appear at first, it is likely to disappoint those who seek a universal antidote to problems of risk-taking and misconduct in financial services firms.

Third set of concerns: *We may be placing too much emphasis on risk management*

I earlier mentioned what I called the "risk revolution" in internal and external control. What do I mean by this?

What I mean is that over the past few decades, we have witnessed a fundamental realignment at all levels of the basic methodology that we use to design our systems of internal and external control.

The basic realignment is the move to risk based controls.

We see this move to risk-based controls in business lines, most importantly in the financial services world. The Basel capital guidelines applicable to banking firms have, since

1988, been explicitly risk based. They require banking firms to hold capital based on an assessment of the risk associated with the assets and activities in which the banks engage.

We see this move to risk-based controls in organizations' internal audit departments. Internal audit is now risk-based in the sense that the audit plan and audit resources are allocated based on a preliminary risk assessment that identifies areas of greatest concern to the internal audit process.

We see the move to risk-based controls in the area of compliance. Chief compliance officers now typically perform a risk assessment – one that is periodically refreshed – when determining what controls they will put in place and how much resources they will put in place to monitoring different entities and processes within the organization.

We see the move to risk-based controls in external audit. External audits today are almost always based on a preliminary risk assessment by the independent accounting firm that is charged with examining the company's internal controls over financial reporting.

We see the move to risk-based controls in regulatory agencies. Regulators in many areas today perform a preliminary risk assessment in order to determine the scope and intensity of supervision they will devote to regulated firms, or to particular activities of regulated firms.

This across-the-board adoption of risk-based is what I call the risk revolution in internal control.

This risk revolution is a good thing, overall: we should not be foolish, and we should focus our resources and our energies in ways where are likely to do the most good. A nation doesn't aim its missiles at the center of the ocean where are no enemies. Institutions of internal and external control, likewise, should not spin the wheels in meaningless make-work when there are really dangerous conditions that call for their attention.

At the same time we should be cautious about putting too much faith in the risk revolution as a solution to the challenge of managing control functions in complex organizations.

The biggest problem in the risk-based approach is simply this: *our risk analysis can be wrong*.

How could this be, given that so many intelligent people are spending their entire working lives in assessing risk and incorporating the risk assessments, once made, in strategic plans for business management?

The answer is that risk analyses can be wrong, even though so many people are working on getting them right.

We have a recent and very costly example of this fact.

During the 2000s, in the years leading up to the financial crisis of 2007-2009, thousands of people were looking at the risks in world financial markets.

These included people at banks and securities companies who had real money at stake in terms of bonuses, promotions and so on.

They included also government officials including central bankers who were supposed to watch out for risks to the world's financial markets.

They included, even, the Financial Stability Forum, a committee of regulators and central bankers based in Basel, Switzerland, whose sole mandate and responsibility was to monitor and detect threats to the stability of the world's financial system.

These people were sophisticated, highly educated, well-paid, and highly motivated. They were not corrupt and they were not improperly influenced by any person or interest.

Yet virtually all of these people missed the profound risk to the world's financial system posed by the housing bubble and the massive growth in subprime mortgage backed securities and related instruments.

Many of you probably have seen the movie *The Big Short*, which provides a vibrant dramatization of the blindness that most people in the financial world displayed towards the risk of a collapse in housing prices, even though the few astute investors who really looked into the matter realized that a such a collapse was inevitable: the question was not whether it would happen, but when.

When risk assessments are wrong, we can often be worse off than if we engage in no risk assessment at all. The reason is that we will devote our control resources to the wrong subjects. In such a case we would be better off with the old check-the-box approach, which, despite its manifest defects, at least required the control function to look systematically across the entire range of possible threats to the organization.

And the problem is worse than the mere fact risk assessments can be wrong. The problem is one of complacency: we can come to place so much trust that our risk assessments will guide us in the right direction that we ignore common sense measures that we would otherwise undertake to protect ourselves or our organizations.

Again, the financial crisis provides an example.

During the decade of the 2000s, the Basel Capital Adequacy guidelines were regulatory superstars. The new version of the guidelines, which came out in 2004, was the most thoroughly vetted, sophisticated, and widely lauded international regulatory initiative of all time.

And under these guidelines, the banking sector in 2006 looked to be in the peak of health. The banking sector as a whole was more than well capitalized, and every major international bank was in compliance with regulatory requirements.

Regulators, central bankers, commercial bankers, investors, and others relied on these results to conclude that the world's financial system was in the bloom of health: even though house prices in some countries were rising pretty steeply, there was no cause for concern.

Of course, there was a cause for concern.

At that very moment, in 2006, the housing boom peaked and the world's financial system was poised on the brink of the most catastrophic period of loss and turmoil since the Great Depression of the 1930s.

In other words, we can and do get our risk assessments wrong. And the fact that many people are working on risk assessments isn't necessarily a protection against this problem.

The reason is that there is an enormous amount of group think in risk assessments. It's true that the various control operations in a firm are supposed to arrive at their own independent risk assessments: the risk assessment made by internal audit may not be the same as that made by compliance, and the risk assessment by compliance may not be the same as that made by the Chief Risk Officer. In practice, however, everyone knows what everyone else is doing and companies do not operate autonomous and independent risk assessment operations.

Regulators, for their part, don't necessarily help matters. Their risk assessments are based, often, on the risk assessments they hear from their regulated firms, and so are not necessarily independent. Moreover, bank regulators inform the banks they regulate about their assessment of the bank's risk, and banks would be well advised to take the regulator's risk assessment into account when compiling their own assessment.

In other words, there is a danger of a cycle in which internal offices at the banks coordinate with one another, the banks tell the regulators, and the regulators tell the bank. This process doesn't necessarily lead to independent thought. It can lead, instead, to a consensus in which no one is brave enough to come forward with their own views. Group think kicks in and we end up with the entire system making skewed or inaccurate risk assessments.

Fourth set of concerns: *The administrative state may have become too powerful in a way that threatens our fundamental values.*

My fourth and final set of concerns relates to the role of the modern administrative state. The concern is that the administrative state, of which the compliance function is an integral part, may have in some respects become too large, too powerful, and to unchecked by countervailing power.

It is commonplace today, but still remarkable, to consider the awesome powers of modern administrative agencies and prosecutors.

In the modern administrative state, norms governing complex organizations are defined, adjudicated, and enforced by administrative agencies or prosecutors rather than courts. Agencies, rather than judges, declare what the law is; enforce the law so declared; and adjudicate rights of private parties in enforcement proceedings that they have brought.

In the modern administrative state, judges are not absent but play a notably less important role. They defer to agency interpretations of legal norms and examine agency determinations under a standard so deferential as to make judicial review, in many cases, little more than a chimera. Judges are relegated to the margins -- juridical Bob Cratchets with little to do other than blessing decisions made by others.

The growth of the administrative model has altered the balance of power between government and the private sector. Regulated firms today are cast in the role of supplicants seeking to curry favor with despotic, although often well-intentioned rulers. They can cajole, coax, and flatter, but usually cannot resist the will of their overseers.

The events of 2007-2009 only added to the power imbalance as governments leveraged their failure to predict or prevent the disaster into an argument for obtaining even greater authority over financial markets and institutions.

It is clear that many if not most of the key elements of the administrative model are now permanent features of our governmental landscape. Many also respond to genuine public needs and serve important public purposes: private sector actors respond to incentives, positive and negative, and some percentage of them will violate applicable norms and rules if they feel they can get away with it.

Yet, for those who fear that the administrative state may have now expanded beyond its optimal level of size and influence, even imposing limits on its growth could be seen as a desirable development.

At issue is a simple but fundamental question: will official discretion continue its seemingly inexorable expansion into every corner of everyday life, or will the courts devise meaningful limitations to protect the private sector and the public against inappropriate exercises of governmental power?

As we meet here today, the outcome to this question is is uncertain. Green shoot of resistance are appearing, and seem to be cropping up with increasing frequency in federal courts. Even some Justices of the Supreme Court seem to share the concern about excessive administrative power and receptive to the idea of placing limits on its further expansion. It is not yet clear whether these tentative efforts will blossom into more significant efforts to place limits on the administrative state.

If a crisis of administrative law does develop over the next decade, as appears possible, it is likely to consist of an extended conflict between those who would enhance the authority of government even further and those who seek means to hold it in check.

I will illustrate this point, and also close my remarks, by calling your attention to a dissenting opinion by Chief Justice Roberts in a recent administrative case. This opinion, in part because it is a dissenting opinion, has received little attention by the press or by commentators.

But I think it is one of the most significant statements by a Supreme Court justice of the past decade. The reason is that it evinces fundamental and deep-seated concern, on the part of the chief jurist of our country, about the fundamental and overwhelming growth of administrative power.

The case was called *City of Arlington v. F.C.C.*[2]

The majority opinion in that case had afforded *Chevron* deference to an agency's interpretation of its own jurisdictional statute. In dissent, the Chief Justice not only took issue with the Court's ruling, but also raised fundamental questions about the power and growth of the modern administrative state.

When the Chief Justice of the United States speaks – even if in dissent, and even when the comments in question are not directly relevant to his legal analysis – Court watchers should take notice. And Roberts, perhaps emboldened by the freedom of expression afforded in a dissenting opinion, did not pull his punches.

[2] 133 S.Ct. 1863, __ (2013).

The Chief Justice's disquisition on the modern administrative state is worth quoting at some length because of what it reveals about how the nation's most important judge views the rise of administrative government:

> One of the principal authors of the Constitution famously wrote that the "accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny" [citing Madison's language in *Federalist No. 47*]. Although modern administrative agencies fit most comfortably within the Executive Branch, as a practical matter they exercise legislative power, by promulgating regulations with the force of law; executive power, by policing compliance with those regulations; and judicial power, by adjudicating enforcement actions and imposing sanctions on those found to have violated their rules. The accumulation of these powers in the same hands is not an occasional or isolated exception to the constitutional plan; it is a central feature of modern American government.

Roberts went on to tie these general concerns about the administrative state to the specific context of *Chevron* deference:

> By design or default, Congress often fails to speak to "the precise question before an agency. In the absence of such an answer, an agency's interpretation has the full force and effect of law, unless it "exceeds the bounds of the permissible." It would be a bit much to describe the result as "the very definition of tyranny," but the danger posed by the growing power of the administrative state cannot be dismissed.[3]

*The danger posed by the growing power of the administrative state cannot be dismissed.* Coming from the Chief Justice of the United States, these are rather extraordinary words, even in a dissenting opinion. And Justice Scalia's majority opinion did not really disagree with the assessment. Responding to the Chief's jeremiad, Scalia remarked that "the Chief Justice's discomfort with the growth of agency power is perhaps understandable."[4] The difference between the majority opinion and the dissent rested in contrasting views of the scope of *Chevron*

[3] 133 S.Ct at __ (Roberts, C.J., dissenting) (quotation references deleted).
[4] Id. at __, n.4.

deference as applied to the particular facts – not a disagreement about the dangers posed by the growth of administrative power.

What lesson can we draw from this, and other recent statements by Justices of the Supreme Court and by a number of lower court judges, which display deep skepticism about the growth of administrative power.

Your guess is as good as mine.

But my guess is the following: at least some of the Justices of the Supreme Court – the Chief Justice being one of them – are preparing to define a new agenda for the court – an agenda that will raise the fundamental issue of whether the judicial branch can or should play a more active role in constraining the powers of administrative agencies.

Former federal district judge John Gleeson captured the essence of the issue in a decision from 2015. Judges, he said, are not "potted plants."

In modern administrative cases, judges often feel as if they are being treated as potted plants: asked to sign papers and approve decisions made by others, with no real substantive say in the outcome.

It may be that over the next decade, the federal courts will address the question of whether the potted plant role is the right one for judges in administrative cases, or whether they will play a more equal and active role in the administrative process.

This brings me to the end of my prepared remarks. As I said at the outset, the compliance revolution of recent years is an important development in social policy, and one which, overall is a cause for celebration. Now, however, that the changes wrought by that revolution are beginning to mature and to be tested over time, we are also faced with some reasons for caution and with reasons for avoiding an overoptimistic response to the changes that we have observed.

This all goes to demonstrate the adage that with maturity comes responsibility. We in the compliance space are not faced with the challenge of

In the pages that follow, I will explore the topic of modern regulation and its discontents. Part I describes the awesome breadth of authority exercised by modern administrative agencies. Part II identifies what appears to be a growing sense, on the part of judges across the political spectrum, that the administrative state has become too large, too powerful, and insufficiently controlled by effective checks and balances. Part III explores several ideas about rules or doctrines that the courts could adopt if they wish to establish a firmer basis for limiting administrative discretion. I end with a brief conclusion.

## I. Leviathan 2.0

Thomas Hobbes' great work of political philosophy describes how human kinds, trapped in a state of nature involving a brutal war of all against all, agree to a social compact in which each person cedes his or her rights to self-governance to an all-powerful sovereign: one that can prescribe rules of law, judge cases, impose punishments on malefactors, and create a bureaucracy of powerful officials vested with delegated sovereign powers – all without answering to any higher authority.[5] Hobbes titled his book "Leviathan" in reference to the awesome size and power of the government envisaged under his theory.

Although today's administrative state is not the all-powerful sovereign imagined in Hobbes' philosophy, it is close enough to the Hobbesian model to evoke discomfort in the hearts of those who value liberty and limited government. Like Hobbes' Leviathan, the 21st Century

[5] Thomas Hobbes, Leviathan

administrative state is created and justified for the best of reasons. Without powerful administrative agencies, it is said, the public will be ruthlessly abused by unscrupulous and self-interested forces. Chemical companies will emit pollutants into the environment, poisoning the lives of future generations; banks will exploit consumer ignorance to impose unfair terms in loans and deposit accounts; pharmaceutical companies will pawn off ineffective medicines; airlines will fly unsafe planes; bigoted landlords will refuse to rent apartments to members of minority groups; and much, much more. Government must be strong enough to combat the magnitude of the threat, and since the threat is great, government must be strong. The powers vested in administrative agencies of the 21sty Century are not as absolute as those vested in Hobbes' commonwealth, but from time to time it seems that they don't fall very far short. Like Hobbes's Leviathan, the bureaucracy is a massive enterprise, employing millions of people and with a budget in the trillions of dollars. Like Hobbes' Leviathan, it is awesomely powerful – so powerful that it can impose its will on the subjects of the realm without much fear of opposition.

## A. Saying what the Law Is

A bedrock role of the federal judiciary, famously articulated in *Marbury v. Madison*, is the power and duty to "say what the law is."[6] That principle no long holds when it comes to the administrative state. Instead, the guiding principle is a form of deference so complete as to amount to a de facto abdication. *Chevron* and cases following establish that federal courts will defer to reasonable administrative interpretations of governing statutes put forward by administrative agencies.  Like Hobbes' Leviathan, the administrative state exercises the power to "say what the law is."

[6] *Marbury v. Madison*,

Taken by itself, the *Chevron* principle appears to be grounded in realistic assessments of the respective competences of courts and administrative agencies. Many administrative statutes create complex and interconnected regulatory regimes which must operate on a unified basis to regulate a field of commerce. A regulatory agency, far more than a court, understands how the elements of its governing statute interact with one another, and therefore is better positioned to identify reasonable interpretations that reconcile and harmonize different parts of a regulatory scheme. Regulations are often grounded on arcane and technical issues of engineering or science – matters on which the knowledge of judges pales in comparison with that of administrators. It is, accordingly, entirely reasonable that judges should take the views of regulators into account and accord them deference when interpreting a regulatory statute.

As *Chevron* had developed, however, this sensible principle of deference has morphed into a quite different rule, one in which the regulators rather than the court have final say on most matters of interpretation in regulatory cases. Suppose, for example, that a court issues a definitive interpretation of a statute but later an administrative agency, claiming authority under *Chevron*, adopts a contrary interpretation. No matter: as long as the statutory issue is sufficiently ambiguous to trigger *Chevron* deference, the agency's subsequent interpretation trumps the earlier judicial one.[7] Suppose the issue of interpretation involves the scope of the agency's own jurisdiction. On this issue, at least, administrative constructions of statutory language ought not to receive deference, since the agency's desire to expand or protect its "turf" gives it a built-in conflict of interest in the form of an incentive to adopt the most expansive interpretation. No matter: the Court gives the same deference even to interpretations of jurisdictional rules.[8]

[7] *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005).
[8] *City of Arlington v. F.C.C.*, 133 S.Ct. 1863 (2013).

The Court does maintain a fig leaf of respectability in this area. Deference is not owed, it is said, if the statute is clear and unambiguous.[9] But, as hundreds of decisions under *Chevron* demonstrate, the intent of Congress is rarely clear enough to trigger this rule; attorneys can almost always tease out enough ambiguity to avoid this first prong of the rule. Nor is deference owed to administrative regulations found to be so procedurally defective as to forfeit any claim to judicial good will – as, for example, when an agency reverses its own interpretation, without a reasoned explanation, in a case where private interests had placed substantial reliance on the prior interpretation.[10] But the agency's actions must be truly egregious before federal courts will intervene. All that is required is a "permissible" construction of the statute – and nearly any construction has a claim to rationality, however tenuous, that is sufficiently substantial as to fall within the ambit of regulatory authority. Deference is not owed if an agency completely fails to take account of a relevant factor, such as the cost of a regulation.[11] But administrative agencies can easily avoid the danger of having their rules invalidated on this ground by the simple expedient of purporting to take cost into account.

B. The Power to Punish

Hobbes' Leviathan possessed plenary power to punish members of the commonwealth for disobeying the norms set down. In this respect, too, the modern administrative state is a form of Leviathan 2.0. Regulatory statutes necessarily require enforcement: fines and other sanctions are required in order to provide private parties with proper incentives to comply with the law. With the move from the judicial to the administrative model, however the level of sanctions appears to have risen dramatically. With each new wave of scandals, Congress and state

[9] See *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984).
[10] *Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117 (2016).
[11] See *Michigan v. Environmental Protection Agency*, 135 S. Ct. 2699 (2015).

legislatures ratchet up the penalties even more, in order, if nothing else, to be able to tell constituents that they are actually doing something to fix the problem. Violators of the Resource Conservation and Recovery Act may be assessed civil penalties of up to $27,500 for each day of noncompliance.[12] Violators of the Bank Secrecy Act can be assessed penalties of up to $25,000 per violation.[13] This may not sound like a major penalty, but penalties can multiply quickly because in a given case there may be thousands of violations, and the statute provides that a separate violation occur for each day and at each office, branch, or place of business were the violation occurs. Civil money penalties for violations of banking regulations and laws can run up to $5,500 per day for simple violations, $27,500 per day for more serious violations, and up to $1,100,000 or 1 percent of the violator's total assets for violations that are knowingly committee and cause a substantial loss to the institution or a substantial pecuniary gain to the violator.[14] Many similar examples could be cited.

Civil sanctions are far from the only concerns a company or individual may face when accused of regulatory violations. Many regulatory violations are also crimes; and the defendant may find himself or herself pursued by prosecutors seeking criminal fines and other sanctions. Because the civil and criminal enforcement proceedings are separate, the resolution of one doesn't necessarily dispose of the other. The impact of a proven violation, moreover, is not limited to the fine or other penalty directly imposed. Companies found to be guilty of crimes or serious civil offenses face a reputation sanction and may experience loss of customers, impairments in their supply chains, and difficulty in recruiting qualified employees (although the severity of these reputational sanctions, somewhat ironically, seems to have diminished as

[12] 42 U.S.C. § 6928(a); 28 U.S.C. §2461.
[13] 31 U.S.C. §5321(a).
[14] Cite.

criminal convictions of corporations grow more common). For many companies, conviction of a crime carries the additional serious threat of debarment – the loss of rights to do business governments or government-related entities. Most importantly, for American companies, is the threat of debarment from conducting business with the federal government. A debarred is shut out of both procurement and non-procurement programs and cannot act as contractor or subcontractor to the government absent compelling reasons. A debarred company also faces challenges entering into business relationships with non-debarred government contractors: government agencies are allowed to consider such ties when they decide whether to do business with the non-debarred entity.

The problems associated with very large sanctions are exacerbated when multiple agencies seek to partake in the enforcement feast. The judicial model of administration contemplated that one and only one administrative agency would be charged with protecting the public against threats to the health, safety or welfare. With the burgeoning of the administrative state, however, the problem of agency overlap has become a matter of significant public concern. It is not uncommon for a regulated firm to face scrutiny from state regulators, federal regulators, state and federal prosecutors, and foreign regulatory officials – all of them vying to burnish their reputations, to serve public goals as they define them, and to capture fines and penalties for their particular governments and agencies.[15]

---

[15] This problem of regulatory overlap arose first, and most acutely, in the area of bank regulation. Any bank is subject to multiple regulators, all of whom exercise substantial control over the bank's activities and operations. A national bank, for example, answers to the Comptroller of the Currency as its primary regulator; to the Board of Governors of the Federal Reserve, which possesses overlapping supervisory power; to the Federal Deposit Insurance Corporation, which also has the power to examine the bank and to undertake enforcement actions against it; and – if it is a big bank – to the Consumer Financial Protection Bureau. If the bank conducts operations abroad, it is answerable to the regulatory authorities of any country where it does business. In a given case, the bank could be subject to enforcement actions by several of these regulators. If the alleged misconduct involves potential violations of the criminal laws, moreover, prosecutors will get into the action: the United States Department of Justice, but potentially also prosecutors from other countries as well.

Regulatory overlaps impose large and growing costs on many regulated firms.  There have, to be sure, been some attempts to mitigate these costs. The Congress addressed the problem of regulatory overlap in the banking industry by creating the Federal Financial Institution Examination Council (FFIEC), an intergovernmental agency consisting of the OCC, the FDIC, the FRB, the CFPB the NCUA, and a representative from a state bank regulator.[16] This body seeks to harmonize and standardize the processes of examination and enforcement among the banking agencies. In practice, the FFIEC has functioned fairly well as a device for avoiding duplication, but some overlap inevitably occurs. The Fed might generally accept the results of a bank examination performed by the OCC, for example, but it will not always do so. Likewise, the FDIC has discretion to do perform its own examination and analysis if it distrusts the information it receives from its sister agencies. In the early years of its existence, the CFPB manifested a tendency to go its own way. Although it has cooperated with other agencies to some extent and is a member of the FFIEC, it also has manifested a degree of suspicion to towards its fellow agencies, resulting perhaps from a view that the older agencies had fallen down on the job of consumer protection. Time will tell whether the CFPB settles into a more cooperative relationship with other agencies or whether it will continue to assert a high degree of independence in its approach.

Commendable as they are, attempts at controlling regulatory overlap do little to mitigate the problems that arise when a company or individual is in the crosshairs of multiple regulators. A company doing business overseas, if accused of paying bribes to foreign governments, is likely to face regulatory action by the U.S. SEC, by the United Kingdom Serious Fraud Office, and by civil or criminal enforcement officials in the country where the bribery occurred – at a

[16] Cite.

minimum. Volkswagen's emissions scandal brought out many possible enforcers. The company has settled (for $14.7 billion) claims by four regulators: the United States Department of Justice, the Environmental Protection Agency, the Federal Trade Commission, and the State of California.[17] But many other claims or potential claims remain outstanding, including actions involving German authorities, by U.S. states other than California, and by numerous class and shareholders derivative actions both in the United States and overseas. BNP Paribas, the French bank accused of violating U.S. sanctions regimes, entered an $8.9 billion settlement with the United States Department of the Treasury, the New York State Department of Financial Services, the New York District Attorney, and the United States Department of Justice,[18] and separately settled an enforcement action brought against it by the Board of Governors of the Federal Reserve.[19]

Cases of agency overlap have a built-in pro-regulatory dynamic, in that the agency that demands the strictest degree of compliance is usually the one whose wishes control the outcome. Companies that want to avoid being caught up in regulatory investigations or enforcement proceedings will ordinarily elect to comply with the set of regulations which is most demanding, on the theory that doing is the safest course of action, and that adjusting activities for particular regulators or particular jurisdictions is too complex and fraught with potential for error. Accordingly, agency overlap is not only expensive, but also biased in the direction of increased regulation.

[17] *Federal Trade Commission v. Volkswagen Group of America, Inc*., FTC File 162 3006 (August 9, 2016);
[18] United States Department of the Treasury, Settlement Agreement with BNP Paribas, COMPL-2013-193659 (June 30, 2014); *In the Matter of BNP Paribas*, New York State Department of Financial Services; *United States v. BNP Paribas, SA*, Plea Agreement with U.S. Department of Justice, Criminal Division (June 27, 2014); DA Vance: BNP Paribas Bank Sentenced To Forfeiture of Nearly $8.9 Billion in Penalties Following Guilty Plea to Criminal Charges, New York County District Attorney's Office (April 15, 2015).
[19] *In the Matter of BNP Paribas, SA*, Board of Governors of the Federal Reserve System, Docket Nos. 14-022-B-FB; 14-022-CMP-FB (June 30, 2014).

Regulated entities have little hope of challenging the power of regulators and prosecutors to obtain very large penalties. The authorizations for these penalties are written into the governing statutes, and the statutes themselves are largely immune from judicial attack. A party might argue that the penalty scheme bears no credible relationship with any of the statutory purposes, a court might declare that imposing a sanction would violate principles of substantive due process. To win a substantive due process challenge, however, the aggrieved party must do more than show that the rule in question is "unwise, improvident, or out of harmony with a particular school of thought."[20] The party must demonstrate that the challenged rule is not rationally related to a legitimate government purpose.[21] Nearly any statute, no matter how poorly conceived or incompetently drafted, can be construed to have a minimal core of rationality sufficient to survive this lenient standard.

A party might claim that a penalty is so severe as to violate "excessive fines" clause of the Eighth Amendment.[22] To prevail on this theory, however, a party must establish that the regulatory action was punitive and that the penalties are grossly disproportionate to the gravity of the alleged offense.[23] Most statutes applicable to compliance violations would pass this test, simply because offenses to the general public can be seen as grave in and of themselves, even apart from the substantial pecuniary harm that is often alleged.

In criminal cases, a defendant might challenge a conviction on the ground that the jury had not determined beyond a reasonable doubt all facts that increase the penalty beyond the statutory minimum.[24] This argument succeeded in *Southern Union Co. v. United States*,[25] a case

[20] *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 487-488 (1955).
[21] *Usery v. Turner Elkhorn Mining Co*., 428 U.S. 1, 15 (1976).
[22] U.S. Const. Amend. VIII.
[23] *United States v. Bajakajian*, 524 U.S. 321 (1998).
[24] See *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).
[25] 132 S. Ct. 2344 (2012).

in which the Supreme Court reduced the fine on the ground that the sentencing judge had inappropriately calculated the penalty in reliance on a probation officer's estimate of the period of violation rather than submitting that question to the jury. The regulated party won in this case, but in later cases, prosecutors will be more careful to ensure that the jury decides all the required elements of the penalty determination.

### C. Adjudicating Private Rights

Like Hobbes' Leviathan, agencies in the modern administrative state exercise the power of adjudication. The judicial model contemplated that administrative enforcement proceedings would be brought in courts of law. As administrative agencies grew in power and importance, and as their case dockets expanded at exponential rates, courts and legislatures recognized that requiring formal in-court adjudication of administrative cases would strain the capacities of the judicial system. The solution was the creation of administrative courts and tribunals, bodies which today have taken over vast amounts of business that would otherwise fall in the jurisdiction of state or federal courts.

Once the administrative state began to gain momentum, the nation faced a basic question regarding how the adjudicatory tasks associated with the new administrative regimes would be administered. The choice was either to grow the judiciary by appointing more judges or to outsource responsibility to non-judges. For members of all the branches of government, the answer was obvious. Congress and state legislatures wanted to extend to scope of regulation to ever-broader areas of commerce and domestic life. The executive branch agencies that were established to administer the new programs wanted to control their agendas and expand their turf. Judges, for their part, wanted to avoid being burdened by tedious administrative cases and sought to preserve their status as members of an elite institution – status that would be threatened if thousands of new judges were brought into the system and assigned to the management of low-level administrative matters. At the time the basic decisions were made, accordingly, there was essentially no political opposition to the outsourcing idea.

Not surprisingly, given that all three branches of government liked the idea, Congress increasingly chose the latter option – vesting adjudicatory responsibilities in non-judicial officers. By the 1930's, administrative tribunals and agencies were well-established parts of a burgeoning administrative state: as the Court observed in *Crowell v. Benson*, "familiar illustrations of administrative agencies created for the determination of [disputes between government agencies and private citizens] are found in connection with the exercise of the congressional power as to interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions, and payments to veterans."[26] In the ensuring years, Congress vested even more authority in administrative tribunals, to the point that far more adjudications are made by administrative agencies today than by federal courts.

Because administrative tribunals were expedient, courts and commentators found ways to explain away, gloss over, or ignore the constitutional objections. The most important such objection is due to the location of these tribunals in the same agency that is bringing the enforcement proceeding. The combination of these inconsistent functions in the same agency implicates two constitutional problems. It is in severe tension with the core idea of separation of powers on which the Constitution was founded. Liberties of the people were to be protected, in the original scheme of the Constitution, by the fact that the departments of government would check and balance one another. As Madison puts it in Federalist No. 10, "No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not

[26] *Crowell v. Benson,* 285 U.S. 22, __ (1932).

improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time . . . ."[27] The principle of checks and balances is preserved when the power of adjudication is vested in judges who inhabit a different branch of government; it is lost when the functions are combined in the same department. The constitutional problem is not obviated merely because administrative law judges enjoy a degree of insulation within their agencies. These individuals are still employees of the same agency that is bringing the prosecution and, as such, are likely to share in the basic values and objectives of the agency as a whole. Moreover, whereas in the judicial model the courts as coordinate branches of government enjoy an equal dignity with the executive branch, in the administrative model the administrative law judges are subordinate officials with little power within the agency outside the scope of their case dockets. The Framers of the Constitution would not have considered the consolidation of the judicial and enforcement functions to be in line with the principles of republican government on which the nation was founded.

Supplementing these general separation-of-powers concerns is a more specific problem under Article III of the Constitution. A fundamental issue, for all federal administrative tribunals, is how they can exercise any authority consistent with the declaration in Article III of the Constitution that the "judicial power" of the United States shall be vested in the Supreme Court and in any inferior courts that Congress might from time to time establish.[28] These provisions created obvious problems for the administrative state: if all matters falling in the "judicial power" of the United States had to be adjudicated by federal judges, then administrative tribunals could hardly exist at all. The Supreme Court addressed this issue in 1856, at the dawn of the administrative state, with a observation that "there are matters, involving public rights, which

[27] The Federalist No. 10 (Madison).
[28] U.S. Const., Art. III.

may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper."[29] In other words, the judicial power of the United States is not exclusively vested in federal courts: administrative agencies can also exercise this authority. In doing so, of course, they must provide basic constitutional protections to parties who appear before them: notice, an opportunity to be heard, and the right to a decision based on evidence.[30] But no reason appears why administrative tribunals cannot provide such protections.

If extended to its limit, the principle that the judicial power of the United States may be vested in non-judicial bodies could all but eradicate any role for the courts in protecting private rights. If the judicial power can be vested in bodies other than courts, then Congress could do so virtually without limitation, leaving the federal courts with little business other than the tasks specifically conferred on the Supreme Court by the Constitution. The Supreme Court long ago recognizes that the complete exclusion of courts from the process would "sap the judicial power as it exists under the federal Constitution, and . . . establish a government of a bureaucratic character alien to our system."[31] The Supreme Court insists that courts must retain the right to police administrative agencies to ensure that constitutional rights are protected, and also to ensure that agencies do not act beyond the scope of their jurisdiction.[32] The basis for this reservation of authority is not entirely clear: if the judicial power can be outsourced, then why can't it be outsourced in all respects, rather than only in the technical respects having to do with ordinary administrative fact-finding?  In using the metaphor of "sapping" the judicial power, the

[29] *Murray's Lessee v. Hoboken Land & Improvement Company*, 59 U.S. 272 (1856).
[30] *Crowell v. Benson,* 285 U.S. 22 (1932)
[31] Id.
[32] Id.

Court is acknowledging that it is ceding judicial authority to bureaucrats when it is convenient to do so, and retaining the authority when it is not.

Administrative tribunals can also raise issues under the Appointments Clause of the Constitution, which requires that “officers of the United States” must be nominated by the President and confirmed by the Senate, but that the power to appoint “inferior officers” of the Unites States may be vested in the President, the courts of law, or the heads of departments.[33] The question then arises whether an ALJ is an “inferior officer” of the United States. If so, the individual must be appointed by one of the means specified in Article II. For reasons of convenience, however, administrative law judges and persons carrying out similar responsibilities are sometimes appointed, not by the heads of their departments, but rather through the civil service process applicable to ordinary employees. In such a case, a litigant may challenge the authority of the ALJ to rule on his or her case.

The issue came to the Supreme Court in *Freytag v. Commissioner*,[34] a case involving the role of special trial judges in the Tax Court. The Court held that these individuals were “inferior officers” of the United States, on the ground that they had permanent positions and performed “more than ministerial” tasks involving the exercise of significant discretion. Among other responsibilities, these individuals took testimony, conducted trials, ruled on the admissibility of evidence, and ensured compliance with discovery orders. Despite what would seem to be the clear import of the *Freytag* decision, the SEC failed to reform its procedures for the appointment

[33] U.S. Constitution, Art. 2, § 2, cl. 2.
[34] 501 U.S. 868 (1991).

of administrative law judges in that agency, resulting in a number of pending challenges to the authority of these officials.[35]

What is most telling about the recent SEC cases is not the underlying issue or its judicial disposition, but rather the fact that the matter arose at all. Given the *Freytag* case, it should have been evident to the SEC that its administrative law judges were at least at risk of being declared to be inferior officers, and that if it did not reform its procedures for appointing these officers, there could be serious problems down the line with respect to the validity of decisions rendered by these officials. It would have been a simple and straightforward matter for the SEC to simply place the appointment of new administrative law judges on the agenda of the full Commission and to secure a resolution confirming their appointment – a process that could easily have been done in bulk and that would not have required more than a few minutes of the Commissioners' time. That the SEC was so negligent in this matter might be seen as a marker of the arrogance of the modern administrative state, which has grown so used to operating outside of the purview of judicial scrutiny that even routine housekeeping matters such as this may be ignored.

The constitutional problems of administrative tribunals are not limited to the area of separation of powers. How can it comport with due process for an administrative agency to be both prosecutor and judge in the same case? Elementary ideas of due process extending back to Magna Carta hold that no person should be the judge of his own case.[36] The institution of administrative law judge appears to belie that principle. The legal system tolerates the combination of prosecutorial and judicial functions for reasons of expediency: if the effective administration of a regulatory scheme requires an adjudicatory function, and if that function

---

[35] Compare *Raymond Lucia Companies, Inc. v. SEC*, ___ F.3d ___, 2016 WL 4191191 (D.C. Cir. 2016) (SEC administrative law judges are not "inferior officers" of the United States) with *Gray Financial Group, Inc. v. SEC*, 2015 WL 10579873 (N.D. Ga. 2015) (SEC administrative law judges are "inferior officers").
[36] Cite.

cannot effectively be carried out by a court of law, then someone else has to do it, and the obvious candidate is a judicial officer within the same agency that is bringing the enforcement action.[37] A fig leaf of respectability is maintained through the claim that the conflict of interest is acceptable because administrative law judges are highly trained professionals who are granted a degree of insulation from the political officials within their agency. Yet even if most administrative law judges are impartial and unbiased, some may not be. In any given administrative adjudication there is a real danger that the administrative law judge will shade her opinion or skew the analysis of evidence with a view to gratifying (or avoiding incurring the displeasure of) higher ranking political officials in the agency. We would never tolerate the appointment of a private sector trustee, no matter how ethnical and upstanding, if that person were subject to a direct, unconsented conflict of interest. Should we less scrupulous when constitutional rights are at stake?

Yet another difficulty with administrative courts concerns the right to trial by jury. Rights adjudicated by administrative tribunals can have the characteristics of actions at law that would, if brought in federal court, require the empaneling of a jury at the request of either party. But it is inconvenient to run jury venires to hear routine administrative cases. The process would be expensive, time-consuming – and probably would result in a revolt by citizens who already feel burden by obligations for serving on state and federal grand and petit juries. The Supreme Court addressed the issue of jury trial rights in *Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Commission*.[38] An administrative tribunal of the Occupational Safety and Health Review Commission had imposed a monetary penalty on an employer. In the Supreme Court, the employer argued that the penalty imposed was similar to a remedy at law, and therefore that it

[37] See *Crowell v. Benson*
[38] 430 U.S. 442 (1977).

was entitled to a trial by jury on the issue. The Supreme Court summarily rejected the contention, acknowledging in the process that the reason jury trials are not available in administrative adjudications is simply that it is inconvenient and infeasible to require them:

> [W]hen Congress creates new statutory "public rights," it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment's injunction that jury trial is to be "preserved" in "suits at common law." Congress is not required by the Seventh Amendment to choke the already crowded federal courts with new types of litigation or prevented from committing some new types of litigation to administrative agencies with special competence in the relevant field. This is the case even if the Seventh Amendment would have required a jury where the adjudication of those rights is assigned instead to a federal court of law instead of an administrative agency….

Justice White's opinion, in other words, frankly admits that jury trial rights are unavailable in federal administrative proceedings simply because it would be inconvenient to include them – an odd interpretation of a basic constitutional right.

The problems of administrative agencies combining legislative, prosecutorial and judicial functions in a single hand might be mitigated if there existed meaningful rights of judicial review over administrative action. Even though courts would not in the first instance be deciding on the meaning of laws or issuing findings on contested issues of fact, at least a court would be available to check up on the agency and make sure it has not transgressed any boundaries. Meaningful judicial review in this sense, however, is only a fantasy. The reality is that courts do not, in general, exercise meaningful judicial review over the power of judicial review of administrative action.

In the judicial model, judges exercised plenary rights of review. Enforcement actions by administrative agencies were brought in court, and courts therefore had authority to uphold or reject the legality of those actions. Along with the rise of the administrative state, however, came significant restrictions on the power of judicial review of administrative action. In the typical case where the action – whether it be a rulemaking or an enforcement proceeding – is initially undertaken within the agency itself, judicial review, where it is available, is extremely deferential.

The Administrative Procedure Act distinguishes between issues of law and issues of fact. As to the former, it is said, reviewing courts exercise *de novo* scrutiny, without deferring to the agency's determination. The right of de novo review, however, is usually trumped by the *Chevron* doctrine. On judicial review of an administrative determination, courts exercise *de novo* review of agency rulings of law; but in their *de novo* review they apply the principle of *Chevron* deference, thus creating a preposterous circle in which what purports to be meaningful judicial scrutiny morphs into the usual rule of extreme deference to the agency's interpretation. The ambit of effective judicial review is reduced to the function of assessing whether the agency properly applied to the fact a legal standard which the agency itself had defined and articulated.

*Chevron* deference is not owed to an agency's findings of fact. As to these, however, a different and equally effective principle of deference applies, in the form of the rule of the Administrative Procedure Act that agency action will be upheld unless it is found to be "arbitrary, capricious, or an abuse of discretion."[39] The language implies a deferential standard of review; and courts have run with the implication, nearly turning somersaults to rationalize and validate dubious exercises of administrative authority. In candid moments, the courts admit as much, confessing that "arbitrary or capricious" review is applied "sparingly, granting agencies broad policymaking leeway."[40]

[39] Administrative Procedure Act, 5 U.S.C. § 706(2)(A).
[40] F.*C.C. v. Fox Television Stations*, *Inc*., 556 U.S. 502, 548 (2009) (Breyer, J., dissenting).

The limitations on administrative discretion that are recognized under the "arbitrary or capricious" standard of review are lax and easily avoided. It is said, for example, that administrative agencies should not make decisions for "purely political reasons."[41] But the limitation applies only to decisions that are "purely" political in content: actions that have technical or nonpolitical content apparently will withstand review even if they are clearly motivated by political concerns as well. Moreover, agencies are experts at disguising political motivations in the bland rhetoric of rational action, and courts almost never open the kimono to unveil the true underlying motivations.

It is said, further, that agency action will not survive "arbitrary or capricious" review if is not supported by a sufficient explanation of reasons.[42] But courts are usually extremely charitable in concluding that an agency's explanation, however feckless, stands up to this standard. A Bar Mitzvah boy has a greater chance of failing his Torah reading than the usual administrative agency has of being faulted for offering an inadequate explanation. And even if an explanation is deemed inadequate, the agency is only sent to the penalty box. It is allowed to come back with the same action, but supported this time by a more fulsome list of explanations.

It is said that courts applying the "arbitrary or capricious" standard should police against administrative action that is based solely on the "personal preferences" of bureaucrats.[43] But agencies can act improperly for many reasons other than gratifying a personal preference of the administrator. Further, even if an administrator does act out of spite, malice or other personal motive, it is usually rather easy to disguise such motivations in the clothing of a benign concern for the public interests. Finally, and as a backup to all the others, it is said that administrative

[41] Cite.
[42] Cite.
[43] *F.C.C. v. Fox Television Stations, Inc*., 556 U.S. 502, 548 (2009) (Breyer, J., dissenting).

discretion under the "arbitrary or capricious" standard is not "unbounded."[44] But saying that administrative action is not unbounded is hardly tantamount to imposing constraints that bind in the real world.

For an illustration of the feebleness of arbitrary or capricious review of agency action, consider the Supreme Court's opinion in *Camp v. Pitts*.[45] Some promotors sought permission to establish a national bank in Hartsville, South Carolina. The application was vetted for public comment, resulting in champions of the public interest springing forth to argue that the establishment of the proposed bank would be antithetical to the public welfare. By no coincidence, those concerned citizens happened to be representatives of existing banks in the area who wished to avoid new competition. Apparently responding to these impartial pleas, the Comptroller of the Currency rejected the application without holding a hearing, offering by way of explanation the terse comment that "the factors in support of a new National Bank in this area are not favorable."[46] On request for reconsideration, the Comptroller again rejected the application, but this time offered the semblance of an explanation, reciting the names of existing banks in the area and the amount of deposits held by each. This explanation was hardly more adequate than the first one because it was devoid of analysis of why these banks were adequately serving the needs of the area or why entry of a new bank would be problematic.

Unusually, the promoters didn't give up but rather challenged the Comptroller's actions in court. The Court of Appeals, reviewing the administrative record, concluded that the Comptroller's reasoning lacked all credibility. The agency had made two attempts to justify its decision, and had failed both times. Having lost faith in the Comptroller's objectivity and

---

[44] *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167–168 (1962).
[45] 411 U.S. 138 (1973).
[46] Cite.

capacity to make a reasoned decision in the case, the court of appeals remanded the matter to the District Court for a trial of the promoter's challenge to their application. The Supreme Court would have none of it: the Justices reversed the court of appeals and declared that there would be no trial: the role of the court was restricted to evaluating the administrative record to and determining whether the agency had provided a sufficient explanation of its actions. Although the Court left open the possibility that the agency's explanation would be found lacking, there was little doubt about the ultimate outcome: even its second try at explaining the action was insufficient, it could simply gin up another, more plenary explanation and ram the decision through.

Decisions like *Camp v. Pitts* – and countless others – make it very clear that a party wishing to challenge agency action in court faces a steep and possibly insuperable obstacle. The cards are stacked in favor of the agency. Knowing this fact, parties who are aggrieved by agency action will ordinarily have to nurse their wounds in secret: they might wish to take the matter all the way to the Supreme Court, but the Supreme Court will not be receptive to their claims. All they will get for their efforts is a large bill from their lawyers and the animosity of their regulators. Given the dim prospects of success in an "arbitrary or capricious" challenge, it is hardly surprising that administrative determinations adverse to private parties are rarely challenged in court: the infrequency of litigation is the result of accepting the inevitable rather than acquiescing in the result.

There is another obstacle to judicial review of agency action: the principle of exhaustion of administrative remedies. In many if not most administrative schemes that contemplate an adjudication by an administrative law judge or similar official, the governing statute specifies that the initial challenge to the determination must occur within the agency itself, by appeal to a higher official or board. The requirement that an aggrieved party exhaust administrative appeals makes sense insofar as it vests the reviewing function in a body that is familiar with the factual, legal, and policy framework within which the controversy arises. But intra-agency appeals also exacerbate the potential for exorbitant, arbitrary, or inappropriate agency action. Administrative law judges are officials of the enforcing agency, but at least they have a professional identity that calls for a degree of objectivity and distance from the enforcement officials; and they are typically not political appointees who are expected to represent the views of any particular party or ideology. These protections disappear when their decisions are reviewed by a full board or administrator. Moreover, committing the initial round of appeal to intra-agency processes further removes the judiciary from the facts and circumstances: because the facts will be determined and then reviewed within the agency, the courts have even less of a basis on which to exercise meaningful review of the agency's action.

A stunning example of the dangers of intra-agency review of administrative adjudication occurred in 2015. An administrative law judge within the Consumer Financial Protection Bureau imposed a $6 million fine on PHH Corporation for violations of the Real Estate Settlement Procedures Act.[47] Rather than meekly accepting the sanction, as most private parties would, PHH Corporation challenged the decision, as was its right under the governing statute. The CFPB's director, Richard Cordray, not only rejected the appeal but also increased the fine from $6 million to $109,188,618 – an increase of 1,700 percent! On top of this punitive sanction, Cordray imposed a set of business practice restrictions that would greatly increase the company's cost of doing business in the future: enjoining PHH from entering into any affiliated reinsurance agreement for the next 15 years, enjoining the company, for a period of 15 years, from referring

[47] See *In the Matter of PHH Corporation*, Decision of the Director, Docket No. 2014-CFPB-0002, Dkt. 226 (June 4, 2015); Final Order, Docket No. 2014-CfPB-0002, Dkt. 227 (June 4, 2015).

any borrower to any provider if a real estate settlement service if that provider had agreed to purchase or pay for any service from PHH; and requiring PHH to maintain comprehensive records of "all things of value" it receives from any real estate service provider to which PHH refers borrowers, and to make those records available to CFPB upon request. Many in the industry understood Cordray's decision as a thinly disguised abuse of process. This was the first appeal of a contested administrative adjudication to arise within the agency. Cordray was sending a message to any regulated firm who might dare to challenge his and his agency's hegemony. You have a right to judicial review; but if you wish to exercise that right, you must first pass through the office of the Director, where your temerity in resisting his agency's power will receive an appropriate rebuke. Given this apparently punitive response, what organization would dare to challenge the CFPB's authority in the future?

At least in the CFPB case the disappointed party had an avenue for judicial review once it had gone through the gauntlet of review within the agency.[48] But Congress can, if it wishes, completely preclude judicial review. So long as an agency provides the standard due process protections applicable in courts of law – due notice, proper opportunity to be heard, and findings are based upon evidence – a well-established line of precedent holds that agency findings and adjudications can be declared to be final and protected against any and all judicial review.[49] The power of Congress to preclude review is expressly recognized in the Administrative Procedure Act, which is expressly made inapplicable to the extent that "statutes preclude judicial review" or "agency action is committed to agency discretion by law."[50] Congress has, in fact, frequently

[48] In August 2015, the United States Court of Appeals for the District of Columbia Circuit granted PHH's motion for a stay pending appeal, finding that the appellant had satisfied the "stringent requirements" for such relief. *PHH Corporation v. Consumer Financial Protection Bureau*, No. 15-1177 (D.C. Cir. August 3, 2015). As this article is written, the matter has been argued and is awaiting a decision.
[49] See *Crowell v. Benson*, 285 U.S. 22 (1932).
[50] Administrative Procedure Act, 5 U.S.C. § 701(a).

exercised its authority to cut off judicial review of agency action. *Cuozzo Speed Technologies, LLC v. Lee*[51] is a recent example. The statute at issue in that case purported to preclude judicial review of a Patent Office decisions to review claims in already-issued patents.[52] Over the objections of the disappointed patent holder, the Court blithely deferred to the congressional dictate, rationalizing its ruling with the comforting thought that Congress wanted to provide the Patent Office with "significant power to revisit and revise earlier patents."[53] In other words, Congress can dispense with judicial review whenever such review might interfere with the ability of agencies to carry out their business. This idea is not new: the same justification for cutting off rights of review can be found in opinions extending back at least to the Depression Era.[54] But that is exactly what judicial review is designed and intended to do: any time a court gets involved in reviewing administrative action, there is the potential that the judge will delay, impede, or even prevent the agency from doing what it wants to do.

Supreme Court decisions often offer reassurances that courts are not really excluded from the process – that even if judicial review is precluded, courts will still be available as a backstop to prevent things from going really wrong. In the *Cuozzo* case, for example, the majority opinion rather defensively proclaimed in *dicta* that a patent holder was not deprived of *all* judicial protections in a case where the Patent Office stripped away claims previously granted. The majority opinion suggested that courts would be open to claims that the Patent Office had violated the petitioner's constitutional rights or had reached out to decide questions beyond the

[51] 136 S.Ct. 2131 (2016).
[52] 35 U.S.C. § 314(d) (providing that decision to institute inter partes review is "final and non-appealable.")
[53] 136 S.Ct. at 2139.
[54] See, e.g., *Crowell v. Benson*, 285 U.S. 22 (1932) (to hold otherwise would be to defeat the obvious purpose of the legislation to furnish a prompt, continuous, expert, and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task.").

scope of the issues as to which Congress had expressly precluded review.[55] Similar defensiveness is found in other opinions in which the Court labors to find a basis for judicial review even when a statute appears to preclude it. Thus, the Court indulges the "strong presumption" in favor of judicial review.[56] Ambiguities or gaps are energetically exploited to justify the availability of review, even when a natural interpretation of the statutory text might lead to the conclusion that review is precluded.[57] Preclusions of review applicable to one statute or one section of a statute are strictly limited in scope and are not extended to related sections or similar statutes.[58] The Court's efforts to identify a basis for review escalate even further when constitutional rights are involved.[59] Nevertheless, the Court has never held that the Due Process Clause or any other provision of the Constitution categorially preserves a right even to the minimal and cursory judicial review provided under the Administrative Procedure Act. The Court's decisions place the burden on Congress to clearly state that judicial review is unavailable. But the burden can be overcome by "clear and convincing" statutory language, specific legislative history, or inferences drawn from an analysis of the statutory scheme as a whole.[60] The concept of non-reviewable agency action is in tension with basic principles of due process. Inherent almost in the atomic structure of due process is the notion of access to the courts. A system that allows executive officials to act arbitrarily or capriciously, and that denies

---

[55] *Cuozzo Speed Technologies, LLC v. Lee*, 136 S.Ct. 2131, 2141 (2016).

[56] See, e.g., *Mach Mining, LLC v. EEOC*, 135 S.Ct. 1645, 1650–1651 (2015); *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 212-213 (1994).

[57] See, e.g., *Sackett v. Environmental Protection Agency*, 132 S. Ct. 1367 (2012) (judicial review under Clean Water Act); *United States Army Corps of Engineers v. Hawkes Co., Inc.*, 136 S. Ct. 1807 (2016) (same).

[58] See *Johnson v. Robison*, 415 U.S. 361, 367 (1974) (preclusion of review under a statute doesn't bar constitutional challenges); *Traynor v. Turnage*, 485 U.S. 535, 544–545 (1988) (preclusion provision doesn't apply to different statutes, even on related subject matters).

[59] See *Webster v. Doe*, 486 U.S. 592, 603 (1988) (a "serious constitutional question" would arise if a federal statute denied any judicial forum for constitutional claims).

[60] *Block v. Community Nutrition Institute*, 467 U.S. 340, 349–350 (1984).

citizens the right to challenge such actions before an independent court of law, can hardly be considered one that affords its citizens the elementary protections of legal process.

Even if judicial review is technically available, it will be of little benefit to parties that lack the resources to withstand the risk of devastating liability in the event their challenge to an enforcement action fails. The enforcing agency threatens to impose a spectacular sanction but offers to relent if the regulated firm capitulates to its demand that the target confess its wrongdoing and submit to a high, but manageable set of sanctions. Targets could, of course, refuse the offer and litigate their cases, but their prospects of success in such litigation are usually low, and, if they do not succeed, the fines they face if they refuse the settlement offer can be devastating. Not surprisingly, in the face of this calculation, nearly everyone settles. Even though they have a technical right to a judicial determination of their rights, the risks of obtaining the ruling are too great.

The threat of devastating sanctions not only creates nearly irresistible pressures to settle regulatory proceedings on terms favorable to the government; it extends back to the period even before charges are brought. The Department of Justice and other enforcement agencies routinely give credit for cooperation. If a company cooperates fully with the enforcer, turns over all information, and identifies persons in the company whose actions contributed to the alleged violations, it will receive some mercy at the penalty phase. The enforcer may even decline to press charges if the enforcement has been sufficiently fulsome. But the iron fist in the velvet glove is the threat of what happens: if the company doesn't cooperate, it can expect that the government's response will be harsh and punitive. The result: targets of government enforcement investigations are effectively compelled to cooperate, even though they have no legal obligation to do so.

Assistant Attorney General Leslie Caldwell, head of the Justice Department's Criminal Division, delivered this threat in blunt terms in a speech delivered in 2015:

> As is their right, corporations may also choose not to cooperate with the government. But, they too must understand the consequences of their decisions. The lack of timely and complete cooperation, which effectively frustrated the prosecution of culpable individuals, was one of the tipping points leading to charges, guilty pleas and landmark monetary penalties in the BNP Paribas and Credit Suisse cases last year. BNPP's failure to cooperate was expressly referenced in the plea agreement in which the bank admitted guilt and agreed to pay nearly $9 billion in financial penalties.[61]

One might doubt the value of the right not to cooperate with a government investigation if the consequence a possible $9 billion fine. When the robber says "your money or your life," the victim technically has the right to choose, but most people turn over their wallets.

Special difficulties can arise in cases where the regulated party wishes to conduct a particular activity within the law, but faces the possibility of severe penalties if it conducts the activity and turns out to be mistaken about what the law requires. *Sackett v. EPA*[62] presented such a situation. Owners of property located several lots away from a lake filled in part of their lot with rocks and dirt in preparation to constructing a house. They received an unwelcome notice from the Environmental Protection Agency informing them that they had violated the Clean Water Act by discharging pollutants into the navigable waters of the United States and ordering them to return the site to its former condition. The Sacketts did not believe that their property was subject to the statute, but faced potential fines of $75,000 per day for each day they

[61] Assistant Attorney General Leslie R. Caldwell Delivers Remarks at New York University Law School's Program on Corporate Compliance and Enforcement, New York City, NY United States -- Friday, April 17, 2015, available at https://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-new-york-university-law.
[62] 132 S.Ct. 1367 (2012).

failed to remediate the problem. Although the Sacketts took their case to the Supreme Court, and eventually won the right to obtain a judicial review of vast majority of property owners, faced with the potential for devastating liability would have simply complied with the EPA's order, even though they believed the order was invalid.

Early in the last century, the Supreme Court offered some hope to parties faced with this choice. The State of Minnesota adopted populist measures slashing the rates railroads could charge consumers in the state and established a schedule of onerous fines for violations of the new rate schedules. Both the company and its officers and directors were subject to fines and imprisonment (in the case of individuals). And because each ticket sold constituted a separate offense, the penalties quickly escalated to a term of life in prison and a bankrupting fine. As the Court noted, given penalties of this magnitude, no company and no employee would ever risk knowingly violating the statute; and because no one would risk violating the statute, there would be no opportunity for judicial review. The Court in *Ex parte Young* held that the statute, by precluding judicial review in all but name, unconstitutionally denied the due process of law: "[W]hen the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights."[63] *Ex parte Young* remains officially good law, but its impact has been severely diluted in later case holding that due process requires only that the regulated party must have some means for obtaining a judicial determination of its rights before it engages in the forbidden contact. For example, the regulated party might be able to obtain a temporary restraining order or preliminary injunction barring the agency from

[63] *Ex Parte Young*, 209 U.S. 123 (1908).

enforcing or imposing the sanction pending determination of the case on the merits.[64] Thus *Ex parte Young* has not proven to be a reliable means for mitigating the *in terrorem* effect of onerous penalties and sanctions.

D. The Decision to Charge

Equipped with the powers described above, regulators and prosecutors face few constraints in their ability to press regulatory charges against alleged violators of regulatory norms. Although prosecutors have, in general, exercised restraint and have not abused the awesome powers afforded to them under current law, cases of misguided prosecution or abuse do occur.

Consider the recent, ludicrous case of *Yates v. United States*.[65] A federal fish and game agent boarded a commercial fishing vessel and found that the catch contained undersized red grouper and order the captain to segregate the undersized fish from the rest of the catch and return to port. Instead, the captain ordered a crew member to throw the fish overboard. The Justice Department argued, apparently with a straight face, that the fisherman had violated the Sarbanes-Oxley Act, a statute enacted to cope with corporate frauds such as Enron. Why? The statute makes it a crime to knowingly destroy or falsify any tangible object with an intent to impede or obstruct a federal investigation.[66] The obvious legislative intent behind the statute was to deter the shredding of documents or other evidence in government investigations of corporate wrongdoing. The government argued, however, that the fisherman had violated its literal terms such he had destroyed a "tangible object" (the fish) in an attempt to impede a federal investigation. The case went to trial and the defendant was convicted. The Supreme Court

[64] Cite.
[65] *Yates v. United States*, __ S.Ct. __ (2015).
[66] 18 U.S.C. § 1519.

reversed the conviction on the ground that the statute did not cover the conduct charged. What is disturbing about the *Yates* case is not so much the Justice Department's exercise of statutory interpretation – the words of the statute could reasonably bear the construction given to it by the prosecutors. The disturbing feature of the case is rather that the Department, regardless of how it read the statute, considered it a wise and sensible use of prosecutorial resources. It was very clear that the statute was not intended to address the situation of the case, and it was equally clear that the law in question did not provide notice to persons such as Mr. Yates that they might be subject to prosecution and imprisonment under its terms.

Consider also the Justice Department's misguided prosecution of Federal Express. Overzealous prosecutors accused the package delivery service of knowingly shipping illegal drugs and money laundering – simply because the company had done its job of transmitting packages for customers. The company denied that it had done anything wrong and offered to terminate any customers whom the government identified as engaging in illegal action. Unsatisfied, the prosecutors obtained an indictment and brought the case to trial, even though they were in possession of plentiful evidence that Fed Ex lacked the requisite criminal intent and in fact had done nothing outside the usual course of business. Four days into the trial the Justice Department dropped the case – a decision applauded by the court, who expressed the view that Fed Ex was "factually innocent" of the charges.[67]

Why did federal prosecutors pursue such a dubious case in the first place, and why didn't higher level officials in the Department call a halt when it became evident that the defendant could not be convicted? The answer appears to be that they brought the case because they could. The Department was pursuing an agenda of putting on-line pharmacies out of business, and

[67] Cite.

because such pharmacies use courier services to ship their product, Fed Ex naturally came into the Department's cross hairs. Prosecutors apparently calculated that regardless of the merits of the case, they could obtain a settlement with Fed Ex that they could then post on the Justice Department Web Site together with self-laudatory quotations from officials up and down the chain of command. Most companies, even if they believed themselves to be innocent of wrongdoing, would give in to the overwhelming threat of fines, loss of reputation, possible debarment sanctions, and onerous business practice regulation. And prosecutors had already scored successes in similar cases: the Department of Justice had recently settled a case with Google (for $500 million) based on the claim that Google had knowingly accepted advertisements from on-line pharmacies it knew to be operating illegally.[68]

Abuses of the charging power occur also in the area of civil enforcement. The scheme of modern administrative law gives regulators substantial discretion as to whether to establish rules of conduct in advance, by means of formal rulemakings, or to enforce the law on a case-by-case basis without establishing such rules. Within limits, such discretion is appropriate: administrators should not have to establish formal rules in every case, especially when they are still working through the underlying policies. But the power to establish rules through case-by-case enforcement proceedings can be abused if it is used to impose sanctions on persons who do not have sufficient notice that their conduct is to be considered illegal.

Some have accused the Consumer Financial Protection Bureau of using this strategy: refusing to issue rules that provide notice of how it interprets its very broad statutory mandate, and then bringing enforcement actions against alleged violators as a way to signal how it

[68] The egregious facts of the Fed Ex prosecution, and the widespread negative publicity the Department received in the wake of the dismissal, caused the Department to initiate a rare internal review. As this article is being written, that review is ongoing.

interprets the law. Director Cordray readily acknowledges that his agency has consciously adopted a regulate-by-enforcement strategy, but is unapologetic about the consequences:

> Our public enforcement actions have been marked by orders, whether entered by our agency or by a court, which specify the facts and the resulting legal conclusions. These orders provide detailed guidance for compliance officers across the marketplace about how they should regard similar practices at their own institutions. If the same problems exist in their day-to-day operations, they should look closely at their processes and clean up whatever is not being handled appropriately. Indeed, it would be "compliance malpractice" for executives not to take careful bearings from the contents of these orders about how to comply with the law and treat consumers fairly. Some have criticized this approach as regulation by enforcement, but I think that criticism is badly misplaced. Certainly any responsible official or agency charged with enforcing the law is bound to recognize that they should develop a thoughtful strategy for how to deploy their limited resources most efficiently to protect the public. That means working toward a pattern of actions that conveys an intelligible direction to the marketplace, so as to create deterrence that can be readily understood and implemented. The alternative is just a random series of actions that takes a few wild swipes at the bad actors without systematically cleaning up the practices that harm consumers across the marketplace. Others have framed this criticism as a suggestion that law enforcement officials should think through and explicitly articulate rules for every eventuality before taking any enforcement actions at all. But that aspiration would lead to paralysis because it simply sets the bar too high. Particularly in an area like consumer financial protection, the vast majority of our enforcement actions involve some sort of deception or fraud. And courts have long noted that trying to craft specific rules to root out fraud or untruth is a hopeless endeavor, as they would likely fail to cabin "the ingenuity of the dishonest schemer." For these reasons, we strive to present specific enforcement orders that meticulously catalogue the facts we have found in our very thorough investigations and set out the legal conclusions that follow from those facts. These specific orders are also intended as guides to all participants in the marketplace to avoid similar violations and make an immediate effort to correct any such improper practices.[69]

[69] Prepared Remarks of CFPB Director Richard Cordray at the Consumer Bankers Association (March 9, 2016), available at http://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-cfpb-director-richard-cordray-at-the-consumer-bankers-association/.

Cordray's defense – that it is impossible to capture in a regulation the wide variety of conduct that is subject to CFPB enforcement – is somewhat inconsistent with his claim that enforcement actions provide "guidance" to compliance officers at other firms. Such guidance would not be possible if the CFPB's interpretation of its governing statute could not be reduced to general principles. Moreover, even if a comprehensive regulation is difficult to develop, it appears that the CFPB has not even tried. The CFPB's strategy of regulation-by-enforcement is clever on several fronts: because the agency does not engage in rulemaking, it avoids being pinned down and preserves the freedom to change course, makes law by means of individual enforcement actions against defendants that lack the resources to mount an effective defense, avoids having to answer in an challenge to its actions by a large segment of the industry, and increases its ability to threaten firms by not providing clear guidance about how and when it will act.

### E. Disarming Attorneys

Attorneys pose a potential threat to the hegemony of the administrative state, both because they protect the interests of clients in administrative proceedings and because, through the work product doctrine and the attorney-client privilege, they can shield information that government officials wish to obtain in order to pursue enforcement actions. Not surprisingly, therefore, the growth of the administrative state has been accompanied by attempts to undermine the effectiveness of legal representation.

Among the protections an attorney can offer to a client in dealings with an enforcer, none is more important than the attorney-client privilege. In *Upjohn v. United States*,[70] the Supreme Court established that the privilege is available to companies in the context of government

[70] 449 U.S. 383 (1981).

compliance investigations. After uncovering evidence that its agents may have bribed foreign officials, Upjohn's counsel conducted an internal investigation involving the distribution of questionnaires to foreign managers. Attorneys for the company interviewed recipients of the questionnaire and several dozen other Upjohn officers and employees. Thereafter the IRS demanded that the company produce the questionnaires and memorandums or notes of the interviews. The court of appeals, in an effort to facilitate the IRS's enforcement efforts, declared that the company could assert attorney-client privilege only for communications between the company's attorneys and persons in the "control group."[71] The Supreme Court, restoring the scope of the privilege traditionally understood, protected all the notes and questionnaire answers from compelled disclosure. It rejected the narrower "control group" these on the ground that it "overlooks the fact that the privilege exists to protect not only the giving of professional advice to those who can act on it but *also the giving of information to the lawyer* to enable him to give sound and informed advice. . . The first step in the resolution of any legal problem is *ascertaining the factual background and sifting through the facts* with an eye to the legally relevant.[72]

The Department of Justice pays lip service to the importance of preserving the attorney-client privilege in corporate investigations. In fact, however, the Department's interpretation of the privilege is inconsistent with the *Upjohn* case and subversive of the underlying rationale for the protection. In the Department's view, the privilege protects communications between attorney and client, but does not protect facts that the attorney discovers during the course of

[71] Id. at __.
[72] Id. at __ (emphasis supplied).

those communications. Assistant Attorney General Caldwell voiced this dangerously constricted view of the privilege: [quote to be added].[73]

The assault on the attorney-client privilege is sometimes supplemented by efforts to terrorize or intimidate attorneys who provide too-vigorous a defense to parties who have come within the crosshairs of regulatory enforcement actions. The *Kaye Scholer* affair offers a stunning example. During the savings and loan crisis, attorneys at an elite law firm represented a troubled savings and loan institution in connection with a contentious bank examination. As would be common in litigated cases, but as was not common in bank examinations, the lawyers insisted that all communications between the examiners and the bank be channeled through them. Standard practice in bank supervision, extending back a hundred years or more, was that the regulator would communicate directly with the banker regarding issues that arose in an examination. Inserting lawyers into the picture would disrupt this long-standing procedure. [74] The regulator's response was to file a claim against the law firm in its own administrative tribunal, alleging that the firm's tactics amounted to serious violations of law. The regulator then persuaded the administrative law judge to freeze the assets of the law firm and its partners, based on the dubious claim that the defendants posed a flight risk. Even though the idea that reputable attorneys would flee the jurisdiction was laughable, the judge prohibited the firm from making capital expenditures in excess of $50,000, barred the firm's partners from transferring assets overseas, and sequestered one-quarter of all partners' earnings pending disposition of the charges. The impact on the firm's reputation, business, and access to credit was direct and devastating. Even though the firm claimed that its attorneys had done nothing other than present

---

[73] Cite.
[74] For an account from the perspective of the regulator's general counsel, who may have designed the litigation strategy, see Harris Weinstein, Attorney Liability in the Savings and Loan Crisis, 1993 U. Ill. L. Rev. 53 (1993).

a vigorous defense of a client, it could not withstand the pressure.  Within a week it capitulated and agreed to pay a $41 million fine. Thankfully, regulators do not often behave in such a vindictive manner; but the fact that the behavior occurred at all is a testament to the breathtaking powers that regulators can unleash if backed into a corner.[75]

Or consider the case of Lauren Stevens.[76] A member of the legal department of GlaxoSmithKline ("GSK"), a drug manufacturer, Ms. Stevens was placed in charge of the company's response to an FDA investigation into claims that GSK had illegally promoted the antidepressant Wellbutrin for off-label uses. In response to the agency's demand that GSK turn over copies of materials pertinent to the company's marketing of the drug, Ms. Stevens, in consultation with outside counsel King & Spaulding, conducted an internal investigation and provided the agency with extensive information about the company's marketing practices. Apparently dissatisfied with her response, the FDA persuaded the Department of Justice to indict the attorney for obstruction of justice – even though there was no evidence that she intended to deceive the agency, and even though all of her actions in the case had been undertaken in reliance on outside counsel.[77] As discussed below, Ms. Stevens was delivered from the nightmare of this misguided and abusive prosecution only by the good offices of a courageous trial court judge.[78]

## II. Green Shoots

The massive growth of the administrative state, and the concomitant diminution of judicial authority over administrative matters, does not sit well with some judges who believe

[75] For contrasting views on the affair, see, e.g., Geoffrey C. Hazard, Jr., The Meaning of the Kaye Scholer case, 26 Akron L. Rev. 395 (1992-93) (strongly criticizing the regulatory response); William Simon, The Kaye Scholer Affair: the Lawyers Duty of Candor and the Bar's Temptations of Evasion and Apology, 23 Law & Soc. Inquiry 243 (1998) (supporting the regulator's actions).
[76] *United States v. Lauren Stevens*, Case No. 10CR694-RWT (D. Maryland).
[77] Id.
[78] Cite.

that the constitutional role of the federal judiciary should not be eclipsed by unelected bureaucracies. This section will identify areas where courts or individual judges have resisted the encroachments of the administrative state and have attempted to preserve a meaningful field for judicial action. As yet, these efforts to check administrative overreaching have not succeeded in materially slowing the expansion of bureaucratic power; but they are green shoots of resistance which, over time, might succeed in establish some limits. These “green shoot” statements occur in two contexts: (a) cases where the judge believes that administrators or prosecutors have abused or behaved unfairly towards regulated parties; and (b) cases where the judge believes that administrators or prosecutors are too friendly towards the regulated party and, accordingly, have exercised excessive leniency in their enforcement efforts.

### A. *Chevron*

One of the more remarkable judicial dissents of recent years, under-appreciated in light of its potential for predicting the future course of the Court’s administrative law jurisprudence, is Chief Justice Roberts’ opinion in *City of Arlington v. F.C.C.*[79] The majority opinion in that case had afforded *Chevron* deference to an agency’s interpretation of its own jurisdictional statute. In dissent, the Chief Justice not only took issue with the Court’s ruling, but also raised fundamental questions about the power and growth of the modern administrative state. When the Chief Justice of the United States speaks – even if in dissent, and even when the comments in question are not directly relevant to his legal analysis – Court watchers should take notice. And Roberts, perhaps emboldened by the freedom of expression afforded in a dissenting opinion, did not pull his punches. The Chief Justice’s disquisition on the modern administrative state is worth quoting at

[79] 133 S.Ct. 1863, __ (2013).

some length because of what it reveals about how the nation's most important judge views the rise of administrative government:

> One of the principal authors of the Constitution famously wrote that the "accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny" [citing Madison's language in *Federalist No. 47*]. Although modern administrative agencies fit most comfortably within the Executive Branch, as a practical matter they exercise legislative power, by promulgating regulations with the force of law; executive power, by policing compliance with those regulations; and judicial power, by adjudicating enforcement actions and imposing sanctions on those found to have violated their rules. The accumulation of these powers in the same hands is not an occasional or isolated exception to the constitutional plan; it is a central feature of modern American government.

Roberts went on to tie these general concerns about the administrative state to the specific context of *Chevron* deference:

> By design or default, Congress often fails to speak to "the precise question before an agency. In the absence of such an answer, an agency's interpretation has the full force and effect of law, unless it "exceeds the bounds of the permissible." It would be a bit much to describe the result as "the very definition of tyranny," but the danger posed by the growing power of the administrative state cannot be dismissed.[80]

*The danger posed by the growing power of the administrative state cannot be dismissed.* Coming from the Chief Justice of the United States, these are rather extraordinary words, even in a dissenting opinion. And Justice Scalia's majority opinion did not really disagree with the assessment. Responding to the Chief's jeremiad, Scalia remarked that "the Chief Justice's discomfort with the growth of agency power is perhaps understandable."[81] The difference between the majority opinion and the dissent rested in contrasting views of the scope of *Chevron*

[80] 133 S.Ct at __ (Roberts, C.J., dissenting) (quotation references deleted).
[81] Id. at __, n.4.

deference as applied to the particular facts – not a disagreement about the dangers posed by the growth of administrative power.

Chief Justice Roberts is not the only member of the Court to express misgivings about *Chevron* deference. Justice Thomas, in particular, has emerged over the past few years as a vocal critic of the doctrine. In several opinions, Justice Marshall takes issue with the idea that Congress has implicitly delegated the power of interpretation to administrative agencies in cases where it has not explicitly done so. The decision to defer to administrative interpretations in such cases is, Marshall argues, based on a legal fiction – a convenient rationalization, not grounded in reality, to cover over the fact that the Court is falling short in its constitutional responsibility to say what the law is.[82] Even with an express delegation of authority, the idea that administrative interpretations should trump judicial constructions of a statute raises concerns under the doctrine of separation of powers, in Marshall's opinion. The executive power of government is not, in his view, a power to formulate generally applicable rules of private conduct; it is the power to enforce the law.[83] The Framers of the Constitution, in Justice Thomas's view, understood that statutes would contain ambiguities that would need to be resolved over time in the context of litigated cases, and contemplated that the resolution of these agencies would be made by courts – not by officers of the Executive Branch.

B. Judicial Review

Justices have also evidenced concern about congressional statutes and agency actions that purport to deny regulated parties the right to a timely judicial review of final agency action. *Sackett v EPA* is a case in point. Justice Alito, concurring in the result, strongly criticized the

---

[82] *Cuozzo Speed Technologies, LLC v. Lee*, 136 S.Ct. 2131, 2148 (2016) (Thomas, J., concurring); Michigan v. EPA, 135 S.Ct. 2699, 2712 (2015) (Thomas J., concurring).

[83] *Department of Transportation v. Association of American Railroads*, 135 S.Ct. 1225, 1242 (2015) (Thomas, J., concurring in judgment).

arguments advanced by the federal government which would have denied the petitioners any right of effective judicial review over whether the Environmental Protection Agency had correctly designated their property as a protected wetland:

> The position taken in this case by the Federal Government . . . would have put the property rights of ordinary Americans entirely at the mercy of EPA employees. . . The reach of the Clean Water Act is notoriously unclear. Any piece of land that is wet at least part of the year is in danger of being classified by EPA employees as wetland covered by the Act, and according to the Federal Government if property owners begin to construct a hoe on a lot that the agency thinks possesses the requisite wetness, the property owners are at the agency's mercy. The EPA may issue a compliance order demanding that the owners cease construction, engage in expensive remedial measures, and abandon any use of the property. If the owners do not do the EPA's bidding, they may be fined up to $75,00 per day . . . And if the owners want their day in court to show that their lot does not include covered wetlands, well, as a practical matter, that is just too bad. Until the EPA sues them, they are blocked from access to the courts, and the EPA may wat as long as it wants before deciding to sue. By that time, the potential fines may easily have reached the millions. In a nation that values due process, not to mention private property, such treatment is unthinkable.[84]

Justice Alito did not cite *Ex Parte Young* for the proposition that due process requires that the regulated party must be given a reasonable opportunity to obtain a judicial ruling on the legality of its conduct before the government can administer a punitive sanction. But he might well have done so, since the concern expressed in his concurring opinion precisely mirrors the concerns that motivated the Court in the earlier case. This green shoot of opposition to penalty schemes that effectively deny access to the courts suggests the possibility that the Supreme Court might someday revive the *Ex Parte Young* decision as a way to install some protections against excessive and overweening administrative action.

### C. Criminal Enforcement

Green shoots of resistance to administrative and prosecutorial excesses have also sprouted in connection with criminal cases. One of these themes is the perception that the

[84] *Sackett v. Environmental Protection Agency*, 132 S.Ct. 1367 (2012) (Alito, J. concurring).

nation's laws have been profoundly over-criminalized – that many types of conduct that could easily be controlled with ordinary civil processes are now declared also to be felonies or misdemeanors, punishable by fines and imprisonment and prosecuted by officials in the Criminal Division rather than by civil authorities. Concerns about the over-criminalization are increasingly heard in academic commentaries;[85] but it appears similar misgivings are shared by some federal judges who deal with the expansion of criminal liability in cases that come before them. These concerns are even shared by Supreme Court Justices. In a thoughtful dissenting opinion in the *Yates* case discussed above, Justice Kagan, while concluding that the fisherman had properly been prosecuted under the law, nevertheless expressed the view that the law itself was misguided and overbroad. The "real issue," Justice Kagan wrote, was the "overcriminalization and excessive punishment" in federal criminal law:

> I tend to think . . . that § 1519 is a bad law – too broad and undifferentiated, with too-high maximum penalties, which gives prosecutors too much leverage and sentencers too much discretion. And I'd go further: In those ways, §1519 is unfortunately not an outlier, but an emblem of a deeper pathology in the federal criminal code.[86]

Justice Kagan's comment is another green shoot of dissatisfaction with the current condition of the administrative state – this time coming from a Justice generally associated with the "liberal" side of the Court.

Trial judges have also expressed concerns about prosecutorial overreaching under broad criminal statutes. Consider the Lauren Stevens case discussed above, involving a prosecution of a drug company attorney for obstructing justice in connection her client's response to a

[85] See, e.g., Lucian E. Dervan, *White Collar Over-Criminalization: Deterrence, Plea Bargaining, and the Loss of Innocence*, 101 Ky. L.J. 543 (2013); Ellen S. Podgor, *Over-Criminalization: The Politics of Crime*, 54 Am. U. L. Rev. 541 (2005); Sara Sun Beale, *The Many Faces of Over-Criminalization: From Morals and Mattress Tags to Over-Federalization*, 54 Am. U. L. Rev. 747 (2005).
[86] *Yates v. United States*, __ S.Ct. __, __ (2015) (Kagan, J., dissenting).

regulatory inquiry. It appears that no one in the Department of Justice questioned the appropriateness of the prosecution. On the contrary, the Department unveiled the indictment with a self-serving press release touting its commitment to strict enforcement of the laws regulating pharmaceutical marketing.[87] This questionable prosecution proceeded to a criminal trial. However, a courageous federal judge, Roger W. Titus, put an end to the matter at the close of the prosecution's case by issuing a judgment of acquittal. Judge Titus's remarks explaining the reasons for this unusual action display a heightened level of concern about Justice Department's possible abuse of process:

> I conclude on the basis of the record before me that only with a jaundiced eye and with an inference of guilt that's inconsistent with the presumption of innocence could a reasonable jury every convict this defendant. . . . In my seven and a half years as a jurist I have never granted [a motion for judgment of acquittal]. There is, however, always a first . . . I believe that it would be a miscarriage of justice to permit this case to go to the jury. Moreover, there are serious implications for the practice of law generated by this prosecution. . . . A lawyer should never fear prosecution because of advice that he or she has given to a client who consults him or her, and a client should never fear that its confidences will be divulged unless its purpose in consulting the lawyer was for the purpose of committing a crime or a fraud. There is an enormous potential for abuse in allowing prosecution of an attorney for the giving of legal advice. I conclude that the defendant in this case should never have been prosecuted and she should be permitted to resume her career . . . .[88]

It is easy to understand Judge Titus's frustration and concern. An apparently hard-working attorney, doing her job as a mid-level officer at a pharmaceutical company, makes good faith efforts to respond to a regulator's demand for information while still providing loyal and capable representation to her client. Recognizing the delicacy of the situation, the attorney

[87] See https://www.justice.gov/civil/cpb/case/us-v-lauren-stevens.

[88] Quoted in Geoffrey Parsons Miller, The Law of Governance, Risk-Management and Compliance ___ (2014). Although the Justice Department's Web Site reports on the indictment and other developments in the case, it makes no mention of the defeat suffered by the DOJ attorneys, the unusual order of acquittal at the close of the prosecution's case, or the harsh words that Judge Titus delivered about the choices made by government attorneys.

reaches out to one of the nation's best law firms and consults with that outside counsel at every step. Nevertheless she is charged with a serious felony, is booked and fingerprinted, required to turn in her passport, and subjected to the anxiety facing a possible 20 year prison sentence, possible fines, loss of her law license, and destruction of her reputation. It is understandable that the trial court sympathized with this defendant. What is less understandable is why the prosecuting attorneys and their supervisors in the Department of Justice did not recognize the serious potential for abuse.

Judge Titus's resistance to the power of the administrative state took the form of an action designed to protect the victim of an inappropriate prosecution. In other cases, the green shoots of judicial resistance reflect a different set of concerns: not that the government will exercise its discretion to impose unfair harms on regulated firms or individuals, but rather that the prosecutors and enforcers will be took friendly to the firms they supervise and, accordingly, will fail to engage in adequately vigorous efforts to enforce the law in the face of evidence of serious wrongdoing.

### D. Judicial Involvement in Settlements

When a regulatory settlement is filed in court, the question arises whether the court should have any substantive involvement either in approving the agreement or in overseeing its administration. Another "green shoot" of resistance to the administrative state involves cases where judges objected to being cast in the role of rubber stamps and insisted on exercising some degree of substantive scrutiny or some more-than formal role in the process.

This issue famously arose in the *HSBC* litigation.[89] The government charged HSBC bank with sanctions violations and obtained a deferred prosecution agreement that included the

[89] *United States v. HSBC Bank USA*, 2013 WL 3306161 (E.D.N.Y., July 1, 2013).

appointment of a compliance monitor. Because the agreement contemplated the deferral of prosecution, the parties presented it to the presiding judge, John Gleeson, for approval under the Speedy Trial Act.[90] The parties argued that Judge Gleeson's authority to review the agreement was limited to narrow considerations under the Speedy Trial Act. Judge Gleeson disagreed, concluding that he had inherent supervisory authority to approve or disapprove the agreement: Judge Gleeson's opinion is important not only for its recognition of authority in federal courts to engage in substantive review of deferred prosecution agreements, but also for its bold refusal to allow judges to be marginalized into factotums whose only responsibility is to sign papers placed in front of them: "a pending federal criminal case is not window dressing. Nor is the Court, to borrow a famous phrase, a potted plant. By placing a criminal matter on the docket of a federal court, the parties have subjected their DPA to the legitimate exercise of that court's authority."[91]

*Judges are not potted plants*. Implicit in these words is a demand for respect: judges are fundamental to a free society and deserve the respect that comports with that role. More than that: Judge Gleeson's words are an assertion of power. He readily acknowledged that if the Justice Department had decided not to prosecute – if it had never filed suit and brought the federal courts in to the process – then the court would have no say in limiting the department's discretion. But, having invoked the court's jurisdiction, the Department also submitted to its authority. A court can exercise authority over matters pending before it "in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination."[92] Although Judge Gleeson also recognized that his review of the deferred prosecution agreement was necessarily deferential – he had no

[90] 18 U.S.C. § 3161(h)(2).
[91] *United States v. HSBC Bank USA*, 2013 WL 3306161 (E.D.N.Y., July 1, 2013) (footnote deleted).
[92] Id.

difficulty concluding that the agreement passed muster under the appropriate standard – he resolutely insisted that his authority was real and substantial, and not narrowly circumscribed to the technical issues under the Speedy Trial Act.

A different view of the judicial role is manifest in a decision out of the D.C. Circuit, *United States v. Fokker Services B.V.*,[93] involving a deferred prosecution agreement with a company charged with sanctions violations. District Judge Richard Leon, invoking his supervisory power, refused to approve the agreement under the Speedy Trial Act, concluding that the government had been too lenient with the defendant. The Court of Appeals for the District of Columbia Circuit reversed, issuing an opinion endorsing the "potted plant" role for the judiciary in supervising the exercise of prosecutorial discretion: "Congress, in providing for courts to approve the exclusion of time pursuant to a [deferred prosecution agreement], acted against the backdrop of long-settled understandings about the independence of the Executive with regard to charging decisions. Nothing in the statute's terms or structure suggests any intention to subvert those constitutionally rooted principles so as to enable the Judiciary to second-guess the Executive's exercise of discretion over the initiation and dismissal of criminal charges."[94]

The *HSBC* and *Fokker* cases arose in the context of criminal prosecutions. Concerns about the role of the judiciary in regulatory settlements are also voiced in civil cases. *SEC v. Citigroup Global Markets, Inc.*[95] involved a settlement of civil securities fraud charges against a major bank. The parties presented the resulting consent decree to federal District Court Judge Jed Rakoff in the expectation that he would sign the papers. Rakoff, however, refused to be

---

[93] 818 F.3d 733 (D.C. Cir. 2016).
[94] Id.
[95] *SEC v. Citigroup Global Markets, Inc*., 827 F.Supp.2d 328 (S.D.N.Y. 2011).

steamrolled. He demanded an explanation of why the SEC had settled for so little – and then rejected the settlement on the ground that it was not fair, adequate or reasonable when assessed from the standpoint of the public interest. Rakoff's opinion gave eloquent voice to the concern, evident in all green shoot cases, that courts were being marginalized by the power of the administrative state:

> An application of judicial power that does not rest on facts is worse than mindless, it is inherently dangerous. The injunctive power of the judiciary is not a free-roving remedy to be invoked at the whim of a regulatory agency, even with the consent of the regulated. If its deployment does not rest on facts—cold, hard, solid facts, established either by admissions or by trials—it serves no lawful or moral purpose and is simply an engine of oppression.[96]

Rakoff's rebellion threatened to disrupt the long-established, convenient consent decree process. If judges were to play the active role contemplated by Rakoff's opinion, then the settling parties would in every case face the uncertainty and inconvenience of having to explain and justify the reasons for their actions.

On appeal, the Second Circuit tamed the most disruptive features of Judge Rakoff's opinion, but also preserved a role for federal courts.[97] The appeals court reversed Judge Rakoff's order, finding that it constituted an abuse of discretion insofar as it asserted the power to review the adequacy of SEC consent decrees. The proper standard of review was more limited: the district court should determine "whether the proposed consent decree is fair and reasonable, with the additional requirement that the "public interest would not be disserved" . . . in the event that the consent decree includes injunctive relief. Absent a substantial basis in the record for

[96] Id. at 335.
[97] *S.E.C. v. Citigroup Global Markets, Inc*., 752 F.3d 285 (2d Cir. 2014).

concluding that the proposed consent decree does not meet these requirements, the district court is required to enter the order."[98]

Increasingly, these days, regulatory settlements include agreements to appoint a monitor to oversee the defendant's compliance with the terms of the decree. These monitors prepare and file reports describing the defendant's performance of its settlement obligations. Typically, neither the defendant nor the government wish the monitor reports to become public, and therefore cause them to be filed under seal. The question then arises whether the court administering the settlement should release some or all of the reports for public review. In another aspect of the *HSBC* case discussed above, Judge Gleeson granted, over the parties' objection, a motion to unseal a report by the settlement monitor. Judge Gleeson held that the report, having been filed in court pursuant to the settlement agreement, was a judicial record subject to rights of public access both under the common law and the First Amendment.[99] In arriving at this conclusion, Judge Gleeson gave voice to the common theme of green shoot opinions: the need to preserve a meaningful role for the courts in the judicial process. The monitor's report was a judicial record, in his view, because:

> There is an open criminal case before me. As the government puts it, my authority here "is to ensure that the DPA remains within the bounds of lawfulness and respects the integrity of this Court." . . . I cannot perform that task without receiving at least some updates from the parties about HSBC's compliance with the DPA.[100]

In other words, the court, in Judge Gleeson's opinion, has an obligation, not just to passively accept the representations of the parties regarding compliance with the agreement but rather

[98] Id. at 294 (citation omitted).
[99] *United States v. HSBC Bank USA*, 2016 WL 347670 (E.D.N.Y. Jan. 28, 2016).
[100] Id. (citation omitted).

affirmatively to monitor the case in order to assure itself that the terms the court had approved are actually being carried out.

## III. Possible Reforms

As yet, these green shoots of dissent have not generated any substantial movement towards meaningfully enhancing the role of the judiciary in limiting the discretion of the administrative state. In several of the cases cited above, moreover, efforts by trial courts to carve out a larger judicial role were countermanded by higher authority. However, one may infer from these and other cases that at least some Supreme Court Justices, and probably many judges of other courts, would be receptive to such reforms. This section explores a few tentative ideas, put forth not as concrete suggestions for action but rather as possible topics that courts might explore.

*Restoring the attorney-client privilege*. Courts need to firmly establish the principle that an effective attorney-client privilege applies to administrative enforcement proceedings. The privilege should protect, not only direct provision of legal advice, but also certain categories of fact. Specifically, a fact known to the target of an investigation should be protected against compelled disclosure if the following conditions are met: the fact was disclosed to an attorney for the company in connection with the provision of legal advice or representation; the fact was material to the subject matter of the advice or representation; and the fact would likely not have been discovered had it not been provided to the attorney in this context. Facts which are the fruits of investigations supervised by attorneys should not be discoverable. This standard would arguably provide an appropriate balance between the legitimate interests of law enforcement in obtaining information pertinent to possible violations of law and the compelling need of the target to obtain legal advice and representation based on an informed understanding of the underlying facts.

*Enhancing transparence of administrative enforcement*. Yet another means for checking the largely unfettered discretion in the administrative state is to increase the transparency of the process. Judge Gleeson's opinion in *United States v. HSBC Bank USA* is exemplary.[101] By insisting on the right to review a monitor's reports documenting compliance (or noncompliance) with a deferred prosecution agreement, Judge Gleeson demanded greater transparency between the parties and the court. And by unsealing and releasing a redacted copy of the report, Judge Gleeson facilitated an additional check on administrative discretion by allowing the public to review information pertinent to the implementation of the agreement. Judge Gleeson's opinion in this matter, being grounded in a First Amendment right of access, cannot be overridden by Congress (although it might be rejected by a higher court). Given the fact that administrative courts today exercise authority over a large part of the judicial power of the United States, it appears that the right of access recognized in Judge Gleeson's opinion would apply also to decisions by administrative tribunals.

*Enhanced substantive review of administrative action*. The standard for judicial review of administrative action is appropriately narrow, but should not be a treaty of surrender. Judges can and should diligently exercise their responsibility to ensure that the actions of administrative agencies are not arbitrary, capricious or an abuse of discretion and that they fully comport with law. Judge ____s opinion in the recent *MetLife* case provides an example of appropriately deferential, but nevertheless meaningful review.[102] The Financial Stability Oversight Council

[101] Id.
[102] See *MetLife, Inc. v. Financial Stability Oversight Council*, __ F.Supp.3d __ (D.D.C. 2016).

(FSOC) exercised its authority under the Dodd-Frank Act to designate MetLife, an insurance company, as a "systemically important financial institution" (SIFI). The designation carried with it onerous responsibilities and subjected the company to bank-like regulation by the Federal Reserve Board. Judge Collyer rejected the designation in a devastating opinion pointing to the FSOC's failure to follow discernible standards, failure to undertake reasoned analysis, failure to engage with bona fide arguments put forward by the company, pervasive use of unsupported assumptions, and unexplained changes of position. This sorry bill of particulars would probably not have sufficed to overcome *Chevron* deference in its maximal form, but it was more than enough for Judge Collyer. Although the opinion does not say so, one senses in the judge's opinion the possible surmise that FSOC's designation of MetLife might have had more to do with politics than with principle: Congress and the public expected that FSOC would designate a credible number of nonbank institutions as SIFIs and MetLife was selected to meet those expectations even though it did not in fact pose systematic risks to financial stability. Excessive exercises of administration might be brought under greater control if more judges exercised robust rather than anemic scrutiny of agency action under the "arbitrary or capricious" standard.

*Aggressive application of the rule of lenity*. The core problem of over-criminalization cannot be corrected by judicial action. As long as Congress perceives a political benefit in enacting "tough" sanctions, the regulatory system will increasingly be placed in the hands of district attorneys and enforced with indictments and prosecutions. Courts might, however, offer some degree of control at the margin by aggressively employing the rule of lenity – the principle that in the event of ambiguity, criminal laws will be interpreted in a light favorable to the accused. The *Yates* case discussed above, involving the prosecution of a commercial fisherman who jettisoned some undersized red grouper, provides an example of how the rule of lenity can be used to mitigate the unfairness and irrationality of extreme interpretations of criminal laws by unscrupulous federal prosecutors. If the courts made more aggressive use of their power of interpretation to police against abuses of this sort, prosecutors might exercise greater self-restraint in charging decisions and the criminal enforcement of statutes might be better contained within the ambit of their reasonable use.

*Judicial review of deferred prosecution agreements*. Judges can and should exercise a degree of substantive scrutiny of deferred prosecution agreements, either under their inherent supervisory power or as an incident to their power to approve the tolling of time under the Speedy Trial Act. The scrutiny should be deferential, both because judges are not experts at evaluating the underlying policy considerations and because the power to reject an agreement provides no recourse to defendants who may have been coerced into the settlement. Judge Gleeson drew the right line in the *HSBC* case: he insisted on exercising the power to evaluate the merits of the agreement, but then, having exercised a deferential standard of review, concluded that the settlement before him easily passed muster. Judge Leon's opinion in the *Fokker* case, in contrast, delved deeply into the merits and, in effect, substituted the court's judgment for that of the parties; the court of appeals rightly reversed on the ground that the judge had exceeded the scope of his discretion.

*Judicial review of civil settlements*. In cases where a civil regulatory settlement must be presented to a court for approval, the court's review should be more than cursory. The court should diligently inquire into the reasonableness of the agreement, keeping in mind that the judge is acting as a *de facto* fiduciary for the public. One can easily sympathize with Judge Rakoff's frustration, in the *Citigroup Capital Markets* case, with the insultingly menial role he had been assigned by the settling parties. Judge Rakoff rightly refused to be treated as a sort of glorified court clerk whose sole function was to sign a paper placed before him. However, like Judge Leon in the *Fokker* case, Judge Rakoff may have overstepped the bounds of his discretion when he second-guessed the SEC and concluded that the penalty imposed was grossly insufficient in light of the severity of the offenses. Judicial review of civil regulatory settlements, like judicial review of deferred prosecution agreements, should be meaningful but also deferential. How to draw that line is a question calling on the judge's experience, discretion and judgment; but federal judges face decisions like this frequently and there is no reason to suppose they would be incapable of performing the task.

*Revitalizing Ex Parte Young*. The decision in *Ex Parte Young* deals with the risk that a private party might be forced to capitulate to a regulator's demands, even though the party has a bona fide defense, because the party cannot bear the risk of the penalties it would incur if it undertakes the challenged conduct and is ultimately held to have committed a violation. That concern has only become more salient with the growth of the administrative state. A court wishing to interpose a modicum of protection for defendants in this situation might consider revitalizing the *Ex Parte Young* case by declaring that in cases where the gravity of the possible sanction makes it infeasible for a regulated party to incur the risk of engaging in arguably legal conduct, Due Process requires that the party must be afforded a reasonable opportunity to obtain an advance judicial determination of the legality of a proposed course of action before the sanction may be imposed. This, in effect, is already the rule that the Supreme Court seeks to administer, although not under the rubric of *Ex Parte Young.* In cases such as *Sackett v. EPA*, the Supreme Court has struggled to confer a right of pre-sanction judicial review, and has done so for the specific purpose of rescuing parties from the dilemma described above. A simpler, more direct, and more reliable way of reaching to same result is to require that principles of due process require that parties who are exposed to potentially devastating sanctions be afforded to reasonable access to the courts.

*Enhanced requirements of notice*. Due process requires that parties be given reasonable notice that their conduct is illegal before they can be punished for violating the law in question.[103] A court wishing to impose limits on the out reaches of administrative discretion could, in an appropriate case, establish the proposition that regulation by enforcement, of the sort currently being undertaken by the Consumer Financial Protection Bureau, is subject to a backstop limit under the Due Process Clause: the Constitution prohibits the imposition of punitive sanctions on a party who had no reasonable expectation of liability, even if an expansive interpretation of the governing statute could cover the activity in question. The *Yates* case is a possible example of a case where this principle could have been invoked. The Dodd-Frank rules in question were so vague and general that – as the Justice Department contended – a provision that was drafted with a view to prohibiting the shredding of inculpatory documents could, as a matter of logic, be stretched to cover the act of throwing an undersized grouper off the side of a commercial fishing vessel. The Court addressed this problem through a laborious effort of statutory construction, but it could have arrived more parsimoniously at the same result by applying the Due Process principle that the statute in question did not provide sufficient notice that it would cover conduct so far removed from its original context.

## Conclusion

The administrative state – that modern Leviathan whose reach extends to every nook and cranny of modern life – has evolved to the point where it now operates virtually free of judicial oversight or supervision. This development is unfortunate. Strong and effective administration is

[103] Cite.

essential to protecting the public against abusive or dangerous behavior by the private sector,; but when the administrative state becomes too powerful, the danger of private malfeasance becomes matched by the danger of official overreaching.

The Framers of the Constitution, wise in so many respects, well understood this problem. Madison's *Federalist 51* cogently sets forth the basic issue: "In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."[104] Administrative agencies need to be powerful to control the propensity of people and firms to act in ways contrary to the public interest; but having obtained the power, the problem becomes how to control the administration.

The recent *Fokker* case vividly illustrates the conflicting considerations that judges experience when asked to lend their services to the administrative state. On the one hand, they recognize that the role of courts is necessarily limited in this context. Judges lack the expertise, the resources, and the power to exercise a proactive role in supervising administrative action. And they are acutely sensitive to the limitations on their constitutional authority in the context of proceedings in which both the legislative and the executive branch have manifested an intention that the courts should play a limited role.[105] Considerations such as these proved decisive in *Fokker*. On the other hand, federal courts are also aware of their important role in the constitutional system and of their responsibility to protect the public against the harms that flow from inappropriate exercises of official power. This concerns appear to have motivated Judge Gleeson's claim to supervisory authority in the *HSBC* case.

---

[104] The Federalist No. 51 (Madison).
[105] Cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 636 (1952) (Jackson, J., concurring) (recognizing that executive authority is at a "maximum" when backed by clear congressional authorization).

While these concerns cannot be fully reconciled, a task for the federal judiciary is to discover a practical accommodation between them – one that preserves ample resources of power in administrators to cope with threats to the public welfare posed by today’s large and complex organizations; but one also that is subject to effective checks and balances from the judicial branch. During the heyday of the administrative state, concerns about the marginalization of judges were eclipsed by enthusiasm for the idea that administrative agencies, through the wise application of technical expertise and sound, apolitical judgment, could act to materially improve the lives of all. Today, this faith in the administrative process has given way to a more skeptical attitude: one that recognizes the potential value of the administrative state, but that also is wary of its potential for excess or abuse. Concerns about administrative overkill have sparked green shoots of resistance on the part of individual Justices and lower court judges. It is still too late to predict whether these tentative expressions of discontent will evolve into a significant effort to impose controls over the administrative process, or whether they will result in little or no change to the ever-expanding trajectory of administrative power.