

JUDGES, BUREAUCRATS AND THE LEVIATHAN STATE:
A REPLY TO PROFESSOR FUNK (35 YEARS LATER)

BY
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I.	INTRODUCTION.....	751
II.	MY 1984 ESSAY	752
III.	PROFESSOR FUNK’S 1984 REPLY	755
IV.	MY BELATED REPLY	759

I. INTRODUCTION

In 1984 I published a short article titled “The Role of Courts in the Implementation and Administration of Environmental Legislation.”¹ The article was based on a lecture I had delivered at Aarhus University in Denmark. A few months later, Professor Bill Funk published “Alive and Well in the Leviathan State: A Reply to Professor Huffman.”² Because both articles were published in Lewis & Clark Law School’s alumni magazine, *The Advocate*, it is possible that Bill and I are the only people who ever read them. After all, alumni are more likely to look for news about their classmates than for scholarly essays in their alumni magazine.

Now, thirty-five years after Professor Funk’s reply, it seems timely to reply in turn. The topic remains as relevant as ever, and it is possible that both Professor Funk and I have learned a few things over the intervening decades. Having reread my words of nearly four decades ago and Bill’s thoughtful reply, I can say with assurance that the questions we examined as young law professors have, if anything, grown more complicated and pressing.

I will summarize below the substance of our two positions of old, but first I must acknowledge that Professor Funk is and has been for many years one of the leading administrative law experts in the country. He is the co-author of one of the leading administrative law casebooks, *Administrative Procedure and Practice: Problems and Cases*, as well as *Administrative Law: Examples & Explanations and*

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¹ James Huffman, *The Role of Courts in the Implementation and Administration of Environmental Legislation*, 3 *ADVOCATE*, no. 2, Spring 1984, at 9–13.

² William Funk, *Alive and Well in the Leviathan State: A Reply to Professor Huffman*, 4 *ADVOCATE*, no. 1, Autumn 1984, at 14–19.

the Federal Administrative Procedure Sourcebook. He has also chaired the Administrative Law Section of the Association of American Law Schools and of the American Bar Association. He served as editor in chief of the latter section's *Administrative & Regulatory Law News* and is a member of the American Law Institute and a Fellow of the American Bar Foundation.

II. MY 1984 ESSAY

Upon rereading my 1984 essay I was somewhat chagrined to realize that I then purported to know something about administrative law. The fact of the matter is that my exposure to the topic was limited to an administrative law class in law school that I did not attend because I found the professor unbearably boring. It was my good fortune that that professor was the author of the casebook, a hornbook and a multi-volume treatise, all of which followed an identical outline with succinct bullet points at the beginning of each chapter which saved one from reading the text and served well the exam needs of a truant. As it happens, those same bullet points got me through the bar exam several years later. So, I am grateful that Bill was both gracious and collegial in not underscoring in his reply the primitive state of my knowledge of administrative law. Having escaped exposure as something of a fraud so many years ago, why not once again sally forth into Bill's rightful territory.

In my essay of thirty-five years ago I argued that the judicial and academic debates of the day regarding the proper role of the courts in administrative law assumed a binary choice between procedural and substantive review. But that did not, I suggested, reflect the concerns of those whose lives were impacted on a daily basis by burgeoning environmental regulation. The courts of their experience, designed in contemplation of more modest government, had little occasion to question the merits of government actions. Judicial review of private claims against government or government claims of private law-breaking is, I suggested, "quite a different matter from judicial review of administrative regulations designed to protect against the unknown risks associated with a substance having unknown impacts on the environment."³ I should have said uncertain in both cases, not unknown.

My argument, at the suggestion of my Aarhus host, drew upon an article published in another alumni magazine by Professor Roger Cramton titled "Judicial Lawmaking in the Leviathan State"⁴—hence the title to Professor Funk's reply. Cramton expressed two concerns about contemporary developments in the law: 1) the importance being placed on procedural technicalities rather than questions of guilt or innocence in criminal law, and 2) the expanding role of judges as lawmakers on social and economic issues.⁵ He went on to offer five explanations for these concerns:

- 1) The role of the judiciary is inevitably changed in the Leviathan state.

³ Huffman, *supra* note 1, at 9.

⁴ Roger C. Cramton, *Judicial Law Making in the Leviathan State*, L. ALUMNI J. UNIV. CHI. L. SCH., Fall 1976, at 12.

⁵ *Id.*

- 2) The confrontational style of then contemporary America.
- 3) The declining state of other mechanisms of social control like the church, the family, and a shared set of values.
- 4) The growth of interest groups in politics.
- 5) The failure of the executive and legislative branches of government to deal with the problems of the day.⁶

To be clear, Professor Cramton did not offer this diagnosis just yesterday, although he might well have were he still alive. But if he was even close to right, surely the issues Bill and I wrote about remain relevant today.

Cramton suggested two models of judicial review that lawyers today will more likely recognize as today's adjudicatory and rulemaking models of administrative procedure. One model involves the adjudication of rights, which Cramton claimed "adds to the integrity and acceptance of the administrative process."⁷ The other model involves "general problem-solving [rather] than . . . dispute resolution."⁸ This model, which Cramton clearly found problematic, arose either because action was thought necessary but the executive and legislature had failed to act, or because objection was taken to executive interpretation or application of general legislative enactments.

After summarizing Cramton's argument as above, I then offered a brief history of judicial review in the United States. For most of our national history, courts resolved disputes between two private parties and between private parties and the state (including constitutional claims of individual right and claims by or against the government when acting in its proprietary capacity). The courts were not perceived to have any role in the defining of the public interest. That was the business of the legislature, with assistance from the executive.

Chief Justice John Marshall's explanation of the judicial role in the constitutional separation of powers drew upon and then guided this dispute resolution history. The judicial role, as Chief Justice Marshall saw it, is to resolve disputes based on the particular facts of the case and the applicable law. He famously wrote in *Marbury v. Madison*⁹ that "[i]t is emphatically the province and duty of the judicial department to say what the law is."¹⁰ As we shall see, this statement has been misunderstood, if not consciously distorted, by those who would have the courts rewrite the law as problem solvers, but for Chief Justice Marshall it meant only that to fulfill their constitutional responsibility as arbiters of legal disputes, courts must decipher the controlling law. To amend existing law or make new law for the purpose of promoting the public good would violate the constitutional separation of powers and constitute an affront to the rule of law.

In the resolution of private disputes and disputes between private parties and the government, courts developed various procedural hurdles to assure that plaintiffs had suffered legally cognizable harms at the hands of the defendant.

⁶ *Id.* at 12–13.

⁷ *Id.* at 13.

⁸ *Id.*

⁹ 5 U.S. (1 Cranch) 137 (1803).

¹⁰ *Id.*

Judges might have sympathy for the offended and for those injured by their own or a third party's doing, but they could offer legal remedies only to those with demonstrated legal rights infringed by the defendant.

Once courts entered the realm of problem solving, they were faced with challenges to government action (and today inaction)¹¹ “not on the basis of essentially bilateral agreements between the individual and the state or specific guarantees of individual right, but rather on the basis of general claims of unauthorized government action.”¹² Because these claims were often indistinguishable from the arguments the plaintiffs and others had made in lobbying the legislature, the courts developed the doctrine of standing. Having opened the door to judicial policymaking, the courts found it necessary to narrow the field of supplicants—to preclude those with generalized grievances whose remedy was properly political and admit only those with personal injuries caused by the objected-to government action. While the standing hurdle has sometimes been set very low,¹³ it persists as an artifact of Marshall's view of an apolitical judiciary—it is not for the courts to grant policy victory to those who have lost in the legislature.

The new environmental laws of the 1960s and 1970s came in two forms: regulation of private actions and regulation of governmental impacts on the environment. Both types of laws left agencies to write the actual regulations that would achieve the objectives set forth by Congress. Just as the writing of such regulations is unavoidably a quasi-legislative activity, so too is judicial review of the substance of those regulations. Once courts reach beyond questions of legal process to challenges to the adequacy of the substance of regulations, they are in the problem-solving business. And once courts are in the problem-solving business, they will be faced with endless petitions for what petitioners imagine will be better and more effective regulation. As Professor Cramton observed early in the modern era of environmental regulation: “This is one field in which the appetite for nostrums does not fade with the demonstrated failure of prior cures. Each reformer, after criticizing the failure and inefficiency of government, then concludes that the remedy is—more of the same!”¹⁴

The combination of general and often vague legislative enactments and legal claims in the name of the public interest transformed administrative processes from almost exclusively adjudicatory to predominantly rulemaking—from quasi-judicial to quasi-legislative. I suggested in my 1984 essay that review of the former is comfortably within the judiciary's constitutional role, while review of the latter casts federal and some state courts in a role for which they lack democratic legitimacy and for which all courts are not particularly competent.

While few judges assert any policy making authority,¹⁵ it is, I suggested, a reality of substantive review of administrative rulemaking. If judges adhere to the

¹¹ See discussion *infra* notes 55–67 and accompanying text on climate change litigation.

¹² Huffman, *supra* note 1, at 10.

¹³ *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 683–85 (1973). On generalized grievances in standing law, see *Warth v. Seldin*, 422 U.S. 490, 499–500 (1975).

¹⁴ See Cramton, *supra* note 4.

¹⁵ A notable exception is former Judge Richard Posner of the Seventh Circuit Court of Appeals who argued for what he called judicial pragmatism—judges justifying their decisions on precedent but ruling with an eye to what is best for society. See RICHARD POSNER, *LAW, PRAGMATISM AND*

2019] *JUDGES, BUREAUCRATS & THE LEVIATHAN STATE* 755

adjudicatory model of review, their focus will be on process. Has the agency enacted its rules in conformance with established procedures? That was, I pointed out, the preference of Judge Bazelon of the District of Columbia Circuit Court of Appeals. But Judge Bazelon's colleagues, Judges Wright and Levanthal,¹⁶ urged that review of agency rulemaking should more resemble the legislative process than the judicial process. The concern, argued Wright, was fairness to the public, not to particular individuals. This could be done, he contended, in a restrained manner that would not transform the courts themselves into quasi-legislative bodies.

My conclusion from all of this was that the rulemaking model of Judges Wright and Levanthal was more problematic than the adjudicatory model of Judge Bazelon. While focusing only on process could have the effect of tying agencies in knots, it would steer courts away from the scientific and value questions inherent in policy making—particularly in the context of the environment. Even then it was commonplace for environmental advocates to call for letting science determine environmental policy. But science can only inform the value choices inherent in setting policy. Judge Bazelon warned of the “wizardry of experts.”¹⁷ There are no experts on what values should dictate policy—it is always a matter of tradeoffs that in a democracy should not be made by unelected judges.

As I will make clear in due course, my thinking on all of this has advanced, or at least changed, over the passing decades. Policy making by courts is a problem, but then so too is policy making by unelected bureaucrats. But first to Professor Funk's, until now, unanswered reply.

III. PROFESSOR FUNK'S 1984 REPLY

Bill described two parallel developments in judicial review: 1) a shift from judicial resolution of private disputes to “lawsuits brought to vindicate the public interest,” and 2) a shift from adjudication to rulemaking in response to federal regulation of environmental harms, consumer products, occupational safety, and highway traffic safety.¹⁸ So far it seems we were on the same page. Bill also agreed that an issue at the time was whether judicial review of administrative decisions should focus on process or substance.¹⁹

He then attributed to me the view that the debate over process versus substance obscured more fundamental issues, namely: 1) the role of courts relative to legislative and executive branches in lawmaking, 2) the competence of courts in this role, 3) the extent of the Leviathan state, and 4) the adequacy of traditional

DEMOCRACY (2003); see generally RICHARD POSNER, *BREAKING THE DEADLOCK, THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* (2001). For my critique of Posner's theory of judicial pragmatism, see James Huffman, *Like the Supreme Court, Posner Is Right for the Wrong Reasons*, 1 L., PROBABILITY & RISK 67 (2002). For an example of a judge who takes Judge Posner's theory to heart, see *infra* notes 58–67 (discussing *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016)).

¹⁶ See generally J. Skelly Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375, 383 n.34 (1974); Harold Levanthal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PENN. L. REV. 509, 511 (1974).

¹⁷ David L. Bazelon, *Science and Uncertainty: A Jurist's View*, 5 HARV. ENVTL. L. REV. 209, 214 (1981).

¹⁸ Funk, *supra* note 2, at 14.

¹⁹ *Id.*

institutions to deal with it.²⁰ It was a good summary, even though my concerns about the Leviathan state were mostly a subtext. Although I had not defined the Leviathan State, having simply repeated the term from the title of Professor Cramton's article, Bill's suggestion that I used the term as a "metaphor for the pervasive role that government has come to play in the economic and social life of our nation"²¹ seems about right. And this was before Bill knew me to be a confirmed, but reasonable, libertarian, he having only just abandoned the real world (well, government) for a position on our faculty.

If the Leviathan state is one in which the government defines and ensures the quality of the air we breathe and the water we drink, and undertakes to cure crime, unemployment, illiteracy, sickness, and other social ills, then Bill did not dispute its existence. Indeed he added the insight that "looking to government for solutions . . . [leads naturally] to government being viewed as a source of the problems . . . [by] doing too much or too little."²² "The answer . . .," Bill observed sardonically, "is for government to do it right."²³ Which means, of course, the Leviathan state never recedes even when it fails.

But this was not a concern for Bill, nor, I suspect, does it concern him today. Noting that it had become "fashionable to decry the Leviathan state," and declining to "attempt a defense of the concept of the all-pervasive government," Bill did observe that while the realities of the Leviathan state "may not dissuade some from expending their intellectual and working energy on their elimination—an ethical position I can only admire, not admonish—some of us would rather dedicate our efforts to the more mundane realm of the feasible."²⁴ In other words, Bill admired my propensity for tilting at windmills.

Bill suggested two reasons the government had become pervasive in environmental matters: 1) the growth of scientific knowledge, and 2) "the reaching of a critical mass from the growth of population and economic development."²⁵ In other words, we were coming to understand a lot more about our impacts on the environment, and the combination of an expanding and more affluent population was magnifying those impacts. Because the environment is in many respects a commons, Bill argued, environmental problems were best understood as resulting from the market failures described by Garrett Hardin as "the tragedy of the commons."²⁶ Intervention to correct for these market failures was called for, and who but the government could effectively intervene? Indeed Bill contended that "[g]overnment necessarily . . . [decides about relative costs and benefits] either affirmatively or passively."²⁷ That is, by doing nothing the government is deciding that the status quo is preferable to any alternative.

Accepting that government intervention occurs even when no affirmative action is taken does not resolve what Bill seemed to view as the more critical

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 15.

²⁶ Garrett Hardin, *The Tragedy of the Commons*, 162 *Sci.* 1243, 1244 (1968).

²⁷ Funk, *supra* note 2, at 15.

question—the form of that intervention. The default form, according to Bill, was the common law. But he did not think it was up to the task because: 1) proving causation can be difficult in the case of environmental harms, 2) standards of liability (intent, negligence, strict) are often not applicable, 3) remedies in the form of injunctive relief or damages are insufficient, and 4) there is no provision for the prevention of possible, but not probable, harm before it occurs.²⁸

The inadequacies of the common law might be remedied by the common law courts which, as Bill notes, have “adapted over the centuries to changing concepts and new knowledge.”²⁹ But this would embroil the courts, Bill continued, in “making societal judgments about . . . new kinds of factual questions, (e.g. causation) and . . . about basic values.”³⁰ Moreover, these judgments would be made in the “context of the traditional adjudication of private disputes . . . [leaving judges] to their own basic knowledge and the arguments and evidence of the two particular opposing parties before the court.”³¹ It is “[n]eedless to say,” said Bill, that “this limitation might effectively prevent the court from reaching the ‘best’ solution.”³²

Given these and other shortcomings of the common law, concluded Bill, “society decided not to leave environmental safety and health protection to the common law.”³³ Instead, “through its elected representatives, [society] provided for other organs of government to regulate a host of the concerns that were perceived as being inadequately dealt with simply by the common law.”³⁴ This is as it should be, argued Bill, because “determining the relative weights to be given to competing values should . . . be the function of the elected representatives of the people.”³⁵ But devotion to popular sovereignty does little to resolve the challenges of judicial review. Much is effectively delegated to agencies because Congress is generally vague on both the facts and its purposes. Sometimes legislation is purposely vague to accommodate differing objectives, and even when all are in agreement language cannot eliminate all ambiguities nor accommodate changing societal values. The expansion of opportunities for public participation in the administrative process may have helped legislators get the values right, at least at the moment, but as Bill noted, public participation is more a “surrogate for the political aspect of legislative lawmaking, to inform and enlighten the judgmental determinations that in a theoretical world would be made by the legislature.”³⁶

After suggesting that public interest objectors to administrative actions bring a quasi-political aspect to the quasi-legislative rulemaking process, Bill contended that judicial review of public interest claims is really much like judicial adjudication of private rights claims—it goes to “statutory authority, procedural regularity, factual support and reasonable judgment.”³⁷ And by way of justifying

²⁸ *Id.* at 15–16.

²⁹ *Id.* at 16.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 17.

³⁶ *Id.*

³⁷ *Id.* at 18.

the quasi-legislation inherent in rulemaking, Bill returned to the not uncommon theme that there is nothing new about judicial lawmaking. “It was and is . . . the essence of common law. It is only where constitutions and statutes define the law, or delegate its creation to entities other than courts, that we question judges making law.”³⁸ But Bill did acknowledge that judicial review of modern environmental law, as I had pointed out, is problematic because of the centrality of scientific facts and value judgments, neither of which courts are particularly well suited to address.

In my essay I had suggested that courts have a choice between the Judge Bazelon adjudicatory model and the Judge Wright/Levanthal rulemaking model, but Bill contended that the Judge Bazelon model had been laid to rest in *Vermont Yankee v. Natural Resources Defense Council*³⁹ in which then Justice Rehnquist ruled that courts could not mandate procedures not required by statute.⁴⁰ We were thus left with the rulemaking model that Judge Wright argued could be done in a restrained manner. According to Bill, this would resemble the rational basis level of review in Equal Protection doctrine. Recognizing that agencies are “bureaucratic, not democratic,” and that “the institutional safeguards and limitations on legislatures are largely missing,” courts would be “grudging in their deference.”⁴¹ They would require “the agency . . . [to] persuade the court that it is acting reasonably, rather than have the court assume it.”⁴²

But there is an “evil seed” in non-deference by the courts,⁴³ suggested Bill. Because courts are less connected to the political process and less competent on questions of science, there is the risk of judicial lawmaking that I had suggested in my essay. Bill’s solution—ever the advocate for reason and a middle way—was what Judge Bazelon has labeled “constructive cooperation” between agencies and courts, implementing the old adage, as Bill put it, that “two heads are better than one.”⁴⁴ Of course old adages do not assure success. “Courts have on occasion both improperly substituted judgment and improperly deferred to agencies,” noted Bill, so no one form of review “shall gain and maintain dominance.”⁴⁵ Leaving us with a bit of that and a bit of the other.

Not until the very end of his essay did Bill get to the heart of a classical liberal’s concern. It comes down to two issues, concluded Bill, the Leviathan state and “the institutions and mechanisms by which it is controlled and checked.”⁴⁶ “The metaphor of the Leviathan state includes not just the neutral concept of the all-pervasive government, but also the negative implication of a loss of freedom resulting from the growth of government regulation and responsibility.”⁴⁷ Exactly. But Bill rightly pointed out that freedom from pollution may require restraints on freedom from government interference with individual choice. “[T]he Leviathan state might also be seen as a metaphor for a social choice relegating freedom [in the

³⁸ *Id.*

³⁹ 435 U.S. 519 (1978).

⁴⁰ *Id.* at 558.

⁴¹ Funk, *supra* note 2, at 18.

⁴² *Id.*

⁴³ *Id.* at 19.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

libertarian sense] to second place among competing values.”⁴⁸ There, in summary, are the arguments Bill and I made some 35 years ago. What say I in reply?

IV. MY BELATED REPLY

As for the case for environmental regulation, both then and now, I take issue with Bill’s characterization of the tragedy of the commons as a market failure. Recognizing that Professor Carol Rose and others have offered important qualifications to the simplistic idea that a commons always leads to tragedy,⁴⁹ it remains undisputed that a resource commons often does lead to wasteful depletion or destruction of the resource in question. Where it does, both free-marketeers and government-interventionists (dare I call them socialists) claim Garrett Hardin as their own. For the former, property rights are the answer. For the latter, centralized planning is the solution.

As with most such stark divisions, of which we have more today than we had in 1984, the practical solution lies somewhere in the increasingly vacant middle. Perhaps this is what Bill was saying about my suggesting that we have a choice between adjudication and rulemaking models of judicial review. But getting to the middle in solving the commons problem requires that we understand the nature of the problem, and it is more one of institutional than market failure. Absent property rights, there can be no market. Markets are about trading and in a commons there is nothing to trade. With respect to some commons, like air and the ocean, establishing property rights is difficult, but not impossible as we have learned from tradable emissions permits⁵⁰ and tradable fishing quotas.⁵¹ By labeling the tragedy of the commons a market failure, Bill implied that government intervention is the only solution. By understanding that the tragedy may be rooted in institutional failure, we broaden the range of possible solutions and thus may avoid some of the downsides of the Leviathan state.

Nowhere in his essay did Bill address the benefits of markets beyond the desire of individuals to be free from state interference. The tragedy of the commons is that scarce natural resources are wasted. In our age of sustainability we should aspire to those institutional arrangements that minimize waste and maximize benefits from the use of these scarce resources. While acknowledging that markets have distributional consequences, both earned and unearned, it should nevertheless be undisputed that humans have never devised a more effective institution for the efficient allocation of scarce resources and thereby the generation of wealth.⁵² Both the Leviathan state and the private market are means for allocating scarce

⁴⁸ *Id.*

⁴⁹ See Carol Rose, *The Comedy of the Commons: Commerce, Custom, and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986) (discussing the benefits of public ownership and recreation for society).

⁵⁰ *What is Emissions Trading?*, U.S. ENVTL. PROTECTION AGENCY, <https://perma.cc/W8KK-V978> (last visited July 13, 2019).

⁵¹ Gary Libecap, *The Tragedy of the Commons, Revisited*, DEFINING IDEAS (Mar. 21, 2017) <https://perma.cc/XDM7-VG7G> (explaining how tradable fishing quotas can combat the tragedy of the commons.).

⁵² By efficiency, I mean achieving that allocation of resources that provides the most benefit at the least cost, including the cost of resources consumed.

resources. In the former resources are allocated (and distributed) in response to political influence. In the latter they are allocated in response to prices that, if not distorted by government intervention, reflect both demand and supply. Whereas political allocation responds, at best, to vague and delayed signals on both supply and demand, markets respond to the instantaneous signals of constantly adjusting prices. Furthermore, without the efficiencies inherent in market transactions, there would be far less wealth for the Leviathan state to spend, with valuable resources wasted along the way.

A career's worth of experience tells me that the preceding paragraph will be read by many as a declaration that the market is the solution to every social challenge. I am confident that Bill, at least, recognizes that while my advocacy of liberty may be ideological, my advocacy of markets is practical. Markets are not the answer to every problem. There are market failures that result from our inability to establish property rights in particular resources (as yet), from high transactions costs (though the transactions costs of government are often higher) and from monopolization. And wealth distribution should be a concern for any believer in liberty. But markets do, in more circumstances than not, lead to more efficient use of scarce resources and to the generation of the wealth that provides the only wherewithal government has to do its good works and offset the inevitable disparities in wealth.

Bill's suggestion that common law courts are just one form of government intervention either: 1) ignored the fundamental difference between government sponsored adjudication of private disputes and government displacement or constraint of the private transactions that occasionally lead to those disputes, or 2) accepted the erroneous notion that common law courts are lawmakers in the same sense as are legislators. Common law adjudication is meant to be neutral as between allocational and distributional alternatives. Government regulation is meant to be anything but neutral on either question.

Bill contended that common law lawsuits between private parties cannot achieve the "best" solution because only the interests of the private parties are before the court.⁵³ But this sells short the genius of the common law. In a sense, the common law is like a market in bringing to the fore those questions worth (to the parties to the dispute) the cost of addressing. Although each lawsuit is a singular occurrence, like the transactions in a market, the aggregation of these lawsuits confirm the best rule to guide future conduct. Over time, as circumstances and values change, private litigants bring to the attention of the courts their perspectives on how existing law, as they would have it understood, will best serve its core purposes. Thus, what is a purely private dispute in the individual case is also a piece of the larger process of determining the best legal solution over time. The public interest is not absent from the common law process. To the contrary, judges in search of the best solution may well be better informed by having reference to past experience as represented in common law precedent than by relying upon abstract testimony from interested parties at a single point in time.

Even if courts have the capacity and wisdom to judge whether agency rulemaking serves the public interest, by what authority do they proclaim what the

⁵³ Funk, *supra* note 2, at 16.

2019] *JUDGES, BUREAUCRATS & THE LEVIATHAN STATE* 761

law should be? Lawmaking, stated Bill, “was and is . . . the essence of the common law.”⁵⁴ Given that generations of law students have been taught that the difference between statute and common law is that the former is made by the legislature and the latter by the courts, Bill’s statement was not surprising. But it is misleading at best. The common law grew out of the customs and practices of daily life. Common law judges simply formalized those customs and practices into rules for the resolution of the case before them. Those rules, in turn, provided guidance for future human interaction. It is what Douglas Whitman has labeled a “demand side” process, meaning that the rules that emerged were those established by past experience, not those thought best by judges.⁵⁵ Over time, with changing circumstances and community values made apparent by litigants, courts adapted the rules.

This was not lawmaking in the sense that legislatures make law. Rather it was modifying, in light of changing circumstances and values, the judicial account of the rules so that the purposes of the law would continue to be achieved. To be sure, there have been judges more than happy to make law in the legislative sense. But they are the aberration, as well they should be, under our constitutional separation of powers and the rule of law. Justice Rehnquist, who Bill cited as the author of the death of Judge Bazelon’s process model of judicial review, had it right in ruling that the courts cannot, in Bill’s words, “create a common law of agency rulemaking procedures.”⁵⁶ Nor can the courts create a common law of environmental protection from whole cloth or by the less direct method of second-guessing agency rulemaking.

A hazard in the mistaken view that common law courts are lawmakers, and always have been is before us in full force in the form of a wave of climate change litigation having little or no foundation in existing law.⁵⁷ Some of these cases are based in public nuisance law and may have some plausibility. But most are founded either on the Fifth or Fourteenth Amendment Due Process Clauses or the public trust doctrine. Because neither Due Process precedent nor public trust doctrine precedent offer any support for the claims being made, the default argument is that common law courts have always had the authority to make law. Exemplary is the opinion of Federal District Court Judge Ann Aiken in *Juliana v. United States*.⁵⁸ “Exercising my ‘reasoned judgment,’” writes the judge, “I have no doubt that the rights to a climate system capable of sustaining life is fundamental to a free and ordered society,” and therefore guaranteed by the Due Process Clause.⁵⁹ She also concludes that both the actions and omissions of government have violated its “obligation to hold certain resources in trust for the people and for future generations” as required by the public trust doctrine.⁶⁰ Apparently recognizing that

⁵⁴ Funk, *supra* note 2, at 18.

⁵⁵ Douglas Glen Whitman, *Evolution of the Common Law and the Emergence of Compromise*, 29 J. LEGAL STUD. 753, 775–76 (2000); *see also*, James Huffman, *People Made Law: Spontaneous Order, Change and the Common Law*, 11 J.L. ECON. & POL’Y 179, 196–97 (2015).

⁵⁶ Funk, *supra* note 2, at 18.

⁵⁷ *See* James Huffman, *Previously Unrecognized Rights: Climate Change Lawsuits and the Rule of Law*, QUILLETTE (Oct. 30, 2018), <https://perma.cc/9F4M-DDS8>.

⁵⁸ 217 F. Supp. 3d 1224, 1233 (2016).

⁵⁹ *Id.* at 1250.

⁶⁰ *Id.* at 1233.

there is no basis for either conclusion in existing law and precedent, Judge Aiken then appeals to the judges-have-always-made-law refrain. She quotes Chief Justice Marshall's statement in *Marbury v. Madison*⁶¹ that it is "emphatically the province and duty of the judicial department to say what the law is,"⁶² and opines that "[f]ederal courts too often have been cautious and overly deferential in the arena of environmental law, and the world has suffered for it."⁶³

Without implicating Chief Justice Marshall directly, Bill did say in his essay that "it is fundamental American jurisprudence that it is the role of the courts to say what the law is."⁶⁴ But I am confident that he understood then and understands today that Chief Justice Marshall was not asserting a general lawmaking power in the courts. As I wrote elsewhere,

the language of *Marbury* has always been understood as a simple confirmation of the constitutional power of judicial review, not as an assertion of judicial authority to ignore several centuries of common law precedent and rewrite the due process clause of the U.S. Constitution—even if there is thought to be an extreme urgency.⁶⁵

Once the door to judicial lawmaking is left ajar, interests unsuccessful in the political process will turn to filing lawsuits and writing amicus briefs. They will reiterate that common law courts have always made law, that society faces an extreme emergency, and that the courts must act because the legislative and executive branches have failed to do so. Most courts will turn them away for failing to state a justiciable claim, as has happened with most of the climate change cases.⁶⁶ But the strategy of launching a barrage of lawsuits in multiple jurisdictions sooner or later yields a result like that in *Juliana*.⁶⁷ The *Juliana* ruling may well be reversed by the Ninth Circuit Court of Appeals and would almost certainly be invalidated by the U.S. Supreme Court if the Ninth Circuit allows the case to proceed to trial. But even then Judge Aiken's opinion will stand as a beacon to others who have come up short in the political process.

Bill's suggestions that public participation in the rulemaking process brings a democratic legitimacy to what is a quasi-legislative process and that, in any event, judicial review of public interest claims is much like judicial adjudication of private rights claims, did not anticipate the growing influence of what we have come to call stakeholders. Public participants in the rulemaking process may have legal rights at stake, but recognition and enforcement of those rights is not dependent on participation. Vested rights can be vindicated in court or in an administrative adjudication. The purpose of public participation is to allow those with or without vested rights to influence the political decision being taken. These stakeholders have interests that may be affected by the rulemaking, but they have no legal right to be free from those effects. At least that is the theory. The reality, however, is that

⁶¹ 5 U.S. (1 Cranch) 137 (1803).

⁶² *Id.* at 177.

⁶³ *Juliana*, 217 F. Supp. 3d at 1262.

⁶⁴ Funk, *supra* note 2, at 18.

⁶⁵ Huffman, *supra* note 57.

⁶⁶ See, e.g., *Clean Air Council v. United States*, No. 2:17-cv-4977, 2019 WL 687873, at *12 (E.D. Pa. Feb. 19, 2019).

⁶⁷ *Juliana*, 217 F. Supp. 3d at 1262.

rights holders are often viewed as no different from stakeholders. Or to state it differently, stakeholders rise to the level of rights holders when agencies insist on accommodating all interests, or when courts find that stakeholders' interests were not adequately considered. This is particularly true where claimed injuries are allowed to take the form of what Bill called "possible, but not probable harm[s]." ⁶⁸ Private rights that would find vindication in an adjudicatory process are thus transformed into mere interests in the rulemaking process in which the mere threat of injury counts for as much as the infringement of vested rights.

Perhaps this elevation of the stakeholder to quasi-rights holder did not trouble Bill. Using the example of bans on backyard burning, he concluded his essay with the suggestion that one consequence of the new environmental era is that "[n]o longer can the person be self-reliant and self-sufficient for this one, small aspect of his life. . . . [T]he value of clean air has been deemed more important than the marginal loss of freedom." ⁶⁹ But of course life is made up of endless small aspects. A restraint on freedom here and a restraint on freedom there can begin to add up to an oppressive state. As Justice Frankfurter wrote in *Youngstown Sheet & Tube Co. v. Sawyer* ⁷⁰: "The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority." Here we are thirty-five years later with widespread endorsement of a Green New Deal ⁷¹ that would affect virtually every aspect of life. It is offered in the name of countering catastrophic environmental damage, but that does not make it an open and shut case for restricting human freedom. As Bill argued, it all comes down to tradeoffs among values. As Patrick Henry said, "give me liberty, or give me death." ⁷²

Bill's essay was published only months after the U.S. Supreme Court rendered its judgment in *Chevron U.S.A. Inc. v. Natural Resource Defense Council, Inc.* ⁷³ It is possible that he wrote his essay before the case was decided, but even if not it is not surprising that he made no mention of *Chevron*. I had written about the risks of judicial lawmaking, not administrative lawmaking, and that is what Bill replied to. In retrospect, however, I should have addressed the risks of administrative lawmaking because they are inseparable from the risks of judicial lawmaking.

The decision in *Chevron* was an exercise in judicial restraint. Failing to give deference to agency decisions would implicate the courts in second-guessing those decisions. Noting that the respondents appeared to be "waging in a judicial forum a specific policy battle which they ultimately lost in the agency," Justice Stevens, writing for the court, stated that "[s]uch policy arguments are more properly addressed to legislators or administrators, not to judges." ⁷⁴ Having just written about the dangers of judicial lawmaking, I could only have agreed with the court. But what about the lawmaking powers of administrative agencies? Judicial

⁶⁸ Funk, *supra* note 2, at 16.

⁶⁹ *Id.* at 19.

⁷⁰ 343 U.S. 579, 594 (1952).

⁷¹ *Green New Deal*, GREEN PARTY, <https://perma.cc/SK2R-XJXS> (last visited July 13, 2019).

⁷² Patrick Henry, Address at the 1775 Virginia Convention (Mar. 23, 1775).

⁷³ 467 U.S. 837 (1984).

⁷⁴ *Id.* at 863–64.

deference meant that only Congress could check lawmaking by unelected bureaucrats. But the *Chevron* court had allowed that judicial deference was appropriate even where Congress “simply did not consider the question” or “was unable to forge a coalition on either side of the question, and those on each side decided to take their chances” with the agency decision.⁷⁵

The *Chevron* court quoted with approval the observation in *Morton v. Ruiz* that “[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.”⁷⁶ Surely this is true, particularly in the Leviathan state, but does this practical reality justify administrative lawmaking where Congress simply has been unable to agree? Can being unable to agree be considered lawmaking by the legislature? If not, how can it be contended that Congress delegated lawmaking authority to the agency? Or when is a Congressional enactment so vague that it is too vague to constitute a delegation of authority to the agency? Is it enough to command the agency to go out and do good? Presumably not, but how about commanding the agency to do what it takes to protect human health? Somewhere there must be a minimum level of specificity in legislation or the separation of powers is meaningless and unelected bureaucrats are in full command of the Leviathan State. *Chevron* requires courts to defer to agency interpretations of ambiguous statutes unless the agency interpretation is unreasonable.⁷⁷ A reasonable interpretation is one that is “permissible” which means not “arbitrary, capricious, or manifestly contrary to the statute.”⁷⁸ With those minimal requirements, any bureaucrat worth her salt will have no difficulty both rewriting the law and avoiding judicial review.

A core justification of judicial review is enforcing the checks and balances of the constitution. But *Chevron* deference is a near total abandonment of that responsibility. Given that some level of quasi-legislative authority in administrative agencies is inevitable, it is not easy to define the appropriate safeguards of Congress’s Article I authority. It would help if Congress took some interest in asserting and safeguarding its constitutional authority, but as with all checks and balances the judiciary must play a role. As Bill observed in his reply to me, judicial review serves as a “constraint on power.”⁷⁹ An agency will proceed more carefully in formulating a rule “when it knows it will have to stand before a bench of skeptical judges and defend the rule. A deferential approach would not provide such a prophylactic.”⁸⁰ I wonder if thirty-five years in the administrative law trenches has changed Bill’s view, or if he is on board with those who would abandon *Chevron* in the interest of constraining the powers of the Leviathan state.

All these years later I remain concerned about judicial lawmaking, but as our colleague Ron Lansing used to say about many issues, assumption of power in a tripartite government is like a waterbed—you push down here and it pops up there. The challenge is and always will be achieving a balance of powers.

⁷⁵ *Id.* at 865.

⁷⁶ *Id.* at 843 (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)).

⁷⁷ *Id.* at 844.

⁷⁸ *Id.*

⁷⁹ Funk, *supra* note 2, at 18.

⁸⁰ *Id.* at 18–19.