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Our Unruly Administrative State

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OUR UNRULY ADMINISTRATIVE STATE

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One of the perennial academic rituals of administrative "law" is to explain its compatibility with the rule of law. As surely as seasons pass, academics muster their formidable intellectual resources to reassure us, and themselves, that in pursuing administrative power, they have not abandoned the rule of law.

A more immediate justificatory project might be to explain the constitutionality of the administrative state. But notwithstanding valiant efforts, its constitutionality remains in doubt. So a fallback measure of its legitimacy seems valuable.

From this perspective, even if the administrative state is not quite constitutional, it can enjoy legitimacy under traditional common law ideas about the rule of law. Jurisprudence thus comes to the aid of

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aspirations for legality. But can the rule of law rescue the legitimacy of administrative power?

The historical difficulty is that the rule of law is not an old common law ideal. The other difficulty, based in contemporary realities, is that administrative power is unruly. It is so unruly that it cannot easily be fit under any rubric of law or even rules.

THE HISTORY OF THE IDEA OF THE RULE OF LAW

Many scholars treat the rule of law as the ancient and central ideal of our legal system, which, when applied to the administrative state, explains its legitimacy. This paper, in contrast, questions whether it is an old core ideal. Instead, it views it more historically as a relatively recent artifact of anxieties about the legitimacy of the administrative project.

In this vein, Part I argues that the modern principle, rule *of* law, has little historical or legal depth. The common law ideal was rule *through* (or *by*) law. Against this background, the U.S. Constitution established a version of rule through law. So, although the phrase *rule of law* has a pleasing resonance, and although there could perhaps be grounds for embracing it, it is not a principle grounded in our law or its long history.

Moreover, as will be seen in Part II, the notion of the rule of law flourished beginning in the late nineteenth-century as a means of reconciling law and administrative power. Its open-endedness allowed it to square the circle, bringing administrative power with the category of law.

The rule of law, in short, was not a pre-existing or otherwise independent ideal of legality. Instead, it was largely derivative of administrative power and the anxieties it produced. The rule of law therefore cannot be upheld as a traditional common law ideal. Any weak legitimizing value it may have cannot be simply presumed from the common law or its history.

THE UNRULY REALITY OF ADMINISTRATIVE POWER

Whatever legitimizing value can be attributed to the rule of law, the realities of the administrative state sink so low—so far below law and even below rules—that the administrative enterprise cannot find legitimacy in that ideal. In other words, even if there were much legitimizing force in the rule of law, that is of no avail for an administrative regime as unruly as that which prevails in the United States.

Pursuing this point about contemporary realities, Part III observes that, notwithstanding the academic idealization of administrative power, much administrative governance is utterly unruly. Far from being exercised through law, it is not even exercised consistently through rules. Instead, often it sinks down to pathways that are so far below law and rules as to be dangerously unsanitary. Even if this unruly power could, in theory, be cured by prior legislative authorization and subsequent judicial review, administrative decisions are not fully authorized or reviewable. It is difficult to understand how so unruly a regime can find justification in an ideal about the rule of law.

The rule of law thus offers cold comfort. Whether one considers the unhistorical character of the rule of law or the grim contemporary realities of administrative power, administrative power cannot find support in the rule of law.

I. NO HISTORICAL DEPTH

The old ideal of law, familiar from both the common law and the U.S. Constitution, was rule through law—or rule by law. It was not rule of law.

Although the older phrasing may seem only marginally different from the contemporary version, *rule through law* required government to bind, constrain, regulate, and control only through law—through limitations specified in the law and enforced in the courts. That was very different from the more modern *rule of law*, which more permissively allows control even if merely under law.

A. THE LAW/POLITICS DISTINCTION

Notions about the rule of law are elusive in early English or American law. Yes, Bracton recited the basic ideal that even the king must be under law, including human law.[1] And Magna Carta and especially the medieval due process statutes even established elements of governance through law and the courts.[2] But it is difficult to find much early expression of the rule of law.

The reason is easy to discern. Government under law could be understood so loosely as to leave room for kings to rule through other mechanisms, including their prerogative or administrative rules, which were not law. And rule of law would not have done much to solve that problem; on the contrary, as will be seen, it could be at least as permissive of administrative controls. So the principle that seemed essential to some prominent early commentators was governance through law.

It was a double-barreled requirement. Government had to rule only through the law and its courts:

Edward Coke summarized the two elements of the principle in his gnarled, old prose. First, "[t]he king being a body politic cannot command but by matter of record, for Rex præcipit, & Lex præcipit"[3]—meaning, the king orders and the law orders—"are all one, for the king must command by matter of record according to the law."[4] In saying that the king must command by matter of record, Coke meant the king could rule only through the acts of courts of record, including both Parliament and the more narrowly judicial courts. Second, even when the king merely commanded a person to be

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[1] PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 44 (2014).

[2] *See id.* at 255.

[3] 2 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND § 186 (W. Rawlins 1681) (1642).

[4] *Id.*

arrested, "the king cannot do it by any commandment, but by writ, or by order, or rule of some of his courts of justice, where the cause dependeth, according to law."[5] Coke stated this second element more generally in 1628 in the debates over the Petition of Right. Rejecting claims that the king could rule through his prerogative or administrative courts, Coke answered that king's commands had to come through his regular courts, for "[t]he king distributes his power by the judges."[6]

The question came to be settled in the 1640s not by lawyers, nor even by Parliament, but by Parliament's armies. After the Civil War, lawyers could be confident that the Crown could exercise power over its subjects only through the law of the land and its courts.

The most profound of common law judges, Matthew Hale, summarized this dual point: "Potestas imperii or regalis in England hath two qualifications: (1) That it is not absolute or unlimited, but bounded by rule and law. (2) It is not simple but mixed with jurisdiction, for the contempt or disobedience to his command ought to receive his punishment by that jurisdiction which the king is intrusted with, viz. in his courts of justice."[7] Pursing the first point, about governance under law, Hale added that in England it required governance through the law, for "by the constitution of this realm the supreme power of the king is limited and qualified that it cannot make a law or impose a charge but by the consent both of lords and commons assembled in parliament."[8] What got resolved in the mid-seventeenth century was thus not merely that government had to be under law, but more specifically that its power had to be channeled through the law and its institutions.

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[5] *See id*.

[6] *See* Edward Coke, Speech in Parliament (Mar. 25, 1628), *in* 3 THE SELECTED WRITINGS OF EDWARD COKE 1232, 1233 (Steve Sheppard ed., 2003).

[7] MATTHEW HALE, THE PREROGATIVES OF THE KING ch. 7, at 269 (D.E.C. Yale ed., Selden Soc'y 1976) (17th century AD) (quoted in HAMBURGER, *supra* note 1, at 278).

[8] *See id*. at 141 (quoted in HAMBURGER, *supra* note 1, at 278).

Roger Twysden pursued similar conclusions. The primary point was that the king had to govern through the law, not through any administrative power. He explained that the king was to govern by and under the law—that he was "to govern his subjects by and according to those laws which at his coronation he is sworn to observe."[9] This meant that "he cannot alone in any particular alter any laws already established, either common [law] or statute" and that "he cannot alone make new laws."[10] Secondarily, the king could confine his subjects only through the law courts: "[H]e cannot proceed against any subject, civilly or criminally, but in his ordinary courts of justice, and according to the known laws of the land."[11]

Whether as expressed by Coke, Hale, or Twysden, the constitutional assumption was that there was no room for prerogative or administrative power constraining subjects outside the law and the adjudications of the courts. Instead, binding power could be exercised only through these mechanisms.

Perhaps the most eloquent declaration of this ideal—at least of its primary element—came in a pamphlet from the 1766 embargo controversy:

> It is the glory of this constitution, says one our ablest lawyers, that its true and simple definition may be comprised in three words, government by law. Indeed what is the difference between a free state and arbitrary power, but that in the one the law promulgated stands the certain and unerring guide of our conduct, [and] in the other the uncertain and

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[9] ROGER TWYSDEN, CERTAINE CONSIDERATIONS UPON THE GOVERNMENT OF ENGLAND 87 (Camden Soc'y 1849) (1655) (quoted in HAMBURGER, *supra* note 1, at 278).

[10] *Id.* (quoted in HAMBURGER, *supra* note 1, at 278).

[11] *Id.* (quoted in HAMBURGER, *supra* note 1, at 278).

> erroneous will of one man, or a few men, in whom the executive power resides, is substituted instead of law.[12]

Government by law ensured a freedom measured by law.

It often is assumed that the cardinal achievement of the English in their constitutional struggles was to subdue the Crown under the law, particularly under the English constitution. The principle of government under law, however, was only the most general expression of what was at stake. The threat came specifically from royal efforts to rule outside the law—to exercise prerogative or administrative power outside the regular channels for lawmaking and adjudication. The seventeenth-century vindication of law therefore rested not only on the principle of rule under law but also on the more detailed principle of rule through the law and the courts.[13]

Not merely governance under law, but rule through law was the old English ideal. It was self-consciously asserted in the seventeenth century, and it remained familiar in the eighteenth. It prohibited precisely the sort of irregular power that the rule of law permits.

B. THE CONSTITUTION'S ESTABLISHMENT OF RULE THROUGH LAW

Although the U.S. Constitution did not declare the principle of rule by law, it went far in that direction. It established a government that was to regulate through law and adjudicate through the courts. The new government was thus formed in line with the old ideal.

I. Legislative Power

That the government was to regulate through law was made clear by the Constitution's location of its legislative powers.[14] These

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[12] ANONYMOUS, STATE NECESSITY CONSIDERED AS A QUESTION OF LAW 6 (1766).
[13] HAMBURGER, *supra* note 1, at 278.
[14] U.S. CONST. art. I, § 1.

powers included that of regulating commerce among the states—the power that is the font of most administrative regulation.[15] Such powers, according to the Constitution, were to be exercised by Congress, thus ensuring rule by law.

This point has been challenged by recent delegationist scholarship.[16] But that scholarship ignores the Constitution's framing and text. It simply does not discuss the framing debates about delegation or the specific language of the vesting clauses.[17] When those crucial considerations are examined, it becomes evident that the Constitution required regulation to be done through laws made by Congress.

In framing the Constitution in 1787, the Philadelphia Convention expressly rejected the Executive's exercise of congressionally delegated power. James Madison sought to expand executive power with a proposal for it to include the authority to execute congressionally delegated powers. When General Charles Cotesworth Pinkney expressed concern that "improper powers" might be delegated, Madison modified his proposal so it let the Executive exercise only those congressionally delegated powers that were neither "Legislative nor Judiciary in their nature."[18] In other words, he treated executive power as residual and hoped Congress might convey portions of it that the Constitution did not.[19]

In the end, even this proposal was voted down. The framers thus rejected any congressional delegation of power to the Executive, even additional executive power. More basically, even Madison agreed

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[15] *Id.* § 8.

[16] Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 279-80 (2021) [hereinafter Mortenson & Bagley, *Delegation*].

[17] *Id.*; Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding: A Response to the Critics*, 122 COLUM. L. REV. 2323 (2022).

[18] 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 67 (Max Farrand ed., 1911).

[19] For a more complete account of the debate, *see* Philip Hamburger, *Nondelegation Blues*, 91 GEO. WASH. L. REV. (forthcoming 2023).

that the Executive should not exercise any congressionally delegated legislative or judicial power.[20]

What the framers planned the people enacted. The Constitution's very text required regulation to be done through law, not merely under law. To be sure, many scholars protest that the Constitution lacks any nondelgation clause.[21] In other ways, however, it makes clear that regulation is to be done by law—in particular, through laws made by Congress.

Article I declares that all of the Constitution's legislative powers, including the power to regulate interstate commerce, "shall be vested" in Congress.[22] One might suppose that the Constitution's vesting of legislative power merely conveyed that power to Congress—as if it were a conveyance of title to land—leaving Congress free to retransfer it to administrative agencies. But the Constitution doesn't simply 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 merely transfers the powers; it also makes their location mandatory. It thereby bars any transfer of legislative power out of Congress.[23]

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[20] *Id.*

[21] Cass Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000). *See also* Kurt Eggert, *Originalism Isn't What It Used to Be: The Nondelegation Doctrine, Originalism, and Government by Judiciary*, 24 CHAP. L. REV. 707, 716, 718 (2021) ("[T]he Constitution is silent on whether Congress can delegate its legislative power" and "[t]he nondelegation doctrine is found nowhere in the Constitution"); Cynthia R. Farina, *Deconstructing Nondelegation*, 33 HARV. J.L. & PUB. POL'Y 87, 89 (2010) ("The Constitution's text is of little help, for it says nothing explicit about delegating the power Article I confers."); Mortenson & Bagley, *supra* note 17, at 2325 (2022) ("the Constitution's text does not directly address legislative delegations"); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1762 (2002) ("nothing in the language or structure of the Constitution supports" nondelegation).

[22] U.S. CONST. art. I, § 1.

[23] For further details, see Hamburger, *Nondelegation Blues*, *supra* note 19 (manuscript at 64-65).

Article III reinforces this point. It 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] Congress, in other words, was expressly authorized to designate the location of judicial power. In contrast, it was not authorized in Article I to designate the location of legislative power. This is telling. If Article I let Congress designate the location of legislative power, it would have said that the legislative powers "shall be vested in Congress *and such executive agencies as the Congress may from time to time ordain and establish*." But it did not do that.[25]

There are other textual indications—in Article II and the Necessary and Proper Clause—that regulation must be done by congressional enactment of laws. That evidence and much more can be read in my "Nondelegation Blues."[26] For purposes of this paper, the framing and Articles I and III should be enough to show that the Constitution established rule through law, not merely rule under or of law.

II. Judicial Power

As for the other element of rule through law—the adjudication of disputes in the courts—that can be observed in Article III. In saying that the judicial power of the United States "shall be vested" in the courts, Article III mandated the location of this power.[27] Moreover, by authorizing Congress to designate the location of some of the judicial power in the inferior courts, Article III makes especially clear that Congress cannot locate that power in bodies that are not inferior courts, such as executive agencies.

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[24] U.S. CONST. art. III, § 1.

[25] For further details, see Hamburger, *Nondelegation Blues*, *supra* note 19 (manuscript at 68).

[26] *See id.*

[27] U.S. CONST. art. III, § 1.

Reinforcing this conclusion is the Fifth Amendment's Due Process Clause.[28] It assured Americans that they could be held to account only through the courts.

The 1368 English due process statute already recited that attempts to hold subjects accountable in the king's council were "against the law."[29] As summarized in the margin of the Parliament roll, "none shall be put to answer without due process of law"—meaning the process of the courts.[30] This due process language and its meaning was echoed in the seventeenth century.[31] Against this background, the Fifth Amendment's due process of law seems to have similarly required the government to act through the courts.[32]

Its meaning was 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."[33] Chancellor James Kent similarly said it "means law, in its regular course of administration, through courts of law."[34] Citing both Tucker and Kent, Joseph Story concluded that "this clause in effect affirms the

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[28] *See* U.S. CONST. amend. V.

[29] HAMBURGER, *supra* note 1, at 170.

[30] *Id.*

[31] *Id.*

[32] Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1721-23 (2012).

[33] St. George Tucker, Law Lectures (1790s) (recorded on page 4 of four loose pages inserted in the second notebook of law lecture notes in the Tucker-Coleman Papers held in Box 62, Special Collections Research Center, Earl Gregg Swem Library, College of William and Mary) [https://perma.cc/J7GE-JUCL]. 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." *See id.* at 203-04 (fifth notebook).

[34] 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 13 (1826).

right of trial according to the process and proceedings of the common law."[35]

One might protest that this right to be held to account only in the courts came with exceptions. The leading example was distraint or distress against property owed to the government by a tax collector, which was upheld in in *Murray's Lessee v. Hoboken Land & Improvement Co.*[36] As the Supreme Court made clear, however, distraint was merely a historical exception to the due process of law, not something that would unravel the commitment to holding Americans to account only in the courts.[37]

The ideal of rule through law thus finds expression in the Constitution—at least, it once did. The United States, according to that document, is to regulate through congressionally enacted law, not delegated rulemaking. And it is to adjudicate violations through the courts, not lesser mechanisms.

III. Implications for Administrative Power

In the mid-nineteenth century, Americans were still relatively innocent about administrative power. Europeans, especially on the Continent, had much more experience with administrative evasions of government through law.

So it should be no surprise that the American who most clearly understood the danger was Francis Lieber. After suffering under Prussian administrators, he came to America, where he became a leading intellectual and legal commentator. Dedicated to rule through law, he rejected regulation by "mere proclamations of the crown or executive," and he protested that a citizen "ought not to be

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[35] 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1789 (1833).

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

[37] For further details, *see* HAMBURGER, *supra* note 1, at 217.

subject . . . to a 'government by commissions,' nor to extraordinary courts of justice."[38] He was right to be worried.

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The rule of law has little depth in the history of Anglo-American law. Rather than a deep-rooted common law ideal, the rule of law is a relatively new-fangled justificatory tool.

II. THE RULE OF LAW AS A JUSTIFICATION FOR ADMINISTRATIVE POWER

Far from being an old common law ideal that developed independently of administrative power and that therefore can justify it on traditional grounds, the notion of the rule of law has flourished only relatively recently—precisely as a means of reconciling administrative power with law.

Although it sounds very law-like, it is sufficiently open-ended to justify administrative power. In this way, it flourished as a means of making administrative power seem compatible with Anglo-American traditions of law.

A. A DICEY PROPOSITION

Beginning in the late nineteenth-century, there was a shift in ideas: rule of law began to displace rule through law. The old ideal was no longer much defended, and the new ideal found support as lawyers attempted to explain administrative power. Indeed, the notion of the rule of law seems have flourished precisely because it gave cover for administrative power—giving it an appearance of lawfulness.

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[38] *See id.* at 279-80.

No one did more to popularize the newer ideal than Alfred Dicey. On both sides of the Atlantic, he was the leading expositor of "the rule of law."

Working from this slogan rather than the underlying concerns, Dicey explained, "We mean, in the first place, that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established before the ordinary courts of the land."[39] He then supplemented this with a caution against excusing administrative officers from accountability in the courts: "We mean in the second place, when we speak of the 'rule of law' . . . not only that . . . no man is above the law, but . . . that 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."[40]

These high-minded sentiments echoed ideas of rule through law and the court, but admirable as these views sounded, they were presented in such limited and woolly phrasing as to nearly legitimize administrative power.

To be sure, Dicey boldly denied that England had the sort of administrative power familiar in France. And he said no one should be punished "except for a distinct breach of law established before the ordinary courts of the land."[41] But as counsel for the Commissioners of the Inland Revenue, he was very familiar with England's centralized administrative power.[42] Moreover, he could not have meant that England had no administrative power at all. So, his suggestion seems

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[39] *Id*. at 280 (quoting ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 183 (8th ed. 1924)).

[40] *Id*. (quoting ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 189 (8th ed. 1924)).

[41] ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 175 (3d ed. 1889).

[42] MARK WALTERS, A.V. DICEY AND THE COMMON LAW CONSTITUTIONAL TRADITION: A LEGAL TURN OF MIND 307 (2020).

to have been that England's version of administrative power was consistent with the rule of law.

Tellingly, he did not foreclose the possibility that a "breach of law" might consist of violating a statute giving effect to administrative regulations and decisions. This sort of governance, through statutorily authorized agency rules, departed from the old ideal of rule through law, but could slip through Dicey's account of the rule of law. He thus seems to have accepted some administrative rulemaking even while declaiming about the rule of law.

His argument, of course, was not altogether forthright. Probably out of idealism and a fear of legitimizing a further slide down the administrative slope, he did his best to reconcile English administrative regulation with the English legal tradition. He did this, on the one hand, by denying or downplaying English administrative regulation and, on the other, by elevating the notion of the rule of law—an ideal that sounded as if it preserved the old rule through law while quietly accommodating current realities.

He had greater difficulty explaining away administrative adjudication. He eventually dealt with this awkward problem by allowing that, even if a breach of law should be established in the ordinary courts, this could wait until there was review from administrative decisions. He came to accept (in the words of Mark Walters) that "it is possible to have administrative power and the rule of law if there is judicial review by the ordinary common law courts to ensure power is exercised consistently with principles of legality."[43] That is, having given prominence to the rule of the law in order to accommodate some degree of administrative power, he faced up to the realities of administrative power by adapting the rule of law to make it even more accommodating.

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[43] *Id.* at 315.

American courts soon made similar moves. They explicitly permitted regulation merely under law and administrative adjudication subject to review in the courts.

In *United States v. Grimaud*, the Supreme Court upheld a conviction under a statute criminalizing violations of regulations made by the Secretary of Agriculture.[44] Legislative authorization for agency rules seemed enough to bring such rules within the rule of law and even the Constitution. Unlike *rule through law*, the dubious ideal popularized as *rule of law* could accommodate the administrative rule of rules.

The next step for the rule of law in America was to justify administrative adjudication. John Dickinson seems to have played a significant role. Summarizing Dicey, Dickinson concluded merely that "every citizen is entitled, first, to have his rights adjudicated in a regular common-law court, and, secondly, to call into question in such a court the legality of any act done by an administrative official."[45] He admitted that adjudication in a regular common law court had been "overridden" by administrative agencies.[46] But this loss, he argued, was cured by subsequent judicial review.[47]

Of course, it was optimistic to think that subsequent review was an adequate substitute for initial resolution in the courts. Due process and juries were rights in the first instance.[48] And the later review came with extra expense, no jury, and much deference.

The main point here, however, is not the administrative injustice and loss of rights, but the collapse of the old ideal into the new. Rule

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[44] United States v. Grimaud, 220 U.S. 506, 523 (1911).

[45] JOHN DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES 35 (1927).

[46] *Id.*

[47] *Id.*

[48] *See* HAMBURGER, *supra* note 1, at 153.

through law was reduced to rule of law—precisely to accommodate administrative power.

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The old ideal had been rule *through* the law and its courts. It became the rule *of* law when commentators hoped to reconcile administrative power with old aspirations for legality. By virtue of its vagueness, the new ideal seemed to have the virtue of preserving a sense of legality amid disturbing administrative developments. But the euphemisms used to preserve ideals can also undermine them. The rule of law soon offered almost unlimited legal cover for agency rules and their tribunals.

It therefore is unclear what legitimacy the rule of law can give to the administrative state. Although it is said to be an old common law ideal, it actually developed with the administrative state. So it cannot be presumed to enjoy any historical depth in the common law or to have any other independent legitimizing value.

Such is the historical objection to relying on the rule of law. But there also is a difficulty based in contemporary realities.

III. OUR UNRULY ADMINISTRATIVE REGIME

Although administrative law is widely thought to satisfy the rule of law, it actually falls well below the Constitution, the rule of law, and even the rule of rules. The reality of administrative power is quite unruly. So it is unclear how such a power can find legitimacy in ideas about the rule of law.

Professors Daniel Farber and Anne O'Connell have noted that there is a "gap between theory and practice" in administrative

scholarship that leads to an "increasingly fictional yet deeply engrained account of administrative law."[49] The depth of the gap is sobering.

A. ALJ ADJUDICATION

Let's start with the administrative exercise of judicial power. Scholarship emphasizes the regularity and law-like character of administrative power by pointing to administrative law judges (ALJs). They are said to be neutral adjudicators and so give credence to the claim that administrative power conforms to the rule of law. But how neutral are they?

Most ALJs outside the Social Security Administration are selected from the SSA, not through the merit system, which means they can be selected for their willingness to support an agency's enforcement agenda.[50] Their decisions are reviewable or finalized by the heads of their agencies—so ALJs must always look over their shoulders, lest their decisions be reversal by political appointees.[51] In other words, even though most are fair-mined, they work under institutional pressures that are incompatible with neutrality.

Indeed, they can have their salaries lowered for inefficiency, including resistance to agency policy.[52] And they can have their positions eliminated for disagreeing with their agency.[53]

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[49] Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1180, 1189 (2014).

[50] Philip Hamburger, *The Administrative Evasion of Procedural Rights*, 11 N.Y.U. J.L. & LIBERTY 915, 931 & n.39 (2018); Brief of the New Civil Liberties Alliance at 3-6, 24-26, Lucia v. SEC, 138 S. Ct. 2044 (2018) (No. 17-130).

[51] Hamburger, *supra* note 50, at 950.

[52] *See id.* at 948 & n.99.

[53] Brief of the New Civil Liberties Alliance, *supra* note 50, at 14-15.

Their procedures also are biased. They impose imbalanced discovery on defendants. Some even require defendants to carry the burdens of proof and persuasion.[54]

Far from being neutral, ALJ adjudication is institutionally biased in favor of agencies. Is this the rule of law?

B. NOTICE AND COMMENT RULEMAKING

Recognizing that administrative power does not regulate us through laws, many scholars present it as something like the rule of rules—for example, by giving pride of place to notice and comment rulemaking.

But notice and comment is not the same as voting, or even the freedom of speech. What's more, 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, as long as the agency "for good cause" finds that these procedures "are impracticable, unnecessary, or contrary to the public interest."[55]

The administrative logic of this exception is obvious enough. But the rules for which notice and comment are "contrary to the public interest" tend to be those adopted in emergencies.[56] 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.

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[54] Hamburger, *supra* note 50, at 952.

[55] 5 USC § 553(b)(3)(B).

[56] 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").

C. NOT RULES, BUT UNSANITARY POWER

Even more seriously, much administrative power runs through mechanisms that are quite unlike rules.

How low do the administrative realities sink below the vision of administrative rules? In contrast to the ideal of notice-and-comment rulemaking, much regulation occurs through guidance—an imposition of policy without rules.[57] It also happens through waivers and regulatory licensing—mechanisms that allow regulatory policy to be defined not so much by rules as by exceptions and permissions. Administrative regulation even happens by means of raised eyebrows, overt threats, and even boycotts.

Far from being the rule of law, or even the rule of rules, these mechanisms need to be understood more bluntly as exertions of power. It is a power that runs down from law to rules, and from there down to much cruder, even unsanitary modes of control.

This cascade of administrative power down into unhygienic channels of power is discussed elsewhere and need not be repeated.[58] Suffice to say: "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."[59]

Such a regime does not rise to rule through law. Its unwholesome mechanisms are not even the rule of rules. Although the mechanisms

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[57] *See, e.g.*, Clarian Health W., LLC v. Hargan, 878 F.3d 346, 357 (D.C. Cir. 2017); Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Serv., 140 F. Supp. 3d 1123, 1199-1202 (D.N.M. 2015).

[58] *See* HAMBURGER, *supra* note 1, at 111-15; *see also* Philip Hamburger, Response, *Vermeule Unbound*, 94 TEX. L. REV. ONLINE 205, 209-10 (2016).

[59] Philip Hamburger, Administrative Harms 19 (May 31, 2023) (unpublished working paper) (on file with the Hoover Institution of Stanford University).

are sanctioned by the notion of the rule of law, it is unclear why they should be given cover with notions of rule or law.

D. PRIOR AUTHORIZATION AND SUBSEQUENT REVIEW?

All of this—both the institutionally biased adjudication and the unsanitary modes of regulation—are often justified as compatible with the rule of law on the theory is that there is legislative authorization and subsequent judicial review.

But much administrative power is not really authorized by law. This is most clear from the growing range of rulemaking, waivers, and other regulatory action done without statutory foundation. In addition, *Chevron* seems to authorize regulation on the basis of statutory ambiguity and even silence—that is, precisely where Congress did not actually intend regulation to extend.[60] Administrative regulation is thus often without its alleged authorization.

The statutory authority often missing at the front is matched by the difficulty of getting real judicial review at the back. There typically is no review from agency "guidance," as it is not final agency action.[61] Worse, many businesses and individuals hesitate to seek appeals from the decisions of their regulating agencies out of fear of retaliation. The agencies exercise not only the judicial power but also the legislative and executive powers. They therefore have many ways to punish those who seek judicial recourse.

Even when one gets to court, the review is meager. Judges almost invariably defer to an agency's account of the facts—what is called the *administrative record*, as if it were a court record.[62] And a series of

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[60] *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984).

[61] *See Hargan*, 878 F.3d at 349.

[62] *See* Env't Def. Fund, Inc. v. Castle, 657 F.2d 275, 284-85 (D.C. Cir. 1981) ("It is well settled that judicial review of agency action is normally confined to the full administrative record before the agency at the time the decision was made.").

doctrines—such as *Chevron* deference,[63] *Auer-Kisor* deference,[64] and *Mead-Skidmore* respect[65]—require judges to defer to, or at least show distinctive respect for, agency interpretations of ambiguous statutes or agency rules. Judges, moreover, tend to defer to agencies on their warrants, subpoenas, and inspections. Overall, judges defer to agencies on both the facts and the law, which means defendants cannot be confident they will get full or meaningful review.

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The administrative rules and adjudications that get justified in terms of the *rule of law* are poor substitutes for the rules enacted by Congress and the judgments of the courts. They often do not always amount to the rule of rules, and they rarely include neutral adjudication—let alone, the old rule through law and unbiased judges. Worse, much administrative power inhabits an even lower realm, where power descends far below rules and takes disturbingly unsanitary forms—all with little authorization in law and with less review in the courts. Such a regime cannot accurately be understood in terms of law or rules. More accurately, it is unruly.

CONCLUSION

There is good reason to be concerned about the administrative state. But such concerns should prompt us to recognize the realities of administrative power, not to paper them over with euphemisms about the rule of law.

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[63] *See Chevron*, 467 U.S. at 844.

[64] *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2414 (2019) (citing Auer v. Robbins, 519 U.S. 452 (1997)).

[65] *See* United States v. Mead Corp., 533 U.S. 218, 227-28 (2001); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

The historical point (in Parts I and II) is that the rule of law is a feeble substitute for the old common law ideal of rule through law. It cannot be presumed to confer any of the legitimacy associated with historical common law ideals.

The contemporary observation (in Part III) is that the administrative state is unruly. Rather than the rule of law, or even rules, we have a cascade of power. It long ago spilled over the Constitution's banks and flowed into administrative rules. Now, it overflows even those rules, coursing down through waivers, guidance, threats of retaliation, extortion through licensing, third-party boycotts, and so forth. So unruly a regime cannot easily be sanctified in terms of the rule of law.

If the administrative regime is to be justified, let it be justified as it is, warts and all. And that means it has to be embraced as an unruly sort of power, not the rule of law or even the rule of rules.