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Agency Statutory Interpretation and the Rule of Common Law

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INTRODUCTION

American administrative theory and law have long treated as an axiom the notion that agencies are subordinate to the statutes that govern their mandates, and that statutory interpretation is central to the implementation of these mandates. Working from this starting point, scholars have diverged both over the extent to which agency practices should parallel the interpretive methods of courts and the degree of deference to which agency interpretive decisions are entitled. But the essential construction of administrative behavior as an exercise in statutory interpretation has generally been shared by most administrative law scholars. This understanding has been called into question recently by at least two authors. In lieu of statutory construction, Professor Foote posits "operational implementation of statutory programs" as the core function of agencies[1] and blames the *Chevron* decision[2] for the entrenchment of an erroneous statutory-interpretation para-

* Thanks to Glen Staszewski for insightful comments, and to Barbara Bean for extraordinary research support.

1. Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How* Chevron *Misconceives the Function of Agencies and Why It Matters*, 59 ADMIN. L. REV. 673, 674-75 (2007).

2. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

digm.[3] Similarly, Professor Pierce has argued that policy making is a more apt descriptor than statutory interpretation of the process through which "agencies give meaning to ambiguous provisions in the statutes."[4] For Pierce, statutory interpretation properly describes the role of agencies where Congress spoke directly to an issue and the matter consequently falls under step I of *Chevron*.[5] But interpretation does not properly capture the meaning of agency action in the face of statutory ambiguity.[6] Taking issue with Pierce, Professor Mashaw contends that agencies cannot successfully defend their statutes before reviewing courts except in reference to permissible interpretation of their governing statutes, and that the process by which agencies set out to implement their statutes is by necessity interpretive.[7] In the context of the Mashaw and Pierce debate, the choice of label is relevant to whether courts and agencies are justified in applying differing standards to the interpretation of statutes. But the terminological impasse the two hit in the course of this debate cuts to the very core of administrative law theory.

To question the fit between statutory interpretation and administration is to cast doubt on deep-rooted constructions of the meaning of the rule of law in America. The understanding of agencies as faithful agents of Congress informs the judicial review provisions of the Administrative Procedure Act. And yet, as attested by many of the papers in this symposium, statutory interpretation is frequently a poor descriptor of the practice of agencies or the logic of administrative action. For this reason, our ability to advance the contemporary debate over agency statutory interpretation would benefit from greater awareness of the historical process through which we have come tentatively to settle on this formulation. Towards this end, this paper offers a highly abbreviated account of the process through which the work of agencies came to be equated with statutory interpretation under common law. This history exposes deep-seated divisions over this formulation and its implications for the status and autonomy of executive authority over the course of English legal history. Greater awareness of the sources and per-

3. *Id.*

4. Richard J. Pierce, Jr., *How Agencies Should Give Meaning to the Statutes they Administer: A Response to Mashaw and Strauss*, 59 ADMIN. L. REV. 197, 199 (2007).

5. *Id.* The *Chevron* decision applied a two-step process to judicial review of agency interpretation of statutory provisions. Step one asks whether Congress spoke directly to the specific issue in question. To the extent that the reviewing court answers the above in the positive, congressional intent is dispositive and the reviewing court must implement it. If the court determines, however, that Congress did not speak to the specific issue it moves to the next step in the analysis. Under step two the question for the court is whether the agency's interpretation is a reasonable construction of the statute. *Chevron*, 467 U.S. at 842-43.

6. *See* Pierce, *supra* note 4, at 199.

7. Jerry L. Mashaw, *Agency-Centered or Court-Centered Administrative Law? A Dialogue with Richard Pierce on Agency Statutory Interpretation*, 59 ADMIN. L. REV. 889, 898 (2007).

sistence of this disagreement can enhance our ability to discern similar undercurrents within the contemporary debate.

England, rather than the United States, must serve as the starting point for this inquiry because the framing of agency action through the lens of statutory interpretation is a distinctive feature of the common law world, in contra distinction from continental civil law. Key to the evolution of this distinction was the role of Roman-law-based conceptions of prerogative royal authority in the legitimation of absolutist monarchies in early modern Europe. For many centuries, English monarchs and their supporters made claim to prerogative regulatory authority parallel to that of rulers in France and elsewhere in Europe. Their opponents brought a countervailing legal ideology geared at limiting the scope of the prerogative under common law principles. The history of English constitutionalism is one of a struggle between supporters of the royal prerogative and the expansive regulatory authority it conferred on the one hand, and those who invoked common law principles as a constraint on the Crown's authority, on the other. Embedded within the respective constitutional positions were divergent conceptions of the role of the state. Those who aligned with the Crown considered the prerogative to be a beneficial instrument for the advancement of the general welfare and common good.[8] Detractors viewed prerogative interference with private rights to be tyrannical measures and the mark of despotism. The latter construction transformed into a constitutional axiom after the end of the seventeenth century. Ever since, the Crown's regulatory authority was subordinated to Parliament, and executive regulation could proceed only under statutory delegation. By definition, agency action became contingent on statutory interpretation.

Pervasive doubts regarding the desirability of regulatory interventions, the role of the state, and the legitimacy of continental legal and administrative models were hardly put to rest with the victory of Parliament and the common lawyers at the end of the 17th century as discussed below. But the terms of the debate shifted towards the permissible scope of delegation and the degree of deference to be accorded to an agency's statutory interpretation. In this fashion, the formula served to disguise unresolved disagreements on whether and when administrators were entitled to make, rather than strictly interpret law.

I. PARLIAMENT, ORDINARY LAW AND THE RULE OF COMMON LAW

At least since Dicey, comparisons between common law and continental systems of administrative law have tended to focus on the identity of the

8. ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 63 (1921).

judicial tribunals in charge of reviewing agency decisionmaking.[9] In frequently quoted language, Dicey contrasted French *Droit Administratif* with English "rule of law" principles under which "every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals."[10] Discussions of this passage have tended to highlight Dicey's reference to the necessity of review by ordinary tribunals. But for the purpose of tracing the link between common law constitutionalism and administrative statutory interpretation, it is Dicey's reference to "ordinary law" that is most important. A requirement for judicial review of administrative decisionmaking does not inherently entail that agencies justify their decisions through the lens of statutory interpretation. One can well imagine a hybrid system in which regular courts oversee the implementation of a distinct set of administrative norms such as those that specialized courts are entrusted with enforcing under the continental model. Rather, the overlap between agency statutory interpretation and judicial review follows from the subordination of administrative behavior to "ordinary law," a subordination that was for Dicey derivative of the sovereignty of the English parliament.

Parliamentary sovereignty is most often construed as a synonym for unrestricted lawmaking power and attendant legislative immunity from constitutional judicial review. But in addition, as Professor P.P. Craig has argued, parliamentary sovereignty was understood by some as a requirement for parliamentary monopoly over lawmaking.[11] Under the latter meaning, the executive was deprived of any independent lawmaking authority by virtue of Parliament's exclusive power to legislate. Dicey argued from such a conception of parliamentary monopoly when he equated the rule of law with the universal application of the "ordinary law of the realm."[12] And it was from this starting point that he derived the rationale for judicial review. Legislative monopoly was compatible with the delegation of implementing authority to executive bodies such as ministries and agencies. But the ever-present threat that the executive would exceed the scope of its delegated authority "demanded an institution to *police* the boundaries which Parliament had stipulated."[13] This was the function that judicial review of administration was intended to serve. Speaking directly to this issue, Dicey wrote: "The fact that the most arbitrary powers of the English executive must always be exercised under Act of Parliament places the government, even

9. A.V. DICEY, LECTURES INTRODUCTORY TO THE STUDY OF THE LAW OF THE CONSTITUTION 179-91 (London, MacMillan 1885).

10. *Id.* at 177-78.

11. P.P. CRAIG, PUBLIC LAW AND DEMOCRACY IN THE UNITED KINGDOM AND THE UNITED STATES OF AMERICA 19-29 (1990).

12. DICEY, *supra* note 9, at 178.

13. CRAIG, *supra* note 11, at 22.

when armed with the widest authority, under the supervision, so to speak, of the Courts."[14] The nexus between administrative decisionmaking and statutory interpretation followed as a consequence. Since agencies could not exceed the jurisdictional boundaries determined under the statute, they were compelled to justify their decisions in reference to statutory meaning.

Nineteenth-century British judges diverged among themselves regarding the degree of autonomy to be accorded to agencies' readings of their statutes in a fashion reminiscent of contemporary divisions in American administrative law.[15] An important group of cases adopted the position that it was up to agencies to determine the meaning of applicable statutory terms, whereas other courts took a more interventionist approach.[16] Formally, the disagreement between the two judicial philosophies revolved around the degree of autonomy that parliament had intended to confer on agencies through delegation—a framing that did not seem to call into question parliament's legislative monopoly as such. The possibility that this framing masked deeper divisions over the legitimacy of independent executive-branch lawmaking authority deserves serious consideration in view of the paramount significance of this question over the course of English constitutional history.

II. ROMAN LAW, COMMON LAW, AND PREROGATIVE AUTHORITY IN EARLY MODERN ENGLAND

With the consolidation of territory under single rulers during the late Middle Ages, European monarchs set out to implement ambitious agendas of social and economic reforms. In justification of their authority to alter existing institutions and entitlements, the emergent monarchies invoked a royal prerogative to "administer, judge and legislate for the common and public welfare."[17] At least since the fourteenth century, French and English kings invoked their prerogative to collect taxes and issue royal ordinances, letters patents, and other forms of regulation. In both countries, the 16th and 17th centuries brought marked expansion in the Crown's utilization of prerogative regulation in pursuit of mercantilist economic policies. The promulgation of royal legislative enactments (termed "ordinances" in France and "proclamations" in England) was accompanied by the creation of specialized prerogative courts with sole jurisdiction over the enforcement of prerogative regulation.[18] Through these courts, monarchs sought to insu-

14. DICEY, *supra* note 9, at 339.

15. CRAIG, *supra* note 11, at 23-25.

16. *Id.* at 23-24.

17. GAINES POST, STUDIES IN MEDIEVAL LEGAL THOUGHT: PUBLIC LAW AND THE STATE, 1100–1322 20 (1964).

18. E.R. Adair, *The Statute of Proclamations*, 32 ENG. HIST. REV. 34, 41 (1917).

late their regulatory activities from review and obstruction by existing regular courts.

In pursuing this strategy, European rulers relied on Roman law principles under which the ruler was said to have acquired, by delegation from the people, absolutist administrative and legislative authority.[19] The subordination of private rights to the ruler's prerogative followed from the ruler's obligation to advance the "common utility, good, and safety of all."[20] Under the normal course of events, the king was bound by private law and expected to respect private rights. But when the safety and welfare of the realm were put in danger, the ruler's prerogative authority took precedence.[21] Roman law built in this fashion on a distinction between private law pertaining to the interests of individuals and public law applying to the interests of the state as such. Justinian's *Digest* begins with a reference to this distinction as recounted by Ulpian, and the *Corpus Juris Civilis* similarly offered textual support for the ruler's authority to promote the public welfare even at the expense of private rights.[22] Justinian's writings were well familiar throughout Western Europe during the Middle Ages and were repeatedly invoked as evidence of the legality of absolute executive authority.[23] This was the case not only in continental Europe, but in England as well. In England, however, Roman-law-based claims to the legitimacy of the royal prerogative faced a formidable challenge from the common law.

Writing during the later part of the 15th century, Sir John Fortescue argued for the existence of fundamental constitutional differences between the authority of English and French rulers. In a book titled *De Laudibus Legum Angliae* (*Praises of the Laws of England*), Fortescue insisted that English law barred unilateral royal policies of the type exercised by the French Crown.[24] Unlike France, Fortescue wrote, "In the realm of England . . . . [The king may not] by himself or by his ministers, impose tallages, subsidies, or any other burdens whatever on his subjects, nor change their laws, nor make new ones, without the concession or assent of his whole realm expressed in his parliament."[25] Elsewhere, Fortescue explained the cardinal difference between the authority of English monarchs and that of rulers under civil law through a distinction between royal and political power. Civil law conferred absolute royal power under the Justinian maxim, "What

19. R.C. VAN CAENEGEM, JUDGES, LEGISLATORS AND PROFESSORS: CHAPTERS IN EUROPEAN LEGAL HISTORY 74 (1987).

20. POST, *supra* note 17, at 13.

21. *Id.* at 20.

22. J.W. F. ALLISON, A CONTINENTAL DISTINCTION IN THE COMMON LAW 1 (1996); POST, *supra* note 17, at 19.

23. LEGISLATION AND JUSTICE 340 (Antonio Padoa Schioppa ed., 1997).

24. SIR JOHN FORTESQUE, ON THE LAWS AND GOVERNANCE OF ENGLAND 52 (Shelley Lockwood ed., 1997).

25. *Id.*

please[s] the prince has the force of law."[26] But "the king of England is not able to change the laws of his kingdom at pleasure, for he rules his people with a government not only royal but also political."[27]

Fortescue's book attests to the existence of significant disagreement in early modern England regarding the legitimacy of Roman-law-based conceptions of monarchical regulatory authority. While insisting that English constitutional principles denied rulers prerogative legislative authority, Fortescue acknowledged that some English monarchs tried to emulate French administrative practices and invoked civil law principles so as to change laws at their pleasure, make new ones, inflict punishments, and impose burdens on their subjects, and also determine suits of parties at their own will and when they wish.[28] By the latter, Fortescue seemingly referred to the creation of prerogative courts, independent of common law oversight, during his time.

The 16th century brought marked expansion in prerogative legislation and with it growing opposition from both the courts and parliament. In a number of cases, judges questioned the validity of royal proclamations issued in the absence of statutory authorization.[29] These decisions were behind parliament's enactment in 1539 of what has come to be known as Henry VIII's "Statute of Proclamations."[30] The Act required obedience to royal proclamations "concerning the advancement of his commonwealth and good quiet of his people."[31] In justification of the need for royal legislative authority independent of express parliamentary authorization, the statute invoked the need for "speedy remedies" necessitated by "sudden causes and occasions," and by the existence of "regal power" given to the King by God to "make and set proclamations for the good and politic order and governance of . . . his realm."[32] The King was precluded, however, under the statute from issuing proclamations made to the prejudice of any person's life, liberty, or property, or in breach of any laws or customs currently in force.[33]

In granting explicit authorization for the King to issue proclamations across broad areas of policy, the statute acknowledged and responded to judicial concerns regarding the legality of proclamations that were not authorized by parliament and thus, from this perspective, the statute can be

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26. *Id.* at 17.
27. *Id.*
28. *Id.* at 48.
29. Sir John Baker, *Human Rights and the Rule of Law in Renaissance England*, 2 NW. U. J. INT'L HUM. RTS. 3 (2004).
30. Statute of Proclamations, 1539, 27 Hen. 8 c. 26 (Eng), *available at* http://www.constitution.org/sech/sech_074.txt.
31. *Id.*
32. *Id.*
33. *Id.*

seen as deferential to the courts.[34] At the same time, the parliamentary imprimatur, which the Statute conferred upon prerogative legislation buttressed the practice against judicial scrutiny. In this fashion, the Statute of Proclamations helped avert a political crisis through a pragmatic formula aimed at reconciling parliamentary supremacy with prerogative authority.[35] The strategy faced considerable opposition, however, both within and outside Parliament, resulting in the repeal of the Proclamations Statute soon after Edward VI's coronation in 1547. Nevertheless, the Tudor monarchs continued and expanded their reliance on prerogative legislation throughout the rest of the 16th century against judicial insistence that "'no proclamation by itself may make a law which was not law before, but may only confirm and ratify an old law, and not change it.'"[36] The issue came to a head under James I, whose frequent recourse to proclamations prompted the House of Commons to protest the practice by petitioning the King in 1610. James turned to Edward Coke, who was then Chief Justice of the Court of Common Pleas, with the hope of procuring Coke's support. Coke's response was that proclamations could not create new offenses and may only aggravate an offense that was already illegal.[37] The issue likewise arose in an exchange between Coke and the Lord Chancellor on the legality of a pair of royal proclamations, the first of which prohibited the construction of new buildings in London and the second the processing of wheat starch.[38] The charge against these proclamations was that they lacked "former precedent or authority in law."[39] The Lord Chancellor retorted that "every precedent hath a commencement."[40] His advice to the judges was that they should "maintain the power and prerogative of the King" whose actions are "according to his wisdom, and for the good of his subjects."[41] Invoking Fortescue, Coke responded that "the King by his proclamation or other ways cannot change any part of the common law, or statute law, or the customs of the realm."[42] Neither could the King "create any offence by his prohibition or proclamation which was not an offence before, for that was to change the law."[43] The King could issue proclamations for one purpose only: "to pre-

34. *See* Baker, *supra* note 29, at 6.

35. William Huse Dunham, Jr., *Regal Power and the Rule of Law: A Tudor Paradox*, 3 J. OF BRITISH STUDIES 24, 25 (1964).

36. Baker, *supra* note 29, at 6 (citing British Library [BL] MS. Add. 24845, fo. 31 (translated)).

37. F. W. Maitland, *Sketch of Public Law at the Death of James I*, *in* THE CONSTITUTIONAL HISTORY OF ENGLAND 256-58 (Cambridge University Press 1968).

38. Proclamations Case (1611), 77 Eng. Rep. 1352, at 1353 (K.B.).

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

vent dangers, which it will be too late to prevent afterwards, he may prohibit them before, which will aggravate the offence if it be afterwards committed."[44] Notably, Coke himself expressed quite a different perspective on this issue a decade earlier when he wrote in his capacity as attorney general for Queen Elizabeth "that '[i]f any thing be hurtfull or preiudiciall to the common wealth or the state, albeit the same be not prohibite by lawe her Majestie may prohibite the same for the good of her people.'"[45]

Intertwined with conflict over the existence of prerogative lawmaking authority was the justiciability of matters pertaining to the exercise of prerogative powers before the regular common law courts. As noted earlier, both in France and England resort to prerogative legislation was accompanied by the granting of exclusive jurisdiction over enforcement to specially created judicial bodies. In England, the most prominent of these prerogative courts were the Chancery, the Admiralty courts, the Court of Star Chamber, and the Court of Requests.[46] The justification for granting exclusive jurisdiction over prerogative enactments to prerogative courts was based on the fundamental Roman law distinction between ordinary and extraordinary law.[47] Writing for the Court of Exchequer in Bate's Case (1606), Baron Fleming offered the following on why the imposition of customs duties was not justiciable in ordinary courts:

> The Kings power is double, ordinary and absolute, and they have several lawes and ends. That of the ordinary is for the profit of particular subjects . . . and this is exercised by equitie and justice in ordinary courts, and by the civilians is nominated *jus privatum* and with us, common law: and these laws cannot be changed, without parliament . . . . The absolute power of the King is not that which is converted or executed to private use, to the benefit of any particular person, but is only that which is applied to the general benefit of the people and is *salus populi* . . . and is most properly named Pollicy and Government. [48]

The following year, Dr. James Cowell, a Professor of Civil Law at Cambridge, spoke to prerogative's independence from the common law courts when he "defined the royal prerogative as 'that special Power, Preeminence, or Privilege which the King hath over and above other Persons, and above the ordinary course of the Common Law.'"[49]

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44. *Id.*

45. Adair, *supra* note 18, at 45 (quoting Notes by Attorney-General Coke on the prerogative, State Papers, Dom. Eliz., cclxxvi. 81 (1600?)).

46. *See* J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 101-9 (2d ed. 1979).

47. *See* Francis Oakley, *Jacobean Political Theology: The Absolute and Ordinary Powers of the King*, 29 J. HIST. IDEAS 323 (1968).

48. An Information Against Bates, 145 Eng. Rep. 267 (1606), *cited in* Oakley, *supra* note 47, at 324.

49. Oakley, *supra* note 47, at 325 (quoting DR. COWELL, A LAW DICTRONARY OR INTERPRETER OF WORDS AND TERMS, USED EITHER IN THE COMMON OR STATUTE LAWS, SV. "Prerogative" (1727)).

Cowell was among a small but elite cadre of civil-law-trained lawyers in England at the beginning of the 17th century.[50] Civil lawyers and common lawyers generally aligned with opposite sides in the political divisions of early 17th-century England. Whereas the civil lawyers sided with the monarchy and the English Church, the allegiance of most common lawyers was with the Puritans and the Parliament.[51] With the latter's victory subsequent to the 1688 Revolution, the Bill of Rights, and the Act of Settlement, the prerogative was severely curtailed and the King was deprived of any independent legislative authority.[52] Henceforth administrative authority was to be strictly circumscribed in reference to the terms of statutory delegation. Through this transition, parliamentary statutes became significantly more detailed than was the practice prior to the revolution when statutes tended to frame statutory objectives in general terms leaving broad sphere for prerogative implementation.[53] In lieu of conferring general administrative authority in matters of economic and social policy such as the construction of roads or the naturalization of aliens, Parliament pursued a case-by-case, highly localized approach to statutory authorization.[54] In the process, administrative practices that were earlier justified as an exercise of prerogative authority were redefined as interpretive of pertinent statutory language.

Centuries of division over the compatibility of Roman-law-based distinctions (between private and public or ordinary and extraordinary law) with English constitutionalism seemingly resolved with the common law's triumph at the end of the 17th century. But the victory was far less complete and final than historical accounts have often construed it to be. And the desirability of emulating continental, civil-law based administrative models remained a major bone of contention in Britain of the 18th, 19th, and early 20th century.

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50. Until the middle of the 13th century, most English lawyers received their education on the continent. Around that time, however, legal education institutions were established in England. In time two alternative tracks developed for entering England's legal profession. One path required study at Oxford, Cambridge, or one of the universities on the continent, culminating in the degree of doctor in civil law. The other required apprenticeship in legal inns, after which students were called to the bar. Graduates of the first track became known as civilians, and graduates of the second were called common lawyers. The common lawyers dominated England's legal profession by a large margin. Although there were only 200 civilian lawyers in the period between 1603 and 1641, there were close to 2000 common lawyers. BRIAN P. LEVACK, THE CIVIL LAWYERS IN ENGLAND 1603-1641: A POLITICAL STUDY 3 (1973).

51. *Id.*

52. MARGUERITE A. SIEGHART, GOVERNMENT BY DECREE: A COMPARATIVE STUDY OF THE HISTORY OF THE ORDINANCE IN ENGLISH AND FRENCH LAW 58 (Stevens & Sons Ltd. 1950).

53. Maitland, *supra* note 37, at 605.

54. HENRY PARRIS, CONSTITUTIONAL BUREAUCRACY 161-62 (1969).

III. EXECUTIVE LAW MAKING IN BRITAIN AT THE TURN OF THE 20TH CENTURY

In an 1893 treatise on comparative administrative law, Frank Goodnow distinguished between the type of ordinances present under "monarchical governments or republics where monarchical traditions are strong" and those existing in the United States. Under the former, the executive can issue independent and supplemental regulation geared at the creation of law where there was no statute or where the statute left gaps to be filled through executive implementation.[55] Importantly, Goodnow appeared to include England within the list of countries in which independent lawmaking by the executive was allowed, distinguishing it in this fashion from the United States where the executive "has [only] the right of delegated ordinance[s]."[56] Relatedly, Goodnow alluded to differences between the great degree of detail characteristic of American legislation, and the propensity of English and especially continental legislatures to confine themselves "to the enactment of general principles which it is then the duty of the executive, the heads of executive departments, or the local authorities by ordinance to carry out in their details."[57]

The detailed language and narrow statutory delegations that were the mark of English legislation subsequent to the Revolution gave way during the early 19th century to far broader legislative mandates. Crucial to this transformation was the democratization of the English franchise after the Reform Act of 1832 and the activist orientation that the British Parliament came to adopt in the wake of that Act.[58] Writing in 1905, Dicey decried this development as "The Growth of Collectivism"[59] and warned against the dangers of "democratic despotism."[60] A decade later, he directly linked these collectivist tendencies to a "marked decline" in "the ancient veneration for the rule of law" in England.[61] For Dicey, the connection followed

55. 1 FRANK J. GOODNOW, COMPARATIVE ADMINISTRATIVE LAW: AN ANALYSIS OF THE ADMINISTRATIVE SYSTEMS NATIONAL AND LOCAL, OF THE UNITED STATES, ENGLAND, FRANCE, AND GERMANY 27 (New York, G.P. Putnam's Sons 1893).

56. 2 FRANK J. GOODNOW, COMPARATIVE ADMINISTRATIVE LAW: AN ANALYSIS OF THE ADMINISTRATIVE SYSTEMS NATIONAL AND LOCAL, OF THE UNITED STATES, ENGLAND, FRANCE, AND GERMANY 110 (New York, G.P. Putnam's Sons 1893).

57. *Id.* at 111.

58. Maitland, *supra* note 37, at 383-84.

59. A.V. DICEY, LECTURES ON THE RELATION BETWEEN LAW & PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH CENTURY 210 (1905).

60. *Id.* at 304-05.

61. A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION xxxviii (8th ed. 1915).

from an underlying equation between common-law-based conceptions of the rule of law and limited government.[62]

World War I accelerated the growth of administrative government in Britain, and the late-1920s political conflict over the delegation of lawmaking authority to agencies sharpened considerably. A prominent participant in this debate was Lord Hewart of Bury, England's then-Lord Chief Justice who published in 1929 a book titled *The New Despotism*. The title evoked a comparison between contemporary executive authority and the royal prerogative as it was exercised by the Tudors and Stuarts. Making the comparison explicit, Hewart described pertinent similarities and differences in the following terms:

> In those days the method was to defy Parliament—and it failed. In these days the method is to cajole, to coerce, and to use Parliament—and it is strangely successful. The old despotism, which was defeated, offered Parliament a challenge. The new despotism, which is not yet defeated, gives Parliament an anaesthetic. The strategy is different, but the goal is the same. It is to subordinate Parliament, to evade the Courts, and to render the will, or the caprice, of the Executive unfettered and supreme.[63]

The analogy that Hewart drew between royal absolutism and the type of legislative authority that Parliament conferred on the executive branch was a recurrent line of attack. Hewart cited in this connection a Times article that likened contemporary legislative trends to the earlier-mentioned Statute of Proclamations enacted during the reign of Henry VIII.[64] The term "Henry VIII clauses" soon caught on as a referent to legislative provisions included in various bills from the 1880s onward that authorized government departments to make orders modifying the law when found necessary. These changes were then to be put before Parliament within a short period of time for authorization. But the requirement for post-hoc parliamentary authorization did little to allay fears that Parliament would simply rubber stamp this type of departmental legislation. Moreover, critics perceived the clauses as means of bypassing judicial review of agency interpretation of statutes. The "Henry VIII clauses" relieved agencies of the need to frame their decisions as based on statutory interpretation. Instead, they could explicitly claim to be changing the law subject to Parliament's approval. Parliament, rather than the courts, was made in this fashion the arbiter of the legality of administrative action. During a time when social legislation faced significant resistance from judges, ministerial capacity to bypass the courts in favor of a direct appeal to Parliament held significant benefits for progressive reformers. Conservatives, on the other hand, denounced what

62. ROBERT THOMAS, LEGITIMATE EXPECTATIONS AND PROPORTIONALITY IN ADMINISTRATIVE LAW 5-6 (2000).

63. LORD HEWART OF BURY, THE NEW DESPOTISM 17 (1929).

64. *Departmental Legislation*, THE TIMES OF LONDON, Feb. 16, 1929, at 13.

they saw as parliamentary capitulation and unconstitutional abrogation of legislative authority to the executive, akin to that which Parliament displayed under Henry VIII.

The controversy prompted the appointment in October 1929 of a Committee "to consider . . . what safeguards are desirable or necessary to secure the constitutional principles of the sovereignty of Parliament and the supremacy of the Law."[65] The matter of the "Henry the VIII clauses" was among the central issues taken up by the report. The compromise position the report adopted on this matter called for the abandonment of the practice "in all but the most exceptional cases" and only upon "special grounds stated in the Ministerial Memorandum attached to the Bill."[66] At the same time, the report concurred with the view that "the Henry VIII clause is a political instrument which must occasionally be used."[67] In similar fashion, the report left the door open for use of another category of controversial statutory provisions, which insulated certain regulatory actions from judicial review. These, like the Henry VIII clauses, were to be used only in "the most exceptional cases," but the constitutionality of the practice was not questioned as such.[68]

Importantly, in distinguishing between "normal" and "exceptional" categories of delegated legislation, the report echoed the longstanding Roman law distinction between ordinary and extraordinary law.[69] As discussed, it was in reference to this distinction and the necessity of emergency legislative powers that absolutist rulers justified prerogative interventions. Conversely, the denial of any such extraordinary prerogative authority was a central tenet of the common law and is at the root of the Diceyian conception of the rule of law. The degree to which the continental paradigm retained its hold within the English polity at the start of the twentieth century finds evidence in the report's explicit endorsement of plenary executive lawmaking authority in matters of emergency. As the report explained:

> In a modern State there are many occasions when there is a sudden need of legislative action. For many such needs delegated legislation is the only convenient or even possible remedy. No doubt, where there is time, on legislative issues of great magnitude, it is right that Parliament itself should either decide what the broad outlines of the legislation shall be, or at least indicate the general scope of the delegated powers which it considers are called for by the occasion.
>
> But emergency and urgency are matters of degree; and the type of need may be of greater or less national importance. It may be not only prudent but vital for Par-

65. Committee on Ministers' Powers Report. Cmd. 4060, at 1 (1932).
66. *Id.* at 65.
67. *Id.* at 61.
68. *Id.* at 65.
69. *Id.* at 30.

> liament to arm the executive Government in advance with almost plenary power to meet occasions of emergency, which affect the whole nation . . . .[70]

The suggested analogy between this type of plenary authority and the authority that the Henry VIII statute conferred regarding royal proclamations had more than a degree of truth to it. Those who originally coined the term "Henry VIII clauses" intended it as a political insult grounded in the assumption that fictions of the type the 1539 statute embodied as means of reconciling prerogative authority with parliamentary supremacy were inherently unconstitutional after the 1688 revolution. The extent to which the term gained hold across all sides in the debate suggests that the compromise embodied in the Henry VIII clauses remained to some a viable and preferable alternative to the construction of agency decisionmaking as statutory interpretation and the judicial oversight that this construction entailed.

IV. AGENCY STATUTORY INTERPRETATION AND THE AMERICAN ADMINISTRATIVE STATE

Almost in parallel with Britain, legislative delegations were at the center of a heated legal and political controversy during the 1920s and 30s, one that was construed to a large extent in reference to the choice between Anglo-American and continental administrative models. Writing in 1921, Pound began his book *The Spirit of the Common Law* with an ode to the common law's historical resilience throughout repeated crises "in which it seemed that an alien system might supersede it."[71] The external threat varied across the centuries and included the Catholic Church, the Tudor and Stewart rulers of England, and French sympathizers within the early American republic. But the "alien system" in question was always rooted in the Roman or civil law tradition of continental Europe. For Pound, the early 20th century marked another moment of crisis within this historical chain. Writing against the backdrop of unprecedented growth in federal and state administrative power during World War I, Pound argued that

> [T]he tendency to commit everything to boards and commissions which proceed extrajudicially and are expected to be law unto themselves, the breakdown of our polity of individual initiative in the enforcement of law and substitution of administrative inspection and supervision, and the failure of the popular feeling for justice at all events which the common law postulates appear to threaten a complete change in our attitude toward legal problems.[72]

Five years earlier, in 1916, Elihu Root, who earlier served as Secretary of State and senator and would later win the Nobel Peace Prize, departed from Pound's common law sentiments and declared that with the growth of

70. *Id.* at 52.
71. POUND, *supra* note 8, at 5.
72. *Id.* at 7.

government "the old doctrine prohibiting the delegation of legislative power has virtually retired from the field and given up the fight."[73] But the Supreme Court would prove Root's prediction wrong when it twice invalidated congressional statutes on non-delegation grounds in 1935.[74] Writing in the wake of these decisions, James Landis wistfully noted that "[m]any administrators who have had to struggle with the problem of translating a statutory scheme of regulation into a working reality would have welcomed, at least in a limited form, the power conferred by the so-called Henry VIII clauses in English legislation."[75] A grant of power modeled after "[t]hese celebrated clauses," Landis went on to state, "might prove serviceable as well as immune from abuse."[76] As things stood, however, the option was foreclosed by the Court's reading of Art. § 1 of the Constitution as barring Congress from abdicating or transferring "to others, the essential legislative functions with which it is thus vested."[77] The equation between administrative decisionmaking and statutory interpretation followed as a consequence.

Following Britain's lead, the American administrative state evolved over the course of the 19th century through protracted conflict over the legitimacy of continental administrative paradigms and the supremacy of common law principles.[78] And as was the case in Britain, the view of agencies as interpreters of statutory mandates offered a workable compromise between those who viewed administrative power as incompatible with common law constitutionalism and those who argued for the necessity and legitimacy of agency autonomy in the modern administrative state. The compromise proved resilient largely due to the ambiguous scope of the pertinent interpretive mandate and the broad range of administrative activities that could arguably fit under its expansive umbrella. In the process, longstanding divisions over executive lawmaking were recast as administrative law debates over the degree of deference to be accorded to agency interpretation. In this way, the current problem definition—"agency interpretation of statutes"—represents a kind of truce between competing ideologies over the nature of the American administrative state. Both the fluctuations in administrative law doctrine and the unresolved search for theoretical principles in this area stem largely from the ad-hoc nature of this truce.

The relevance of the historical conflict over prerogative lawmaking to contemporary administrative law has largely receded from view. On occa-

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73. Elihu Root, *Public Service by the Bar*, *in* ADDRESSES ON GOVERNMENT AND CITIZENSHIP 519, 535 (Robert Bacon & James Brown Scott eds., 1916).

74. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388, 433 (1935).

75. JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 52 (1938).

76. *Id.*

77. *Panama Refining*, 293 U.S. at 421.

78. Noga Morag-Levine, *Common Law, Civil Law and the Administrative State: From Coke to* Lochner, 24 CONST. COMMENT. 601, 602 (2007).

sion, however, these tensions resurface, as in the recent disagreement between Professors Mashaw and Pierce regarding the existence of a distinct agency policymaking authority. The competing administrative paradigms at stake in present discussions of agency statutory interpretation become easier to recognize when the current controversy is viewed as a modern-day expression of pervasive and deep historical disagreements over the legitimacy of executive law making within the common law world.