The return of the king: the unsavory origins of administrative law*

O retorno do rei: as origens desagradáveis do direito administrativo

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ABSTRACT

Philip Hamburger's *Is Administrative Law Unlawful?* is a truly brilliant and important book. In a prodigious feat of scholarship, Professor Hamburger uncovers the British and civil law antecedents of modern American administrative law, showing that contemporary administrative law "is really just the most recent manifestation of a recurring problem." That problem is the problem of power: its temptations, its dangers, and its tendency to corrupt. Administrative law, far from being a distinctive product of modernity, is thus the "contemporary expression of the old tendency toward absolute power — toward consolidated power outside and above the law." It represents precisely the forms of governmental

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action that constitutionalism — both in general and as specifically manifested in the United States Constitution — was designed to prevent. Accordingly, virtually every aspect of modern administrative law directly challenges the Constitution.

This extraordinary book will be immensely valuable to anyone interested in public law. My comments here concern two relatively minor points that call for more clarification. First, Professor Hamburger does not clearly identify what it means for administrative law to be "unlawful." Does that mean "in violation of the written Constitution"? "In violation of unwritten constitutional norms?" In violation of natural law"? There is evidence that Professor Hamburger means something more than the former, but it is not clear what more is intended. In order to gauge the real status of administrative law, we must have a more direct conception of law than Professor Hamburger provides.

Second, much of Professor Hamburger's historical and constitutional analysis focuses on the subdelegation of legislative authority. While his discussion contains numerous profound insights, including some that require correction in my own prior scholarship on the subject, it does not discuss how to distinguish interpretation by judicial and executive actors from lawmaking by those actors. Presumably, the prohibition on subdelegation of legislative authority prohibits only the latter. Figuring out where interpretation ends and lawmaking begins is one of the most difficult questions in all of jurisprudence, and I am not convinced that Professor Hamburger can successfully perform an end-run around it.

But these are modest nitpicks about a path-breaking work that should keep people of all different persuasions engaged and occupied for quite some time.

KEYWORDS

administrative law — rule of law — delegation

RESUMO

Is administrative law unlawful?, de Philip Hamburger, é um livro realmente brilhante e importante. Nesse prodigioso estudo, o professor Hamburger desvenda os antecedentes do direito britânico e civil do direito administrativo americano moderno, mostrando que o direito

administrativo contemporâneo "é realmente apenas a manifestação mais recente de um problema recorrente". Esse problema é o problema do poder: suas tentações, seus perigos e sua tendência a corromper. O direito administrativo, longe de ser um produto distinto da modernidade, é assim a "expressão contemporânea da velha tendência para o poder absoluto — para o poder consolidado fora e acima da lei". Ele representa precisamente as formas de ação governamental que o constitucionalismo — tanto em geral quanto como manifestado especificamente na Constituição dos Estados Unidos — foi criado para prevenir. Assim, praticamente todos os aspectos do direito administrativo moderno desafiam diretamente a Constituição.

Esse livro extraordinário será imensamente valioso para qualquer pessoa interessada no direito público. Meus comentários aqui dizem respeito a dois pontos relativamente menores que exigem mais esclarecimentos. Primeiro, o professor Hamburger não identifica claramente o que ser "ilegal" significa para o direito administrativo. Significa "em violação à Constituição escrita"? "Em violação às normas constitucionais não escritas?" "Em violação ao direito natural?" Há evidências de que o professor Hamburger quer dizer algo mais do que violar a Constituição escrita, mas não está claro o que mais se pretende. A fim de avaliar o verdadeiro status do direito administrativo, devemos ter uma concepção mais direta da lei do que a que o professor Hamburger nos fornece.

Em segundo lugar, grande parte da análise histórica e constitucional do professor Hamburger se concentra na subdelegação da autoridade legislativa. Embora sua discussão contenha inúmeros insights profundos, incluindo alguns que requerem corrigir meu próprio aprendizado anterior sobre o assunto, ela não discute como distinguir a interpretação dos agentes judiciais e executivos da elaboração de leis por esses agentes. Presumidamente, a proibição da subdelegação da autoridade legislativa proíbe apenas esta última. Descobrir onde a interpretação termina e onde começa a legislação é uma das questões mais difíceis em toda a jurisprudência, e não estou convencido de que o professor Hamburger consiga obter com sucesso uma conclusão em torno dela.

Mas essas são apenas modestas tentativas de buscar defeitos em uma obra inovadora que deve manter pessoas de diferentes convicções engajadas e ocupadas por muito tempo.

PALAVRAS-CHAVE

direito administrativo — estado de direito — delegação

After teaching and researching a subject for more than a quarter of a century, one does not normally expect to encounter a 500-plus page book on that subject from which one learn something new on almost every page. Even less does one normally expect such a book from an author whose scholarly expertise lies outside the relevant field of study. But Philip Hamburger's brilliant book, *Is Administrative Law Unlawful?*,[1] defies expectations, transcends boundaries, and extends the domain of human knowledge in too many directions to encapsulate in a brief review. I am honored to have the opportunity to comment on this extraordinary work, and I am profoundly grateful to Professor Hamburger, as should be anyone interested in administrative law or the American Constitution, for the insights that he provides. This is a book that will (or at least ought to) change the way even long-time scholars — and I suppose that I am unhappily old enough to bear that title — will look at the history, practice, and doctrine of administrative law.

Professor Hamburger, a legal historian by trade, has turned his prodigious talents to uncovering the British and civil law antecedents of modern American administrative law. Contrary to the common misperception that there is something distinctive about modernity that gives rise to the administrative state, he shows that contemporary administrative law "is really just the most recent manifestation of a recurring problem."[2] That problem is the problem of power: its temptations, its dangers, and its tendency to corrupt. The nature of power — and of the people who seek it — has changed little over time. Administrative law is thus the "contemporary expression of the old tendency toward absolute power — toward consolidated power outside and above the law."[3]

To some extent, those antecedents of modern administrative law have been hiding in plain sight for centuries. It is no great secret that the American Constitution "was designed specifically to prevent the emergence of the kinds

1 Philip Hamburger, *Is administrative law unlawful?* (2014).
2 *Id*. at 5.
3 *Id*. at 16.

of institutions that characterize the modern administrative state"[4] and that this eighteenth-century design was inspired largely by events in American colonial and British history. Professor Hamburger's great achievement is to systematize and document this history, to integrate it into a coherent narrative, and to provide a comprehensive account of the myriad ways in which modern administrative law recreates governmental pathologies that the founding generation in this country thought "were safely buried in the past."[5]

Nestled within the broader narrative is a treasure trove of detailed information about numerous topics in public law. Careful readers of this book gain deeper understandings of, inter alia, the problem of legislative delegation (or sub-delegation),[6] the nature of executive power,[7] the proper limits on agency investigatory authority,[8] the seriously under-analyzed line between civil and criminal proceedings,[9] the dangers of administrative waivers,[10] and even the executive role in awarding patents.[11] More broadly, one acquires new perspectives on such matters as the role of specialization of knowledge as a foundation for separation of powers;[12] the class bias that underlies the expansion of the administrative state, in which power systematically flows to those with appropriate credentials and connections;[13] and the role played — both today and in the past — by judicial deference in the rise of administrative governance.[14] After scrutinizing this book, one will never think of *Chevron*,[15] or even of *Crowell v. Benson*,[16] in quite the same way again.

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4 Gary Lawson, *Burying the Constitution under a TARP*, 33 HARV. J. L. & PUB. POL'Y 55, 55 (2010).

5 HAMBURGER, *supra* note 1, at 130.

6 *See, e.g., id.* at 37-39, 43-44, 377-86.

7 *See, e.g., id*. at 51-54, 89-95.

8 *See id*. at 183-90, 237-40.

9 *See id*. at 60-61, 228-30, 265-68.

10 *See id*. at 120-27.

11 *See id*. at 198-202.

12 *See id*. at 325-45.

13 *See id.* at 370-74.

14 *See id*. at 285-98, 313-19.

15 Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

16 285 U.S. 22 (1932). Strictly speaking, *Crowell* ruled against deference to agency fact-finding in the particular circumstances at issue, but its dictum broadly approving of such deference in most cases, *see id*. at 56-58, has proven far more influential. For an enlightening account of *Crowell*'s evolution and influence, see Mark Tushnet, *The Story of* Crowell: *Grounding the Administrative State*, *in* FEDERAL COURTS STORIES 354 (Vicki C. Jackson & Judith Resnick eds., 2010).

Professor Hamburger also definitively puts to rest the shibboleth that modern circumstances are somehow unique and call for novel forms of governance.[17] Professor Hamburger surgically dissects this claim by showing that every important aspect of modern administrative government has precedents in British legal history.[18]

> It thus is not a coincidence that administrative law looks remarkably similar to the sort of governance that thrived long ago in medieval and early modern England under the name of the "prerogative." In fact, the executive's administrative power revives many details of [the] king's old prerogative power. Administrative law thus turns out to be not a uniquely modern response to modern circumstances, but the most recent expression of an old and worrisome development.[19]

The administrative state is not something that the founding generation simply could not have imagined. The founders did not need to imagine it, because they and their ancestors lived it — and resoundingly rejected it.[20]

Most fundamentally, Professor Hamburger's scholarship makes it impossible for serious thinkers to overlook the crucial distinction between executive acts that purport to bind subjects[21] and executive acts that purport merely to instruct executive agents or exercise coercion against non-subjects.[22] This distinction runs through much of the book, and it helps to explain a host of historical and doctrinal puzzles that continue to arise today. For example, it is only the former kind of executive actions — attempts by the executive, with or without statutory authorization, to constrain subjects — that raise constitutional problems of adjudication outside of Article III and raise broader jurisprudential problems of extra-legality and absolutism. Professor Hamburger makes this point with clarity and emphasis, and for this

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17 *See, e.g.*, JAMES LANDIS, THE ADMINISTRATIVE PROCESS 1-2 (1938); Mistretta v. United States, 488 U.S. 361, 372 (1989) ("in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives").

18 *See* HAMBURGER, *supra* note 1, at 493 ("Although binding administrative power is widely said to be a novelty, which developed in response to the necessities of modern life, it is as ancient as the desire for consolidated power outside and above the law").

19 *Id*. at 5-6.

20 *See id*. at 495-96.

21 Professor Hamburger uses the term "subjects" to mean "all persons who, on account of their allegiance to a sovereign, are subject to its laws". *Id*., at 2 n.a. This includes citizens as well as non-citizen aliens who are lawfully present within the sovereign's jurisdiction.

22 *See, e.g., id*. at 2-5.

reason alone *Is Administrative Law Unlawful?* serves as a prolegomenon to any future work involving the separation of powers.

The book's sheer scope, of course, invites fair criticism. Administrative law scholars can justly claim that Professor Hamburger's treatment of modern administrative law doctrine is very thin, and constitutional law scholars can say much the same thing about his treatment of constitutional doctrine. But, apart from the fact that extended treatment of either topic would expand an already-lengthy book, Professor Hamburger was not really writing a book on administrative or constitutional doctrine. Nor is it a straightforward work in legal history, as it devotes much attention to relating that history to modern conditions and problems. In some sense, the book is best viewed as a call to arms — and perhaps a literal one[23] — to recognize some very profound dangers of administrative governance.[24] Professor Hamburger writes — repeatedly — that administrative power "runs outside the law",[25] "abandons rule through and under the law,"[26] "threatens the liberty enjoyed under law,"[27] "has resuscitated the consolidated power outside and even above the law that once was recognized as absolute,"[28] and constitutes a form of "soft absolutism or despotism."[29] But to emphasize this feature of *Is Administrative Law Unlawful?* may downplay the book's scholarly erudition and depth, which can surely be appreciated even by the staunchest supporters of the modern state who might scoff at these characterizations of administrative governance as hyperbole.[30] This is a book that defies easy categorization, and it should prove invaluable to almost anyone interested in public law.

Any substantive comment on so ambitious and integrated a book risks diminishing its significance by focusing on particular matters, and especially on matters that the reviewer regards as shortcomings, but that is unavoidable. Accordingly, I will direct my comments here to one conceptual gap and to one important doctrinal implication that requires more elaboration, with no

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23 *See id*. at 489.

24 *See id*. at 9 ("the argument of this book is of a more expansive sort than may be expected by legally trained readers. Whereas most legal arguments rest on doctrine, the argument here … is more substantively from the underlying danger").

25 *Id*. at 6.

26 *Id*. at 7.

27 *Id*.

28 *Id*. at 494.

29 *Id*. at 508.

30 To be very clear, Professor Hamburger is (alas!) hardly a libertarian. He lodges no objection to the *scope* of the modern state. He objects only to the administrative *forms* through which the power of the modern state is exercised. *See id*. at 2.

suggestion that these are the most significant aspects of the book, or even representative of it, rather than simply reflections of my own idiosyncratic interests.

Conceptually, the book's biggest defect is its failure to define precisely what it means by the term "unlawful." Does that mean "in violation of the written Constitution"? "In violation of unwritten constitutional norms?" "In violation of natural law"? Professor Hamburger seems to mean something more than the former, but it is not clear what more is intended, and that ambiguity hangs over the entire project.

Doctrinally, Professor Hamburger's work sheds valuable light on the problem of delegation — or, more precisely, sub-delegation — of legislative power. His analysis clarifies, and in some vital ways corrects, my own writing on the subject. But more remains to be said on the relationship between legislation and interpretation, and I hope in this Comment to flesh out that relationship a bit.

I emphasize that both of these points are relatively minor in the context of Professor Hamburger's project, and nothing that I say here should detract from the fact that this is one of the most important books to emerge in my lifetime.[31]

I

The unlawfulness of administrative law highlighted by the book's title appears constantly as a theme throughout the work. At every stage of Professor Hamburger's analysis, we are reminded that modern administrative practices, as well as their pre-modern forbearers, are "extralegal", "above and outside the law", expressions of "absolute power", and the like.[32] At the end of the day, however, it is unclear exactly what Professor Hamburger means when he describes administrative law as "unlawful".

To be sure, Professor Hamburger specifically defines how he is using terms such as "extralegal", "supralegal", and "absolute power". The term

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[31] Barely a week after I wrote this sentence, Scott Johnson on Powerlineblog said that *Is Administrative Law Unlawful?* "is the most important book I have read in a long time". *See* http://www.powerlineblog.com/archives/2014/07/is-administrative-law-unlawful-a-word-from-the-author.php (visited July 2, 2014).

[32] I wanted to say that these expressions appear on almost every page, but documenting such a claim would be tedious. So I randomly opened the book to five pages (60, 118, 174, 250, and 308), and discussions of "extralegal" or "absolute" power appeared on three of them.

"extralegal", as employed by Professor Hamburger, does *not* mean "legally unauthorized" For

> quite apart from the question of legal authorization, there remains the underlying problem of extralegal power — the problem of power imposed not through the law, but through other sorts of legal commands. On this basis, when this book speaks of administrative law as a power outside the law — or an extralegal, irregular, or extraordinary power — it is observing that administrative law purports to bind subjects not through the law, but through other sorts of directives.[33]

Extralegal power is thus "power exercised not through law or the courts, but through other mechanisms."[34]

Supralegal power, for its part, "rose above the law in the sense that it was not accountable to law. Supralegal power thus stood in contrast to ideas about the supremacy of the law, and judges were expected to defer to it, without holding it fully accountable under the law."[35] And absolute power, as defined by Professor Hamburger, is not necessarily unlimited power, but rather is power "exercised outside the law, … exercised above the law … [a]nd where, as usual, it combined the otherwise separate legislative, judicial, and executive powers, … consolidated."[36]

Putting all of this together, it appears as though administrative law is "unlawful" in Professor Hamburger's terms because it involves the exercise of coercive power against subjects through forms other than legislation or court adjudication implemented by bodies specializing in these functions. To which a defender of modern administration will likely respond with something on the order of, "Well, duh."[37] No one disputes that agency rulemaking is not legislation (though some may argue that it is authorized by legislation) or that agency adjudication is not judicial action (though some may argue that agencies are in some sense adjuncts to courts or in a kind of collaborative "partnership" with courts). Many will claim that such agency rulemaking or adjudicative action is nonetheless lawful, but that is simply because they do not agree with Professor Hamburger that lawful coercive action against

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[33] *Id*. at 23.
[34] *Id*. at 24.
[35] *Id*.
[36] *Id*. at 25.
[37] *See, e.g.*, Alan B. Morrison, *Administrative Agencies Are Just Like Legislatures and Courts — Except When They're Not*, 59 ADMIN. L. REV. 79 (2007).

subjects can occur only through legislation and court adjudication, not because they think agency action actually conforms to the requirements set forth by Professor Hamburger. Professor Hamburger claims that "[e]ven the defenders of executive legislation do not ordinarily call it 'law.'"[38] That is manifestly not so,[39] and even if it was, I am quite confident that champions of administrative government would be very happy to change their vocabulary if it actually was important so to do.

Of course, if the very concept of lawfulness necessarily requires action through legislation or court adjudication, then administrative law is unlawful. Does this mean that Professor Hamburger's central thesis is definitional and therefore trivial?

It certainly is very far from trivial if agency exercises of non-legislative, non-court power are *unconstitutional* and thus unlawful in that specific sense. There is much in Professor Hamburger's book to indicate how and why a good deal of modern administrative practice is rather flagrantly unconstitutional. Delegation of legislative power; the combination of legislative, executive, and judicial powers in the same institution; adjudication without full judicial process; and the circumvention of both grand and petit juries are just among the most obvious ways in which administrative law subverts the United States Constitution.[40] As Professor Hamburger details at great length, some of the most fundamental features of the American Constitution, as well as its uncodified British predecessor, were constructed precisely to foreclose many of the institutions of modern governance. He thus writes that "administrative law revives a sort of power that constitutions were emphatically designed to prohibit."[41] At more length:

> Like the English Crown before the development of English constitutional law, the American executive seeks to exercise power outside the law and the adjudications of the courts ….

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[38] HAMBURGER, *supra* note 1, at 351.

[39] *See, e.g.*, CORNELIUS M. KERWIN, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY (1994). Professor Hamburger recognizes this in spots. *See* HAMBURGER, *supra* note 1, at 23 ("apologists for administrative law may be inclined to suggest that it is not an extralegal power, but another sort of law").

[40] For a brief introduction to the rampant unconstitutionality of modern administration, see HAMBURGER, *supra* note 1, at 498-99; Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994). Professor Hamburger's potent elaborations on and extensions of this point are too numerous even for a string citation. Indeed, they are the central themes of the book.

[41] HAMBURGER, *supra* note 1, at 8.

> Constitutional law, however, developed precisely to bar this sort of consolidated extra- and supralegal power …. The [English] constitution … clarified that the government had to rule through regular law and adjudication. Indeed, it was understood to place the lawmaking and judicial powers in specialized institutions and to subject these powers to specific processes and rights.
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> Americans echoed all of this in their constitutions. They made clear that their governments enjoyed power only under the constitutional law made by the people and that the law of the land was supreme. They specified that their governments were to exercise legislative power through the acts of their legislatures, and judicial power through the adjudications of their courts, and they subjected these powers to constitutional processes and rights ….
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> As a result, the governments established by Americans could bind them only through regular legislation and adjudication, not through executive acts ….[42]

If consistency with the Constitution is the relevant species of lawfulness, then much, and indeed most, of federal administrative law is rather plainly unlawful. There are more than occasional suggestions in the book that this is precisely what Professor Hamburger has in mind by unlawfulness.[43]

Nonetheless, I do not believe that Professor Hamburger's argument about administrative unlawfulness is reducible to strictly constitutional terms, at least not as the word "constitutional" is generally used by American scholars. Several considerations feed into this belief.

First, Professor Hamburger states outright that simple constitutional analysis does not communicate everything that he thinks is important about the unlawfulness of administrative law. A constitutionalist approach, he says, "reduces administrative law to an issue of law divorced from the underlying historical experience and thus separated from empirical evidence about the dangers."[44] Again: "The danger of prerogative or administrative power… arises *not simply from its unconstitutionality*, but more generally from its revival of absolute power."[45]

Yes, Professor Hamburger argues in great detail that administrative law is unconstitutional — or, more precisely, anti-constitutional. But that does not seem to be all that he is arguing.

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42 *Id*. at 494.

43 *See, e.g., id*. at 30 ("The Constitution … was framed to bar any such extralegal, supralegal, and consolidated power. It *therefore* must be asked whether administrative power is unlawful") (emphasis added); *id.* at 281 (equating being "outside the law" with being "outside the acts, institutions, processes, and rights established by the Constitution"); *id*. at 480 (identifying illegitimacy with unconstitutionality); *id*. at 496 (identifying "real law" with the Constitution).

44 *Id*. at 15.

45 *Id*. at 493 (emphasis added).

Second, Professor Hamburger does not directly engage the originalism/living- constitutionalism debate, much less the numerous sub-debates within those broad categories, and he does not stake out a particular theory of constitutional interpretation. If his argument was grounded solely on a constitutionalist account of law, one would expect to see a very different kind of argument than he offers. He criticizes a "living constitutionalism" defense of administrative governance, but that critique already presupposes that administrative law is unlawful on some basis.[46] It is not a full-throated argument about constitutional interpretation.

Third, Professor Hamburger's argument is not only about the particular governmental scheme represented by the United States Constitution. At times his account of constitutionalism includes references to state constitutions,[47] and at other times it seems to include the British constitution as well.[48] He often seems to use the term "constitutionalism" to describe a very broad set of principles that are part of the Anglo-American legal and political tradition[49] rather than simply adherence to concrete norms in the United States Constitution. Thus, his point seems to be that there is something lawless about administrative governance that goes above and beyond inconsistency with the governmental scheme embodied by the federal Constitution.

Fourth, when discussing the problem of subdelegation (of which I will say much more shortly), Professor Hamburger observes that subdelegation of legislative power "departs not merely from the constitution, but from republican government itself,"[50] thereby suggesting a much deeper unlawfulness than mere(?) unconstitutionality.

If that is correct, so that lawfulness and unconstitutionality (in the sense of inconsistency with the United States Constitution) are not completely co-extensive terms in Professor Hamburger's analysis, then one might be tempted to conclude that Professor Hamburger is employing some conception of natural law, in which lawfulness is a concept that cannot be reduced to compliance with particular authoritative sources. But while there is nothing wrong (and, I happen to believe, a great deal right) about a natural--law metaphysics, I do not think it is accurate to cast Professor Hamburger's argument in natural-law terms either.

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46 *See id*. at 481-85.
47 *See, e.g., id*. at 494.
48 *See, e.g., id.* at 12.
49 *See, e.g., id*. at 488-89.
50 *Id*. at 385.

In support of some kind of natural-law understanding of Professor Hamburger's argument, one could point to his account of legal obligation. "[A]dministrative governance", he writes, "is a sort of power that has long been understood to lack legal obligation. It is difficult to understand how laws made without representation, and adjudications made without independent judges and juries, have the obligation of law; instead, they apparently rest merely on governmental coercion."[51] Indeed, administrative forms of governance are so fundamentally unlawful that they historically have served as grounds for revolution in both England and America,[52] thus suggesting that their unlawfulness goes beyond inconsistency with formal, positive norms. This notion is reinforced to some degree (though, as we will see, not entirely) by Professor Hamburger's account of the binding quality of law. As I read Professor Hamburger, for something to be law it must be not simply coercively enforced but also perceived as binding, presumably through acquiring a representative pedigree.[53] And "the postmedieval foundation of legal obligation has been the consent of the people,"[54] which in a large society necessarily translates into government through representation.[55] "Early Americans embraced this vision of consent and self-government. They assumed that legislation was without obligation unless the people imposed it on themselves in their representative legislature, and they eventually established the nation and its constitution on this ideal."[56] Importantly, Professor Hamburger presents this account of lawfulness-as-consent-through-representation as a *preconstitutional* norm that was the "foundation" for the actual Constitution (and the nation that it created) but not a *product* of that Constitution. Indeed, much of Professor Hamburger's account of this "central principle of American constitutional law"[57] involves evidence from colonial times.[58] Thus, one might think, Professor Hamburger's argument assumes that the very concept of law requires a normatively sound theory of representation to back it up.[59]

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51 *Id*. at 489.
52 *See id*.
53 *See id*. at 356.
54 *Id*.
55 *See id*. at 356-58.
56 *Id*. at 358.
57 *Id*. at 359.
58 *See id*. at 358-59.
59 For Professor Hamburger's detailed response to those who would defend the "representative" character of administrative law through its link to presidentialism or some form of public participation, see *id*. at 360-69.

I believe that this comes closer to Professor Hamburger's real account of lawfulness than either definitional fiat or narrow constitutionalism, but it still leaves some questions. Bruce Ackerman has famously argued that the Constitution of 1788 was effectively "amended" during the New Deal to authorize precisely the kind of administrative governance to which Professor Hamburger objects.[60] I have elsewhere argued that Professor Ackerman's argument does not validate the administrative state,[61] and I am quite certain that Professor Hamburger would find Professor Ackerman's non-Article V "amendment" process lacking in transparency.[62] But suppose that Professor Ackerman is "right" in some important sense involving constitutionalism. Or even more directly, suppose that some amendments validating administrative governance were formally adopted using the procedures of Article V. In those circumstances, one could not say that administrative governance was unconstitutional in the narrow sense of lacking conformance to the United States Constitution. But would it be lawful? A natural lawyer could comfortably say no if such a constitution is sufficiently lacking in normative bite. A positivist could also say no if there is some recognized norm of legality that is pre-constitutional, to which any constitution must conform in order to be lawful, that rules out administrative governance as a valid form of social organization. Or one could, at that point, concede the legality of administrative law (without necessarily conceding its wisdom).

What would be Professor Hamburger's answer? In other words, what underlying conception of lawfulness drives his analysis? I honestly do not know, and for me that is the most nagging difficulty with this amazing book.

II

Many of the issues involving administrative governance revolve around the problem of delegation of legislative authority. Administrative agencies make rules that have the force and effect of law — that function as though they are statutes — but that do not go through the constitutionally-prescribed (and representative) lawmaking process.[63] Because the Constitution vests

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[60] *See* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 34-57 (1991).

[61] *See* Lawson, *supra* note 40, at 1250-52.

[62] *See* HAMBURGER, *supra* note 1, at 482-83.

[63] *See* U.S. CONST. art. I, § 7, cls. 2-3. Administrative agencies, of course, also issue adjudicative orders that function like court judgments but that do not have the procedural pedigree of

"[a]ll legislative Powers herein granted in a Congress of the United States,"[64] Congress is the only institution authorized to exercise federal legislative power. If agency rulemaking amounts to the exercise of legislative power, it is rather obviously forbidden by the Constitution — unless something in the Constitution authorizes Congress to delegate its legislative authority to another actor. Much of Professor Hamburger's book explains the origins and fundamentality of this nondelegation principle.[65] Without the shield of delegation, a great deal of modern executive action amounts to precisely the kind of prerogative or rump legislation that both British and American revolutionaries worked hard to abolish.

I have elsewhere written at great length, from the standpoint of formal constitutional analysis, about why many modern statutes constitute delegations of legislative power and thus fly in the face of the Constitution's allocation of institutional authority.[66] Most of my prior writing focused on the Necessary and Proper Clause[67] as the textual foundation for a constitutional nondelegation principle. Congress can only do anything, including authorize other agents to act, if there is some affirmative grant of power permitting it so to do. There is no express "delegation of legislative power" clause, so the question (my past analysis reasoned) is whether the Necessary and Proper Clause serves as an implicit authorization for delegations.

Suppose, for example, that Congress mandates that all health insurance policies provide "essential health benefits" as part of their coverage.[68] Congress could enumerate by statute the precise content of what counts as "essential health benefits", but could it instead provide that the Secretary of Health and Human Services shall designate the appropriate "essential health benefits"?[69] The constitutional argument in favor of such a law would be that

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legitimate court proceedings. I tried to find something with which to disagree in Professor Hamburger's too-lengthy-to-cite discussion of why administrative adjudication is unlawful, but was unable to find enough of consequence to warrant discussion here.

64 *Id*. art. I, § 1.

65 *See, e.g.*, HAMBURGER, *supra* note 1, at 377-402.

66 *See* Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327 (2002); Gary Lawson, *Discretion as Delegation: The "Proper" Understanding of the Nondelegation Doctrine*, 73 GEO. WASH. L. REV. 235 (2005).

67 U.S. CONST. art. I, § 8, cl. 18.

68 Of course, Congress in reality — meaning constitutional reality, not political or doctrinal reality — has no enumerated power to regulate the content of insurance policies, *see* Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581, 585-86 (2010), but never mind for the moment.

69 *Cf.* 42 U.S.C. § 18022(b)(1) (2012) (instructing the Secretary of Health and Human Services to define "essential health benefits" that must be provided by qualified health plans that are

the instruction to the Secretary to define the relevant term is "necessary and proper for carrying into Execution" the statute and is thus authorized on Congress's end. The Secretary, for his or her part, would simply be executing the law by following to the letter its instruction to fill out the law if he or she promulgated rules defining "essential health benefits", and what could be a more straightforward exercise of "executive Power" than following to the letter the instruction in a statute?

In past years, I would have analyzed such a statute by asking two complementary questions: (1) whether it granted so much legislative-like discretion to executive agents that it was not a "proper" law for carrying federal power into effect and therefore exceeded Congress's power to enact and (2) whether it involved so much legislative-like discretion that it did not constitute "executive" power and thus exceeded the executive's power to implement. Professor Hamburger insists that this analysis, while fine as far as it goes, is impoverished and incomplete, because it overlooks "two more basic points":[70]

> First, delegation is a principle underlying all grants of power by the people, and thus the barrier to subdelegation is not merely a doctrine or implication derived from the Constitution's text. And because the barrier to subdelegation arises from the initial delegation of power by the people, it precludes much more than the subdelegation of legislative power through the necessary and proper clause. More broadly, it bars any subdelegation of legislative power.[71]

Professor Hamburger is absolutely right on all fronts, and any sound analysis of delegation must take his argument into account.[72]

For starters, he is right that one should never speak of the "delegation" of congressional legislative authority. One instead should speak of its "subdelegation."[73] This is not a mere matter of terminology; it goes to the substance of the constitutional problem with executive (and, for that matter, judicial) exercises of lawmaking discretion. The Constitution creates all of the institutions of the national government and vests them with all of the powers

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authorized to be sold on exchanges under the Patient Protection and Affordable Care Act).

70 *See* HAMBURGER, *supra* note 1, at 379 n.b.

71 *Id*.

72 Since my previous analysis did not take into account Professor Hamburger's not-yet-existent book, does that mean that this analysis was unsound? In some respects yes — which I hope to rectify in this Comment.

73 *Id*. at 377.

that they have. In that sense, the "legislative Powers herein granted" to Congress are a *delegation* of those powers from "We the People"[74] who initially possessed them. If Congress attempts to pass those powers onto someone else, it is attempting to delegate a delegated power, which is subdelegation. Both constitutional and conceptual analysis must thus focus on the propriety *vel non* of subdelegation of legislative authority.

Professor Hamburger is also right that, once viewed as subdelegation, *all* transfers of legislative power are invalid, whether effectuated through the Necessary and Proper Clause or some other means. The principle against subdelegation does not depend on the language of a particular clause but instead infuses the entire Constitution.

If there is any "textual" hook through which Professor Hamburger's historical account of subdelegation finds constitutional expression, it is the Preamble. The Preamble provides:

> We the People of the United States in Order to form a more perfect Union, to establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.[75]

By "ordain[ing] and establish[ing]" the various institutions of governance created by the Constitution, We the People purported to authorize various agents — Congress, the President, the Vice President, the federal courts, appointed federal officers, presidential electors, amending conventions, and in a few instances state officials — to manage some portion of We the People's affairs. Instruments that authorize some people to exercise power on behalf of others were commonplace in the eighteenth century — as they are today. Guardians, executors, factors, attorneys under powers or letters of attorney, and the like all function as fiduciaries, exercising power on behalf of others, pursuant to authorization from *agency instruments.* In form, the Constitution is an agency instrument within this broad category. It is, as James Iredell termed it at the North Carolina ratifying convention, "a great power of attorney."[76]

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[74] U.S. CONST. Preamble. On the significance of "We the People" as the legal authors of the Constitution, see generally Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise,* 23 CONST. COMMENTARY 47 (2006).

[75] U.S. CONST. Preamble.

[76] THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 148 (Jonathan Elliot ed., 2d ed. 1901).

A full discussion of the reasons for viewing the Constitution in agency or fiduciary terms, and the implications of that characterization of the document for constitutional interpretation, would require a book. Such a book is forthcoming;[77] until then, one can find a brief introduction to the argument in a short article[78] and foundational background in several articles by Robert Natelson,[79] who deserves credit for re-introducing the fiduciary conception of the Constitution into modern law and scholarship. For now, the key point is that agency instruments in the eighteenth century — and today — were read in light of a thick set of interpretative rules. One of the most basic interpretative features of agency or fiduciary instruments was/is that agents exercising delegated power generally *could not subdelegate that power without specific authorization in the instrument*. Rob Natelson has articulated the relevant background rule as of the late eighteenth century:

> When not authorized in the instrument creating the relationship, fiduciary duties were nondelegable. The applicable rule was *delegatus non potest delegare* — the delegate cannot delegate. As Matthew Bacon phrased it in his *A New Abridgment of the Law*, "One who has an Authority to do an Act for another, must execute it himself, and cannot transfer it to another; for this being a Trust and Confidence reposed in the Party, cannot be assigned to a stranger." In England, positions whose holders could assign them to others were designated "offices of profit," but positions that were unassignable without prior authorization were "offices of trust."[80]

Thus, because the Constitution is a species of agency instrument, the presumption is that delegated powers cannot be subdelegated, absent an express delegation authorization. There is no such express delegation clause. The Necessary and Proper Clause is not nearly express enough to

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77 GARY LAWSON, ROBERT G. NATELSON & GUY I. SEIDMAN, "A GREAT POWER OF ATTORNEY": UNDERSTANDING THE FIDUCIARY CONSTITUTION (University Press of Kansas, forthcoming 2017).

78 Gary Lawson, Guy I. Seidman & Robert G. Natelson, *The Fiduciary Foundations of Federal Equal Protection*, 94 B.U.L. REV. 415 (2014).

79 *See* Robert G. Natelson, *The Legal Origins of the Necessary and Proper Clause, in* GARY LAWSON, GEOFFREY P. MILLER, ROBERT G. NATELSON & GUY I. SEIDMAN, THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE 52 (2010); Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077 (2004). I am profoundly grateful to Rob Natelson for pointing my eyes to the obvious agency-law character of the Constitution, which I somehow missed for two decades even while studying a clause (the Necessary and Proper Clause) that plainly exemplifies it.

80 Natelson, *The Legal Origins of the Necessary and Proper Clause*, *supra* note 79, at 58-59 (footnote omitted).

authorize delegation of legislative power. Indeed, as my previous arguments demonstrate at length, the Necessary and Proper Clause is more easily read, in the context of the Constitution, affirmatively to forbid delegations than affirmatively to permit them.

The agency-law conception of the Constitution, and its implication of non-subdelegation of legislative authority, gibes perfectly with Professor Hamburger's historical analysis of the problem of subdelegation (which, I submit, is quite likely the consequence of both arguments being correct). Indeed, after tracing the prohibition on legislative delegation from John Locke through Whig theory through Tory arguments into American republican theory,[81] Professor Hamburger explicitly notes the agency-law connection to delegation:

> [I]f the principal selects his agent for her knowledge, skill, trustworthiness, or other personal qualities, he presumably gave the power to her, not anyone else. Of course, a principal could expressly subdelegation, but he could not otherwise be understood to have intended this…
>
> On such reasoning, the principle of delegation bars any subdelegation of legislative powers to Congress. The people, moreover, specify that they grant the legislative powers to a Congress "consist[ing] of a Senate and House of Representatives", with members chosen in specified ways. The delegation to Congress thus is to a body chosen for its institutional qualities, including members chosen by their constituents for their personal qualities. Congress and its members therefore cannot subdelegate their power.[82]

The overwhelming force of these considerations can be seen graphically by examining a list of constitutional provisions, and subsequent amendments, that deal with the selection, structure, and operation of Congress. This list does *not* include provisions that describe the scope of Congress's legislative powers or prescribe the requirements for valid lawmaking; these are provisions dealing with the *composition* and *mechanics* of the federal legislature:

Article I, § 1
Article I, § 2, cl. 1
Article I, § 2, cl. 2
Article I, § 2, cl. 3
Article I, § 2, cl. 4

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81 *See* HAMBURGER, *supra* note 1, at 380-85.
82 HAMBURGER, *supra* note 1, at 386.

Article I, § 2, cl. 5
Article I, § 3, cl. 1
Article I, § 3, cl. 2
Article I, § 3, cl. 3
Article I, § 3, cl. 4
Article I, § 3, cl. 5
Article I, § 4, cl. 1
Article I, § 4, cl. 2
Article I, § 5, cl. 1
Article I, § 5, cl. 2
Article I, § 5, cl. 3
Article I, § 5, cl. 4
Article II, § 2, cl. 3
Article II, § 3
Amend. XIV, § 2
Amend. XIV, § 3
Amend. XV
Amend. XVII
Amend. XIX
Amend. XX
Amend. XXIV
Amend. XXVI
Amend. XXVII.

In view of the attention paid by the Constitution to the selection and activity of the members of Congress, it is nothing short of farcical to argue that the Constitution implicitly countenances delegation of legislative authority through the backdoor of the Necessary and Proper Clause. No agency instrument would contain such detailed selection procedures and then implicitly allow an end-run around them. It is not an argument that can be advanced with a straight face by an honest interpreter.[83]

One short detour before the pay-off from this analysis: Just as the Constitution contains no clause explicitly authorizing the delegation of

[83] So am I saying that constitutional defenders of delegation are dissemblers or dishonest? Not at all. It may well be that they simply are not interpreters. There are, after all, a great many things — and quite possibly many valuable or interesting things — that one can do with a constitutional text other than interpret it.

legislative power, it also contains no clauses authorizing delegation of executive or judicial power. Are those powers also nondelegable? The answer is yes. In the case of judicial power, judges who, either from laziness or incapacity, delegate the decisionmaking task to others such as law clerks are breaching their fiduciary duties and should be impeached and removed from office. The case of executive power is a bit more involved but ultimately the same. The President need not personally perform every executive function, such as investigations and prosecutions, because the "executive Power" vested in the President is the power *either* personally to execute the law[84] *or* to supervise its execution by subordinates.[85] A president who shirks both of those duties in favor of, for example, extensive golf outings is breaching a fiduciary duty and should be impeached and removed from office. But the nature of executive power leaves room for more dispersal of that power to subordinates than is the case with either the judicial or legislative powers.

Professor Hamburger seems to believe that some portion of the executive power can be allocated to subordinates because the Article II Vesting Clause does not say that *all* "executive Power" is vested in the President.[86] The Constitution, however, vests "[t]he" executive power — meaning all of the executive power — in the President. There is no executive power remaining to be vested in anyone else. If Congress grants power to a subordinate executive official, that executive power automatically vests in the President by virtue of the Article II Vesting Clause. The Constitution creates a unitary executive.[87]

So what kind of power do subordinate executive officials exercise when they apply statutes? The answer is, of course: executive power. Officers exist precisely in order to carry laws into effect; their power so to do is what makes them officers.[88] A law creating executive officers, who can then carry laws into effect, is the quintessential law "necessary and proper *for carrying into Execution"* federal powers. The Constitution thus specifically contemplates

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[84] *See* U.S. Const. art. II, § 1, cl. 1 ("[t]he executive Power shall be vested in a President of the United States").

[85] *See id.* at art. II, § 3 ("he shall take Care that the Laws be faithfully executed").

[86] *See* Hamburger, *supra* note 1, at 387.

[87] *See* Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 NW. U.L. REV. 1377 (1993); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992).

[88] The Supreme Court was absolutely right to define officers of the United States for purposes of the Appointments Clause, U.S. CONST. art. II, § 2, cl. 2, as "any appointee exercising significant authority pursuant to the laws of the United States …". Buckley v. Valeo, 424 U.S. 1, 126 (1976).

the creation of officials other than the President who will exercise executive power. The Article II Vesting Clause provides, however, that whenever an official is granted power to execute federal law, the President is also granted that power whether or not the statute so specifies, along with a corresponding obligation either to exercise the power personally or to supervise its execution.

That ultimate power of exercise or supervision cannot be delegated. Thus, there is no problem at all with Congress authorizing subordinate officials to exercise executive power — so long as that exercise is subject to supervision, oversight, and if necessary veto by the President.

Can one argue that Congress similarly satisfies its constitutional obligations by supervising the exercise of lawmaking power by agencies? One can argue anything; the question is whether the argument is good or bad, and this argument would be very, very bad. Legislative power and executive power are different powers, which is why they are vested in different institutions and subject to different procedural and substantive checks. The Constitution specifies precisely how legislative power must be exercised: Article I, section 7 is quite detailed on the point. There is nothing in that section about alternative lawmaking methods subject to congressional supervision. There is nothing in the centuries-old Anglo-American conception of legislative power, as it would have been understood by a reasonable person in 1788, which treats legislative power as a supervisory power over other legislators. Gooses and ganders may take the same sauces, but legislative power and executive power are very different birds.

Executive power can be dispersed, up to a point, because of the nature of the power, but legislative power is not divisible in this fashion. Representative William Findley of Pennsylvania expressed this idea very eloquently in 1792 when he declared that "it is of the nature of Executive power to be transferrable to subordinate officers; but Legislative authority is incommunicable and cannot be transferred."[89] End of detour.

What does it matter whether a non-subdelegation principle is found in the Necessary and Proper Clause or in the background rule of agency instruments? For most of the agency actions that concern Professor Hamburger's book, it matters not a bit. It makes a difference only when someone attempts to

[89] 2 ANNALS OF CONG. 712 (1792). Of course, perhaps the reporter rather than Representative Findley was eloquent; the accuracy of the Annals of Congress in those days is quite spotty. *See* James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1, 36 (1986).

justify subdelegation through some mechanism other than the Necessary and Proper Clause. The most obvious candidate is the Territory and Property Clause of Article IV, which grants Congress "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States…"[90] This clause could be thought to authorize broad delegations to executive officials in federal territories and over federal property management — and I once so believed.[91] I was wrong[92] and Professor Hamburger is right that all exercises of federal power are subject to the non-subdelegation rule. Does that mean that Congress must pass meaningful rules for the management of the one-third of the nation's land mass owned by the federal government? Yes, that is what it means. This is not a startling conclusion, as the Constitution never contemplated that Congress would maintain ownership and control over one-third of the nation's land mass. If managing that property is too much for Congress, Congress needs to unload the property — either onto states or private citizens. Does this mean that Congress cannot allow self-government in federal territories because territorial legislatures violate the non-subdelegation doctrine? Professor Hamburger sees territorial governance as a limited and justified exception to the non-subdelegation principle,[93] though I frankly find his reasons for justifying it difficult to grasp.[94] More than two decades ago, I disagreed and argued that territorial legislatures were unconstitutional.[95] I changed my mind after deciding that the Necessary and Proper Clause, which is not needed to create territorial legislatures, was the source of the non-subdelegation principle, but I now think I was right the first time. If that conclusion seems hard to swallow, it would not be difficult to devise fast-track legislative methods for rubber-stamping the work product of territorial legislatures and giving it the formal imprimatur of the Constitution's lawmaking process.

Thus, Professor Hamburger and I disagree on some minor aspects of delegation, but we agree on the big picture: there is no constitutional

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90 U.S. CONST. art. IV, §3, cl. 2.

91 *See* Lawson, *Delegation and Original Meaning*, *supra* note 66, at 392-94.

92 *See* Lawson, Seidman & Natelson, *supra* note 78, at 448 n.173 (confessing error).

93 *See* HAMBURGER, *supra* note 1, at 389-90.

94 I do not mean by this, as is sometimes connoted, that they are bad reasons. I mean that they are difficult to grasp. I literally do not understand them and therefore cannot judge them to be good or bad.

95 *See* Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CAL. L. REV. 853, 900-05 (1990).

authorization for sub-delegation of legislative power. The devil, however, is often in the details, and the details of subdelegation can be quite vexing.

Suppose that Congress enacts a statute requiring employers to bargain collectively with recognized groups of "employees". A group of foremen, who "carry the responsibility for maintaining quantity and quality of production, subject, of course, to the overall control and supervision of the management,"[96] seeks recognition as a bargaining unit. In one sense, the foremen are obviously "employees", because the company pays their salaries. But the company also pays the salary of the CEO, so the statute must have something more specific in mind by the term "employee" than simply a contractual relationship with a company. Foremen have responsibility, including possibly disciplinary responsibility, over other employees, but it seems unlikely that the statutory term "employee" means only those people with no responsibility. The applicability of the statute in these circumstances is not absolutely clear.

If the case goes directly to a court — pretend for the moment that there is no National Labor Relations Board — should the court rule that the statute is invalid because it unconstitutionally delegates legislative power to the court? I believe that Professor Hamburger would say no. Certainly, this statute requires a degree of interpretation in these circumstances. But more facts about the particular duties of the foremen, the relationship of the foremen to the company's senior management and lower-level workers, the customs and practices in the relevant industry, the surrounding context of the statute, etc. might shed light on the proper application of the statute. One can imagine a theory of statutory interpretation, and even multiple theories of statutory interpretation, that could ultimately find a resolution to this question. This kind of interpretative enterprise, using "'artificial reason and judgment of law,'"[97] seems part and parcel of the judicial office. Statutes do not delegate legislative authority simply because they do not resolve every possible application on their faces. Interpretation is an activity distinct from lawmaking.

Interpretation, however, can shade into lawmaking under certain conditions. Suppose that Congress makes it unlawful "to maintain a borfin that schlumps on publicly-accessible property whenever it is accompanied by"

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[96] Packard Motor Car Co. v. NLRB, 330 U.S. 485, 487 (1947). This example is based on *Packard* — for no better reason than that I opened my Administrative Law casebook to the page containing it.

[97] HAMBURGER, *supra* note 1, at 54 (quoting *Prohibition del Roy*, 2 REPORTS 74-75 (1608)).

… and then the Statutes at Large contain an ink blot (that roughly resembles a profile of the late Robert Bork) where one would expect the next word. There is no additional relevant information about the statute. If a judge was to "construe" this statute to reach any particular conduct, the judge would not be interpreting but would be legislating. Not every action that takes the form of interpretation is actually interpretation.

Some activities *really are* interpretation and some *really are not*. Action-in-the-form-of-interpretation that does not involve the true activity of interpretation is unlawful legislation. A judge exercising judicial power should simply give this collection of words in the statute books no effect in any particular case.

Now consider a statute that prohibits the importation, and provides for the civil forfeiture of, any tea brought into the United States that, "in the opinion of the judge presiding over the forfeiture proceeding, is inferior in quality" to certain standard samples of tea designated by law.[98] Unlike the borfin/ink-blot statute, this one is perfectly comprehensible. There is no difficulty at all in grasping the law's instructions. The problem is that it calls upon the judge to make a decidedly un-judge-like determination of the quality of tea. The statute, in essence, makes it unlawful to import tea that certain judges think does not taste good enough. Is applying that statute a proper exercise of the "judicial Power", and is a statute that calls for such a judicial decision a valid exercise of legislative power? Has Congress in effect subdelegated legislative power to the courts?

To me, the answer is very clearly yes, that is an unconstitutional delegation of legislative power. Even if Congress itself could pass "bills of attainder" against particular shipments of tea,[99] it cannot give that power to courts in the false guise of "interpretation." Courts interpret laws because and when the exercise of the "judicial Power" requires it, but not every activity that takes the form of interpretation is actually an exercise of the judicial power.

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[98] This fictitious statute is based on the old Tea Importation Act, ch. 358, 29 Stat. 604 (codified at 21 U.S.C. §§41- 50), which was repealed by the Federal Tea Tasters Repeal Act of 1996, Pub. L. No. 104-128, 110 Stat. 1198 (1996). For a brief summary of the old law, see GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 59-60 (6th ed. 2013).

[99] Whether it could do so is actually a quite interesting question. The answer depends on the scope of the "equal protection" principle that is part of the fiduciary backdrop of all congressional powers. *See generally* Lawson, Seidman & Natelson, *supra* note 78. There would have to be some reason for focusing on one particular shipment of tea and not others. I can imagine a random selection process passing muster, though until my co-authors and I work out the details of Congress's fiduciary responsibilities (which we will do in a forthcoming book that we have not yet written), I would not want to make any bold pronouncements.

How to draw the line between permissible interpretation and impermissible exercise of legislative authority is a perennial nightmare. I have elsewhere catalogued at interminable length the efforts of courts and scholars to come up with an accurate formulation for telling valid from invalid statutes[100] and ended up agreeing with Chief Justice Marshall that one must separate "those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are not act under such general provisions to fill up the details."[101] In other words, "Congress must make whatever policy decisions are sufficiently important to the statutory scheme at issue so that Congress must make them."[102] The line between interpretation and legislation turns on impossible-to-quantify and difficult-to-describe distinctions among kinds and qualities of discretion conferred by statutes. Or so I think. For his part, Professor Hamburger does not really address this question. I would be very interested to hear how he draws the line between interpretation and legislation. I do not see how one can have a subdelegation doctrine without some such line.

Executive officials also interpret statutes in the course of their activities. Is there any meaningful difference between executive and judicial interpretation?

Professor Hamburger seems to suggest that the answer is yes. By his lights, judicial interpretation — when it is actually interpretation of a valid statute — results in actual legal consequences. If the statute is constitutionally valid, so is the judgment entered as a result of (legitimate) interpretation of that statute. But as I understand Professor Hamburger, there is no circumstance in which executive interpretation can have the same effect. Of course executives can offer interpretations of statutes, but those are merely offerings — just as any random citizen can offer an interpretation. They are not entitled to any deference from judges[103] and they have no independent legal force. As Professor Hamburger describes the early English history:

> Moreover, the exposition of law was a matter of judgment about law, and the law gave the office of judgment, at least in cases, to the judges. It thus became apparent that the judges — indeed, only the judges in their cases —

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100 *See* Lawson, *Delegation and Original Meaning*, *supra* note 66, at 355-77.
101 Wayman v. Southard, 23 U.S. (10 Wheat) 1, 43 (1825).
102 Lawson, *supra* note 40, at 1239.
103 *See* HAMBURGER, *supra* note 1, at 291-98, 313-17.

> had the power to give authoritative expositions of the law. Lawyers recited this in constitutional terms — for example, when a lawyer argued in King's Bench that "a power is implicitly given to this court by the fundamental constitution which makes the judges expositors of acts of Parliament." The judges therefore could not defer to interpretations of persons who were not the constitutional expositors, let alone interpretations that were administrative exercises of legislative will.[104]

Professor Hamburger's argument against binding executive statutory interpretation[105] is more powerful than I think many are likely to credit, but matters may be more complicated than he lets on. First, I do not think this argument can be confined just to laws that constrain subjects. If Congress passes a benefits law that does not constrain, Congress's exercise of lawmaking power is just as subject to the fiduciary obligations inherent in the Constitution's delegation of legislative power to Congress as it is when Congress passes constraining laws. The Constitution's enumerated powers of Congress do not sort themselves into constraining and non-constraining powers. The permissible activities of the *executive* may well depend on the constraint/non-constraint distinction, but it is not clear to me that the permissible activities of the *legislature* follow the same dichotomy. If that is right, there may be large classes of activity involving statutory interpretation that takes place *only* in the executive, with no role for the courts. In those circumstances, it is hard to operationalize the idea that executive interpretations have no legal force. It is quite easy to grasp the implications of that idea when courts are involved: the executive can say anything that it wants but the courts will ultimately make up their own minds. If it is a decision that is not subject to judicial review, perhaps because of sovereign immunity, then … what? I would be interested to know if Professor Hamburger thinks that there are any circumstances in which executive interpretation is legally significant.

Second, the proper relationship between executive and judicial interpretation may be more muddled than Professor Hamburger lets on. To be sure, I am no big fan of judicial deference. I hold no brief for *Chevron*,[106] and I think it is affirmatively unconstitutional for Congress to order courts

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[104] *Id*. at 289.

[105] It is crucial to note that Professor Hamburger has no objection to executive statutory interpretation that controls the activities of executive officials. The President or the Secretary of Treasury can give instructions on how to apply and understand the law to subordinate officials and discipline (or overrule) them if they fail to heed the instructions. *See id*. at 89-95.

[106] *See* Gary Lawson & Stephen Kam, *Making Law Out of Nothing at All: The Origins of the* Chevron *Doctrine*, 65 ADMIN. L. REV. 1 (2013).

to defer to agencies (or even to tell courts what evidence they can hear).[107] Courts have an obligation to try their best to get the right answers to legal questions. But sometimes executive interpretations are good evidence of the right answer. If there are whole classes of cases in which that is likely to be true, there may be reasons for giving weight to the entire class of cases, if the costs of sorting out the considerations in each case are too high.

Courts do not have unlimited resources. Time spent figuring out the right answer in one case is time not spent on other cases. I have no general theory of how hard decision-makers need to work in any particular instance to get the right answer. Without such a general theory, it is difficult to see how one can make categorical judgments about the permissibility of deference.

To be sure, Professor Hamburger is surely on safe ground criticizing the current regime of deference. Categorical condemnations of any kind of deference regime are much trickier. I am not saying that they cannot be made. I am just not sure that Professor Hamburger (or anyone else, including most especially myself) has laid the full jurisprudential foundation necessary to make them.

In sum, Professor Hamburger largely elides the line-drawing problem posed by any attempt to distinguish interpretation from legislation by categorically removing all executive statutory interpretation from the table. This move may be more problematic than it seems at first glance. If such a move is not available, then I think that Professor Hamburger needs to say more about what kinds of executive interpretations cross the line into legislation.

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On both counts — the meaning of lawfulness and the appropriate line between interpretation and legislation — my call is for more explanation from Professor Hamburger. Of course, more of anything from Professor Hamburger is always welcome. Topping *Is Administrative Law Unlawful?* is going to be difficult, even for him, but I fervently hope that he gives it a try.

[107] *See* Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 CONST. COMMENTARY 191 (2001).