

Antonin Scalia Law School  
George Mason University

**The Administrative State and Its Critics (LAW 734-001)**

Spring Term, 2023 Tuesdays 4 p.m. – 6 p.m.

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SYLLABUS (tentative - revised to Dec. 9, 2022)



Man Controlling Trade by Michael Lantz (1942)  
(Outside Federal Trade Commission Headquarters in Washington, D.C.),  
[http://dcmemorials.com/index\\_indiv0000522.htm](http://dcmemorials.com/index_indiv0000522.htm)

Student Learning Objectives:

1. Students will become familiar with both classic and modern arguments for an administrative state of permanent government employees who are largely insulated from political control.
2. Students will become familiar with arguments based on economics against central planning by the administrative state.
3. Students will be exposed to the main legal and constitutional arguments against the administrative state.
4. Students will reach their own conclusions about the pluses and minuses of the administrative state.

Grades will be based primarily on a written essay exam. However, class participation will also be considered, and may count for up to one-third of a student's grades. Because class discussions are an integral part of the course, students are permitted to miss no more than three classes during the term.

## INTRODUCTION

### I. Tuesday, January 17 - Introduction to the Administrative State

Woodrow Wilson, *The Study of Administration*, 2 POLITICAL SCIENCE QUARTERLY (Jun., 1887), pp. 197-222, [http://www.commentary.com/admin\\_thoughts\\_1887.pdf](http://www.commentary.com/admin_thoughts_1887.pdf)

Ronald Pestritto, Woodrow Wilson: Godfather of Liberalism, The Heritage Foundation (July 31, 2012), <https://www.heritage.org/political-process/report/woodrow-wilson-godfather-liberalism>

E. Donald Elliott, Review of *Achieving Regulatory Excellence*, 38 RISK ANALYSIS 1758 (2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3289261](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3289261)

### II. Tuesday, January 24 (by zoom) - The Classic Progressive Vision: Market Failure and Regulated Capitalism

THOMAS K. MCCRAW, PROPHETS OF REGULATION: CHARLES FRANCIS ADAMS LOUIS D. BRANDEIS JAMES M. LANDIS ALFRED E. KAHN (Harvard, 1984), Chapters 2-4, pp. 52 – 152 re Brandeis and creation of the FTC (on reserve) [http://www.amazon.com/Prophets-Regulation-Charles-Francis-Brandeis/dp/0674716086/ref=sr\\_1\\_fkmr0\\_3?ie=UTF8&qid=1279989921&sr=1-3-fkmr0](http://www.amazon.com/Prophets-Regulation-Charles-Francis-Brandeis/dp/0674716086/ref=sr_1_fkmr0_3?ie=UTF8&qid=1279989921&sr=1-3-fkmr0)

### III. Tuesday, January 31 – The Classic New Deal Vision: Expertise.

THOMAS K. MCCRAW, PROPHETS OF REGULATION: CHARLES FRANCIS ADAMS LOUIS D. BRANDEIS JAMES M. LANDIS ALFRED E. KAHN (Harvard, 1984), Chapters 5-6, pp. 153–209 re James Landis, the SEC and the New Deal. (on reserve) [http://www.amazon.com/Prophets-Regulation-Charles-Francis-Brandeis/dp/0674716086/ref=sr\\_1\\_fkmr0\\_3?ie=UTF8&qid=1279989921&sr=1-3-fkmr0](http://www.amazon.com/Prophets-Regulation-Charles-Francis-Brandeis/dp/0674716086/ref=sr_1_fkmr0_3?ie=UTF8&qid=1279989921&sr=1-3-fkmr0)

Unfortunately, Landis's classic series of lectures is out of print and not easily available, JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS (Yale and Oxford Univ. Press, 1938) (on reserve). The first lecture, Chapter I, "The Place of the Administrative Tribunal" is the most important.

However, an (in)famous short review by another famous administrative lawyer, Walter Gellhorn, is available at <https://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=1058&context=lalrev>

Later in life, Landis was not so sanguine about the administrative process. In 1960, he wrote a Report on Regulatory Agencies to the President-Elect (John F. Kennedy) with recommendations for how to reinvigorate the administrative process. A Kindle edition of that is available <https://www.amazon.com/Report-Regulatory-Agencies-President-Elect-Landis->

[ebook/dp/B00LLHWMRA/ref=sr\\_1\\_1?qid=1669649023&refinements=p\\_27%3AJames+M.+Landis&s=digital-text&sr=1-1](https://www.amazon.com/dp/B00LLHWMRA/ref=sr_1_1?qid=1669649023&refinements=p_27%3AJames+M.+Landis&s=digital-text&sr=1-1). We will discuss it briefly in class but it is NOT assigned.

In response to the perceived abuses of the New Deal, Congress passed the Administrative Procedure Act, 5 U.S.C. §551 *et seq.* in 1948. Those not familiar with its provisions from an administrative law course should review them briefly here, <https://www.law.cornell.edu/uscode/text/5/part-I/chapter-5> particularly §§ 553, 556, 702 and 706.

We will discuss the hostile reception that the APA received in the courts based on this article, which is assigned:

E. Donald Elliott, *How the Supreme Court Blocked Congress's Effort to Redeem the Administrative State Over and over the Court vetoed reform*, THE AMERICAN SPECTATOR (August 21, 2022), <https://spectator.org/how-the-supreme-court-blocked-congresss-effort-to-redeem-the-administrative-state/>

IV. Tuesday, February 7 - The Classic Conservative Critique: The Limits of Central Planning

F.A. HAYEK, THE ROAD TO SERFDOM (1944) Chicago: U. Chicago Press (paperback: ISBN 0-226-32061-8) [http://www.amazon.com/The-Road-Serfdom-Intellectuals-Socialism/dp/0255365764/ref=tmm\\_pap\\_title\\_0](http://www.amazon.com/The-Road-Serfdom-Intellectuals-Socialism/dp/0255365764/ref=tmm_pap_title_0)

Thomas Sowell, How Smart Are We?  
[http://www.realclearpolitics.com/articles/2010/07/27/how\\_smart\\_are\\_we\\_106479.html](http://www.realclearpolitics.com/articles/2010/07/27/how_smart_are_we_106479.html)

PETER H. SCHUCK, WHY GOVERNMENT FAILS SO OFTEN: AND HOW IT CAN DO BETTER (Princeton U. Press, 2014) List Price: \$27.95 ISBN: 9780691161624. Only Chapter 1 – Introduction pp. 1-36 is assigned. It is available to download as a pdf for free at <http://press.princeton.edu/chapters/s10192.pdf> )

V. Tuesday February 14 - The Classic Progressive Rejoinder: Technocracy as Correcting Decentralized Choices (aka Paternalism).

Edmund Burke, Speech to the Electors of Bristol, (3 Nov. 1774)(Collected Works 1:446-48; 1 Collected Works 217 (1855 ed.)  
<http://press-pubs.uchicago.edu/founders/documents/v1ch13s7.html>

JOSEPH L. SAX, MOUNTAINS WITHOUT HANDRAILS: REFLECTIONS ON THE NATIONAL PARKS (1980), *passim* but esp. pp. 47-77 (Chapters 3 and 4) (on reserve)

[http://www.amazon.com/Mountains-Without-Handrails-Reflections-National/dp/0472063243/ref=sr\\_1\\_1?ie=UTF8&s=books&qid=1279998818&sr=1-1](http://www.amazon.com/Mountains-Without-Handrails-Reflections-National/dp/0472063243/ref=sr_1_1?ie=UTF8&s=books&qid=1279998818&sr=1-1)

Available to read for free:

[https://www.nps.gov/parkhistory/online\\_books/sax/](https://www.nps.gov/parkhistory/online_books/sax/)

Fred Siegel, Fracking, Poverty and the New Liberal Gentry, *Wall Street Journal* November 7, 2013  
[http://online.wsj.com/article/SB10001424052702303936904579178201737694182.html?reflink=desktopwebshare\\_permalink](http://online.wsj.com/article/SB10001424052702303936904579178201737694182.html?reflink=desktopwebshare_permalink)

David Brooks, The Technocracy Boom, *The New York Times*, July 19, 2010, [http://www.nytimes.com/2010/07/20/opinion/20brooks.html?\\_r=1](http://www.nytimes.com/2010/07/20/opinion/20brooks.html?_r=1).

David Brooks, Where Wisdom Lives, *The New York Times*, June 6, 2011, <http://www.nytimes.com/2011/06/07/opinion/07brooks.html?r=1>.

## VI. Tuesday, February 21 - Libertarian Neo-Paternalism

RICHARD H. THALER AND CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (Yale Press, 2008) only Chapter 1 is assigned (on reserve) [http://www.amazon.com/Nudge-Improving-Decisions-Health-Happiness/dp/014311526X/ref=sr\\_1\\_1?ie=UTF8&s=books&qid=1280344808&sr=1-1](http://www.amazon.com/Nudge-Improving-Decisions-Health-Happiness/dp/014311526X/ref=sr_1_1?ie=UTF8&s=books&qid=1280344808&sr=1-1)

In lieu of the book, those that prefer can review a preliminary version Thaler, Richard H., Sunstein, Cass R. and Balz, John P., *Choice Architecture* (April 2, 2010). Available at SSRN: <http://ssrn.com/abstract=1583509> or <http://dx.doi.org/10.2139/ssrn.1583509>.

Sarah Conly, Three Cheers for the Nanny State, *The New York Times* March 24, 2013, [http://www.nytimes.com/2013/03/25/opinion/three-cheers-for-the-nanny-state.html?pagewanted%3Dall&\\_r=0](http://www.nytimes.com/2013/03/25/opinion/three-cheers-for-the-nanny-state.html?pagewanted%3Dall&_r=0)

Cass R. Sunstein, It's For Your Own Good! (Review of Sarah Conly, *Against Autonomy: Justifying Coercive Paternalism*), *The New York Review of Books*, March 7, 2013, <http://www.nybooks.com/articles/archives/2013/mar/07/its-your-own-good/?pagination=false>

Adam C. Smith, *(Mis)Applications of Behavioral Economics to Regulation: The Importance of Public Choice Architecture* Engage Volume 13, Issue 1, March 2012 [https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs1866/f/downloads/smith\\_behavioral\\_econ\\_20110823.pdf](https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs1866/f/downloads/smith_behavioral_econ_20110823.pdf)

Jeremy Waldron, It's All for Your Own Good (Review of *Why Nudge? The Politics of Libertarian Paternalism* by Cass R. Sunstein, *The New York Review of Books* (October 9, 2014), <http://www.nybooks.com/articles/2014/10/09/cass-sunstein-its-all-your-own-good/>

## CRITIQUES FROM CONSTITUTIONAL LEGITIMACY

### VII. – Tuesday, February 28 - Is the Administrative State a Threat to Liberty?

PHILIP HAMBURGER, *THE ADMINISTRATIVE THREAT* (Encounter Books, 2017) (on reserve) <https://www.encounterbooks.com/books/the-administrative-threat/> ISBN: 9781594039492 List Price: \$4.79

Adrian Vermeule, 'No' Review of Philip Hamburger, 'Is Administrative Law Unlawful?', 93 TEX. L. REV. 1547 (2015),  
[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2488724](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2488724)

Richard A. Epstein, *Why the Modern Administrative State Is Inconsistent With the Rule of Law*, 3 NYU J. LAW & LIBERTY 491 (2008)  
[http://www.law.nyu.edu/sites/default/files/ECM\\_PRO\\_060974.pdf](http://www.law.nyu.edu/sites/default/files/ECM_PRO_060974.pdf).

Max Fisher, Stephen K. Bannon's CPAC Comments, Annotated and Explained, THE NEW YORK TIMES, Feb. 24, 2017,  
<https://www.nytimes.com/2017/02/24/us/politics/stephen-bannon-cpac-speech.html>

### VIII. Tuesday, March 7 - Was the Rise of the Administrative State Illegitimate?

RICHARD A. EPSTEIN, *HOW PROGRESSIVES REWROTE THE CONSTITUTION* (2006), (on reserve) [http://www.amazon.com/Progressives-Rewrote-Constitution-Richard-Epstein/dp/1933995068/ref=sr\\_1\\_fkmr0\\_1?ie=UTF8&qid=1279995815&sr=1-1-fkmr0#](http://www.amazon.com/Progressives-Rewrote-Constitution-Richard-Epstein/dp/1933995068/ref=sr_1_fkmr0_1?ie=UTF8&qid=1279995815&sr=1-1-fkmr0#)

Gary Lawson, *The Rise and the Rise of the Administrative State*, 107 HARV.L.REV. 1231 (1994), [https://scholarship.law.bu.edu/faculty\\_scholarship/948/](https://scholarship.law.bu.edu/faculty_scholarship/948/)

Charles J. Cooper, *Confronting the Administrative State*, NATIONAL AFFAIRS 96 (Fall, 2015), <http://www.nationalaffairs.com/publications/detail/confronting-the-administrative-state>.

March 14 – no class – Spring Recess

### IX. – Tuesday, March 21 - A Government of “few and defined” Enumerated Powers.

George F. Will, Progressives are wrong about the essence of the Constitution, *The Washington Post*, April 16, 2014 [http://www.washingtonpost.com/opinions/george-will-progressives-are-wrong-about-the-essence-of-the-constitution/2014/04/16/7c05aa00-c4ac-11e3-bcec-b71ee10e9bc3\\_story.html](http://www.washingtonpost.com/opinions/george-will-progressives-are-wrong-about-the-essence-of-the-constitution/2014/04/16/7c05aa00-c4ac-11e3-bcec-b71ee10e9bc3_story.html) (Review of TIMOTHY SANDEFUR, *THE CONSCIENCE OF THE CONSTITUTION: THE DECLARATION OF INDEPENDENCE AND THE RIGHT TO LIBERTY* (2014), Kindle edition available for \$6.99 at <http://www.amazon.com/The-Conscience-Constitution-Declaration-Independence/dp/1939709032> )

Eamonn Butler, The conscience of the constitution, Adam Smith Institute Blog, (April 2, 2014 <https://www.adamsmith.org/blog/liberty-justice/the-conscience-of-the-constitution-25172> (Review of Sandefur, *supra*))

John O. McGinnis, Book Review: 'The Classical Liberal Constitution,' by Richard A. Epstein: Our understanding of the Constitution lost its way when we embraced the idea that rights are created by a benevolent state, THE WALL STREET JOURNAL March 23, 2014, <http://online.wsj.com/news/articles/SB10001424052702303802104579451693060396308> (Review of RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT (Harvard Univ. Press, 2014)(on reserve)).

Gary Lawson, *Limited Government, Unlimited Administration: Is it Possible to Restore Constitutionalism?* (2009), <http://www.heritage.org/Research/Reports/2009/01/Limited-Government-Unlimited-Administration-Is-it-Possible-to-Restore-Constitutionalism>

Antonin Scalia, *Back to Basics: Making Law Without Making Rules*, 5 REGULATION 25 (July/August 1981), <https://www.cato.org/sites/cato.org/files/serials/files/regulation/1981/7/v5n4-5.pdf>

Randy Barnett, Book Review: 'Terms of Engagement,' by Clark M. Neily III, *Wall Street Journal*, Nov. 19, 2013, <http://online.wsj.com/news/articles/SB10001424052702303680404579141781929962584>

Bruce Ackerman, The Supreme Court's War on the Twentieth Century, *Huffington Post* (January 31, 2013), [http://www.huffingtonpost.com/bruce-ackerman/the-supreme-courts-war-on\\_b\\_2586512.html?view=print&comm\\_ref=false](http://www.huffingtonpost.com/bruce-ackerman/the-supreme-courts-war-on_b_2586512.html?view=print&comm_ref=false)

#### X. Tuesday, March 28 - The (Non) Delegation Doctrine

DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993; 1995 paperback) (on reserve), [http://www.amazon.com/Power-Without-Responsibility-Congress-Delegation/dp/0300065183/ref=sr\\_1\\_1?ie=UTF8&s=books&qid=1280228279&sr=1-1](http://www.amazon.com/Power-Without-Responsibility-Congress-Delegation/dp/0300065183/ref=sr_1_1?ie=UTF8&s=books&qid=1280228279&sr=1-1)

*Field v. Clark*, 143 U.S. 649 (1892), only pages 691 – 694 re delegation are assigned <https://supreme.justia.com/cases/federal/us/143/649/>

*Whitman v. American Trucking Assn.*, 531 U.S. 457 (2001), <https://supreme.justia.com/cases/federal/us/531/457/>

*Gundy v. U.S.*, No. 17–6086 (U.S. Sup. Ct., June 20, 2019), [https://www.supremecourt.gov/opinions/18pdf/17-6086\\_2b8e.pdf](https://www.supremecourt.gov/opinions/18pdf/17-6086_2b8e.pdf)

*West Virginia v. EPA*, No. 20–1530 (U.S. Sup. Ct., June 30, 2022)  
[https://www.supremecourt.gov/opinions/21pdf/20-1530\\_n758.pdf](https://www.supremecourt.gov/opinions/21pdf/20-1530_n758.pdf)

Matthew Continetti, Who Rules the United States?: How bureaucrats are fighting the voters for control of our country, *The Free Beacon* (February 17, 2017),  
<http://freebeacon.com/columns/rules-united-states/>

E. Donald Elliott, Fixing the Most Dangerous Branch, *THE AMERICAN SPECTATOR* (Nov. 21, 2016), <https://spectator.org/fixing-american-government/>

### **CRITIQUES FROM EFFICACY**

XI. Tuesday, April 4 – Complex Rules *ex ante* or Simple Rules *ex post*.

RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* (1995), (on reserve)  
[http://www.amazon.com/Simple-Rules-Complex-Richard-Epstein/dp/0674808215/ref=sr\\_1\\_1?ie=UTF8&s=books&qid=1279998026&sr=1-1](http://www.amazon.com/Simple-Rules-Complex-Richard-Epstein/dp/0674808215/ref=sr_1_1?ie=UTF8&s=books&qid=1279998026&sr=1-1)

E. Donald Elliott, *U.S. Environmental Law in Global Perspective: Five Do's and Five Don'ts from Our Experience*, 2010 *NATIONAL TAIWAN UNIVERSITY LAW REVIEW* 2  
[http://digitalcommons.law.yale.edu/fss\\_papers/2717/](http://digitalcommons.law.yale.edu/fss_papers/2717/)  
[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1709966](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1709966)

Colin S. Diver, The Optimal Precision of Administrative Rules, 93 *YALE L.J.* 65 (1983),  
<https://openyls.law.yale.edu/handle/20.500.13051/16235>

### **CRITIQUES FROM PUBLIC CHOICE THEORY**

XII. Tuesday, April 11 - The Political Economy of Administrative Regulation

George Stigler, *The Theory of Economic Regulation*, 2 *BELL J. ECON.* 3 (1971),  
<http://www.jstor.org/stable/3003160>

Glenn Harlan Reynolds, Regulators wreck Uber innovation, *USA Today* June 9, 2014,  
<http://www.usatoday.com/story/opinion/2014/06/09/uber-lyft-taxi-transportation-regulators-column/10198131/>.

Chip Mellor and Jeff Rowes, A Casket Cartel and the Louisiana Way of Death, *The Wall Street Journal* March 22, 2013  
<http://online.wsj.com/news/articles/SB10001424127887323419104578374961200161762>

*St. Joseph Abbey v. Paul Wes Castille*, (No. 11-30756, 5<sup>th</sup> Cir., March 20, 2013),  
<http://www.ca5.uscourts.gov/opinions/pub/11/11-30756-CV1.wpd.pdf> cert denied  
[http://www.supremecourt.gov/Circuits/Order/Circ5\\_20131015\\_11-30756\\_13-91.pdf](http://www.supremecourt.gov/Circuits/Order/Circ5_20131015_11-30756_13-91.pdf)  
(October 15, 2013).

Kolko-ism, [http://en.wikipedia.org/wiki/Gabriel\\_Kolko](http://en.wikipedia.org/wiki/Gabriel_Kolko)

Agency capture theory, <http://everything2.com/title/capture+theory>

E. Donald Elliott, *Biden Revives Secret Laws That Crush Everyday Americans: Revoking Trump's good guidance executive order helps Big Business keep out competitors*, THE AMERICAN SPECTATOR (Jan. 31, 2022), <https://spectator.org/biden-revives-secret-laws-that-crush-everyday-americans/>

XIII. Tuesday, April 18 – Deregulation and Buying Votes with Government Benefits.

THOMAS K. MCCRAW, PROPHETS OF REGULATION: CHARLES FRANCIS ADAMS LOUIS D. BRANDEIS JAMES M. LANDIS ALFRED E. KAHN (Harvard, 1984), pp 222- 299.  
[http://www.amazon.com/Prophets-Regulation-Charles-Francis-Brandeis/dp/0674716086/ref=sr\\_1\\_fkmr0\\_3?ie=UTF8&qid=1279989921&sr=1-3-fkmr0](http://www.amazon.com/Prophets-Regulation-Charles-Francis-Brandeis/dp/0674716086/ref=sr_1_fkmr0_3?ie=UTF8&qid=1279989921&sr=1-3-fkmr0)

Andrew Syrios, *The Financial Crisis – Part 1: Is Deregulation to Blame? Well, Kinda...*, May 25, 2009, <https://www.andrewsyrios.com/home/the-2008-financial-crash-was-deregulation-to-blame-well-kinda>

E. Donald Elliott, *Democracy WAS on the Ballot: Biden spent hundreds of billions of your money buying votes in the midterms*, THE AMERICAN SPECTATOR (Nov. 13, 2022), <https://spectator.org/democracy-was-on-the-ballot/>

Reading Days – April 24 - 25