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Administrative Harms

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INTRODUCTION

Administrative power is the dominant reality of American governance. Being the nation's most common mechanism for control, it profoundly shapes how Americans experience government. So different is it from the Constitution's framework that it is called *the administrative state*—as if to acknowledge that it is distinct from a republic and is almost a state within the Constitution's United States.

Such an edifice begs to be questioned. If it deserves our respect, let alone obedience, it should be able to survive academic doubts. And if it is so frail that it cannot withstand questioning, that is worth knowing. So this article surveys the damage done by administrative power, with the goal of inviting more systematic justifications of it than have appeared thus far.

THE DAMAGE AND ITS IMPORTANCE

The administrative harms are numerous. They include not only violations of the Constitution's structural freedoms but also systematic violations of its constitutional rights. In addition, there is the declension from the rule of law—not merely to the rule of rules, but even down to much less sanitary pathways of power. Other harms include the irrationalities of administrative decision making; prejudice and discrimination; a dehumanizing denial of personal agency; and so much alienation and political conflict as to be destabilizing.[1]

These are serious wounds to the Constitution, to the United States, and to most Americans. It is important to recognize them, because once this range and degree of harm is recognized, administrative power becomes difficult to justify.

A persuasive defense of administrative power would need to respond to the full extent of administrative harms, showing that administrative power is constitutional and otherwise desirable notwithstanding its many costs. If the administrative state is defensible, it will be necessary to wrestle with all its damage.

A Hoover Institution Essay

CONTEMPORARY REALITIES

This article combines traditional constitutional arguments with observations about contemporary harms. Defenders of the administrative state often assume they are fending off a misguided originalist critique, which idealizes the past and fails to recognize contemporary realities. But their understanding of administrative "law" tends to be highly idealized, and it is precisely the ugly realities of administrative power that need to be recognized.[2] So, rather than idealize the past, this article aims to draw attention to contemporary realities.

To be sure, the article looks to the historical Constitution to show how much freedom has been lost under the administrative state. But other harms—such as administrative irrationalities and discrimination—are not measured historically. And whether the harms are measured historically or otherwise, the point here is to recognize the contemporary damage.

Thus, while there will be some reliance on the Constitution as originally understood, the argument is centrally about contemporary administrative realities. Put another way, this article does not ask readers to embrace either originalism or the living constitution. Both old- and new-style constitutional analysis lead to the same conclusion about the dismal effects of administrative power.

THE ARGUMENTS

The focus of the arguments will be mostly, even if not exclusively, on federal administrative power.[3] The damage will be summarized in seven categories:

1. Administrative power deprives Americans of basic structural freedoms, such as their freedom to be governed by laws made by their elected representatives and their freedom to be held to account only by adjudications of the courts with real judges and with juries.
2. It systematically violates constitutional rights, mostly procedural but also substantive.
3. It abandons not merely the Constitution and governance through law, but even the administrative ideal of the rule of rules, and it devolves down toward ever more disreputable pathways of power.
4. Although long praised for its rationality, administrative decision making comes with its own biases or distortions.
5. Federal administrative power developed amid racial prejudice, and it remains an instrument of discrimination.
6. It is dehumanizing, in the sense of diminishing individuals' political and moral agency. It disenfranchises many Americans by diluting their voting rights. It often shortcuts their exercise of legal and moral judgment. It even tends to reduce them from self-governing citizens to mere objects of power.
7. It stimulates alienation and political conflict—to the point of being dangerously destabilizing.

Each of these problems should be enough to raise serious misgivings about administrative power.

Of course, any departure from the status quo is bound to be unsettling, and the prospect of cutting back on administrative power has provoked a sort of moral panic. This article therefore makes these additional points:

8. The administrative anxieties about abandoning administrative power tend to be overstated.
9. Change probably can't be avoided—not because of academic opposition to the administrative state, but because this regime weighs so heavily on American society.
10. None of this means that the administrative state needs to be dismantled all at once. Instead, there should be shared interest in a principled experimental gradualism.

The sheer scale of the damage condemns the administrative state. Those who defend this unwholesome edifice have some explaining to do.

This article is only an initial draft of a longer forthcoming work, so some sections are omitted here in the interest of brevity. And because the draft is merely tentative, criticisms and suggestions are especially welcome. I am grateful for this opportunity to test my thoughts and get comments.

STRUCTURAL FREEDOMS

Administrative power shifts legislative and judicial power to executive and other agencies. It thereby damages the Constitution's basic structures—its location of legislative powers in Congress and judicial power in the courts.

These administratively endangered structures are secured by the Constitution's separation of powers. More precisely, they are protected by its vesting of the tripartite powers in their own branches of government.

The administrative state displaces these structural arrangements, harming the freedoms they protect. At stake are some of the most basic freedoms of Americans, including those of living under laws made by their elected representative lawmakers and of being judged by independent judges and juries. This pairing of political lawmaking and unpolitical judging is a matter of freedom, not just structure.

LEGISLATIVE POWER

The Constitution vests the legislative powers, including the regulation of interstate commerce, in Congress and thus in the hands of elected and representative lawmakers. Nonetheless, administrative agencies exercise legislative power.

Nondelegation Doctrine

The conventional justification is the "nondelegation doctrine." This Supreme Court doctrine purports to bar Congress from delegating legislative power.[4] It actually is entirely permissive of such delegation—as long as Congress offers an "intelligible principle" guiding agencies in their regulation.[5] Indeed, the Court has upheld congressional delegations even without any such intelligible principle.[6] The nondelegation doctrine thus permits exactly what it says it prohibits.

So muddled a doctrine is scarcely credible. The underlying idea—that when an administrative rule gives effect to a statutory intelligible principle, it is an exercise of executive power, not delegated legislative power—was long ago denounced as "confused" by none other than James Landis.[7] The difficulty is that even when the doctrine denies that any legislative power is being delegated, agencies appear to be legislating.

The doctrine is therefore being reconsidered both within and outside the Court. One might consider abandoning it for a theory that the Constitution generally permits the delegation of legislative power. But so lax a view of the Constitution is improbable.

Even where the Constitution is interpreted to leave some room for congressional delegation of legislative power, there probably must be some limit. Otherwise Congress could defy the people's choice of Congress as their legislature and even could defeat their elective choice of particular legislators. So delegation is a real problem.

Multiple Grounds for Rejecting Any Transfer of Legislative Power

The Constitution's solution is to bar transfers of legislative power—in particular by vesting each power in its own branch of government and making that location mandatory.[8]

How is this known? From multiple underlying principles, including old ideas about the difference, separation, and exclusivity of the tripartite powers; about representative consent and about nondelegation; about the difference between internally and externally exclusive powers; and about exclusive and nonexclusive authority. In addition, of course, one must consider the framing assumptions and the Constitution's text.

The scholarship that defends delegation conveniently ignores most of the above-mentioned principles, the framing debates, and even the text! Each of these layers of evidence shows that legislative power could not be transferred. And each (other than nondelegation) gets little if any attention from delegationists.

But these layers of evidence matter, as I explain in "Nondelegation Blues."[9] Here, it should suffice to summarize just the principle of representative consent, framing assumptions, and the Constitution's text, particularly the first three articles. On each ground, especially the text, it will be seen that legislative power cannot be relocated—a point confirmed by early federal practices.

Representative Consent

By way of background, it is important to recognize the principle of government by consent—in particular, consent through the election of representative lawmakers.

One of the major achievements of political theory during the past millennium has been to reconcile individual freedom and government power. The solution lay in consent. On the assumption that individuals in the absence of government were equally free, it seemed that they could be bound or obliged to government only through their consent. By this measure, it was assumed that without consent, government and law were illegitimate. So government had to be established, and its laws had to be made, with consent—as a practical matter, by elected representatives.

The Americans who resisted Britain and established new governments almost uniformly thought they should be governed only with representative consent. Many advocates for administrative power narrowly focus on eighteenth-century ideas about delegation, without adequately considering what early Americans thought about consent. But there was widespread agreement among early Americans that they could be bound only by elective consent—that the laws or rules governing their rights and duties had to be made by their elected representatives. Indeed, the main point of the Revolution and the erection of American constitutions was to preserve republican or representative government—primarily meaning a system in which the people governed themselves, in the sense of electing their lawmakers and other officials. So prevalent were these views that it is difficult to identify any widely held contrary position.[10]

Of course, Congress in action is rarely as admirable as in theory. The institution is not perfectly representative, and its decisions are often distorted by corporate and other interests. But administrative agencies also are affected by such pressures—in ways that are much less open—and with no representative consent.

For both historical and contemporary legitimacy, it is essential that legislative power be exercised with representative consent. This is crucial. So it is difficult to understand how legislative power can be exercised by agencies in place of Congress.

Framing Assumptions

Some scholarship claims there was no nondelegation at the Founding—that there was "deafening silence about constitutional limits on delegation."[11] But this is astonishing. The framers discussed such questions. Indeed, the 1787 Constitutional Convention rejected any executive exercise of congressionally delegated power.

When the Convention discussed how to establish a national executive, James Madison proposed that, in addition to other executive powers, the executive should have the power to execute congressionally delegated powers.[12] His initial suggestion along these lines provoked General Charles Cotesworth Pinckney's concern that "improper powers" might be

delegated.[13] So Madison came back with a proposal that limited the executive's delegated powers to those that were neither "Legislative nor Judiciary in their nature."[14] In other words, he treated executive power as residual and hoped Congress could expand upon what was specified. The broader point is that there seems to have been agreement that the executive should not exercise delegated legislative or judicial powers.

But even this was not enough for the Convention. Charles Pinckney—not to be confused with General Pinckney—moved to strike out Madison's proposed authority for the executive to execute delegated powers that were not legislative or judicial.[15] Pinckney thought Madison's words "unnecessary, the object of them being included in the 'power to carry into effect the national laws.'"[16] The Convention then voted (seven states to three) to remove Madison's delegation language.[17]

This episode is illuminating. First, it shows that the Convention thought that if there was to be congressional delegation, the executive should exercise only delegated powers that were neither legislative nor judicial.[18] Second, it reveals that a majority of the Convention assumed the executive shouldn't exercise even any additional *executive* power delegated by Congress. Any delegation of the tripartite powers would be done by the Constitution, so any congressional delegation of such powers was unnecessary.

Article I

Although the underlying principles of consent and the framing assumptions are interesting, far more significant is the Constitution itself. Defenders of administrative power have been remarkably hesitant to dig into the Constitution's vesting language. But it is crucial. Rather than employ the imperfect term *delegated*, the Constitution speaks in terms of power being *vested*.[19] Indeed, the Constitution declares that all legislative powers granted by the Constitution "shall be vested" in Congress.[20]

The natural extent of legislative power was understood to be the power of making binding rules for a society. Put another way, legislative power seemed, by nature, to be regulation, or the rules governing rights and duties. Such rules were naturally legislative on the theory that individuals could be bound only with their consent—that is, through their elected representatives.

From this point of view, although Congress's legislative powers could include some nonbinding matters, such as borrowing money, they necessarily included at least the making of binding rules—the rules regulating duties and rights.[21] Alexander Hamilton, in *The Federalist*, summarized: "The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated."[22]

For the federal government, this was primarily the power to "regulate" commerce among the states—the power that is the font of most administrative regulation. Whatever one thinks of the natural basis of legislative power, the Constitution enumerates all of its legislative powers, including all of the federal power to regulate the public.

It therefore is telling that Article I's Vesting Clause not only transfers the legislative powers but also mandates their location. One might suppose that the Constitution's vesting of power merely conveyed the power to Congress—as if it were a conveyance of title to land—leaving Congress free to retransfer it to administrative agencies. But transfers of power are not transfers of land. And the Constitution doesn't merely use the language of transfer.

To be precise, it doesn't say that it *hereby vests* the legislative powers in Congress—phrasing that would allow Congress to vest the powers elsewhere. Rather, the Constitution says that the legislative powers *shall be vested* in Congress. This language not only transfers the powers; it also makes their location mandatory. And in making their congressional location mandatory, the text bars any transfer of legislative power out of Congress.

Let's return to the commerce power for purposes of illustration. The Constitution says this power "shall be vested" in Congress. The Congress is the required location within which the power to regulate interstate commerce must vest.

Of course, delegation language remained commonplace in talking *about* the Constitution. Roman law and seventeenth-century political theory had treated transfers of power as matters of delegation.[23] So it is unsurprising that delegation language remained a generic way of speaking about shifts of legislative power. For example, the Tenth Amendment talks about "the powers not delegated to the United States by the Constitution." But when the Constitution is not merely speaking *about* its placement of powers but is actually locating them, it employs a different vocabulary. Then, it specifies where they "shall be vested."

The Constitution thereby makes clear that the legislative powers cannot be divested from Congress and cannot be vested elsewhere. Congress was to be their only and final location. Congress therefore cannot divest its legislative powers to agencies.

In response, it might be urged that when Congress gives legislative powers to administrative agencies, it merely shares those powers. From this perspective, although Congress lets agencies exercise some of its legislative powers, it still enjoys the capacity to exercise them, and so they remain vested in Congress. Yet the Constitution does not say that the legislative powers "shall be vested in a Congress of the United States *and such other bodies as Congress specifies*." Instead, it says that the legislative powers "shall be vested in Congress." They therefore must remain there, not in agencies or any other bodies.

If the Legislative Vesting Clause textually permits sharing of vested power across branches, does that mean the Executive Vesting Clause textually permits the executive to share some of its power with Congress or the courts? Or that the Judicial Vesting Clause textually lets the courts share some of their power with Congress or the executive? Obviously not. Nor does the Legislative Vesting Clause allow Congress to share its powers with the other branches.

The text makes the congressional location of legislative powers mandatory. So, such powers cannot be transferred, shared, or otherwise relocated.

Article III

What has been said about the vesting of legislative powers is unexpectedly confirmed by a second text—in particular, that vesting judicial power. Article III states: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[24] In other words, when the Constitution, in vesting judicial power, let Congress specify the location of that power, this was expressly authorized. In contrast, remember, when the Constitution vested the legislative powers, it did not say they "shall be vested in Congress *and such executive agencies as the Congress may from time to time ordain and establish*."

The structure of congressional authorization expressly established in Article III cannot be attributed to Article I. Congress was expressly authorized to designate the location of judicial power, but not of legislative power. Congress therefore cannot designate the location of legislative power.

Article II

The vesting obstacles to congressional delegations of legislative power have a mirror image in a third text, Article II's vesting of executive power in the president.[25] The delegation danger was not only that Congress would unconstitutionally delegate legislative power but also that the president would unconstitutionally go beyond his executive power by exercising legislative or judicial power.

This explains why the framers assumed not simply that Congress shouldn't delegate legislative power, but more immediately that the executive shouldn't exercise any power of a legislative or judicial nature.

Early Federal Practices

Early federal practices confirm that legislative powers could not be shifted to the executive. Repeated studies of early statutes reveal no early examples of national domestic binding rules made by the executive. In other words, there was no agency rulemaking of the sort that is at the core of the current debate over administrative power.

Of course, in contrast to binding administrative rules, there were executive rules instructing executive officers about the distribution of patents, pensions, and other things that were understood as government grants or privileges.[26] There also were jurisdictional limits to what had to be done in Congress. Congress delegated legislative power at the margins—for example, in some cross-border matters and in the territories and the District of Columbia (where the Constitution gave Congress local legislative power).[27] But in national rules regarding domestic matters, it is difficult to find instances in which Congress authorized the executive to make binding rules.[28]

Layered Evidence

Layers of evidence thus show that, under the Constitution, Congress may not transfer legislative power to agencies, and agencies may not exercise any such power. The full range of relevant evidence is discussed in my article *Nondelegation Blues*.[29] Here, the dual limits are clear from the principle of representative consent, from the framing, repeatedly from the Constitution's text, and from early federal practices. Rarely in constitutional law do so many considerations align so powerfully to show what is unconstitutional.

In the administrative state, however, legislative powers are transferred to administrative agencies. The resulting exercise of legislative powers by unelected bureaucrats is the initial element of the structural damage. And the damage is profound, for it denies Americans their freedom of self-government—their freedom to define their rights and duties through laws made by their elected representatives.

EXECUTIVE POWER

Even executive power is dislodged by the administrative state—because some agencies are independent. Their heads are statutorily protected from being dismissed by the president without good cause. So they hold office without being subject to presidential control, except in rare circumstances.

An independent agency can exercise executive power—for example, by bringing regulatory enforcement actions (before its own administrative law judges or in the courts).[30] But because the commissioners who oversee prosecutorial policy are not ordinarily removable, it is difficult to conclude that their executive power remains in the president.

Executive power is defined by the advocates of delegation as the power to execute or enforce the law.[31] It is more accurately understood as the force or action of the nation, including domestic law enforcement but also more discretionary action, especially abroad.[32] Either way, this executive power "shall be vested" in the president, meaning that this location is mandatory.[33]

To be sure, executive power is not as fixed as the legislative powers, for the Constitution expressly indicates that the president may subdelegate his power to his subordinates. The Constitution makes him commander in chief and gives him the duty to "take care that the law be faithfully executed."[34] These clauses clearly anticipate that he will work through subordinates. At the same time, they suggest that he must retain control over his subordinates.

How is he to do this? Appointment and removal are part of both law execution and, more broadly, the nation's action. So, however executive power is defined, it includes the authority to appoint or remove the subordinates who assist him in carrying out such power.[35]

It therefore is telling that the Constitution carefully limits and adjusts the appointments power but says nothing about removal.[36] This means that the president's executive power includes

an unlimited removal power, which is exactly what one would expect if he is to be able to take care that the laws are faithfully enforced. Indeed, when Alexander Hamilton was the first Treasury Secretary, he explained that his control over subordinates rested ultimately on his authority to fire them.[37]

But the president's executive power, including the essential capacity to fire subordinates, is sharply eroded by the development of independent agencies. Put another way, to the extent executive power is exercised by persons whom the president cannot fire, it is difficult to conclude that it is still vested in him. It also is difficult to believe that the president can still take care that the laws are faithfully enforced.

The administrative transfer of executive power away from the president thereby undercuts the Constitution's assurance that executive power will be politically accountable. When the Constitution says executive power shall be vested in the president and that he shall take care that the laws are faithfully executed, it makes all federal law enforcement accountable to the president and ultimately to us. It is valuable that prosecution and other enforcement decisions are made in the first instance by lawyers and other subordinates, not the president. But when they are not politically accountable to and through the president, subordinates can go astray, pursuing their own agendas and deviating from the law, without political accountability.

NECESSARY AND PROPER?

In defense of the administrative mixing of power across branches, it is sometimes suggested that the necessary and proper power will do the trick. From this perspective, it is necessary and proper for Congress to execute the powers of government by rearranging them. But this vigorous understanding of the necessary and proper power runs into difficulties.

Proper

At the very least, it seems that the transfer of legislative and judicial powers is not proper. It has been proposed that the term "necessary and proper" should be read as a *hendiadys*—a double-barreled expression of a single standard. (Literary examples include *good and strong* and *nice and warm*.) From this perspective, neither *necessary* nor *proper* is a distinct measure of authority, let alone a limitation.[38] But is this true?

Necessity standing alone had long been an open-ended justification for power.[39] So the requirement that legislation be necessary for effectuating another power looks like a limited authorization, and the word *proper* looks like an additional limit on what was necessary.[40]

The Constitution itself reveals the independent significance of *proper*. Prominent British legislation (notably the 1774 Quebec Act) had distinguished two sorts of necessary actions. Some royal acts (such as providing support for the clergy) were discretionary and could be done as the king thought "necessary and expedient."[41] Others (such as erecting provincial courts)

were more hedged by legal limitations and so were to be done as he thought "necessary and proper."[42] Similarly, the Constitution empowers the president to recommend to Congress such measures as he judges "necessary and expedient."[43] In contrast, it limits Congress to enacting what is "necessary and proper."[44] *Proper* looks like a distinct limitation.[45]

That *proper* was a separate limit is confirmed by early commentaries. Of course, Anti-Federalists protested that *proper* did not much limit the federal government.[46] But framers, Federalists, and (after ratification) even men with Anti-Federalist sympathies agreed that *proper* was an independent restriction. Hamilton repeatedly referred to the power to make "*necessary* and *proper*" laws—using italics to distinguish the two elements.[47] Madison alluded to any power "not necessary or proper," thus revealing his understanding that these were separate requirements.[48] And Thomas Jefferson referred to the power to make laws "*necessary* and proper" for carrying the enumerated powers into execution.[49]

The word *proper* thus has distinct significance as a limit on what is authorized as *necessary*. Congress has an incidental power to legislate as necessary for executing other governmental powers. But only as far as is proper for those ends. And it seems improper for Congress to change the location of powers from where the Constitution says they "shall be vested."

Vested

Indeed, the Constitution not only confines Congress to what is proper but also empowers it merely to carry out vested powers. It thereby bars the relocation of such powers—for example, into administrative agencies.

If the Constitution had said that Congress may make laws necessary and proper for carrying out legislative power in the abstract—or judicial power in the abstract—then Congress might have constitutionally shifted these powers out of the bodies in which the Constitution vested them. But the Constitution restricts Congress to carrying out the Constitution's powers as vested in various bodies. To be precise, Congress can make laws "necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[50] Congress thus can enact what is necessary only for carrying out those vested powers. As explained by Judge Nathaniel Chipman of Vermont in 1793, Congress is "empowered, to make all laws necessary and proper for carrying into effect, in the government, or any department, or office of the United States, all the powers, which they are invested, by the constitution."[51]

Being limited to carrying out only the powers *vested* by the Constitution, Congress cannot use the Necessary and Proper Clause to change where those powers are vested. For example, because the Necessary and Proper Clause concerns only the vested powers, and because legislative power is vested in Congress, Congress cannot use the clause to vest that power in, say, the Securities and Exchange Commission. So too, with judicial power, which is vested in the courts. Being confined to doing what is necessary and proper for executing the vested judicial power, Congress cannot use the Necessary and Proper Clause to vest the judicial power in, say, the Federal Trade Commission.

The rearrangement of powers to create the administrative state therefore cannot be justified by the Necessary and Proper Clause. This relocation of powers is not *proper,* and it goes beyond effectuating the powers as *vested* by the Constitution. The Necessary and Proper Clause is thus no excuse for the structural damage done by the administrative state.

Another Textual Objection to Transferring Legislative Power

Although it has been seen thus far that the Necessary and Proper Clause cannot justify redistributing the Constitution's powers, the clause goes further. Rather than merely not justify transfers of power, it also suggests that such transfers are barred.

When Congress authorizes agencies to make rules, it is using the agencies to carry out congressional lawmaking powers. Yet in providing for "carrying" the legislative powers "into Execution," the Necessary and Proper Clause anticipates that Congress will make laws for this end, not that it will leave agencies to do it by making administrative rules.

The power to act of necessity had long been claimed by kings as part of a royal or executive power above the law, and this "absolute" power seemed very dangerous.[52] The Constitution tames the power to act of necessity—most basically, by making it a congressional power exercised through *law*.[53] So, rather than permit the executive or any agency to do what is necessary and proper to carry out the legislative powers, the Constitution empowers *Congress* to make laws that are necessary and proper for carrying the legislative powers into execution.

This authorization for Congress to make laws necessary and proper for carrying the legislative powers into execution means that Congress itself must make such laws. It cannot leave the legislative powers to be carried into execution by mere agencies acting through mere rules. The Necessary and Proper Clause is thus a fourth textual foundation for rejecting any congressional transfer of legislative power.

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The administrative state deprives Americans of the Constitution's structural protections. Most centrally, it denies us our structural freedom to be bound only by laws enacted by elected representative legislators and by the adjudications of independent judges.

But it is not only the structurally protected freedoms that suffer.

RIGHTS

The administrative state is destructive of constitutional rights. The losses are most immediate and sweeping in procedural rights, but they extend to substantive rights, such as the freedom of speech.

The scholarship defending administrative power is notably silent about the rights violations—as if the problem goes away if one just doesn't talk about it. But the damage is substantial. Administrative power is a sobering threat to civil liberties.[54]

JURIES

Whereas the Constitution places judicial power in the courts, the administrative state exercises that power in its own tribunals. These administrative caricatures of courts have the advantage (for government) of denying the Constitution's procedural rights and offering, at best, only much watered-down versions. Most seriously, they operate without juries.

The Constitution protects jury rights not once, nor twice, but three times. It initially secured a jury in the trial of all crimes, but not civil cases.[55] After this provoked an outcry, the Bill of Rights included a more tightly drafted guarantee of juries in all criminal prosecutions and, in addition, a guarantee of trial by jury in suits at common law—meaning all civil cases, other than those in equity or admiralty.[56]

The Constitution's jury rights thus cover the waterfront. They generally assure Americans of jury rights in all cases outside of equity or admiralty, regardless of whether the cases are criminal or civil. This breadth of jury rights is advantageous, as it reduces the incentives for government to play games by shifting law enforcement from criminal to civil proceedings. Either way, the government must make its case to a jury.

Administrative tribunals, however, deny the right to a jury. When the government brings administrative enforcement proceedings, its proceedings are often, functionally, alternatives for criminal prosecutions. And because these enforcement proceedings are usually brought to correct or punish, they tend to be criminal in nature.[57] But there is no need to insist that enforcement proceedings in agencies are criminal, not civil. Either way, they let the government bring proceedings against Americans without the crucial protection of a jury.

The denial of a jury is justified on the assumption that *all* administrative enforcement proceedings are civil, that *all* such proceedings involve public rights, and that the Seventh Amendment does not secure jury rights in cases involving public rights. But it is highly improbable that all administrative proceedings are categorically civil or that all of them categorically involve public rights. What's more, the notion of public rights cannot excuse juryless enforcement proceedings.

The term *public rights* was applied in the nineteenth century to instances in which the executive could constitutionally act on its own, without working through the courts (notably, distraint and the distribution of grants or privileges, such as land patents, invention patents, and pensions).[58] But public rights were not generally understood to include instances involving binding judgments about binding law, whether concerning duties or rights—such cases being at the core of judicial power and therefore not resolvable by the executive.[59] So, there is no justification in the Constitution, at least as understood historically, for concluding that administrative

enforcement actions involve public rights and so can proceed without a jury. That, however, is the justification for juryless administrative enforcement proceedings.

The administrative denial of jury rights is especially disturbing because it assumes that the government's "public rights" defeat a defendant's private claim to a constitutional right. The Constitution gives the government various powers, not rights. In foreign affairs, where nations are equals, not subject to each other, it has long been conventional to speak of the competing rights of different nations. But in domestic matters, it is very odd to speak of the government's rights against the people. The Constitution grants limited powers to government and then further restricts the powers by enumerating rights in persons or the people. It is therefore a complete inversion of constitutional language to say that government has public rights that cut back on the private constitutional right to a jury.

It is true that the right to a jury does not extend to matters outside the judicial power. So, as already hinted, there is no jury right in exercises of executive power, such as distraint, the distribution of patents for land or inventions, and other benefits and privileges. But in binding adjudications governed by binding laws—including the rules that purport to bind in the manner of law—there undoubtedly is a right to a jury.[60] So the notion of public rights does not justify the denial of juries in administrative enforcement proceedings.

Indeed, the administrative denial of jury rights taints the courts whenever they hear a petition for the review of an administrative proceeding. By statute, such petitions are to the circuit courts, which hear appeals and so cannot call a jury. Rather than hold the underlying administrative proceeding unconstitutional, such courts almost always simply accept the "administrative record"—the agency's account of the facts. The administrative denial of a jury is thus echoed by the courts. Every court that reviews administrative proceedings is drawn into the destruction of jury rights.

DUE PROCESS

It is tempting to recite each of the administrative perversions of procedural rights. In this vein, this article could linger on reversed burdens of proof and persuasion, refusals to permit confrontation of witnesses, and so forth. But for the sake of brevity, let's turn to the broadest of procedural rights, the due process of law.

Core of Due Process

The core of this right was a freedom to be held to account only in the courts.[61] So, when acting against a person, government must act through the law and the courts. This matters because, in the courts, the judges have a duty of independent or unbiased judgment in accord with the law of the land and have to follow the gnarly old common law procedures. In contrast, administrative adjudication occurs outside the courts and does not provide those procedures. In both ways, it denies the due process of law.

Already in the Middle Ages, in 1368, a due process statute recited that attempts to hold subjects accountable in the king's council were "against the law."[62] The statute then barred such

proceedings by requiring (as summarized on the margin of the Parliament roll) that "none shall be put to answer without due process of law"—meaning the process of the courts.[63] Thus, any move—even merely a summons—to compel subjects to answer questions or charges in the king's prerogative-administrative proceedings was unlawful.[64]

This understanding of due process persisted. The 1640 act of Parliament abolishing the Star Chamber recited the principle stated in 1368, that "no Man be put to answer without presentment . . . by due Process and Writ Original according to the old Law of the Land."[65] Due process was a right to be held to account only in the courts.

The Fifth Amendment's passive voice—as shown by Nathan Chapman and Michael McConnell—discloses its breadth: "No person shall . . . be deprived of life, liberty, or property, without due process of law."[66] If the amendment had aimed merely to limit what the courts could do, it might have stated (in the active voice): "No *court* shall deprive any person of life, liberty, or property, without due process of law." But, like the other procedural clauses in the Bill of Rights, the Fifth Amendment had to do more than confine the courts; it also had to bar adjudication outside the courts. Such adjudication was an old, recurring threat. Guarantees of due process and other procedural rights would have been meaningless if the government could have avoided them by simply sidestepping the courts. Accordingly, like so many procedural rights, the Fifth Amendment's Due Process Clause is written in the passive voice. It thereby limits all parts of government.

Also revealing (again, as noted by Chapman and McConnell) is the location of the Fifth Amendment.[67] To bar adjudication outside the courts, due process and the other procedural rights could not simply modify Article III of the Constitution, for then they would have limited only the courts. Instead, they also had to limit the executive, established in Article II. They additionally had to confine Congress, established in Article I, lest that body authorize adjudication outside the courts.

It was probably for this reason that the drafters of the Bill of Rights changed how they wrote it. They originally framed amendments that would have rewritten particular articles in the body of the Constitution—altering their wording article by article, section by section. But ultimately the drafters decided, instead, to add their amendments at the end of the Constitution. This was crucial, for it enabled the procedural amendments to limit all parts of government. These two drafting techniques—using the passive voice and putting amendments at the end—ensure the breadth of due process and the other procedural rights.

The implications were well recognized. When lecturing on the Constitution in the 1790s, St. George Tucker—then a Virginia judge and eventually a federal district court judge—quoted the Fifth Amendment's Due Process Clause and concluded, "Due process of law must then be had before a judicial court, or a judicial magistrate."[68] Chancellor James Kent similarly said it "means law, in its regular course of administration, through courts of justice."[69] Citing both Tucker and Kent, Joseph Story concluded that "this clause in effect affirms the right of trial according to the process and proceedings of the common law."[70]

That due process required proceedings in the courts was especially clear because of the meaning of *process*. Although the due process of law has increasingly been understood to require the protection of traditional court procedures, it most centrally was a matter of legal process. That is, it most crucially was the *original* process by which individuals were brought into court, the *mesne* or intermediate process employed by courts during litigation, and the *final* process by which judgment was executed. So it was inescapable that the due process of law could be had only from a court and that even a mere summons to testify had to come through such process.

Of course, the threat that led to this due process principle came from the king's personal power, not the government's bureaucratic power—so it was more prerogative than administrative. But the principle that government can proceed against persons only in the courts, not other tribunals, is equally telling against the administrative threat.

In defense of administrative power, one might point out there were limits to the due-process right to be held to account only in the courts—the preeminent counterexample being distraint or distress by the executive against property owed to it by a tax collector. This was an executive seizure, without court proceedings, of property in which the government had something like a prior interest. It was upheld in *Murray's Lessee v. Hoboken Land & Improvement Co*.[71] In that case, however, the Supreme Court viewed the distraint merely as a historical exception to the usual requirements of due process of law.[72]

Like all constitutional rights, due process was not unlimited, and the exceptions don't detract from its general requirement that government can hold persons to account only through the courts. Put another way, an old case permitting distraint does not generally legitimize administrative adjudication.

In short, administrative adjudication cannot be reconciled with due process. The core of the due process of law was a freedom from being bound outside the courts. Yet that is what administrative tribunals do every day. They let government condemn Americans without judges and juries.

Without a jury, without judicial filters on demands for information, without even a judge, we are more vulnerable. And for government, all of that makes administrative adjudication appealing.

New Due Process

A new ideal of due process has displaced the old, and the new variety allegedly permits the exercise of judicial power outside the courts. Most centrally, the Supreme Court's current due process doctrine excuses administrative adjudication. Administrative judging, however, is so biased and unjust that it does not satisfy even the Court's watered-down due process.

Although the old due process of law, at its historical core, required the legal process of a court, it also, by implication, required all that ought to occur in a court, including a decision by a judge in compliance with the duties of a judge and in accord with the law.[73] It thus

required unbiased judgment in accord with the law of the land and traditional common law procedures.

In contrast, the new due process requires merely an adjudication by a *neutral decision maker*.[74] Rather than merely follow the law, the decision maker is also expected to follow regulations and guidance. Instead of adhering to old common law procedures, he need only provide *notice*, a *hearing*, and *fairness*.[75] (In many instances, the hearing can be merely on paper—so the hearing is more metaphysical than physical, and the defendant does not actually have to be heard.)[76] Jurisprudential generalities have thus displaced law, judicial duty, and the gnarly old common law procedures.

The Supreme Court's underlying excuse for its diminished conception of due process is that "due process is flexible and calls for such procedural protections as the particular situation demands."[77] From this elastic and contextual perspective, the administrative adjudication of regulation—including not only administrative law judge adjudication of rules but also the much less protective adjudication done under regulatory conditions and licensing—is "all the process that is due."[78] The justices thereby enable much less than the Constitution's due process.

How dangerous is the new due process? Well, it has been used to justify administrative detention—as in *Hamdi v. Rumsfeld*.[79] It also seems to permit sweeping regulatory constraints without anything even close to the old due process of law, as can be illustrated by the Comprehensive Environmental Response, Compensation, and Liability Act—more familiarly known as CERCLA.[80] Under this statute, the Environmental Protection Agency (EPA) adjudicates by issuing "unilateral administrative orders."[81] As landowners have learned to their surprise, the EPA can simply order the cleanup of land (even by individuals or businesses who have acted entirely without any negligence or fault). The EPA thereby adjudicates and commands private action without so much as a physical hearing.

Even as measured by the new due process, none of this is satisfactory. It seems utterly disproportionate to impose weighty constraints with such fluffy or nearly nonexistent process. And the EPA's unilateral orders can hardly be said to come from neutral adjudicators.

Theoretical accounts of administrative adjudication celebrate administrative law judges (ALJs). They are held out as the epitome of unbiased administrative judges. So, who could object that they are not real judges? Personally, most of them surely are well-meaning. Yet ALJs leave much to be desired. They impose rules of discovery disfavoring defendants.[82] And at least some adopt burdens of proof favoring the government.[83] That is a far cry from what real judges do.

For institutional reasons, moreover, ALJs inevitably are biased—not personally prejudiced, but by virtue of their institutional circumstances. The decisions of ALJs are typically finalized or reviewable by agency heads, who are political appointees. Structurally, as already noted, this unconstitutionally subjects judicial decisions to political review. In due process terms,

the ALJs are institutionally biased because they must always look over their shoulders, lest their decisions deviate from what their superiors expect. This is not merely a matter of inconvenience or indignity for the ALJs. Their compensation can be reduced for deviating from their agency's interpretations of law.[84] And although ALJs cannot easily be fired, those who sufficiently displease their political masters can have their positions simply eliminated.[85]

So ALJs are subject to institutional pressures that would never be tolerated by real judges. Indeed, some have complained that they have been admonished by their agency heads for their views and even have been asked to change their opinions.[86]

The results are inevitable. At the Securities and Exchange Commission, one administrative law judge was so loyal to his agency that he found defendants liable in every contested case he heard.[87] As of 2021, no administrative law judge at the Federal Trade Commission had ever held against the commission in twenty-five years (except one ALJ in one instance, who was promptly overruled by the commissioners).[88]

All of this grossly denies the due process of law. It is neither the old due process of the courts nor even the new due process that supposedly justifies administrative tribunals. It is yet another example of how, in circumventing the courts, administrative proceedings deny Americans basic procedural rights.

NO LONGER RIGHTS, BUT OPTIONS FOR POWER

The administrative evasion of procedural rights goes so far as to alter their very nature. The government has a choice. It can bring enforcement proceedings in court, where defendants get the Constitution's juries, due process of law, burdens of proof, and other procedural rights. Or it can take the administrative route, which offers biased adjudicators, no jury rights, reversed burdens of proof, and so forth.

This choice means that the government need not comply with the Constitution's procedural liberties. Instead, it can work through administrative tribunals, largely without such rights, and so can treat them as elective. No longer guarantees, procedural rights have become just options for power.

The administrative pathway for adjudication thus does more than merely deny or diminish procedural rights. It also changes what it means to have the Constitution's procedural rights. It transforms rights into mere options for government, at its discretion.

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The administrative state threatens the full range of our constitutional liberties. It defeats structural freedoms, most procedural rights, and often substantive rights. It is a profound threat to civil liberties.

RACE TO THE BOTTOM

It now is necessary to look below the surface of the administrative state to examine its more subterranean realities. Thus far, this article has primarily considered how the most prominent mechanisms of administrative power deny the Constitution's structural freedoms and rights. But below the level of administrative rules and adjudications lurks a host of even less salubrious administrative realities, some of which look rather grim.

They depart not merely from constitutional ideals but even from administrative ideals. They thereby confirm the somewhat illusory character of what are offered as administrative ideals.[89]

The underlying administrative realities also disclose the motivating structure or nature of the administrative state. Although often taught in terms of complex judicial doctrines and justified in terms of abstract ideals, its layers of power and its trajectory are best understood as a cascade of evasions—a flow of power that courses around one limit after another—including the Constitution, statutes, and even administrative constraints—spilling down to ever more disgraceful channels. This descent into ever less sanitary modes of power shows that administrative power is an odiferous mode of control.

ADMINISTRATIVE IDEALS

Before delving into low administrative realities, let's recall the high administrative ideals. The administrative state rests on a series of ideals—not the Constitution's principles, but still very elevated notions of governance.

There have been some recent efforts to find originalist foundations for administrative power. But the administrative state ultimately needs some flexibility with regard to the Constitution. Rather than really satisfy constitutional principles, it asks us to rest content that it meets a series of administrative principles, which reflect jurisprudential more than constitutional commitments.

For example, although administrative power is not the *rule of law*, we are asked to be satisfied with an administrative *rule of rules*. These rules get public input through mere *notice and comment*, not voting. They are said to be rational, but only in the minimal sense of not being *arbitrary and capricious*. Because they combine the powers that the Constitution separated, they claim, at least in appearance, to preserve a *functional separation*, such that prosecution is *functionally separate* from rulemaking and adjudication, and adjudication is *functionally separate* from rulemaking and prosecution, etc. As for the judicial element of administrative power, ALJs are not independent judges, but are said to be *neutral* adjudicators, who provide *notice* and *fairness* in a *hearing*.[90]

These administrative substitutes for the Constitution's principles are framed in further administrative ideals about *prior legislative authorization* and *subsequent judicial review*. Before any agency makes a binding rule, Congress allegedly must authorize the rulemaking and provide an intelligible principle to guide the agency. Afterward, the agency is accountable in the

courts. So the administrative enterprise claims to be firmly confined by the constitutional and legitimizing processes of legislative and judicial power.

To maintain belief in this principled administrative vision, however, one needs to shut one's eyes to many of the realities of administrative power. On examination, much of the administrative state turns out to be quite unhygienic. So the problem is not just that the administrative principles are pale substitutes for the Constitution's principles; in addition, the administrative principles look like justificatory illusions, which distract us from all that is unsanitary.

Of course, most practitioners and scholars recognize that the administrative system is more complex than can be captured by the administrative principles. Nonetheless, the administrative state tends to be justified in terms of the ideals about notice-and-comment rulemaking, neutral ALJ adjudications, fair hearings, functional separation of powers, and the framing ideals of legislative authorization and judicial review—all of which fail to capture the actual workings of much of the administrative state.

This means that the administrative system (like the solar system in the era prior to Copernicus) is still evaluated in terms that fail to capture its real character and trajectory. Whatever one thinks of the administrative system, there is much to be said for seeing it as it is.

THE REALITIES

It is bad enough that law has been largely displaced by rules, and judges, by neutral adjudicators. But that's not all, for the administrative state descends much lower. It also controls us with a host of other, ever less wholesome mechanisms.

Rules without Notice and Comment

Notice and comment is not the same as voting, or even the freedom of speech, but even this feeble sort of public participation can be evaded. Not often, but when necessary, an agency can make a rule immediately effective, without complying with the notice-and-comment requirements, where the agency "for good cause" finds that these procedures "are impracticable, unnecessary, or contrary to the public interest."[91]

The administrative logic of this exception is obvious enough. But the rules for which notice and comment are held to be "contrary to the public interest" tend to be those adopted in emergencies.[92] In such circumstances, political anxieties run high, and courts are very reluctant to hold against the agencies—as became evident during the COVID-19 crisis. So in the very situations in which agencies might get carried away and public feedback might specially matter, agencies usually can sustain their rulemaking without notice and comment.

Lawmaking through Adjudication

In contrast to regulating through rules, some agencies—notoriously the National Labor Relations Board and the Federal Trade Commission—make law through adjudication. They bring administrative enforcement actions against companies not for violating any preexisting regulation,

but for practices the agencies wish to prohibit. Their judicial decisions against the companies then become precedents barring the practices. Adjudication becomes lawmaking.

Not being even administrative rules, however, such enforcement actions fail to give defendants prior notice about what is forbidden. The rule of administrative precedents thus falls well below even the mere rule of rules.

This use of adjudication to create new legal duties is especially worrisome in a criminal context. Regulatory enforcement actions, being substitutes for criminal prosecutions, are criminal in function. And being brought to correct or punish, they tend to be criminal in nature. The due process objections are therefore more than ordinarily worrisome when enforcement actions are used to legislate through adjudication.

The Rulemaking Justified by *Chevron*

Much rulemaking is done under the theory that it is interpreting ambiguities in statutes and rules. The Supreme Court doctrine known as "*Chevron* deference" requires judges to defer to agency interpretations of statutory ambiguities. Of course, the interpretations based on *Chevron* deference tend to be statements of agency policy more than interpretations of statutes. Many policymaking agency rules therefore do not enjoy direct congressional authorization but rather are justified as interpretations of congressional ambiguity or even silence.

One difficulty is that, in requiring judges to defer to agency "interpretations," *Chevron* asks the judges to abandon their own judgment about what the law is. This is contrary to the judges' duty under Article III to exercise their own judgment about what the law is.[93] And it denies parties their Fifth Amendment right to the due process of law.

Disturbingly, there is an even worse due process violation: *Chevron* requires judicial bias. In any agency enforcement action, *Chevron* requires the judge to bow to the agency's legal position. Although this is not personal judicial bias, it is an institutionalized judicial prejudice, preferring one of the parties over the other, in violation of the due process of law.[94] The regulation done in the guise of interpretation thus comes with an absence of congressional intent, a strained claim of interpretation, an abandonment of judicial duty, and systematic judicial bias.

To avoid these Article III and due process dangers, some commentators suggest that *Chevron* should be understood in terms of delegated lawmaking or policymaking, not interpretation.[95] But the logic of *Chevron* depends on interpretation. The only way the Court in *Chevron* could extract rulemaking authority out of statutes that were ambiguous or silent was to suggest that statutory ambiguity constituted authorization for agencies to resolve the ambiguity.[96] It is therefore difficult to escape the interpretation justification for *Chevron*.

Unauthorized

Although agency regulation is said to be congressionally authorized, in some important instances it is without statutory authorization. In the summer of 2021, for example, the Centers

for Disease Control and Prevention (CDC) reinstated the very sort of unauthorized eviction moratorium that the Supreme Court had just indicated was unconstitutional for lack of statutory authorization. The justification for the CDC was that its moratorium would take effect before a court could object.[97] As put by Maxine Waters, "Who is going to stop them? Who is going to penalize them?"[98]

More pervasively, the authorization question comes back to *Chevron*, which lets agencies find rulemaking authorization in mere ambiguity or even silence. It thereby gives the executive a power to regulate unless or until Congress prohibits it. As put by Thomas Merrill, *Chevron* reverses the roles of Congress and the executive: "The conventional view is that Congress is the prime mover in establishing policy. . . . The *Chevron* doctrine seems to validate a different view, that agencies are a coequal source of policy change, and Congress can constrain the agencies only by adopting limits—in 'clear' language—on what agencies can do."[99]

ALJs

The dirty underbelly of the administrative ideals includes ALJ adjudication and the enforcement pursued before these "judges." ALJs are held out as models of administrative adjudication. Yet (as already noted) they impose rules of discovery disfavoring defendants, they sometimes adopt burdens of proof favoring the government, their decisions are often subject to review or finalization by agency heads, and their salaries and even their jobs can be at risk. But there is more.

Although ALJs theoretically are chosen for merit, they actually are selected by their own agencies. As taught in law schools, an agency with an opening makes its choice from a list of the top three candidates identified by the Merit Systems Protection Board. But that's not the reality. Agencies can also draw ALJs from other agencies outside the merit selection process. Unsurprisingly, almost all agencies take advantage of this approach to avoid the merit system—usually hiring ALJs from the Social Security Administration.[100]

The Securities and Exchange Commission (SEC) is one of the many agencies that likes to choose ALJs with prior experience at the Social Security Administration.[101] Those ALJs lack relevant expertise in securities law. More to the point, they are accustomed to following agency policy in handing out benefits rather than thinking for themselves in applying binding regulations.

Indeed, ALJs and commissioners are assumed not to have authority to consider constitutional objections to their proceedings.[102] As executive officers, they may not violate the Constitution, and as judicial officers, they are bound to follow it in their decisions. But administrative adjudicators rise above such expectations.

The SEC's enforcement division has been improving its chances of winning before the agency's ALJs by secretly accessing "adjudicatory memoranda" in the administrative adjudications section of the SEC computer system.[103] Imagine that the Justice Department spied on the

computers of the federal courts. Inconceivable, right? But not for the SEC enforcement division when litigating before SEC ALJs. Although the SEC claims to have fessed up and protests that there was no prejudice to defendants, the SEC did not report the spying to the Inspector General and is resisting an FOIA request about the full extent of the spying.[104] So the story is still unfolding.

One might think that this spying is just an instance of overzealousness and so is not revealing about the administrative state. But it would be difficult for Justice Department prosecutors to infiltrate Supreme Court computers, and if they were caught, they would not be defended. In contrast, when prosecutors are in the same agency as judges, it is easier for them to get into the judges' computers, and the agency is likely to cover for them.

And there is more. By hook or by crook, the SEC uses its enforcement division and ALJs to secure settlements in the vast majority of its cases. One advantage of the settlements is that the SEC can use them to impose unconstitutional gag orders on settling defendants—thus protecting itself from complaints about its sordid enforcement and adjudicatory processes.

Privately Stated Standards

Another reality of administrative lawmaking is the incorporation of private standards. One might have thought the pale administrative imitations of law would at least mimic law in being stated publicly. But many agencies have rules requiring compliance with standards set by private bodies. The incorporation of private standards raises interesting constitutional questions—some standards, for example, are merely factual determinations and thus not necessarily unconstitutional. But the point here is simply that many of the standard-setting organizations keep their standards private, unless one pays for access. The "law" that binds Americans is thus sold, not published. Even if regulated entities—and persons considering whether to enter regulated businesses—could always and equally afford to pay, this system hides the law from the myriad other Americans who have a right to know the laws of their country.

Guidance

Below the level of rule by rules, is rule by guidance. When an agency issues guidance on its interpretation of one of its rules or of its authorizing statute, it can get a degree of deference or at least "respect" from the courts for its pronouncement.[105] Much agency regulation therefore comes under the guise of offering guidance about its positions.

But guidance often expresses an agency's policy choices and so is not just an interpretation of a statute or rule. It therefore cannot easily be defended merely as interpretation. And in requiring judges to defer (or pay special respect) to agency interpretations, the underlying doctrines demand that judges be systematically biased in violation of due process.[106]

Unlike an administrative rule, guidance can consist merely of a casual statement by an agency about its understanding of its power or policies—even if merely recited in a brief. Lawmaking

thus gets reduced not just to agency rules, but to nearly any hint dropped by an agency about what it expects from the public.

Recommendations and Best Practices

Another method of regulating without adopting a rule is for an agency to make recommendations or to recognize best practices. For example, the CDC and the Food and Drug Administration make important health recommendations, and the Department of Health and Human Services (HHS) and the National Science Foundation declare best practices in research.

Although such statements don't purport to bind, they establish measures of private conduct that doctors, researchers, and others recognize as nearly obligatory. The recommendations can establish baselines for licensing and accreditation decisions, for insurance, and even for the standard of care under state negligence law.[107] Federal agencies cultivate these effects to give their recommendations and best-practice statements the effect of rules.[108]

Regulation through Consent Decrees or Orders

Moving still further away from governance by law is regulation through settlements. This sort of regulation can come from two directions. Sometimes, an agency initiates proceedings. The Federal Trade Commission, for example, challenges corporate data practices and threatens dire consequences until companies settle, agreeing to restrictions far beyond anything required by any law or rule. In other instances, private groups sue a sympathetic agency, such as the Environmental Protection Agency, and secure a settlement imposing regulation that goes beyond what the agency could have done on its own.[109]

Such settlements acquire an especially powerful regulatory effect when they are formalized in judicial consent decrees or administrative consent orders. Of course, in issuing such decrees, judges depart from the law in violation of their office and the scope of the judicial power. More to the point here, their decrees become another mode of regulation, which strays from representative lawmaking and even from administrative rulemaking. Litigation becomes a means of legislation.

As put by Robert Reich: "[T]hese lawsuits are blatant end-runs around the democratic process. We used to be a nation of laws, but this new strategy presents an entirely novel means of legislating—with settlement negotiations of large civil lawsuits initiated by the executive branch. This is nothing short of faux legislation, which sacrifices democracy to the discretion of administration officials operating in utter secrecy."[110]

This peculiar mode of legislation is perversely effective because judicial consent decrees and administrative consent orders impose more than the ordinary force of law. The agreed-upon regulatory restrictions are difficult to adjust. They also are highly enforceable because the decrees transform violations into acts of contempt. Consent decrees thus are an illicit path for a sort of super-legislation.

Waivers

Accompanying the administrative power to make binding regulations is the power of unmaking them. The Constitution (by granting the president only executive power and giving him the take care duty) rejects any powers to suspend or dispense with the law—with one narrow exception for the suspension of habeas corpus.[111] But these old unlawful powers have come back to life with the idea of waivers.[112]

This matters because waivers—like their progenitors, suspensions and dispensations—unloose the laws and their obligation. In both form and effect, they are the antithesis of law and even rules.

One might respond that the executive enjoys prosecutorial discretion in its enforcement of the laws. This is true, but only up to a point. Prosecutorial discretion is not a constitutional power. It is merely the discretionary authority left over after the Constitution vests legislative powers in Congress and executive power in the president—subject to his duty to take care that the laws are faithfully enforced.

This duty means that the executive's prosecutorial discretion cannot include any authority generally to suspend the law by announcing that no one will be prosecuted. It also means that prosecutorial discretion cannot include any authority to dispense with the law—to assure particular persons that they will not be held legally accountable. Such statements would revive the suspending and dispensing powers and violate the duty to take care that the laws be faithfully enforced.

Nonetheless, executive suspending and dispensing have been legitimized in the form of administrative waivers. Congress often authorizes agencies not only to make regulations but also to issue waivers.[113] The waivers typically excuse particular companies from compliance in the manner of dispensations and sometimes even relieve all affected parties, like suspensions.[114]

Some statutes go so far as to authorize agencies to waive statutory duties—what two federal judges have celebrated as "Big Waiver."[115] Occasionally, agencies even issue waivers without statutory authorization.[116]

Waivers offer agencies even greater flexibility than rules, interpretations, and guidance. They directly undercut both law and administrative rules to establish governance by administrative grace and favor—or, perhaps more accurately, administrative inequality and favoritism.

They expressly establish inequality under law. All waivers, indeed, create a regime in which everyone is subject to law until an agency says some are above it. The real shape of regulation thus comes in private letters, adopted without prior notice and comment, and usually left unpublished.

Agencies use waivers to co-opt opposition to their rules, leaving regulated parties that don't get waivers unable to form effective coalitions against the underlying regulations. The power

to issue waivers also liberates agencies to adopt overbroad rules. Rather than frame their regulations carefully, agencies can sketch them out in very general terms and then trim them back with waivers. Waivers thus profoundly alter the character of the rules from which they offer relief.

And because waivers are rarely made public, Americans do not even know the extent of the inequality, favoritism, co-opting, and undermining of rules. So they have little chance of understanding how they are hurt.

Privatized

Below the nethermost federal administrative mechanisms are the privatized versions. The privatization of government power has been evolving rapidly and is especially disturbing when used to deny constitutional rights.

The Department of Health and Human Services uses funding conditions to get universities and other research institutions, including private ones, to establish institutional review boards (IRBs), which adopt their own restrictions on speech and publication in addition to those of HHS, and which license research speech and publication almost without process limits.[117] The Department of Education enforces Title IX by asking academic institutions, including private schools, to regulate sexual speech, usually through tribunals that do not allow legal representation, do not allow cross-examination, and often seem biased against defendants.

In such ways, privatization seems to offer the government and especially the administrative state a pathway for evading constitutional rights, both substantive and procedural. The justificatory theory is that the Constitution limits only government, not private institutions, which therefore can do the government's dirty work for it without consequence.

But whatever the fate of the private agents, the federal government remains limited by constitutional rights. So even when acting through private parties, the government is unconstitutionally suppressing speech and denying due process.

Third-Party Boycotts

Agencies also govern by pressuring regulated entities to carry out agency policy—notably, through third-party boycotts. In Operation Choke Point, for example, the Justice Department lacked any law or regulation prohibiting payday lenders.[118] But it used the government's regulatory power to pressure banks and other financial firms into denying their products and services to the disfavored type of business.[119] Rather than regulate by law or even rule, the government used its administrative power to press private companies into a boycott.

Regulation by Threat of Inspection

Site inspections allow agencies to learn about regulatory violations. But threats of repeated inspections are also used to secure acquiescence to new or heightened regulatory requirements.[120] Inspection thus becomes a means of negotiating or extorting extra regulation.

Regulation by Threat of Retaliation

Some particularly important administrative regulations rest on little more than the threat of retaliation. Often called *regulation by raised eyebrow*, it is nothing more than a regulatory demand backed up with an understated but very real hint of regulatory consequences for noncompliance.[121] Although the chair of a congressional committee can make such threats, an agency can go much further, because it enjoys the powers of all three branches of government. Agencies have many ways of punishing the recalcitrant.

Not just a method of regulation, the potential for retaliation also serves to stymie judicial review. A business must think twice before venturing to challenge its regulator in court, for the regulator can return the favor—by ratcheting up regulation, by making burdensome investigations, by judging the business harshly, and so forth.[122]

Regulation by Informal Arrangement

Agencies often work out what they want through informal negotiations or contacts with businesses, universities, or other organizations. One might think this is a very civilized way of resolving differences. But these informal arrangements occur in the shadow of more formal administrative mechanisms and are used by agencies to secure power for which they have uncertain or no authority.

When combined with the risk of retaliation, such negotiation or other communication is very effective—at least for the agency. It allows agencies to bar lawful enterprises or to secure substantial changes—not because the agencies clearly have that power as a matter of law, but because they have the practical power.[123]

One evening, after a prominent businessman had spent a year developing an innovative new venture, he received a phone call at home from a federal regulator. The regulator wished him a good evening and took note of the businessman's plan to announce his new enterprise the next day. There was a possibility that the regulator had legal authority to bar participation by a crucial partner in the enterprise. That authority, however, was uncertain, and the regulator's agency never went so far as to try to exercise it. Instead, although the regulator made no suggestion that the enterprise was unlawful, he said his agency would strongly discourage the partner from going forward with the venture.

The agency did not have to test its formal authority or hold anything unlawful. It was enough for one of its regulators informally, at night, at the very last minute, to cast doubt on the venture.

The businessman understood the implications. Notwithstanding massive investments of time and money, he dropped the entire project. Kafka has arrived in America.

CASCADE OF EVASIONS

As it exists in reality, not just in elevated administrative ideals, administrative power cascades away from the Constitution, law, and even rules, down to ever less constrained and less

justifiable pathways. It is a flow of power that runs around constitutional, statutory, and even administrative ideals.

Agencies, judges, and scholars often present administrative power as relatively continuous—as if it has existed in more or less stable form since the Founding. But administrative power is not stationary. On the contrary, it has a trajectory, driven by continual efforts to evade limitations on power—so that it flows down into ever less restricted paths, leaving the public ever more vulnerable.

How low does it go? It initially sidesteps the Constitution's avenues for binding regulation and adjudication but at least works through rules and adjudications. Then it largely dodges formal administrative rulemaking by relying on informal notice-and-comment rulemaking. From there, it runs down into less rule-like administrative pathways, including governance by interpretation, guidance, and waiver. Ultimately, it flows through channels that are genuinely unsanitary, including extortion in licensing, harassing inspections, boycotts, hints of retaliation, and so forth. This unlawful power spills over the Constitution's banks and gushes down, step-by-step, to ever lower levels.

Government was traditionally understood in terms of fixed forms of power. But it currently is better understood in terms of its trajectory—a cascade of power that escapes one form after another.

UNREAL IDEALS AND UNRULY REALITIES

Rather than the rule of law or even the rule of rules, the reality of administrative power is unruly. The realities make a mockery of the administrative ideals.

- Administrative power descends far below the *rule of rules*.

- Rules are not consistently made with *notice and comment*, and much administrative regulation comes through guidance, waivers, and other administrative edicts that are not subject to *notice and comment*.

- Much of the system (including, for example, regulation by threat and boycott) lends itself to *arbitrary and capricious* decisions.

- Administrative enforcement or prosecution is not *functionally separate* from rulemaking and adjudication—because enforcement officers are subject to rulemaking commissioners and because they can surreptitiously read ALJs' files. Administrative adjudication is not *functionally separate* from rulemaking and prosecution—because ALJ decisions are reviewable or finalized by commissioners, because ALJs' salaries are adjustable, and because noncompliant ALJs can have their positions simply eliminated.

- Being institutionally compromised in these and other ways, ALJs cannot be *neutral* adjudicators, who provide *fair* resolution of disputes.

- *Prior legislative authorization* often consists of mere ambiguity or silence and sometimes is simply treated as unnecessary.

- *Subsequent judicial review* is often illusory because of the danger of agency retaliation for seeking review and because of judicial deference, whether on the facts or the law.

All of this reveals the unreal quality of the administrative ideals and the unsanitary character of the administrative state.

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The prevailing vision of administrative power is more idealistic than realistic, more justificatory than just. It emphasizes not law, but the pale administrative substitutes for law, such as notice-and-comment rulemaking and adjudications done by ALJs. Yet even these mechanisms—which are not the same as congressional lawmaking and the judgments of judges sitting with juries—are only the public face of administrative power. For a more complete understanding of that power, one must also dwell on less salubrious things, such as waivers, regulatory conditions, licensing, extortion, guidance, site inspections, third-party boycotts, and threats of retaliation.

RATIONAL?

Notwithstanding its departure from the Constitution, from law, and even from rules, administrative power claims to offer the distinctive advantage of rational decision making.[124] Whereas government decisions once were based on hierarchical political authority, and then, in the early modern era, on egalitarian popular authority, there now allegedly is an opportunity to base power on knowledge-based rationality.[125]

But is this entirely true?

Doubts about the rationality of administrative power may initially seem improbable. Surely, you may think, agency experts are rational, knowledgeable, and even scientific. From this perspective, it is advantageous to let their rational decision making displace the bartering, log-rolling, self-interest, and corruption of political decision making.

Administrative rationality, however, is compromised by a series of decision-making biases. It therefore is doubtful how far one can go in thinking administrative power distinctively rational.

Confidence Bias

One distortion is the confidence bias arising from the administrative confusion of expertise and science. Whereas bureaucratic expertise consists of known truths, cutting-edge science pursues questions about what is unknown. It therefore is dangerous for regulatory bureaucrats to assume that their expertise rests on cutting-edge science. Their confidence in the

scientific quality of their expertise seems to justify their regulatory power. But their expertise is often closer to out-of-date science than the cutting-edge version of it. Indeed, it sometimes is quite distant from contemporary science. Bureaucrats, however, confuse the two and thereby end up regulating with overconfidence in their expertise on the assumption it is scientific.[126]

This is one of the many problems with IRBs—the gatekeepers to much empirical scientific and academic inquiry. For example, an IRB member with traditional statistical expertise will confidently impose old models of inquiry on researchers experimenting with new methods.

Confusion between expertise and science also pervades federal agencies. The resulting confidence bias was especially clear during the COVID-19 debacle. Experts in multiple agencies imposed scientifically dubious policies with great self-assurance, on the theory that they were experts and we should follow the science.

Specialization Bias

Another irrationality of administrative decision making is the specialization bias. Expert knowledge is specialized knowledge. Although this specialization has great advantages for many purposes, it typically distracts experts from the breadth of other specialized perspectives and the public interest, which might moderate or modify their conclusions about public policy.

Put in colloquial terms, when the proverbial dentist walks into a room and sees you, he sees your teeth, not you as a whole. Indeed, dental experts recognized the value of fluoridation for preserving teeth, but they never bothered to ask about its consequences for the mental development of children exposed to fluoride in utero.[127] Bureaucrats with expertise in fire hazards insisted on flame retardants in children's pajamas, without pausing to ask whether the chemicals might be toxic to children.[128] Government immunologists focused on the measures necessary to limit the transmission of COVID-19, without adequately taking into account the costs of confining children and shutting down much of the economy.

The specialization bias is complicated by a host of factors. For example, it may be encouraged by similarly focused special interest groups, and it may be tempered by economic review at the Office of Information and Regulatory Affairs and political review by the White House.

In drawing attention to the specialization bias, this article doesn't deny that specialized knowledge can have value in regulatory decision making. It obviously is useful for agency experts to share their specialized knowledge with legislators. But it is risky to leave lawmaking decisions to experts, as they tend to be subject to their specialization bias. Even when the heads of specialized agencies are not experts, they often are attached to their agency's specialized mission and therefore echo the bias of its experts. In short, expertise and expert decision making are different, and the value of the one must be distinguished from the danger of the other.

Specialization Bias in IRBs

For a peculiarly self-conscious instance of the specialization bias, it is necessary to return to IRBs. When government experts in biomedical ethics worked to protect human subjects from research harms, they decided that their specialized regulatory goal should be pursued without consideration of other, more general public interests. So they expressly required IRBs to weigh risks to human subjects without considering the long-term benefits of the knowledge acquired: "The IRB should not consider possible long-range effects of applying knowledge gained in the research (*e.g.*, the possible effects of the research on public policy)."[129] In other words, IRBs must deliberately be indifferent to the medical and policy benefits of research.

How serious is it to ignore the long-term medical and public policy benefits of research? The costs can be staggering. Indeed, the research suppressed by IRBs has a body count. The tally from the suppression of a single research project can easily run into hundreds of thousands of deaths.[130] The overall losses are surely much higher. These human costs of ignoring the long-term benefits of new biomedical knowledge were entirely predictable, but that's not what the experts cared about. They ostentatiously aimed to protect only human subjects and, with this specialized concern, were indifferent to the price.

They were especially anxious to protect minorities from the burdens of research. So they placed distinctive burdens on research that focused on minority human subjects—with inevitably severe results for Black men, pregnant women, and anyone else who was the object of their solicitude.[131]

You might think that the specialized concern for human subjects, to the point of ignoring the long-term benefits of the research, is justified by the high risk to human subjects. But the argument here is merely about the use of IRBs under the human subject research regulations, not FDA regulations. And in the research covered merely by the human subject research regulations, significant harms to human subjects have always been relatively rare.[132] Of course, when government is doing research (such as in the Tuskegee Study or the Army Radiation Experiments), the risks to human subjects are high, but that has little to do with the risk of research done outside the government.[133] So if one leaves aside the special dangers of government research, the costs for human subjects are relatively low, and they are overwhelmed by the profound costs of discouraging research.

The use of IRBs to pursue the specialized goals of experts was unusually self-conscious. But the resulting policy—of protecting against research harms without weighing long-term research benefits—nicely captures the broader danger: The specialized aims of experts tend to override other interests, including the public interest.

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Decision-making biases—including confidence, specialization, and size biases—distort a vast range of administrative regulation. Although administrative power has long been justified as distinctively rational, one must fear that its decision making suffers from its own irrationalities.

The biases inherent in administrative decision making, however, do not stand alone. They are joined by prejudices that intrude from without.

ADMINISTRATIVE ANXIETIES

Notwithstanding all that is wrong with the administrative state, there is much anxiety about its demise. There is deep concern, even moral panic, about what we would do without the administrative state. The fears, however, seem overstated. There is reason for caution, not anxiety.

END OF REGULATION?

The most common response to the prospect of abandoning or even cutting back on the administrative state is that we need that regime for regulation. But the objections to administrative power are not complaints about regulation; they do not question the benefits of clean air, safe cars, or efficacious drugs. Rather, the point is that regulation can come along different pathways, unlawful and lawful, very harmful and less harmful. At stake, therefore, is not regulation, but the administrative path for regulation.

It is true that congressional regulation would be different from administrative regulation. For example, Congress would have to regulate through laws, not adjudications or consent degrees, and so would have to state its requirements up front. It would be unable to rely on waivers to trim back on overly broad rules and so would have to draft its rules relatively tightly. And so forth.

Most substantially, Congress would need to overcome political disagreements and so would not always adopt the same regulatory policies as administrative agencies. But that's as much as to say that Congress would be more hesitant than unelected agencies to impose regulations of questionable popularity. In other words, because the legislative process would be that of a representative body, the resulting rules would be less indifferent to popular feelings. So advocates of a new regulation would have to be politically persuasive; they would have to make their case to politicians and ultimately the public. Is that a danger or a benefit?

LOSS OF AGENCY EXPERTISE?

Another concern is that without agencies, we would not enjoy the advantage of their regulatory expertise. Lacking the depth of expertise enjoyed by many agencies, Congress would regulate in ignorance.

The end of administrative power, however, would not necessarily mean the end of agencies and their experts. They could continue to exist and could continue to propose rules based on their expertise. The difference is that they would not issue their rules but would have to send them to Congress for it to enact.

One might fear that the ultimate enactors—the members of Congress—wouldn't typically know enough to digest agency recommendations. But heads of agencies are not always experts, and this causes little concern. Moreover, agency expertise (as already noted) is not necessarily the best measure of whether a regulation should be adopted. Expertise is different from cutting-edge science, agency expertise is often below the scientific knowledge of industry, and experts tend to suffer from the specialization bias.

So, it probably would be advantageous to have agency proposals adopted by members of Congress. Being elected, they would be more responsive to the people and their diversity. Being nonspecialists, they would be more likely than experts to evaluate proposed rules for their advancement of the public interest—or at least multiple interests—not just one specialized goal.

In sum, there would not be much loss of agency expertise. Rather, the loss would be in expert decision making.

CONGRESSIONAL DELAYS?

Delay is another serious concern, but the most serious delays would usually be more political than procedural.

In at least some areas, the rapidly developing character of modern life probably requires rapidly changing regulation. Yet when delays are considered merely in terms of the formalities required to adopt a regulation, there is no need for administrative power, because Congress can act as quickly as agencies when it is motivated to do so. Agencies usually cannot adopt regulations until they have published them in the *Federal Register* and given the public at least thirty days to submit comments. But Congress faces no such formal time constraints. Although it does not meet every day of the year, it usually meets at least some days every month, which means Congress is almost always ready to act.

So fears about the pace of legislation do not rest on Congress's procedural incapacity. Instead, the question of delay is ordinarily more a matter of political obstacles: "[W]hat is discussed in terms of speed is usually a concern about the political pace of legislation in Congress. The argument that administrative power is necessary to keep up with the tempo of modern society is typically a claim about the need to circumvent the delays inherent in popular representative politics."[134]

In contrast, delays are part of the administrative process at some important agencies. Any licensing system will tend to delay the pace of scientific development—as evident at the FDA and in the use of IRBs to regulate human subjects research. The delay is structurally embedded and overly restrictive because even entirely innocent conduct must await permission or a license. Additional delay results from perverse incentives—the FDA, again, being an example. And these delays can be lethal. So delay is a familiar *administrative* problem, and it seems at least as serious as political delay in Congress.[135]

HOLDING STATUTES VOID?

There is some concern that a rejection of administrative power would require judges regularly to hold agency-authorizing statutes void—indeed, that judges would have to reach very disruptive up-or-down decisions about such statutes.

But it is not necessary for a challenge to a binding agency rule to approach the problem at the highest level of generality—that is, by asking whether Congress has unlawfully divested itself of legislative power and vested it elsewhere. Instead, a challenge to such a rule could focus on the more immediate and concrete problem of whether the agency or the executive is unlawfully exercising legislative or judicial power, which the Constitution has not vested in it. In other words, rather than evaluate the underlying statute, a judge often can more modestly examine the authorized agency rule and hold it void.

The framers themselves and the judges in *Hayburn's Case* clearly thought the immediate problem in such situations was the executive's exercise of nonexecutive power.[136] And that remains true for both principled and practical reasons more than two centuries later. To be sure, a judge's holding that an agency rule is unlawful might eventually reach other agency rules and even the statute. In the meantime, however, the judge could focus on the lawfulness of a concrete administrative rule and avoid more abstract and disruptive questions about the full range of statutory authorization.

BURDENS OF ADJUDICATION?

A more serious concern is that a shift away from administrative power would significantly burden the courts. Could the work of the administrative state be undertaken by the courts sitting with real judges and juries? This is a sobering question, and it suggests that the difficulty with decommissioning the administrative state may be more judicial than legislative.

But these judicial difficulties, although serious, can easily be overstated. For example, the core of administrative adjudication that needs to be taken over by the courts is the work of ALJs in deciding cases applying binding administrative regulation. Is this more than the courts could handle?

There are many ALJs. Most of them, however, are determining the distribution of benefits, the status of immigrants, and so forth, not applying binding regulations. In other words, most are engaged in the exercise of ordinary and lawful executive power, not an administrative version of judicial power.

To understand whether courts could manage the judicial matters currently handled by ALJs, one must examine ALJs who adjudicate binding regulations. For example, the SEC employs only five administrative law judges, the Occupational Safety and Health Review Commission has twelve, and the National Labor Relations Board has thirty.[137] In total, outside the Social Security Administration, there are said to be only 257 ALJs.[138] And probably only some fraction of them are substantially engaged in applying binding regulations.

Whatever the exact number, it is not overwhelming. It means that ALJ adjudication of binding rules could be handled with only a moderate expansion of the judiciary.

JURY RIGHTS?

In the shift from ALJs to judges, regulatory defendants would regain their jury rights, and it is often worried that juries are inefficient. But although jury trials are time consuming and expensive, jury rights can lead to clearer judicial decisions and more settlements.

Without the right to a jury trial (as revealed by the English experience in almost completely abandoning juries), judges tend to blur the law with the facts and make the law inordinately complex. In America, by contrast—even in an era in which most cases are settled before they go to a jury—judges anticipate that future cases will come before juries and therefore tend to distinguish the law from the facts and often keep the law simple enough to be explained to a jury.

So if the cases now handled administratively were restored to the courts, judicial decisions probably would go further than administrative decisions in developing a body of clarifying precedent, distinct from the narrow facts of particular disputes, thus enabling more disputes to settle. The point is not that there necessarily would be many more jury trials, but that the right to a jury would lead judges to distinguish the law and the facts and sometimes keep the law simple enough for a group of laypersons to understand.

The law thus would develop in ways apt to facilitate settlements. So judges would not face the same amount of adjudication as is currently undertaken by agencies. How much less is difficult to discern, but there could be some distinct efficiencies.

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Concerns about an end to regulation and other risks are well-meaning but overstated. Yes, the transition to the nonadministrative state would be complicated. But some hurdles have been exaggerated, and some advantages, ignored. The nonadministrative state wouldn't be without regulation; instead, the regulation would be different, more moderate, and imposed in compliance with the Constitution.

PRINCIPLED EXPERIMENTAL GRADUALISM

It would be unrealistic to expect a complete abandonment of administrative power in the immediate future. As a colleague wryly observed, "Rome wasn't burned in a day." So, although it is interesting to evaluate how we would manage entirely without administrative power, the more pressing question is how to cut back on it without undue risk to valuable regulation. This article therefore closes by noting the advantages of a principled experimental gradualism.

Most critics of administrative power are eager to see step-by-step experiments in dismantling the administrative state. The scholarship defending the current regime, however, doesn't give up even an inch, and this uncompromising attitude has become an obstacle to gradualism.

One might have expected some willingness to place the administrative state on a more defensible footing by abandoning marginal and dubious doctrines, such as *Chevron* and *Auer*. Instead, much administrative scholarship clings to them. One might have thought there would be some willingness to let administrative defendants resolve questions about the constitutionality of ALJs before being tried by them, but the SEC resisted that all the way up to the Supreme Court in *Axon v. SEC* and *Cochran v. SEC*.[139] One might have thought there would be some willingness to abandon secret legislation, gag orders, and having ALJs be accountable to politically appointed commissioners. But no such concessions are in the offing.

This rigidity is unfortunate because it stands in the way of a desirable gradualism. Although the argument here is against administrative power as a whole, this is not to say that the change must happen all at once. On the contrary, there is much to be said for a less hasty approach.

In the courts, such gradualism is built-in, being a natural result of their habitual caution and their jurisdiction over cases and controversies, not abstract questions. On the one hand, judges need to say what the law is that dictates their decisions. So they should candidly state the Constitution's principles. At the same time, they must reach their decisions only case-by-case without unnecessarily resolving constitutional questions. A judicial rectification of the administrative state will therefore naturally occur only gradually as unavoidable constitutional questions reach the courts.

An even more moderate approach could occur politically—for example, if the executive were to ask one agency to give up making binding rules and submit its regulations to Congress for it to enact. Afterward, the executive could make such a request to another agency. This gradual experimentation, agency by agency, would enable the executive to learn from the experience, so as to dismantle administrative power in a smooth and nondestructive manner.

Similarly, a single agency, such as the SEC, could be asked to switch its enforcement from its ALJs to federal district courts. The SEC has only five ALJs, and it already is retreating from relying on them. So it would not be unduly burdensome on the courts if the SEC were to bring its enforcement actions to the Justice Department, for it to pursue in federal district courts.

Alternatively, the executive could ask all agencies to relinquish one type of unlawful power. For example, it could tell government lawyers not to seek *Chevron* deference—on the theory that government lawyers should not ask courts to violate the due process of law, lest the lawyers themselves violate due process and their ethical duties. After this initial experience, the executive could move to another unconstitutional type of power. And then another. The unwinding of unlawful power could be measured and orderly.

If the defense of administrative power were to retreat to what could be justified on high administrative principles, the change could be even more gradual. Perhaps, for example,

there could be agreement that if there is to be administrative rulemaking, it must rest on express congressional authorization. Perhaps there also could be agreement that agencies should at least use rules to regulate Americans—not waivers, guidance, boycotts, threats of hyperintensive inspection, and so forth.

Another approach would be for Congress to adopt older agency rules in statutes. For example, there is no reason for the SEC's antediluvian Rule 10b-5 to remain administrative. It is eighty years old. And if Congress refuses to enact older rules, perhaps they should just be abandoned under a sunset provision.

Such compromises would relieve much of the pressure for more dramatic changes. There would still be demands for conformity with the Constitution's principles. But the dispute over administrative power would become less intense.

If the administrative state is not trimmed prudently, step-by-step, it is likely to collapse more dramatically. So it would be wise to seek gradual pathways for experimentally moving toward constitutional governance. If the administrative state is bound to change, its fate should be considered an opportunity for thoughtful reconstruction.

CONCLUSION

This article has drawn attention to the damage done by administrative power. The burdens of the administrative state mean that change will be coming—sooner than later. So it would be prudent to begin gradually lightening our administrative load.

The administrative damage is substantial. It includes layers of harm, much of it both constitutional and contemporary.

1. The administrative state slices through the Constitution's structures and their protections for our freedoms, including the freedom to be governed by laws made by our elected representatives and the freedom to be held to account in courts with real judges and juries.
2. It violates constitutional rights, systematically violating most procedural rights and even substantive rights such as speech.
3. Rather than the rule of law, or even the rule of rules, administrative power is unruly. It abandons even administrative ideals and descends down to unsanitary mechanisms of power.
4. Its decision-making biases undermine its rationality.
5. At least at the federal level, it has origins in prejudice, and it remains discriminatory.
6. It is dehumanizing—in that it diminishes the personal and political agency of individuals.
7. It undermines political stability by encouraging alienation and political warfare.

8. The anxieties about abandoning the administrative state tend to be overstated.

9. Change is inevitable, as administrative power bears down on Americans in ways that increasingly seem intolerable—so it already is crumbling under its own weight.

10. It therefore seems prudent to seek a responsible return to constitutional governance—in particular, a principled and experimental gradualism.

The vast and varied damage inflicted by the administrative state cannot be ignored. So it is time to face up to the reality of this power and its harms.

NOTES

1. The enumeration of harms is not intended to be complete. For example, this article will not recite the economic damage from its regulation, as that is largely a familiar question. Instead, it will lay out some of the legal and constitutional damage, which is more in need of attention.

2. Philip Hamburger, *Vermeule Unbound*, 94 Tex. L. Rev. *See also* 205, 224–25 (2016) ("Much of the APA [Administrative Procedure Act] and many judicial doctrines serve to justify administrative power, and in casting the realities of this power in legitimizing terms, the APA and the doctrines may have some value as apologetics, but not so much as a window into reality. Far from disclosing the actual landscape of administrative power, the 'official theory' often obscures it. As put by Daniel Farber and Anne O'Connell, there is a 'gap between theory and practice,' which leads to an 'increasingly fictional yet deeply engrained account of administrative law.'").

3. The federal focus is for the sake of simplicity. Although state and local administrative power can also be harmful, not all of it is as clearly unconstitutional, and it must be evaluated under the distinctive requirements of different state constitutions.

4. *See* Gundy v. United States, 139 S. Ct. 2116, 2121 (2019).

5. *See id*. at 2123.

6. *See id*. at 2140 & n.62 (Gorsuch, J., dissenting).

7. James M. Landis, The Administrative Process 15 (1966).

8. There has been some suggestion, based on *Wayman v. Southard*, 23 U.S. 1 (1825), that the Constitution barred delegation only for important regulations. *See, e.g.*, Ilan Wurman, *Nondelegation at the Founding*, 130 Yale L.J. 1490, at 1516–17 (2021); Gary Lawson, *Discretion as Delegation: The Proper Understanding of the Nondelegation Doctrine*, 73 Geo. Wash. L. Rev. 235, 236 (2005). *But see* Philip Hamburger, *Nondelegation Blues*, 91 Geo. Wash. L. Rev. (forthcoming 2023) (manuscript at 13–18) (on file with author).

9. Hamburger, *supra* note 8 (manuscript at 13–18).

10. Even Tories tended to agree with the theory of consensual representative government, but were content with virtual representation in Parliament, which is what Patriots rejected.

11. Julian Davis Mortenson & Nicholas Bagley, Essay, *Delegation at the Founding: A Response to the Critics*, 122 Colum. L. Rev. 2323, 2334 (2022); *see also id*. at 2232 ("Our claim is not that large numbers of the Founders paused, asked themselves whether all legislative powers could be delegated, and then expressly embraced the proposition that they could. We actually doubt that any of them had well-developed views on the matter until late in the 1790s, if then. However odd it may seem to modern eyes, concerns about delegation weren't salient at ratification.").

12. 1 The Records of the Federal Convention of 1787, at 66–67 (Max Farrand ed., 1911).

13. *Id*. at 67.

14. His clarified proposal was that the Executive have not only the "power to carry into effect, the national laws" and "to appoint to offices in cases not otherwise provided for," but also "to execute such other powers not Legislative nor Judiciary in their nature, as may from time to time be delegated by the national Legislature." *Id*. at 66–67. The commas in this quotation appear as periods in the original manuscript—it being very common for eighteenth-century manuscripts to use periods for commas.

15. *Id*. at 67.

16. *Id*.

17. *Id*.

18. *Id*.

19. For the difficulties with delegation language, see Hamburger, *supra* note 8 (manuscript at 65–67).

20. U.S. Const. art. I, § 1.

21. *See* U.S. Const. art. I, § 8.

22. The Federalist No. 78, at 522–23 (Alexander Hamilton) (Jacob E. Cooke ed., Wesleyan Univ. Press 1961); *see also id*. No. 75, at 505.

23. *See* Hamburger, *supra* note 8 (manuscript at 55–59).

24. U.S. Const. art. III, § 1.

25. U.S. Const. art. II, § 1, cl. 1.

26. Hamburger, *supra* note 8 (manuscript app).

27. *Id*.

28. Delegationist scholarship argues that the regulation of Indian traders was national domestic regulation on the marginal ground that some of the regulated trade was with settled tribes within the United States and thus was not cross-border. Mortenson & Bagley, *supra* note 11, at 2357–58. But even when located within the United States, such tribes were distinct nations and the trade with them was understood as a cross-border matter. *See* Hamburger, *supra* note 8 (manuscript at 87).

The delegationist scholarship also finds delegated binding national domestic regulation in the rules made by commissioners under the 1798 Tax Assessment Act. Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 Yale L.J. 1288, 1302 (2021). But on the basis of the statute's text and prior precedent and other sources, it is clear that those rules concerned assessment determinations, which were to be made in a judicial manner, not delegated lawmaking or policymaking. Hamburger, *supra* note 8 (manuscript at 89–92). For other delegationist misreadings of early federal practices, see *id*. (manuscript at 87–89).

29. Hamburger, *supra* note 8.

30. *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) (recognizing the Federal Trade Commission's prosecution of regulatory enforcement actions as executive, although distinguishing the prosecution of actions before the agency as nonconstitutional executive power).

31. *See, e.g*., Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 Colum. L. Rev. 277, 280, 294, 315 (2021) (relying on quotations from Rousseau and Rutherforth, even though those quotations refer to executive power as the society's "strength").

32. Hamburger, *supra* note 8 (manuscript at 31–33).

33. U.S. Const. art. II, § 1, cl. 1.

34. *Id*. §§ 2–3.

35. Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 Ala. L. Rev. 1205 (2014); Ilan Wurman, *The Removal Power: A Critical Guide*, 2019–2020 Cato Sup. Ct. Rev. 157 (2020); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 Harv. L. Rev. 1153 (1992).

36. *See* U.S. Const. art. II.

37. Philip Hamburger, Is Administrative Law Unlawful? 90 (2014).

38. Samuel Bray, *"Necessary and Proper" and "Cruel and Unusual": Hendiadys in the Constitution*, 102 Va. L. Rev. 687, 720, 737 (2016).

39. *See* Hamburger, *supra* note 37, at 423–24.

40. For *proper* as a limit, see Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 Duke L. J. 267, 275 (1993); Gary Lawson & Guy I. Seidman, *Necessity, Propriety, and Reasonableness*, *in* Gary Lawson et al., The Origins of the Necessary and Proper Clause 120, 142 (2010).

41. *See* An Act for making more effectual Provision for the Government of the Province of Quebec in North America, 14 Geo. III, c. 83, at 10, 12 (1774).

42. *See id*. at 18.

43. U.S. Const. art. II, § 3.

44. U.S. Const. art. I, § 8, cl. 18.

45. Other prior usage reinforces this point. Parliament and American state legislatures often recited in their statutes that they were enacting what was "expedient and necessary." See, for example, An Act to amend and render more effectual, in His Majesties Dominions in America, an Act passed in this present Session of Parliament, intituled, An Act for punishing Mutiny and Desertion, . . . , preface, 5 Geo. III, cap. xxxiii ("whereas it is expedient and necessary that Carriages . . ."), An Act to disable certain Officers under the Continental Government from holding Office under the authority of this Commonwealth (Dec. 1788, cap. xxxvi), in A Collection of All Such Act of the General Assembly of Virginia, of a Public Nature, As Are Now in Force, Comprising the First Volume of the Revised Code, 57 (Richmond 1814) ("whereas it is judged expedient and necessary that all those who shall be employed in the administration of the said government ought to be disqualified from holding any office or place whatever under the government of this commonwealth . . ."). This combination of words—"expedient and necessary"—was a conventional expression of the unlimited legislative power that was enjoyed by Parliament and state legislatures. But the Constitution uses the words "necessary and expedient" to define only the president's unlimited power of recommendation. The result is a telling contrast. In other governments, legislative power reaches all that is *necessary and expedient*. In the federal government, that standard is confined to executive proposals for legislation. And legislative power, at its most expansive, must be *necessary and proper*.

46. Lawson & Granger, *supra* note 40, at 275.

47. *See, e.g.*, The Federalist No. 29, at 179 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *id*. No. 33, at 197; *id*. at 198. Similarly, he asked "[w]ho is to judge of the *necessity* and *propriety*" of such laws. *Id*. at 199.

48. When Madison defended the phrasing of the clause in the *Federalist*, he noted that the framers, in the alternative, could have excluded any power "not necessary or proper." The Federalist No. 44, at 281 (James Madison) (Clinton Rossiter ed., 1961). In the 1791 debates over the Bank of the United States, Madison referred to "the terms *necessary* and *proper*, used in the Constitution, and asked whether it was possible to view the two descriptions as synonymous, or the one as a fair and safe commentary on the other." James Madison, The Bank Bill (Feb. 2, 1791), *in* 13 The Papers of James Madison: Congressional Series 372, 377 (Charles F. Hobson & Robert A. Rutland eds., 1981).

49. Jefferson in the Bank debates referred to the power to make laws "*necessary* and proper" for carrying the enumerated powers into execution and took a very narrow view of the "*necessary* means" to argue that they were "those means without which the grant of the power would be nugatory." Thomas Jefferson, Opinion on the Constitutionality of the Bill for Establishing a National Bank (Feb. 15, 1791), *in* 19 The Papers of Thomas Jefferson: Main Series 275, 276 (Julian P. Boyd ed., 1974). Although these men disagreed about the extent of the power, they united in thinking it turned on two distinct requirements.

50. U.S. Const. art. I, § 8, cl. 18.

51. Nathaniel Chipman, Sketches of the Principles of Government 263 (Rutland, J. Lyon 1793).

52. *See* Hamburger, *supra* note 37, at 423–24.

53. *See id*.

54. Philip Hamburger, The Administrative Threat 1 (Encounter Books 2017); Philip Hamburger, *The Administrative Evasion of Procedural Rights*, 11 N.Y.U. J. of L. & Liberty 915 (2018).

55. U.S. Const. art. III, § 2, cl. 3.

56. *Id*. amend. VI; *id*. amend. VII. Although the Seventh Amendment secured a jury only where the amount in controversy exceeded twenty dollars, this was a guarantee of a jury in all civil cases—in the sense that the floor for jury rights simply tracked the floor for the civil jurisdiction of the common law courts. Although some states had followed English law in adopting a forty shilling floor, others had moved it up—for example, to ten pounds in New Hampshire and twenty pounds in North Carolina. Philip Hamburger, Law and Judicial Duty 410, 424 n.70 (2008); An Act to Amend an Act Passed at New Bern, in December, One Thousand Seven Hundred and Eighty-Five, Entitled, "An Act for Encreasing the Jurisdiction of the County Courts of Pleas and Quarter Sessions, and of the Justices of the Peace Out of Court, and Directing the Time of Holding Courts in This State," *in* 24 The State Records of North Carolina 804, 805–06 (Walter Clark ed., 1905) (1786). The federal floor of twenty dollars was equivalent to just under 4 pounds 10 shillings in 1791.

57. *See* Hamburger, *supra* note 37, at 229.

58. *See* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1856).

59. *See id*.; Hamburger, *supra* note 8 (manuscript at 22–24).

60. One might protest that binding administrative rules are not binding laws. But the rules are justified on the theory that Congress has delegated its legislative power to the agency or on the theory that rules merely specify the statutes authorizing them and thus only the law is binding, not the rules.

61. *See* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 Yale L.J. 1672, 1679–80; Hamburger, *supra* note 37, at 169–74.

62. None Shall Be Put to Answer Without Due Process of Law, 42 Edward III, c. 3 (1368).

63. *Id*.

64. *See id*.

65. An Act for the Regulating of the Privy Council and for Taking Away the Court Commonly Called the Star Chamber, 16 Charles I, c. 10 (1641).

66. *See* Chapman & McConnell, *supra* note 61, at 1721.

67. *See id*. at 1722.

68. 2 St. George Tucker, Law Lectures, at 4, https://digitalarchive.wm.edu/handle/10288/13361 [https://perma.cc/WVS6-FLWD]. In the main body of his lecture notes, Tucker discussed the courts, commenting: "No person shall be deprived of life, liberty, or property, (and these we shall remember are the objects of all Rights) without due process of law; which it is the province of the judiciary to grant." 5 *id*. at 203–04.

69. 2 James Kent, Commentaries on American Law 13 (New York, W. Kent 1848).

70. 3 Joseph Story, Commentaries on the Constitution of the United States § 1783, at 661 (Boston, Hilliard, Gray & Co. 1833).

71. Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 280 (1856).

72. *Id*. at 277–78.

73. *See id*. at 280.

74. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 509 (2004) ("neutral decisionmaker").

75. *See id*. at 533.

76. Mathews v. Eldridge, 424 U.S. 319, 343, 349 (1976).

77. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

78. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 547 (1985).

79. *See Hamdi*, 542 U.S. at 533.

80. Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended in scattered sections of 42 U.S.C.).

81. 42 U.S.C. § 9606(a); City of Rialto v. West Coast Loading Corp., 581 F.3d 865, 868 (9th Cir. 2009).

82. Amicus Brief—Amicus Curiae in support of petitioners, Raymond J. Lucia, et al. v. Securities Exchange Commission, at 8–9 (No. 17-130).

83. Amicus Brief—Amicus Curiae in support of petitioners, Raymond J. Lucia, et al. v. Securities Exchange Commission, at 19 (No. 17-130) ("ALJs . . . have a sweeping power to take notice even of disputed facts. To be sure, when an ALJ takes notice of facts, a defendant can ask the ALJ for 'an opportunity to show the contrary.'" 5 U.S.C. § 556(e). But the effect is to shift the burden of proof to the defendant, who now must introduce evidence to *disprove* facts of which the ALJ has taken "official notice."); Jean Eaglesham, *SEC Wins with In-House Judges*, Wall St. J. (May 6, 2015), http://on.wsj.com/1AKOxEH [https://perma.cc/8THY-ZBHU] (quoting a former SEC administrative law judge who alleged that "the burden was on the people who were accused to show that they didn't do what the agency said they did.").

84. 5 U.S.C. § 7521(b)(4). To be precise, compensation can be reduced for conduct "inconsistent with maintaining confidence in the administrative adjudicatory process," Long v. Soc. Sec. Admin., 635 F.3d 526, 536 (Fed. Cir. 2011), including "adjudicatory errors" over a range of cases, Soc. Sec. Admin. v. Anyel, 58 M.S.P.R. 261, 268 (1993). Of course, what the agency considers errors can be what the ALJ understands as her "[i]ndependence" in departing from "agency interpretations of law." *Id*. at 269; *see also* Brief of the New Civil Liberties Alliance as Amicus Curiae in Support of Petitioners at 14, Lucia v. SEC, 138 S. Ct. 2044 (2018) (No. 17-130).

85. For example, the Commodity Futures Trading Commission purged an ALJ who had not held for the agency over almost a decade. *See* Brief of the New Civil Liberties Alliance, *supra* note 84, at 15.

86. For example, an SEC ALJ complained that she was criticized by a commissioner for finding too often for defendants. *See* Eaglesham, *supra* note 83 (reciting complaints of former ALJ Lillian McEwen). At the Patent Trial and Appeal Board, administrative patent judges report often feeling pressured to modify their decisions. Dani Kass, *GAO Says Most PTAB Judges Felt Pressure to Alter Rulings*, Law360 (July 21, 2022, 9:37 PM), https://www.law360.com/articles/1512053/gao-says-most-ptab-judges-felt-pressure-to-alter-rulings [https://perma.cc/2RQW-BXE9]. Some have complained about "political interference in their decisions." *Id*. Indeed, "'[t]here's an excellent chance that if you are not saying the right things exactly the way they're supposed to be said, or you come out with the result that you think is right on the merits but maybe doesn't fit in the right pigeonhole, you may get a visit; you may even be asked to change your opinion.'" *Id*.

87. *See* Jean Eaglesham, *Fairness of SEC Judges Is in Spotlight*, Wall St. J. (Nov. 22, 2015, 9:25 PM), https://www.wsj.com/articles/fairness-of-sec-judges-is-in-spotlight-1448236970 [https://perma.cc/BCU8-FMSR] ("Judge Cameron Elliot, a 49-year-old former nuclear-submarine officer and SEC judge since 2011, has found the defendants liable in every contested case he has heard, the analysis showed. . . . Mr. Elliot told the defendants during settlement discussions on a case they should be aware he had never ruled against the agency's enforcement division. . . .").

88. Axon Enter., Inc. v. Fed. Trade Comm'n, 986 F.3d 1173, 1196 (9th Cir. 2021) (Bumatay, J., concurring in the judgment in part and dissenting in part) ("Axon asserts that its structure has granted the FTC an 'undisputed 100% win rate' within the administrative process for the past 25 years."), *cert. granted in part*, 142 S. Ct. 895 (2022) (mem.).

89. *See* Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 Tex. L. Rev. 1137, 1180, 1189 (2014) (noting a "gap between theory and practice," *id*. at 1180, which leads to an "increasingly fictional yet deeply engrained account of administrative law," *id*. at 1189).

90. For slightly different but equally idealistic justifications for administrative power, see generally Cass R. Sunstein & Adrian Vermeule, Law and Leviathan: Redeeming the Administrative State (2020) ("Our main project has been to put contemporary administrative law in its best light." *Id*. at 90.).

91. 5 U.S.C. § 553(b)(3)(B).

92. U.S. v. Dean, 604 F.3d 1275, 1281 (11th Cir. 2010) ("Emergencies, though not the only situations constituting good cause, are the most common." (quoting Nat. Res. Def. Council, Inc. v. Evans, 316 F.3d 904, 911 (9th Cir. 2003))).

93. *See* Philip Hamburger, Chevron *Bias*, 84 Geo. Wash. L. Rev. 1187, 1206 (2016).

94. *See id*. at 1211–12.

95. *See, e.g.*, Jonathan R. Siegel, Essay, *The Constitutional Case for* Chevron *Deference*, 71 Vand. L. Rev. 937, 942 (2018).

96. Philip Hamburger, Chevron *on Stilts: A Response to Jonathan Siegel*, 72 Vand. L. Rev. En Banc 77, 83 (2018).

97. In *Alabama Ass'n of Realtors v. Department of Health & Human Services*, 141 S. Ct. 2320 (2021). Nonetheless, under White House pressure, the CDC instituted a new moratorium. *See CDC Issues Eviction Moratorium Order in Areas of Substantial and High Transmission*, https://www.cdc.gov/media/releases/2021/s0803-cdc-eviction-order.html [https://perma.cc/EAJ7-UKAF].

98. Ashe Schow, *Maxine Waters Calls for CDC to Extend Eviction Moratorium: "Who Is Going to Stop Them?,"* Daily Wire (Aug. 3, 2021), https://www.dailywire.com/news/maxine-waters-calls-for-cdc-to-extend-eviction-moratorium-who-is-going-to-stop-them [https://perma.cc/W2DB-93RX].

99. Thomas W. Merrill, The *Chevron* Doctrine: Its Rise and Fall, and the Future of the Administrative State 4 (2022).

100. Michael Asimow, A Guide to Federal Agency Adjudication 169 n. 25 (2023) ("[M]ost agencies prefer to hire from the abundance of experienced SSA ALJs, rather than hiring off a strict register. As a result, only the SSA significantly relies on the OPM selection process to hire their ALJs.").

101. *See supra* note.

102. ALJs occasionally hear constitutional objections and resolve them in their own favor. *See, e.g.*, Christopher M. Gibson, Initial Decision Release No. 1398, 2020 WL 1610855, at *37 (ALJ March 24, 2020). More typically, however, it is assumed that constitutional questions are not within their competence. *See, e.g.*, Free Enterprise Fund v. Public Company Accounting Oversight Bd., 561 U.S. 477, 491 (2010) ("Petitioners' constitutional claims are also outside the Commission's competence and expertise.").

103. *See Commission Statement Relating to Certain Administrative Adjudications*, SEC (April 5, 2022), https://www.sec.gov/news/statement/commission-statement-relating-certain-administrative-adjudications [https://perma.cc/2QAZ-NSQT].

104. NCLA v. SEC, Complaint for Declaratory and Injunctive Relief (DDC 2022), https://nclalegal.org/wp-content/uploads/2022/11/NCLA-v.-SEC-FOIA-Lawsuit.pdf [https://perma.cc/2L4W-7AZP].

105. *See* Auer v. Robbins, 519 U.S. 451, 461 (1997); Kisor v. Wilkie, 139 S. Ct. 2400, 2408 (2019); Skidmore v. Swift & Co., 323 U.S. 138, 140 (1944).

106. *See* Hamburger, *supra* note 93, at 1202.

107. *See, e.g.*, Philip Hamburger, *Getting Permission*, 101 Nw. U. L. Rev. 405, 446 (2007) ("An early hint of the potential for relying on the force of negligence law came in 1978 from the National Commission for the Protection of Human Subjects. According to the Commission's *Report and Recommendations*, '[i]n negligence *per se* jurisdictions, violation of IRB rules could be taken as evidence of negligence,' and '[i]n other jurisdictions, the widespread use of IRBs in the research community may create a standard of care for the conduct of all research.'" (quoting Nat'l Comm'n for the Prot. of Human Subjects of Biomedical and Behavioral Rsch., DHEW Publication No. (OS) 78-0008, Report and Recommendations: Institutional Review Boards 86 (1978)).

108. *See id*.

109. For example, see *Sue and Settle: Regulating behind Closed Doors*, U.S. Chamber of Commerce (Mar. 6, 2018), https://www.uschamber.com/regulations/sue-and-settle-regulating-behind-closed-doors [https://perma.cc/V76U-ZLS9].

110. Robert Reich, *Smoking, Guns*, Am. Prospect (Dec. 19, 2001), https://prospect.org/features/smoking-guns/ [https://perma.cc/9D5J-58KM].

111. U.S. Const. art. I, § 9, cl. 2; *id*. art. II, § 1, cl. 1; *id*. art. II, § 3.

112. *See generally* Hamburger, *supra* note 37, at 65–82, 120–27, 406–07.

113. *See* David J. Baron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 Colum. L. Rev. 265, 279–90 (2013).

114. *See id*.

115. *Id*. at 265.

116. *See, e.g.*, Philip Hamburger, *Health-Care Waivers and the Courts*, Nat. Rev. (Mar. 14, 2011, 9:00 AM), https://www.nationalreview.com/2011/03/health-care-waivers-and-courts-philip-hamburger/ [https://perma.cc/7BEH-762N].

117. *See* Carl E. Schneider, The Censor's Hand: The Misregulation of Human-Subject Research xix (2015).

118. *See* Frank Keating, *Justice Puts Banks in a Choke Hold*, Wall St. J. (Apr. 24, 2014, 7:21 PM), https://www.wsj.com/articles/SB10001424052702304810904579511911684102106 [https://perma.cc/CKE6-6YMY].

119. *See id*.

120. For example, the Occupational Safety and Health Administration (OSHA) wanted to impose higher safety standards than imposed by law and did not have enough employees to inspect and enforce current standards. *See* Philip Hamburger, Purchasing Submission 225 (2021). So it told the two hundred employers in Maine with the state's most workplace injuries and illnesses that they would have "a much-reduced chance of inspection as long as [they] voluntarily adopted a higher standard of safety than required by statute or OSHA rules." *Id*.

> [Once] a substantial number of companies accepted this condition, OSHA [had] plenty of employees to engage in severe inspections of the noncompliant companies, and unsurprisingly 198 of the 200 companies submitted. Overall, the higher standard seems to have been beneficial for workers. Nonetheless, the higher standard was imposed . . . by offering reduced inspection and concomitantly subjecting noncomplying companies to especially severe inspection.

Id. The agency thus turned its discretion to inspect into a means of extorting compliance with a higher safety standard. That standard may have been desirable, but it should have been imposed directly by legislation or at least administrative rule, not through bullying.

121. *See* Aurele Danoff, *"Raised Eyebrows" Over Satellite Radio: Has* Pacifica *Met Its Match?*, 34 Pepp. L. Rev. 743, 744 & n.5 (2007).

122. *See, e.g.*, Paul Sperry, *Bank CEO Reveals How Obama Administration Shook Him Down*, N.Y. Post (Feb. 21, 2016, 6:00 AM), https://nypost.com/2016/02/21/bank-ceo-reveals-how-obama-administration-shook-him-down/ [https://perma.cc/7GWW-B6L9] (regarding threat that Ally Financial Inc. "would lose holding-company status for the bank if he fought the charges").

123. *E.g.*, Jonathan Emord, *Regulation by "Raised Eyebrow" Returns to FCC*, News With Views, https://newswithviews.com/Emord/jonathan338.htm [https://perma.cc/EF8M-X6FS] (regarding FCC pressures on radio and television stations to alter their programing).

124. Since at least the time of Max Weber, administrative power has been justified as distinctively rational. *See* Jerry L. Mashaw, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 40 Fordham L. Rev. 17, 23 (2001).

125. Mashaw writes: "This connection between administration and reason is a familiar theme in the social and political theory of modernity. Max Weber famously explained the legitimacy of bureaucratic activity as its promise to exercise power on the basis of knowledge." *Id*. For a modern American iteration of the theme, see Harold H. Bruff, *Legislative Formality, Administrative Rationality*, 63 Tex. L. Rev. 207 (1984).

126. Note that this confidence bias could be viewed as an application of the overconfidence effect—the tendency of individuals to be overly confident in their judgments.

127. *See* Rivka Green et al., *Association between Maternal Fluoride Exposure during Pregnancy and IQ Scores in Offspring in Canada*, 173 JAMA Pediatrics 940, 941 (2019) (finding that "fluoride exposure during pregnancy was associated with lower IQ scores in children aged 3 to 4 years").

128. *See* Clyde Haberman, *A Flame Retardant That Came with Its Own Threat to Health*, N.Y. Times (May 3, 2015), https://www.nytimes.com/2015/05/04/us/a-flame-retardant-that-came-with-its-own-threat-to-health.html [https://perma.cc/T94S-T9W7].

129. 45 C.F.R. § 46.111(a)(2) ("Risks to subjects are reasonable in relation to anticipated benefits, if any, to subjects, and the importance of the knowledge that may reasonably be expected to result. . . . The IRB should not consider possible long-range effects of applying knowledge gained in the research (*e.g.*, the possible effects of the research on public policy) as among those research risks that fall within the purview of its responsibility.").

130. The IRB body count is suggested by Peter Pronovost's study of catheter-related bloodstream infections. Peter Pronovost et al., *An Intervention to Decrease Catheter-Related Bloodstream Infections in the ICU*, 355 New Eng. J. Med. 2725 (2006). HHS shut down this study out of concerns that there had not been sufficient IRB approval, stopping further collection of data. Kevin B. O'Reilly, *HHS Shuts Down Michigan Patient Safety Study*, Am. Med. News (Feb. 4, 2008). But it was published in 2006 with the effect of saving at least 17,000 lives per annum in the United States alone. Kevin B. O'Reilly, *Effort Cuts Down Catheter-Related Infections*, Am. Med. News (Jan. 22, 2007), https://amednews.com/article/20070122/profession/301229957/7/ [https://perma.cc/DVQ4-7LTZ]; Allison Lipitz-Snyderman et al., Research Letter, *The Ability of Intensive Care Units to Maintain Zero Central Line–Associated Bloodstream Infections*, 171 Arch Intern Med. 856 (2011). To date, that means well over a quarter of a million lives (again, just counting the United States). And that was only one study. If one very conservatively supposes that the IRB system impedes only a few profoundly lifesaving studies each year, the lost lives since the imposition of IRBs in 1972 runs into the millions.

131. Philip Hamburger, Essay, *HHS's Contribution to Black Death Rates*, Law & Liberty (Jan. 8, 2015), https://lawliberty.org/hhss-contribution-to-black-death-rates/ [https://perma.cc/ELJ4-EH3Z] (examining the possibility that IRB censorship of research on the distinctive medical difficulties faced by Black men may be partly responsible for their elevated risk of death in cardiac surgery).

132. For example, deaths in such research (in contrast to that done under FDA regulations) are sufficiently uncommon that it is difficult to find empirical studies documenting them.

133. Hamburger, *supra* note 37, at 456.

134. *Id*. at 431–32.

135. If delay were really the objection to relying on congressional regulation, one might at least expect some agreement that agencies should ask Congress to adopt their older rules.

136. *Cf*. 2 U.S. (2 Dall.) 408, 411–14 (1792); *see* Hamburger, *supra* note 8 (manuscript pt. IX.D, at 69–70) (regarding the framers); *id*. (manuscript pt. IX.E, at 71) (regarding *Hayburn's Case*).

137. Hamburger, *supra* note 54, at 956.

138. William Funk, *Slip Slidin' Away: The Erosion of APA Adjudication*, 122 Penn. St. L. Rev. 141, 142 (2017).

139. 20 F.4th 194, 198 (2021), *cert. granted*, 142 S. Ct. 2707 (2022) (mem.).

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