

## REVIEW

### Epstein's Best of All Possible Worlds: The Rule of Law

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*Design for Liberty: Private Property, Public Administration, and the Rule of Law*

Richard A. Epstein. Harvard, 2011. Pp ix, 233.

Richard Epstein is an intriguing combination of Candide and Mr. Micawber. Both characters maintain their optimism in a disaster-filled world. Candide is an optimist for theoretical reasons: “All is for the best in this best of all possible worlds” summarizes his understanding of science.<sup>1</sup> So too Epstein: every plausible general social and political theory—utilitarianism, Kantianism, natural law, neoclassical economics—leads to the conclusion that that government is best which governs least, and through simple rules. Mr. Micawber is a sentimental optimist, whose motto is, “Something will turn up.”<sup>2</sup> So too Epstein: despite the evidence, supported by public choice theory, that governments simply won't govern least, and so won't be best, Epstein seems confident that something will turn up, at least if people (unspecified, but apparently immune from the incentives on which public choice theory focuses) get their heads straight.

This Review begins with a summary of Epstein's argument in *Design for Liberty*, which is a “plea [ ] to marry a set of strong property rights with a system of sound public administration” (p 7) coupled with an argument that, while strong property rights are possible both in principle and in practice, sound public administration is possible only in principle, not in practice. Part II offers some comments on the book's *style*, arguing that it too often gets in the reader's way. Part III examines a central fea-

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<sup>1</sup> See Voltaire, *Candide; or, Optimism* 2, 3, 19 (Norton 1966) (Robert M. Adams, ed and trans).

<sup>2</sup> See Charles Dickens, *David Copperfield* 169, 254, 744 (Oxford 1997).

ture of Epstein's argument, that strong property rights can be embodied in a simple set of easily administrable rules and argues that his critique of the practical impossibility of sound administration applies equally to the set of rules creating strong property rights. Part IV discusses the political economy that underlies Epstein's account of judicial doctrine, which in turn leads to a brief Conclusion that returns us to *Candide* and Mr. Micawber.

### I. THE ARGUMENT SUMMARIZED

*Design for Liberty* is an extended engagement with Friedrich Hayek's views about the modern state and the rule of law. According to Hayek, private law rules developed in the nineteenth century were consistent with the rule of law as he understood it, but the way in which the modern administrative state necessarily operated was not. The private law rules were general and broadly applicable, for example, while characteristic decisions made in the administrative state, such as issuing permits or awarding social support, were necessarily case specific and could not be guided by rules analogous to those developed in private law.<sup>3</sup> Epstein agrees fully with Hayek about private law, and agrees with Hayek's conclusion about the modern state, but disagrees with the reasons Hayek gave for that conclusion (pp 44–45).<sup>4</sup> Administrators *could* act pursuant to principles consistent with the rule of law where those principles derive from sound management practices and professional standards, but in fact they do not act in that way, and in light of the discretion they necessarily have, that behavior is almost inevitable. The administrative state might in theory be consistent with the rule of law, but in fact it is not.

*Design for Liberty's* introduction summarizes its main argument: Hayek was wrong to think that only classical property regimes satisfy the rule of law in principle, but transforming the Hayekian argument from one about principle to one about practice vindicates it. As Epstein argues, “[T]he levels of discretion that modern legislation confers on the organs of the administrative state make it impossible to comply with those neutral virtues captured in the rule of law” (p 7).

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<sup>3</sup> See Friedrich A. Hayek, *The Road to Serfdom* 72–79 (Chicago 1972). See also Friedrich A. Hayek, 1 *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy; Rules and Order* 137–39 (Chicago 1973).

<sup>4</sup> “The discussions of the rule of law are often couched in broad abstractions. . . . Great writers, such as Friedrich Hayek, have been content to speak at a high level of generality, without drilling down into the details of any legal system” (pp 44–45).

The first substantive chapter then lays out what the chapter title calls “The Traditional Conception of the Rule of Law” (p 10). That conception is Lon Fuller’s, and requires clarity, publicity, prospectivity, and more (pp 19–20).<sup>5</sup> The chapter then uses the example of prosecutorial discretion to introduce the distinction between the government as regulator, where it must comply with the traditional requirement’s conception, and the government as manager, where, Epstein argues, sound management principles could prevail (pp 23–27). But, he concludes, “[T]he sheer matter of scale in governance puts insistent stress on both the rule of law and the protection and use of private property” (pp 29–30).

Chapter 2 addresses and criticizes the widespread use of reasonableness standards in contemporary law on the Hayekian ground that they are incompatible with the rule of law.<sup>6</sup> Here Epstein recapitulates in compressed form an argument with which he is identified—that social welfare is increased overall by the use of simple rules in a complex world,<sup>7</sup> rules that ignore “individuated elements” (p 33) because such a system of rules “increases the reliability of decisionmaking while reducing administrative costs” (pp 33–34), even though it generates results that are in some (one hopes few) cases welfare reducing.

The next chapters deal with convergences and divergences between utilitarianism—Epstein’s preferred general moral theory—and natural law. They converge in generating “two overarching principles”: “prohibit coercion; and [ ] facilitate cooperation among autonomous individuals” (p 47). They diverge because, on Epstein’s understanding, natural law arguments tend to support strong libertarianism while utilitarianism acknowledges a larger role for government action, mostly to deal with large-number situations where private contracts cannot readily coordinate action needed to increase social welfare (pp 55–65).<sup>8</sup>

Chapters 5 and 6 lay out Epstein’s account of property rights, which he argues, using property in land as the paradigm case, should consist of rights against interference defined rather

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<sup>5</sup> See also Lon L. Fuller, *The Morality of Law* 38–39 (Yale rev ed 1969).

<sup>6</sup> See Hayek, *The Road to Serfdom* at 78 (cited in note 3).

<sup>7</sup> See generally Richard A. Epstein, *Simple Rules for a Complex World* (Harvard 1995).

<sup>8</sup> For myself, I would not have thought that the term “natural law” was generally used as Epstein uses it in this chapter, which strikes me as describing a dispute between strong and somewhat less strong libertarians. This is reinforced by the fact that the chapter concludes with a strong critique of “the social democratic alternative” (pp 61–65), based on both utilitarian and natural law views.

narrowly (pp 74–75).<sup>9</sup> The bundle of rights is standard: rights to exclude, to enter on one’s own property, to use and develop one’s property (pp 77–78). Though public authorities can sometimes intrude on (violate?) these rights, they are justified in doing so only to avoid harm, and we should “confine the generalized notion of harm to some physical predicate” (p 80). And, again invoking the “simple rules” idea, “[t]he emphasis is always on objective tests that are easily observable, and thus generate minimum levels of favoritism or expense” (pp 87–88).

Epstein then turns to the rules of eminent domain in the book’s longest chapter, offered as a “test” of the notion that in practice the administrative state cannot comply with the rule of law (pp 95–96). The central argument is that the just compensation requirement induces the government to adversely affect an owner’s property rights, either by taking the property or by regulating it, only when the action increases overall social welfare (p 101). Along the way Epstein criticizes almost all of existing takings law (pp 104–17).

After a brief discussion of interests in liberty other than property, Epstein begins to lay out his understanding of the proper role of the administrative state. Chapter 9 deals with “Positive-Sum Projects” (p 131), which is what the administrative state should advance, and Chapter 10 argues that redistribution of wealth by means of regulation should come last—really, not at all—on the government’s list of regulatory objectives (p 143).

Epstein develops his argument that the administrative state is in principle but not in practice compatible with the rule of law in Chapter 11. To avoid duplication, I defer a summary of that argument to my criticisms in Part III of this Review. After a short chapter on retroactivity, Epstein ends by applying his critique of the administrative state to the Dodd-Frank Act’s<sup>10</sup> regulation of financial institutions<sup>11</sup> and the Affordable Care Act’s<sup>12</sup> “reforms” of

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<sup>9</sup> “A system of property rights that requires only uniform forbearance from the use of force and fraud is effective precisely because it is inconspicuous, easily generalizable, and easily transferrable” (p 76).

<sup>10</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub L No 111-203, 124 Stat 1376 (2010), codified at 12 USC § 5301 et seq.

<sup>11</sup> See Dodd-Frank Act §§ 111–23, 124 Stat at 1392–1412, codified at 12 USC §§ 5321–33.

<sup>12</sup> Patient Protection and Affordable Care Act (Affordable Care Act), Pub L No 111-148, 124 Stat 119 (2010), codified in various sections of Title 42.

health care financing.<sup>13</sup> So, for example, Dodd-Frank is flawed because it replicates, in a statute characteristic of the administrative state, the rule-of-law flaws of reasonableness standards in private law (p 176). His “Final Reflections” (p 190) are,

Historically, we witness a constant battle between the forces of science and technology that expand the social pie, and the forces of faction and politics that eat away at those gains. Once upon a time, I was confident that the forces of growth and prosperity could maintain the upper hand. But watching the flailing of political actors, and the drift of our economic system, I am no longer so sure (p 192).<sup>14</sup>

*Design for Liberty* contains more than its central arguments, with some matters drawn in almost kicking and screaming.<sup>15</sup> Because almost all of what follows is quite critical of many arguments in *Design for Liberty* I want to stress that Epstein has offered a well-developed account of the relation between the rule of law and a specific understanding of the structure of private law, and that he offers effective counterarguments to some common objections to that account and understanding. The criticisms are, in the main, that Epstein deals with some objections too quickly and that he does not deal with some objections that I think are better than the ones he does address.

## II. EPSTEIN AS LITERARY STYLIST

Epstein is a notably engaging speaker. I was surprised, therefore, that I found *Design for Liberty* harder to read than I expected. As I tried to understand why, I concluded that the book’s writing style has vices attendant on the virtues of Epstein’s speaking style. As one sits in the audience (or at least when I sit in the audience), one hears Epstein’s well-crafted sentences roll out into the auditorium, each quickly following the last, washing over the listener. The speed with which he speaks keeps one attentive but also makes actually thinking about what he’s saying

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<sup>13</sup> See Affordable Care Act §§ 1001(5), 10101(f), 124 Stat at 136–37, 885–87, codified at 42 USC § 300gg-18 (authorizing regulations on insurance companies to control health insurance costs).

<sup>14</sup> This statement encapsulates some aspects of the political economy to which Epstein appears committed, and which I discuss in Part IV below. (I note that Epstein’s formulation is not incompatible with an ever-expanding pie, if the gains from science and technology are not *completely* “eat[en] away” by faction and politics.)

<sup>15</sup> Another example of an extraneous argument is where Epstein’s observations about the doctrine of unconstitutional conditions are scattered within a larger, more coherent discussion of the proper scope of the modern administrative state (pp 133–40).

difficult; one might flag a sentence or an argument as raising some questions, but by the time one (or, again, at least I) has figured out exactly what the problem is, Epstein has moved on to something else, and the point that might be problematic has been displaced in the listener's mind by the next argument. The effect is that Epstein's talks seem to be a well-constructed fortress impenetrable by fleeting critical thoughts.

When encountered on the page, though, Epstein's words can be read more slowly than they are heard. And, when the pace is slowed down, the reader notices problems and notices as well that Epstein moves on without addressing them. Having picked up on this difficulty early in the book, I continued to read with a critical predisposition that impeded my ability to get into the argument's flow. Epstein writes,

The government that can stop the use of dangerous equipment on private construction sites or issue drivers' licenses for the operation of motor vehicles on public roads need not be given the power to plan comprehensively what buildings should be built where and for what purposes people shall take the highways (p 8).

Now, I understand the desire for parallelism in constructing sentences like that, and the resulting need to find something to serve as a parallel to "what buildings should be built where," but "for what purposes people shall take the highways" certainly pulled me up short. What on earth does Epstein have in mind? HOV lanes? Congestion pricing?

A deep libertarian might not concede that the government has the power to construct highways, but Epstein's libertarianism does not seem to run that deep. He acknowledges that coordination problems arise when projects require the assembly of large amounts of private property, which seems to rule out the complete privatization of road construction (p 97). Then, though, the government that has the power to construct roads almost certainly ought to have the power to address congestion externalities arising from that very construction.<sup>16</sup> These externalities are,

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<sup>16</sup> Epstein acknowledges this to some extent, stating that traffic regulations that rely on clear, objective rules can satisfy utilitarian concerns:

There can, on this view, be genuine disputes as to whether there is enough traffic at a given intersection to warrant the installation of a traffic light. But once that determination is made by a transportation authority, it is a huge mistake to require its revalidation under some generalized reasonableness standard after every individual intersection collision (p 32).

after all, large-number effects whose solution, on Epstein's arguments, typically requires coordinated actions not readily reached through private agreement. The United States is a big country, and I actually do not doubt that somewhere we can find a bureaucrat who proposed a policy of "planning . . . for what purposes people shall take the highways." And, in fact, I can dream up such policies without much difficulty.<sup>17</sup>

The example illustrates the stylistic problem: there might well be something to be said in support of Epstein's point, but he does not say it, and without some explication the point leaves the reader scratching her head. Of course, when delivered as part of a talk, the parallelism is as such rhetorically satisfying, and by the time a listener thinks about its substance, Epstein has moved on.

Nor is this an aberration. There are several additional examples. First: "[T]he global view that all language is so unclear as to preclude the formulation of any rules has this dire consequence: it leads to the disintegration of political and legal discourse" (p 15). Presented without elaboration as a critique of the "global view," this is nonsense. As stated, the form of the argument is, "Were X to be true, there would be dire consequences; therefore X is false." To which the response is, "Tough luck." Consider an assertion in the same form: "Were it to be true that human actions contribute to worldwide climate change, there would be dire consequences; therefore human actions do not contribute to worldwide climate change."

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<sup>17</sup> The one I like most is a requirement that big-box retail stores construct parking lots with *fewer* parking slots than the stores' operators anticipate are needed, thereby discouraging people from driving to the big-box stores in favor of patronizing neighborhood stores. Consider *Dolan v City of Tigard*, 512 US 374, 395–96 (1994) (holding unconstitutional, as insufficiently related to the city's planning purposes, an exaction requiring that a plumbing-supply store include a pedestrian and bicycle pathway to help reduce traffic congestion in the area). For another idea regarding what Epstein might have in mind when referring to "for what purposes people shall take the highways," see Stanley Kurtz, *Burn Down the Suburbs?*, National Review Online (National Review Aug 1, 2012), online at <http://www.nationalreview.com/articles/312807/burn-down-suburbs-stanley-kurtz> (visited Mar 3, 2013) (describing, though without providing much detail, policies aimed at "discouraging driving with a blizzard of taxes, fees, and regulations"). See also Anika E. Leerssen, *Smart Growth and Green Building: An Effective Partnership to Significantly Reduce Greenhouse Gas Emissions*, 26 J Envir L & Litig 287, 307–09 (2011) (discussing California's antisprawl legislation, which allocates transportation funding to land use projects that are consistent with reducing average household vehicle-miles traveled). Even these, I note, do not appear to implicate "planning" about the "purposes" for which "people shall take the highways," except in the sense that "not taking the highways" is such a purpose.

Again, there might be something coherent that is retrievable from Epstein's words. Perhaps the argument is: "The global view, and so forth, implies that political and legal discourse is impossible, but we observe political and legal discourse all the time. Therefore, the global view is false."<sup>18</sup> Then, though, a different set of questions opens up. The proponent of the global view might deny that what we observe all the time is "real" political and legal discourse, but only a simulacrum of it. The discussion then might go in several directions, most ending up, I think, with some consideration of the extent to which the global view is a form of linguistic conventionalism, against which there might well be good arguments.

I am going to return to these replies later because the exchange I have imagined illuminates an important feature of the foundations of Epstein's thinking about rules, which as I have already noted plays a central role in the book's argument. For now, the point is that Epstein's one-sentence dismissal of the global view is silly as stated, and that, though there might be something coherent underlying his words, he owes the reader the argument in a coherent form. Silly arguments will not do.

Second, and related, Epstein writes, "Opponents of classical liberalism, who often take a skeptical approach to the powers of language, despair of offering coherent meanings for terms like 'property' [and] 'coercion'" (p 14). He continues, "Yet on this issue, turnabout is fair play. The same ploy could of course be used against the more ambitious rules of the administrative state—rules pertaining to 'discrimination' [and] . . . 'undue hardship'" (p 14). His next sentence shows why this particular "turnabout" is not devastating to the "opponents of classical liberalism": "Quite simply, the rule of law requires a degree of linguistic clarity that allows for the articulation of any set of comprehensible rules" (pp 14–15). The opponent of classical liberalism can readily agree, but respond that her objection shows either that the rule of law as defined by Fuller and Hayek is impossible or that Fuller's criteria for the rule of law are mistaken.<sup>19</sup> It is only within Epstein's conceptual universe that the turnabout operates as a critique of the critics, yet precisely

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<sup>18</sup> The form here is *modus tollens*, or denying the consequent, which I state somewhat differently from the usual form to show the similarity to the reconstructed argument I attribute to Epstein: "X [the global view] implies not-Y [no political or legal discourse]; Y [political and legal discourse]; therefore not-X [the global view is false]."

<sup>19</sup> See Hayek, *The Road to Serfdom* at 72 (cited in note 3); Fuller, *The Morality of Law* at 63 (cited in note 5).

because they are opponents of classical liberalism they are not operating within that universe. Again, I will return to this point.

Epstein's model for strong property rights—property in land—provides a third example where his literary style glosses over analytic difficulties. Here,

The central proposition is this: the *only* set of substantive rules that achieves [the goal of connecting property rights and the rule of law] is one that requires all persons to *forbear* from interfering with the property rights of any other person, where “interfering” is narrowly defined to involve taking, using, handling, or breaking the property of another (p 74).

I immediately wondered about intellectual property. Later Epstein mentions intellectual property briefly, saying that, setting aside the limited terms of copyright and patents, “the general sets of principles carry over from real estate to other forms of property. The rules of infringement follow from the rules of trespass” (p 165).

I may be missing something here, but—again without being given some assistance by Epstein—I do not see how many aspects of intellectual property law track the rules dealing with real property except metaphorically. And, metaphorical resemblance seems incompatible with “narrow” definitions. Here are some examples.

(1) *Patent infringement*: (a) I am a good but not great engineer. Patents have to be published in a form allowing a person having ordinary skill in the art (the wonderfully named PHOSITA) to build the thing.<sup>20</sup> I read the published patent and then build something new that incorporates what I have learned reading the patent—indeed, it includes a slightly modified version of the apparatus described in the patent—and itself occupies a new market niche.<sup>21</sup> I think it is clear that I've infringed the patent, but it is not clear to me that I have committed anything like a real property trespass on the apparatus—or, of course, on the words written in what I have read. (b) Similarly with independent invention. I am actually a terrific engineer, and come up with a great idea on my own. Unfortunately, and without my

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<sup>20</sup> See 35 USC § 112(a).

<sup>21</sup> Here I'm using the word “read” in its ordinary sense (sitting at your desk with some words and diagrams in front of you), not in the technical sense it has in patent law.

knowledge, that idea was embodied in a patented apparatus already. I have infringed the patent.<sup>22</sup>

I have no doubt that we can call what I did in both cases a (metaphorical) trespass on the apparatus or on the patent, or a nuisance of some sort, but then we ought to think about whether there might be equally metaphorical trespasses or nuisances on real property. The prime candidate for a trespass is, unfortunately, reducing the value of property by setting up a competing business down the block. We know that this is not a classical liberal trespass, but—if patent infringement is a metaphorical trespass giving rise to liability—how can the real property rules “carry over” to the patent setting (p 165)? Maybe there’s an answer, but Epstein does not give one.

(2) *The “dilution” cause of action:* You have a brand name associated with high-quality products in a particular class of goods. I use a brand name similar though not identical to yours to sell low-quality products in a similar though not identical class. I can be held liable to you for trademark dilution if your brand name is famous and it is likely that consumers will start thinking that there are lots of brands *like* yours, not just yours.<sup>23</sup> Importantly, the dilution cause of action does not require that consumers be confused—that they think you are the source of the products I am selling—but only that with my brand on the market yours will stop conveying a sense that it is a unique product.<sup>24</sup> I am hard-pressed to see what property law rule “carries over” to support the dilution cause of action. Again, maybe there is one, but, again, Epstein does not tell me what it is.<sup>25</sup>

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<sup>22</sup> See 35 USC § 271(a).

<sup>23</sup> See 15 USC § 1125(c)(1)–(2).

<sup>24</sup> See 15 USC § 1125(c)(1).

<sup>25</sup> Epstein might respond that we ought to do away with the dilution cause of action, perhaps on “pure” property-law grounds (as inconsistent with the property rights I have in my brand name), or on First Amendment grounds: The dilution cause of action is not a narrowly tailored means of achieving an important social goal. (Avoiding consumer confusion might be sufficiently important, but avoiding mere dilution is not.) But see *United States v Alvarez*, 132 S Ct 2537, 2554 (2012) (Breyer concurring) (“Trademarks identify the source of a good; and infringement causes harm *by causing confusion* among potential customers (about the source) and thereby *diluting* the value of the mark to its owner, to consumers, and to the economy.”) (emphasis added). Note that Justice Stephen Breyer’s comment deals with the infringement cause of action, not the dilution one.

Finally, Epstein sometimes seems like one of Milman Parry or A.B. Lord's "singers of tales."<sup>26</sup> Parry and Lord argued that Homeric epics emerged from an oral tradition in which singers constructed tales out of standard and well-known formulas.<sup>27</sup> In Epstein's work, sometimes this is entirely effective: The listener and the reader say, "Ah, our old friend 'Simple rules for a complex world.' No need to think too hard about the argument right now because we've heard it before." Sometimes the singer of tales harmlessly drops conservative pabulum into the book: "Business today remains on an investment strike in the face of mounting uncertainties in both capital and labor markets" (p 5). Listeners in the Cato Institute's Hayek Auditorium will nod at Epstein's sagacity, confirming their own; more skeptical readers can dismiss the sentence as irrelevant to the argument, as it is.<sup>28</sup>

Sometimes, though, the conservative pabulum does obstruct the argument. Probably the most notable example is this. Discussing the way in which a just compensation requirement "places a persistent financial check on the willingness of dominant social factions to overtax a small fraction of the overall population for partisan gains," Epstein continues,

(Today the United States collects more in income tax from the top 1 percent of earners than from the bottom 95 percent of taxpayers. Ouch.) A taxation regime that systematically insulates any fraction of the population, however poor, from the burdens shared by the rest of the society creates a modern *rentier* class that lives off of expanding government programs, to which they are asked contribute [sic] nothing (p 108).<sup>29</sup>

Again, I am sure that the parenthetical, and particularly the "Ouch," works well for conservative audiences. But it gets in the

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<sup>26</sup> See generally Albert B. Lord, *The Singer of Tales* (Harvard 1960) (presenting Parry and Lord's arguments in their canonical form).

<sup>27</sup> *Id.* at 30.

<sup>28</sup> Epstein also writes of "a country that has been mired in a virtual recession for the past several years" (p 109). One wonders how a virtual recession differs from a real one.

<sup>29</sup> I note that I would ordinarily simply have inserted "[to]" into this sentence rather than "sic" to correct an obvious typographical error, but such errors contribute to the difficulty in reading the book, which is my point here. Another example of a distracting typographical or uncaught copy editor's error: "Government actors (such as private taxpayers anxious to avoid taxation of ordinary income) will resort to ingenious schemes to circumvent constitutional restraints on their power" (p 100). I hope that Epstein means "like private taxpayers," but the phrase occurs in a context describing private party capture of government power for private ends. In that context the reader has to pause to decide whether Epstein really does mean the weird "such as," before concluding that he does not (I hope).

way of the argument, which has to be about the distribution of the overall tax burden, not the distribution of the burden of the federal income tax alone. I would not be surprised to discover that Epstein's argument is supported by evidence about the overall tax burden, but, reaching for the conservative formula, Epstein gets sloppy.<sup>30</sup>

There's an old story about defining circumstantial evidence: when asked how he knew that his milk has been diluted by water when he hadn't seen the farmer pouring water into the can, the buyer replied that the fish he found swimming in it was circumstantial evidence of watering.<sup>31</sup> The parenthetical is circumstantial evidence of the relation between Epstein's antecedent convictions and the structure of his argument.

### III. PRINCIPLE VERSUS PRACTICE

As I have indicated, the heart of Epstein's argument is the creation of a parallel between private law rules and the rules that executive officials should adopt in pursuit of effective governance. As he notes, the latter is novel in his thinking.<sup>32</sup> The parallelism is that a system of private law founded on strong property rights is in principle consistent with Fullerian rule-of-law values—no surprise there—as is a system of executive decision making on matters permissibly delegated to executive officials through general legislation reasonably narrowly drawn, when the executive officials act according to the kind of good-management practices pursued in the private sector.<sup>33</sup> But, according to Epstein, the parallelism breaks down in practice: while judges can enforce only strong property rights in practice, executive officials cannot in practice exercise the discretion granted them according to good management practices.

Epstein's argument as to executive officials is the most interesting one in the book, and it is unfortunate that he leaves it relatively underdeveloped. At the book's outset he states the argument. He acknowledges the force of the Hayekian concern "that the expansion of the administrative state . . . is deeply in

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<sup>30</sup> For another example, see note 40 and accompanying text.

<sup>31</sup> For the basis of this proverb, see Henry D. Thoreau, *I to Myself: An Annotated Selection from the Journal of Henry D. Thoreau* 59–60 (Yale 2007) (Jeffrey S. Cramer, ed).

<sup>32</sup> "Over the years . . . my own views have evolved in ways that turn out to be more sympathetic to government administration than I had once supposed" (p 6).

<sup>33</sup> "[T]he most that can be asked of any government official is to exercise sound discretion in the same way that is demanded in any private business where officers and directors have fiduciary responsibilities" (p 24).

conflict with traditional values of the rule of law” (p 6). But, not being a deep libertarian, Epstein also acknowledges that there will be some government to administer. And,

No amount of devotion to a system of legal rules can eliminate the need for sound discretion in the management of . . . public affairs. . . . [S]ome degree of discretion must be exercised by those persons in charge of . . . making the many management decisions that are inherent in taking those executive positions (p 6).

So, executive officials should be guided by “a system of sound public administration,” yielding what in principle could be “a well-lubricated administrative state” (p 7). *In principle*, though not in practice, because “this supposed happy equilibrium cannot long sustain itself. . . . [T]he levels of discretion that modern legislation confers on the organs of the administrative state make it impossible to comply with those neutral virtues captured in the rule of law” (p 7). Executive officials must have discretion, which ought to be guided by sound management practices, but discretion of the scope required by the modern administrative state enables excessive regulation even when an administrator adheres to such practices.

As far I as could see, the only argument offered in support of this intriguing conclusion comes in Epstein’s discussion of *Christian Legal Society, Chapter of the University of California, Hastings College of the Law v Martinez*,<sup>34</sup> which upheld against a First Amendment challenge the policy of the Hastings College of the Law that every student organization recognized by the school admit all comers to membership:<sup>35</sup> the statutes creating the administrative state “allow[] a level of discretion to public officials which they do not need in order to administer the essential educational functions of their home institutions” (p 139). Note that this argument requires an external standard for determining what an institution’s essential functions are: if the Hastings College of the Law’s functions are “education plus character formation,” for example, Epstein’s argument must address not only whether a manager following good management practices could reasonably regard the “all comers” rule as promoting education,<sup>36</sup> but also whether that manager could reasonably reach the

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<sup>34</sup> 130 S Ct 2971 (2010).

<sup>35</sup> *Id.* at 2978.

<sup>36</sup> Compare Epstein’s discussion of rules for medical malpractice relying on standards “derived from inside the medical profession, and not imposed from without” (p 38).

same conclusion with respect to the rule's relation to character formation.

I have no idea what the answer to the latter question is, but it does require an external standard for determining essential functions. That is not a problem in principle for Epstein, though it would have been nice had he laid out the argument more perspicuously. But, once again, we can see a disjuncture between "in principle" and "in practice." In principle, judges develop and apply the external standard. They should tell the Hastings College of the Law, "You're allowed managerial discretion pursuant to good management practices only with respect to your essential functions; your essential function is legal education (and doesn't include character development); there's no reasonable relation between the 'all comers' rule and legal education; the 'all comers' rule is constitutionally impermissible."<sup>37</sup>

At least, that is what I think the argument is. Epstein never lays the argument out in a compressed form, and much of his presentation is structured in ways that obscure what I think are his most interesting claims. Once we clear away the underbrush, I believe, we can see that the parallelism established at the in principle stage actually carries through to the in practice one. Which is to say, the project of developing a system of private law based on a set of strong property rights, while possible in principle, is impossible in practice. And for the same reasons, I believe that Epstein believes the public law project is impossible. He rejects the full parallelism because he mistakenly truncates the in practice arguments against the private law project.

Epstein's comparison of the two projects is, I believe, infected by what Professor Harold Demsetz called the nirvana fallacy.<sup>38</sup> Epstein compares what the courts could do in principle—enforce strong property rights using a set of simple rules—with

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<sup>37</sup> Epstein notes that he filed a brief on behalf of the Cato Institute in the *Christian Legal Society* case (pp 207–08 n 14). Given the context it's unsurprising that the brief relies on the First Amendment. See Brief of Amicus Curiae the Cato Institute in Support of Petitioner, *Christian Legal Society Chapter of University of California, Hastings College of the Law v Martinez*, No 08-1371, \*4 (US filed Feb 3, 2010) (available on Westlaw at 2010 WL 497337). But Epstein's general theory would, I think, lead to a different doctrinal formulation, that the law school's actions were *ultra vires* the power that could constitutionally be delegated to it.

<sup>38</sup> Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J L & Econ 1, 1 (1969) (defining the "nirvana approach" as the tendency in economics research to compare existing imperfect institutions to ideal ones to point out that inefficiencies exist rather than comparing existing institutions to real-life alternatives to determine how inefficiencies can be minimized). Though Professor Demsetz used the term "approach," "fallacy" has settled in as the standard usage.

what executive officials actually do. The comparison is defective in both parts. As I detail below, Epstein acknowledges—“bemoans” would be a better word—that courts starting sometime in the twentieth century departed from classical liberal principles. And, he never gives “a system of sound public administration” (p 7) a fair shot.

Doing the in principle comparison correctly would require that Epstein describe what discretionary decisions a well-intentioned and reasonably competent executive official would make, exercising her best judgment according to principles of sound public administration, just as he describes what private law decisions a well-intentioned and reasonably competent judge would make.<sup>39</sup> Epstein closes his discussion of land use planning under modern regulatory systems with the example of an application that “must be submitted by phone to a public official who is never in his office” (p 116). That is indeed a departure from the rule of law, and I am sure it happens somewhere. But, what Epstein needs to show is that this behavior is *in principle* part of sound public administration, which of course it is not. And, examining the source on which Epstein relies, one discovers that the problem was not that the official was never in his office, but rather that the official accepted phone applications only during a narrow window of time (perhaps because he was charged with other duties as well, though the source does not go into that).<sup>40</sup> The problem, that is, is that the official’s *supervisors* had allocated—or misallocated—resources in a manner inconsistent with sound public administration.<sup>41</sup>

Perhaps Epstein need not defend the proposition that sound public administration is possible in principle, if misallocations like that are inevitable in practice.<sup>42</sup> Epstein offers several reasons for thinking that they are.

First, sound public administration is possible only if executive officials are given bounded discretion—that is, if the power

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<sup>39</sup> I include reasonable competence as a component here. Assuming more than that, for both courts and executive bureaucracies, would be another example of the nirvana fallacy. See note 38 and accompanying text.

<sup>40</sup> See Doug Kaplan, *Simplify, Don't Subsidize: The Right Way to Support Private Development*, Persp on Eminent Domain Abuse 1, 4 (Institute for Justice June 2008), online at <http://www.castlecoalition.org/images/publications/perspectives-simplify.pdf> (visited Mar 3, 2013).

<sup>41</sup> Or that the relevant legislature had not appropriated enough money for the agency as a whole to do the jobs delegated to it—another failure of sound public administration.

<sup>42</sup> Although I then wonder why make the concession in the first place (and what the basis is for Epstein’s “evolving” views).

delegated to them is relatively narrowly confined. This is illustrated by *Christian Legal Society*: if the state legislature gives Hastings College of the Law the dual mission of legal education and character formation, all bets are off. Epstein gestures in the direction of public choice theory at this point.<sup>43</sup> He emphasizes that *legislatures* are regularly subject to factional control and suggests without quite saying it that factional control carries over into administration. *Design for Liberty* is filled with examples of factional control.<sup>44</sup> Indeed, because Epstein apparently adopts Madison's expansive definition of "faction," which includes minority factions and majority factions,<sup>45</sup> enormous swaths of legislation result from factional control.<sup>46</sup>

Discussing the way bias infects the administrative state, Epstein describes "modern legislation [that] creates explicit preferences for employees, tenants, or consumers that are at odds with the basic impersonal principles of common law" (pp 150–51). This legislation might seem to be the result of ordinary majoritarian decision making, but Epstein puts it into the public choice framework by observing about land-use permit systems that the "ballot box of local citizens [does not] protect nonvoters who would like to move into a community guarded by high permit barriers" (p 117).<sup>47</sup> Again, Epstein moves too fast. The public choice accounts he offers explain why legislatures enact statutes benefiting narrow groups. What he needs to show is that public choice considerations lead legislatures to delegate

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<sup>43</sup> "This situation illustrates how a dominant faction may use its power to exclude for the purpose of beating up a small fringe group that cannot defend itself in the political process" (p 139).

<sup>44</sup> See, for example, Epstein's description of legislation sponsored by Representative Jim Wright to "protect[] American Airlines' dominant market position at the new Dallas–Fort Worth Airport" (p 111).

<sup>45</sup> Federalist 10 (Madison), in *The Federalist* 56, 57 (Wesleyan 1961) (Jacob E. Cooke, ed).

<sup>46</sup> It may be worth observing that many of Epstein's examples of minority factional control involve local governments—as in his examples of permits for development—where, as Madison argued, the opportunities for such control are greater than at the national level. See *id.* at 63–64. Epstein does not discuss why Madison's mechanisms for controlling majority factions at the national level have failed, though the reasons may be well enough known to make such a discussion unnecessary. For one version of the anti-Madisonian argument, see Daryl J. Levinson and Richard H. Pildes, *Separation of Powers, Not Powers*, 119 Harv L Rev 2312, 2317–25 (2006).

<sup>47</sup> "It is easy to persuade other voters to impose these restrictions [on development], given that the large losses are borne by outsiders" (p 63). A more extended analysis than is fairly possible within a short book would amplify this with a discussion of the barriers to national legislation that could address this specific difficulty. (The distinction between "local citizens" and "nonvoters" or "outsiders" disappears at the national level.)

authority to executive officials so as to benefit factions. There are such accounts, though they tend to be rather complicated.<sup>48</sup>

Epstein offers a second reason for bias in exercising delegated power.

The danger with administrative agencies is that their members are selected for one and only one class of cases. Hence, it is easy to staff these bodies with people who have strong antecedent views that take, for example, the position of management or labor, landlord or tenant, firm or investor (p 62).

Some design options reduce the risk of this mission commitment.<sup>49</sup> Expanding the agency's jurisdiction from a single industry to many industries, for example, can reduce the risk that those in the regulated industry will capture the agency. Requiring that the agency's decisions pass through another agency with a different mission commitment—the role of the Office of Information and Regulatory Affairs with respect to major federal rules—can yield policies that are less affected by the originating agency's mission commitment. Mission commitment, like factional control, may not make resource misallocations—and therefore unsound public administration—inevitable, but they certainly increase their likelihood.

For me, the real force of the in practice argument comes elsewhere. For whatever reasons, legislatures in the administrative state delegate broad authority to executive officials. Sometimes a single statute delegates broad authority to an agency, and sometimes a single agency receives broad delegations from numerous statutes. The sheer scope of delegation means that agencies exercising delegated authority “are free to shape policy under the guise of [ ] implementation” (p 151). The reason is that broad delegations are *necessarily* stated in general terms

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<sup>48</sup> See, for example, Peter H. Aranson, Ernest Gellhorn, and Glen O. Robinson, *A Theory of Legislative Delegation*, 68 Cornell L Rev 1, 6–7 (1982). For a more recent and sophisticated version, see Justin Fox and Stuart V. Jordan, *Delegation and Accountability*, 73 J Polit 831, 843–44 (2011).

<sup>49</sup> As Professor Thomas Emerson put it in explaining why the First Amendment bars prior restraints imposed by censorship boards, “Those who are assigned this task already have or soon develop a tendency to pursue it with zeal. At the very least they have a job to do, the continued existence of which depends upon their activeness in performing it.” Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L J 877, 890 (1963). Or, more pithily, the job of the censor is to censor. Similarly, the job of the prescription drug regulator is to regulate prescription drugs (wholly apart from the incentives regulators have to over-regulate so as to avoid public relations disasters). See *Freedman v Maryland*, 380 US 51, 57–58 (1965). See also William T. Mayton, *Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine*, 67 Cornell L Rev 245, 274 (1982).

that cannot “crystallize into particular rules” (p 152). Rather, agencies “necessarily resolve[ ] [questions] on an ad hoc basis that turns on a host of ‘factors,’ each relevant and none decisive” (p 152). Then “expertise ends up second-best to politics” (p 153). Although I still have a nagging sense that Epstein has asserted that broad delegations are inevitable in a faction-driven legislative process but has not really explained *why* they are, I believe that this is the strongest argument supporting Epstein’s in practice claim. Even a well-intentioned bureaucrat, attempting to advance the values embodied in her profession’s basic commitments, will implement a policy driven by deep political rather than superficial expert commitments, because the “all things considered” standards flowing from broad delegations imply that *any* decision the bureaucrat makes will be consistent with professional commitments as expressed in the “all things considered” standard.

At this point Epstein’s in practice claim about public law has to be juxtaposed to his analysis of private law, where, he argues, adherence to the rule of law is possible both in principle and in practice. That argument comes in his explication of Fuller’s rule-of-law principles. For Epstein, “A philosophical presupposition of the rule of law is that it is possible to articulate and apply legal rules that have some ascertainable content that permits their application to particular settings” (p 14).<sup>50</sup> Against rules Epstein sets reasonableness standards, which he argues are incompatible with the rule of law in Chapter 2. A “rule-based system, with limited exceptions, is far more likely to comport with the rule of law than a set of loose standards that inevitably give ample play to judicial discretion in their routine application” (p 34). An example is the negligence rule in torts, which removes “individuated elements” from judicial concern (p 33) even though those elements would properly have a role in “a grand theory of social utility” (p 33). This of course is the “simple rules for a complex world” argument, and it is a powerful one.

Epstein describes “concrete rules as the way station between a grand theory of social utility and the resolution of individual disputes” (p 33). They are also a way station between lin-

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<sup>50</sup> Note that, treating this as a “presupposition” means that Epstein errs in attempting to refute the “global view that all language is so unclear as to preclude the formulation of any rules” (p 15). Proponents of the global view simply have different presuppositions, and for them the fact that *their* presuppositions make the rule of law as conceived by Fuller impossible is not a matter of concern. See, for example, Karl Llewellyn, *The Case Law System in America* 90 (Chicago 1989) (Paul Gewirtz, ed) (Michael Ansaldi, trans).

guistic skepticism about particular words like “property” and “nuisance” and a legal regime in which all decisions are made according to “all things considered” standards. But, I believe, Epstein does not fully consider the possibility that the way station, which enables the rule of law in principle, might also undermine it in practice.

I believe that Epstein is responding to a truncated version of Legal Realist (or, in my view, Critical Legal Studies) arguments. That version goes like this: We see judges using words like “property” and “nuisance” all the time to justify their resolution of individual disputes. But those words have no determinate content, which means that the judges must actually be relying on something else to resolve the dispute.<sup>51</sup> Karl Llewellyn described that “something else” as the judge’s “situation-sense,” an understanding built up from experience about what the right result is, where “right” means both appropriate for the case at hand and suitable for the run of cases like it.<sup>52</sup> Other Legal Realists described “situation-sense” in more conventional terms, as the application of “all things considered” standards.<sup>53</sup>

Epstein identifies problems at the beginning and the end of this argument, but he does not deal with what the Legal Realists put in the middle. At the beginning, his presupposition rejects the general indeterminacy claim. Doing so establishes that rule-governed decision making is possible in principle. And, at the end, he argues that reasonableness standards are incompatible with the rule of law. Doing so establishes that, again in principle, *only* simple rules for a complex world are compatible with the rule of law (pp 33–34).

What is left out is this: Any specific rule can be concrete enough to provide determinate guidance in the resolution of individual disputes. But, what we have is a system of rules. And, as rules proliferate, so do the opportunities for judges to exercise

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<sup>51</sup> See *Guy v Donald*, 203 US 399, 406 (1906) (Holmes).

<sup>52</sup> For Llewellyn’s mature exposition of his position, see Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* 245 (Little, Brown 1960).

<sup>53</sup> These Legal Realists might be characterized as optimistic in their belief that the standards for which they advocated were consistent with the rule of law. Epstein argues that they were mistaken in that belief. Some Legal Realists were more cynical (or really, really realistic), contending that judges were applying unstated rules such as, “The coal company always wins,” to use an example from Frederick Schauer, *Legal Realism Untamed* \*17 (University of Virginia School of Law Public Law and Legal Theory Research Paper No 2012-38, Aug 2012), online at <http://ssrn.com/abstract=2064837> (visited Mar 3, 2013). That judicial approach would of course be inconsistent with the rule of law as well, failing at least the requirements that the applicable rules be stated publicly and in advance of their application.

discretion in working with the set of rules. So, in practice judges, like bureaucrats, “are free to shape policy under the guise of [rule application]” (p 151).<sup>54</sup>

To elaborate: the Legal Realist challenge begins not with skepticism about the in principle possibility of concrete rules, but with the observation that judges regularly apply not single rules but what I will call rule sets. These rule sets are themselves relatively complicated, consisting of rules, subrules, exceptions to the rules, qualifications to the subrules, and more. So, for example, in the nineteenth century an employer was not liable to an employee who was injured as a result of the negligence of a coemployee unless the negligent employee worked in a department different from the one in which the injured employee worked, or had been hired or retained negligently, or was a “vice principal”—in contemporary terms, a supervisor.<sup>55</sup>

The rule sets nonetheless qualify as “simple” in Epstein’s defense of rules against standards because each rule set has an internal logic that explains and justifies the subrules and qualifications.<sup>56</sup> But, according to the Legal Realists, difficulties arise with rule sets in three ways, which make a system of simple rules administered by judges, though possible in principle, impossible in practice.

(1) *Limiting the proliferation of subrules and exceptions.* A litigant acknowledges that the existing rule set does not include a rule or subrule that would lead to her victory. But, she argues, the court should recognize that the logic of the existing subrules and exceptions supports a new subrule favoring her. Pursuing the logic of the rule set, subrules and exceptions proliferate.<sup>57</sup>

Epstein addresses this mechanism indirectly, though I think ineffectively. As he puts it, “the ideal solution is one

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<sup>54</sup> I have substituted “rule application” for “implementation” in this quotation to identify the way in which the in practice argument about courts parallels that about agencies.

<sup>55</sup> And that’s just the beginning. See, for example, *Hough v Railway Co*, 100 US 213, 215–16 (1879).

<sup>56</sup> To oversimplify, in the fellow-servant setting, the logic is a combination of contract rationales (subrules arise when the employee could not extract a wage premium for working in a risky setting because the employee can’t learn of the risks, as in the “different department” rule) and deterrent-based tort rationales (subrules arise when the employee can’t protect herself by insisting that the employer choose between her and the negligent employee, as in the “vice principal” rule).

<sup>57</sup> See Russell West Jr, Comment, *Mikhail Bakhtin and Change in the Common Law*, 72 Wash L Rev 291, 307–14 (1997).

that seeks to use hard-edged rules in the majority of cases, reserving the softer conceptions of reasonableness and good faith for a limited subset of cases” (p 35).<sup>58</sup> The reason is that minimizing subrules and exceptions “increases the reliability of decisionmaking while reducing administrative costs” (pp 33–34). That is obviously right. But, when a litigant seeks the creation of a new subrule within a rule set that already contains many subrules, it is simply arbitrary to say, “The costs of administering the existing rule set are right on the line between acceptable and excessive, and adding just one more subrule will push us over the line.” And, in practice, judges do not say that. They proliferate subrules. In doing so, they set up the situation to which Legal Realists responded with, “Your rule set is now so complicated that in practice you’re using the rules as a mask for determining what’s reasonable all things considered. It would be more transparent to say that by using a reasonableness standard.” I do not think that Epstein offers an argument against this in practice argument.

(2) *Keeping each rule and exception “within bounds.”* As we have seen, Epstein acknowledges that hard-edged rules will inevitably have exceptions, but he wants to keep them limited. The difficulty lies in doing that successfully. Consider the “vice principal” rule. It exists because workers have to do what their supervisors tell them to do, no matter how reckless the instructions seem to the workers (and, after the event, how reckless the instructions proved to be). But, who counts as a “vice principal”? “Obviously,” or so some litigant will inevitably claim, somebody *acting as* a supervisor—a vice principal for purposes of the specific task that resulted in injury. Again, the “acting as” exception is consistent with the rule set’s structural logic. The Legal Realists claimed that this type of move—expanding or contracting the bounds of subrules and exceptions—can be rejected only by arbitrarily cutting the rule set’s structural logic short. More important, they also claimed that, whatever a systematic scholar might say about the subrule’s boundaries, judges in practice expanded and contracted those boundaries in ways

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<sup>58</sup> Note that Epstein moves directly from hard-edged rules to reasonableness standards without acknowledging that subrules and qualifications raise the same difficulties; he also does this when referring to a “rule-based system, with limited exceptions” (p 34).

that could not be explained within the rule set's logic.<sup>59</sup> I think they were right in that second claim.

(3) *The availability of competing rule sets.* The final mechanism by which hard-edged rules disappear in a fog of subrules and exceptions is the one I find most interesting. A litigant seeking advantage says, "You think that this problem falls within the domain of one rule set, but actually it falls within the domain of another—or at least, it's related closely enough to another rule set that we ought to draw on rules and subrules from the other domain to resolve the problem at hand." Consider here the issue of employer liability for injuries to workers. On its face the problem looks like a tort problem—injury resulting from negligent action. But, employers responded that the problem was actually a contract problem because workers could obtain wage premiums for exposure to risk.<sup>60</sup> So, they argued, the real issue in worker-injury cases was determining on whom the employment contract placed the risk of injury, and, in the absence of an express term allocating that risk, what the default allocation should be. And courts agreed.

This is a relatively simple example, but there are many more, and more complex ones, in which tort principles invade property law, property principles invade contract law, and the like.<sup>61</sup> These invasions undermine the "hard-edged"-edness of the rules in any individual rule set.<sup>62</sup>

The Legal Realists argued that these difficulties meant that in practice judges inevitably exercised discretion, at least to the same extent that administrators do.<sup>63</sup> So, if sound public admin-

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<sup>59</sup> See, for example, Llewellyn, *The Case Law System in America* at 68 (cited in note 50).

<sup>60</sup> See, for example, *Farwell v Boston and Worcester Rail Road Corp*, 45 Mass 49, 57 (1842).

<sup>61</sup> For an example of this phenomenon, see *Riggs v Palmer*, 115 NY 506, 509–10 (1889).

<sup>62</sup> I note that, though it is not important to my present argument, this mechanism raises questions about the individuation of rule sets. So did much of the Legal Realist scholarship. See Brian Leiter, *Legal Realism and Legal Positivism Reconsidered*, 111 *Ethics* 278, 282 (2001); Karl N. Llewellyn, *Some Realism about Realism—Responding to Dean Pound*, 44 *Harv L Rev* 1222, 1237 (1931). A classic example is this: we don't have a law of accidents or negligence, but a law of liability for injuries inflicted in connection with the operation of automobiles, a law of liability for injuries inflicted in connection with the operation of railroads, and so on. For my present purposes I require only that there be numerous rule sets and need not worry about how one rule set is differentiated from another.

<sup>63</sup> See Benjamin N. Cardozo, *The Nature of the Judicial Process* 113 (Yale 1921).

istration consistent with the rule of law is possible in principle but impossible in practice, so is the judicial administration of simple rules for a complex world.

I do not think that Epstein addresses this version of the argument because he focuses his attention on the distraction at the front end of global skepticism about linguistic determinacy and on the distraction at the back end of advocacy for standards. And, it is not clear to me that, given his views about administrators, he could have an effective response.

As I have suggested, the core of Epstein's argument about administrators is that even well-intentioned administrators find themselves with so much delegated discretion that their professional commitments run out, leaving them to implement their policy preferences (p 151).<sup>64</sup> With suitable modifications, the same seems true of judges, and because of the structure of litigation, perhaps even more so. Consider the well-intentioned, reasonably competent judge faced with one of the three arguments for proliferating subrules. The judge has legal resources available to her—cases, treatises, and the like. She has to use those resources to decide whether to accept the argument being made, and doing so takes intellectual work.<sup>65</sup> Well-intentioned and reasonably competent judges, though, have limited intellectual resources to deploy in any individual case, if only because they operate under time constraints. They can use various shortcuts to reach a conclusion, one of which is reliance on the intellectual work done by the litigants' lawyers (while taking into account the fact that the lawyers' product is motivated by an interest to advance the client's cause). Sometimes the judge will find herself out-thought by one of the lawyers, in the sense that she is comfortable substituting that lawyer's intellectual work for her own. Then her decision becomes part of the legal materials available to judges and lawyers in the future. The result: the gradual though erratic proliferation of rules and subrules, yielding policy discretion in the judge.<sup>66</sup>

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<sup>64</sup> “[B]road declarations of legislative purpose give vast amounts of delegated authority to administrative agents, who then are free to shape policy under the guise of its implementation” (p 151).

<sup>65</sup> See Duncan Kennedy, *A Critique of Adjudication: Fin de Siècle 169–70* (Harvard 1998) (developing the idea of “work” in this setting).

<sup>66</sup> I suggested in passing that the in practice argument might be stronger for judges than for administrators, and offered the role of litigants' lawyers as the reason. Administrators build into their intellectual work their own understandings of professional norms, which are not subject to displacement by the intellectual work of competing par-

My conclusion is that Epstein has three parts of the story right: adjudication and administration can in principle be consistent with Fuller's rule-of-law principles, and administration in practice almost inevitably violates those principles. He has the fourth part wrong: adjudication in practice almost inevitably violates the same principles. Or, if not wrong, at least he does not adequately defend the position he takes. I turn next to an examination of the reasons Epstein offers for his contrary conclusion about what judges do in practice.

#### IV. THE POLITICAL ECONOMY OF OUR PLIGHT

If Friedrich Hayek and Lon Fuller are Epstein's mentors in social and legal theory, Glenn Beck appears to be his mentor in political economy. For, at the heart of the book lies a puzzle: How did things get so bad? Epstein has a standard account of why legislatures go off the tracks and a related, though relatively underdeveloped, account of why executive officials do. The puzzle, though, is why the judges who found Epstein's classical liberal rights in the common law and the Constitution have gone along.

As to legislatures, Epstein's account is the usual public choice argument about minority factions getting control of the legislature—small interest groups gaining concentrated benefits mobilizing with some intensity to overcome the larger number of less motivated voters who will bear the distributed costs of regulation. The difficulties with this argument as an account of legislative action across the board are well known,<sup>67</sup> but I do not fault Epstein for relying on it in the context of a relatively brief exposition of a larger argument.

As to courts, the Supreme Court's decision in *Christian Legal Society* illustrates the puzzle in political economy raised by Epstein's argument. For centuries—according to Epstein—common law courts developed classically liberal rules of private law, and when the Supreme Court came on to the scene and began to develop constitutional law it too adhered to classical liberal principles (pp 120–25). Then, something went wrong. The courts, who are the heroes of the story up to the early twentieth century, become one of its villains after that. Courts went astray in private law and public law. They have mistakenly adopted

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ties motivated to characterize those norms differently. See Irving R. Kaufman, *Judicial Review of Agency Action: A Judge's Unburdening*, 45 NYU L Rev 201, 201 (1970).

<sup>67</sup> For a good critique of the public choice argument, see Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s*, 139 U Pa L Rev 1, 6–8 (1990).

reasonableness tests “in all major litigated cases” (p 39). “[T]his sound approach has been uniformly rejected not only in the Supreme Court, but also in most state court decisions” (p 105).<sup>68</sup> He refers to “judicial nullification [of US Supreme Court decisions] in the lower federal and all state courts, as judges have used their ingenuity to find some legitimate purpose for every condition attached to particular permits” (p 134). He describes one Supreme Court decision in these terms: “The utter refusal to allow institutional rules to govern the case was, in this instance, a form of judicial lawlessness that offends Fuller’s requirements” (p 42, quoting *Wyeth v Levine*<sup>69</sup>). Modern administrative law gets things backwards, the *Chevron* doctrine giving deference to agencies on questions of law but the hard-look doctrine denying them deference on questions of fact, and “[t]he only way this result could be avoided is for judges to take the exact opposite position” (p 158). “A strong antidevelopment and preregulation view of the world has led courts to meddle unwisely in the government management of public works and public lands” (p 160).

What is the political economy of the shift from the (correct) nineteenth-century approach taken by the courts and their mistaken approach since then? Because he thinks that state and federal courts have gotten off the tracks, Epstein cannot transfer his public choice analysis of legislatures to the courts. Perhaps elected state court judges can be captured by private interests in the way legislatures can, but, even setting timing questions aside,<sup>70</sup> it is hard to see how federal judges and the US Supreme Court can be.

And, indeed, the political economy of Epstein’s account of the judicial transformation is almost entirely ideational. The clearest summary statement comes in a slightly different context, but is applicable to—indeed, is probably distinctively appli-

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<sup>68</sup> I think there is an unacknowledged tension between Epstein’s disparagement of judicial behavior in private law cases and his observation that the Supreme Court’s *Penn Central* decision “would not be possible if the same dense conception of ownership that governs private disputes carried over to evaluating all forms of state action” (p 104). See *Penn Central Transportation Co v New York City*, 438 US 104, 124 (1978). My guess is that what he really means is “the same dense conception of ownership that *should* govern private disputes.”

<sup>69</sup> 555 US 555 (2009).

<sup>70</sup> The great wave transforming state judges from appointed to elected officials occurred before the end of the classical period. See Jed Handelsman Shugerman, *The People’s Courts: Pursuing Judicial Independence in America* 84–102 (Harvard 2012). Even conceding that it might take some time for the public choice effects of judicial elections to manifest themselves in doctrine, I think that the timing is off: degeneration due to judicial elections should have occurred sooner than it did on Epstein’s account.

cable to—the courts: the modern approach “gained traction because modern constitutional and political theory rejects the presumption of distrust in government” (p 150). Where, then, did these bad ideas come from? Apparently, from the mind of Woodrow Wilson. Epstein begins the book with a canned history of the twentieth-century regulatory state. “The first burst of progressive energy took place during the presidency of Woodrow Wilson. . . . Wilson’s 1885 book *Congressional Government* was perhaps the most important academic precursor of the progressive political movement” (pp 1–2). Hayekian challenges to the administrative state “brought forth an equally strong defense by those who followed in the path of Woodrow Wilson” (p 4).<sup>71</sup>

There is little worth saying here about this political economy. Epstein or others might use different venues to develop the ideational account in more detail, beyond gestures toward Woodrow Wilson.<sup>72</sup> But Epstein made a fair choice to present a short account of his overall approach rather than a detailed elaboration. I would fault him on only two points here. He lays out the public choice version of the political economy of legislatures and executive officials in somewhat more detail than he does the ideational political economy of judges. And, probably more important, the ideational account makes public choice analyses irrelevant (or at most supplementary): If courts can be misled by ideas, why can’t voters, legislators, and executive officials? Epstein seems to agree: “The tragedy is that the judges and *legislatures who ought to know better* shy away from the regime of fixed and known rules that could avoid virtually all of” the departures from Fuller’s rule-of-law principles (p 42) (emphasis added). Yet, if everyone can be misled by bad ideas, we do not need the public choice apparatus of factions, concentrated benefits, distributed costs, and the like to account for the rise of the administrative state: the public no less than the judges has been misled by Woodrow Wilson.<sup>73</sup>

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<sup>71</sup> Epstein does not refer to Hayek by name here—Hayek comes into the story by name a bit later (p 6)—but the antecedent is that modern statutory developments “quickly raised the question of whether or not they were consistent with the rule of law as it applied to the administrative state” (p 3), Hayek’s central point. See Hayek, 1 *Law, Legislation and Liberty* at 138 (cited in note 3).

<sup>72</sup> Such an elaboration would focus, I think, more on Professor James Landis and then Professor Felix Frankfurter than on Wilson. See generally Felix Frankfurter, *The Public and Its Government* (Yale 1930); James M. Landis, *The Administrative Process* (Greenwood 1974). Neither appears in *Design for Liberty*.

<sup>73</sup> One might think that it would be easier for voters and legislatures than for judges to adopt wrong ideas because on the public choice account those ideas dovetail with their material interests. I do not know of a metric for “ease of adopting wrong ideas,” though.

## CONCLUSION

Epstein's ideational political economy may be what explains the Candide-Micawber combination. Candide has the right theory of the world, which unfortunately defeats him at every turn.<sup>74</sup> But, Mr. Micawber comes along to say that something will turn up if people only start thinking straight again.

Candide eventually reduces the scope of his ambitions—he will not try to save the world but will do his best to tend his own garden.<sup>75</sup> Somehow I think that that is not within Epstein's range of possibilities. Something did turn up for Mr. Micawber—a new and successful career, albeit in Australia.<sup>76</sup> Perhaps Epstein's better world is somewhere else too. Not on this earth, though.

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<sup>74</sup> I must exclude natural disasters from this appropriation of *Candide*, though doing so is obviously inapt in light of the important role that the Lisbon earthquake played in both Voltaire's understanding of the world and Candide's. See Voltaire, *Candide* at 9–11 (cited in note 1). See also Voltaire, *The Lisbon Earthquake*, in *The Portable Voltaire* 556–59 (Penguin 1977) (Ben Ray Redman, ed).

<sup>75</sup> See Voltaire, *Candide* at 77 (cited in note 1) (“‘That is very well put,’ said Candide, ‘but we must cultivate our garden.’”).

<sup>76</sup> See Dickens, *David Copperfield* at 848–50 (cited in note 2) (describing Mr. Micawber's new position as Port Middlebay District Magistrate in Australia).