

# THE LEGITIMACY OF US ADMINISTRATIVE LAW AND THE FOUNDATIONS OF ENGLISH ADMINISTRATIVE LAW: SETTING THE HISTORICAL RECORD STRAIGHT

*Paul Craig\**

## TABLE OF CONTENTS

### Introduction

- I. Doctrinal and Institutional Foundations
  - A. Doctrinal Foundations
  - B. Institutional Foundations
- II. Rulemaking
  - A. The Thesis on Extralegal Rulemaking
  - B. The Expansive Dimension: The Elision of Prerogative Rulemaking and Administrative Rulemaking
  - C. The Qualifying Dimension: Legislative and Non-legislative Rules
  - D. The Reality of Rulemaking
    - 1. Health, Safety and Trade Regulation
    - 2. Flood Protection
    - 3. Poor Relief
    - 4. Excise
- III. Adjudication
  - A. The Thesis on Extralegal Adjudication
  - B. The Expansive Dimension: The Elision of Prerogative Adjudication and Administrative Adjudication

---

\* Professor of English Law, St John's College, Oxford.

C. The Qualifying Dimension: Judicial Power and Administrative Adjudication

D. The Reality of Administrative Adjudication

1. Bankruptcy
2. Excise
3. Inclosure
4. Turnpikes

Conclusion

## INTRODUCTION

Administrative law is rightly regarded, together with constitutional law, as one of the twin pillars of public law. This is equally true for civil law regimes as it is for those grounded in the common law. The conceptual and normative foundations of administrative law should be examined with care, in the same way as for any other body of legal doctrine. Philip Hamburger recently posed a provocative challenge to administrative law in the USA, as attested to by the title to the book, which asks whether administrative law is unlawful.<sup>1</sup> His thesis is grounded in English administrative law, as it developed in the seventeenth century and eighteenth centuries, when lawyers in the American colonies would have been familiar with it. Indeed this analysis occupies approximately half of the book. It is perfectly legitimate for Hamburger to pose searching questions concerning the legitimacy of administrative law. It is by the same token equally fitting to subject this analysis to close critical scrutiny, which is the purpose of this article. This is more especially so given that there is much that is imperfectly understood about English doctrinal history in this area, and the misconceptions in this respect bear analogy to those revealed in Jerry Mashaw's seminal work on the foundations of US administrative law.<sup>2</sup>

---

<sup>1</sup> PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014).

<sup>2</sup> JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION, THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* (2012).

The ensuing analysis does not consider the fit between Hamburger's argument and modern US administrative and constitutional law. There has been valuable literature on this by those better versed than I in such issues,<sup>3</sup> and I agree with their arguments.<sup>4</sup> What follows is directed towards the central parts of Hamburger's thesis that are built on English administrative law. It will be argued that his thesis is misconceived, and does not represent the reality of this law in the seventeenth century or thereafter, with which American colonists might have been familiar. The argument presented below is also of more general relevance, since it will be shown that Hamburger's thesis is predicated on certain conceptual distinctions that are untenable. The structure of the argument is as follows.

Part I of the article contains a brief overview of the doctrinal and institutional foundations of English administrative law. This is followed in Part II by consideration of rulemaking. Hamburger's thesis concerning "extralegal rulemaking", which is said to be derived from English law, is set out. It has an expansive dimension insofar as the thesis is premised on elision between prerogative and administrative rulemaking. This is mistaken, and did not represent the legal or constitutional reality in the seventeenth century or thereafter. Hamburger's thesis is also premised on a qualifying dimension, in which he seeks to limit the force of his argument concerning "extralegal rulemaking" through definition of the term legislative. This facet of the argument is problematic from a conceptual perspective. This is followed by examination of the reality of such rulemaking in England from the sixteenth century onwards in four areas: health, safety and trade regulation; flood protection; poor relief; and excise. The American colonists would probably have been aware that Parliament had authorized executive actors, the King or specific commissioners, to adopt regulations to protect health and safety, to prevent flood damage, and other matters. This was not regarded as extralegal.

---

<sup>3</sup> ADRIAN VERMEULE, 'No', *Review of Philip Hamburger, Is Administrative Law Unlawful?* 93 Texas Law Review 1547 (2015); CASS R. SUNSTEIN AND ADRIAN VERMEULE, *The New Coke: On the Plural Aims of Administrative Law*, Supreme Court Review, forthcoming. For a response, see, Philip Hamburger, *Vermeule Unbound*, forthcoming.

<sup>4</sup> I am conversant with the case law and secondary material having taught US administrative law for more than twenty years.

The focus in Part III shifts to adjudication, and the analysis is structured symmetrically with Part II. Thus the discussion begins with Hamburger's thesis on "extralegal adjudication", which he derives from early English law. His argument contains an expansive dimension, in that it is based on an elision between prerogative and administrative adjudication. This elision is mistaken, and did not represent legal or constitutional reality. Hamburger's argument also contains, as in the context of rulemaking, a qualifying dimension, in which he limits the force of his principal argument concerning "extralegal adjudication", through definition of the term judicial. This aspect of the argument is beset with conceptual difficulty and does not cohere with the reality of administrative adjudication in England. This reality is revealed through examination of four areas: bankruptcy, excise, inclosure and turnpikes.

Discourse concerning doctrinal foundation and transformation is valuable, but fraught with difficulty. There are issues concerning the level of abstraction or detail at which the inquiry is posed; there are decisions to be made as to what is central and what is merely interstitial; and there are judgments as to the significance of institutional and doctrinal facets of the subject when considered in the relevant temporal frame. These difficulties are exacerbated when the subject matter of the inquiry dates back over 300 hundred years, which is the approximate time span in which administrative law developed in England and thereafter the UK. Whether there has been change depends on identification of the foundational tenets of the subject. Paint the foundational picture one way and you have radical disjunction with the past. Paint it differently and you have a stronger seam of continuity, notwithstanding change.

Matters become more complex yet again when the scholar has a particular normative agenda and seeks to draw succour from historical sources. There is nothing wrong with having such an agenda; indeed we all do to some greater or lesser degree. This does not diminish the relevance of the point being made here. The stronger the normative agenda, the greater the attendant danger that the historical material will, albeit unwittingly, be read so as to lend it support. The stakes are necessarily raised when the normative agenda seeks to call into question the "legality" of a body of law broadly conceived. Close scrutiny of such arguments is more especially warranted in such instances. The message from this article is that whatsoever US courts and commentators

choose to make of Philip Hamburger's thesis in the modern day they should not believe that it represents the legal and constitutional realities from England that American colonists, or the framers of the American constitution, would have been familiar with.

## I. DOCTRINAL AND INSTITUTIONAL FOUNDATIONS

The doctrinal and institutional foundations of administrative law date back to the sixteenth century, but were developed most markedly from the seventeenth century onwards. Detailed analysis would require an extended article in itself, or a monograph, and reference can be made to works of this kind.<sup>5</sup> What follows is perforce an outline of its principal features.

### A. Doctrinal Foundations

Just as Americans long thought, before Jerry Mashaw's seminal demonstration to the contrary,<sup>6</sup> that American administrative law began with the creation of the Interstate Commerce Commission in the late nineteenth century, so too is it common for academics in continental Europe to believe that England had no system of administrative law until the mid-twentieth century, a sentiment fuelled by Dicey's conclusion that the subject was not known.<sup>7</sup> This belief still holds force for many in the UK. There is, however, no necessary connection between widely held belief and factual accuracy. The reality here, as in America, was quite the contrary. England had one of the oldest bodies of administrative law in the post-classical world, the doctrinal foundations of which were laid two centuries before anything comparable began to happen in continental Europe.

---

<sup>5</sup> S.A. de Smith, *The Prerogative Writs* [1951] CAMBRIDGE LAW JOURNAL 40; S.A. de Smith, *Wrongs and Remedies in Administrative Law* (1952) MODERN LAW REVIEW 189; L. Jaffe and E. Henderson, *Judicial Review and the Rule of Law: Historical Origins* (1956) 72 LAW QUARTERLY REVIEW 345; EDITH G. HENDERSON, FOUNDATIONS OF ENGLISH ADMINISTRATIVE LAW (1963); A. RUBINSTEIN, JURISDICTION AND ILLEGALITY (1975); P. Craig, *Ultra Vires and the Foundations of Judicial Review* [1998] CAMBRIDGE LAW JOURNAL 63; P. CRAIG, UK, EU AND GLOBAL ADMINISTRATIVE LAW: FOUNDATIONS AND CHALLENGES (2015), 25-93.

<sup>6</sup> MASHAW, *supra* note 2.

<sup>7</sup> A.V. DICEY, THE LAW OF THE CONSTITUTION (ED. J.W. ALLISON, 2013).

It had a body of legal rules concerned directly with the legal constraints that should be placed on the administration broadly conceived from the late sixteenth century, with certain doctrinal principles emerging earlier. Many of the core concepts that we use today would be recognized by our judicial forbears such as Coke, Holt, Hale, Abbott, Blackstone, Mansfield and Kenyon because they created them. The rules were part of relations between individual and state, thereby forming the foundations for classic judicial review of administrative action, and were central also to relations between the arms of government, thereby operating as a form of structural constitutional review.

In doctrinal terms, the courts developed many of the central concepts of judicial review with which we are familiar today.<sup>8</sup> There was well-established case law on review of fact and law. There was doctrine dating back to the sixteenth century on legal control of discretion, which was cast in terms of rationality review and also what was termed proportionability. There was jurisprudence on due process and damages liability. There was doctrine on principles of good administration, as exemplified by case law limiting the ability of a person who possessed a de facto or de jure monopoly to charge whatever prices he liked, the courts reasoning that such property was imbued with a public interest that limited the normal capacity to charge what the market would bear.

The doctrine was given force through judicial creativity in relation to remedies. The amplification of grounds for review took place within, and was framed by, the evolution of adjectival law. Direct and collateral challenge were the vehicles for this development, the former through the prerogative writs of certiorari, prohibition and mandamus, the latter primarily, albeit not exclusively, through tort actions. The courts transformed mandamus, certiorari and prohibition, thereby creating the remedial mechanisms to effectuate the procedural and substantive doctrines of judicial review. The prerogative writs had existed from medieval times, but were not used to control administration in the manner that became the norm from the seventeenth century onwards. The judicial creativity matches anything found in more modern doctrine.<sup>9</sup> While the prerogative writs were the principal medium for direct challenge, a very

---

<sup>8</sup> CRAIG, *supra* note 5, at 29-44.

<sup>9</sup> HENDERSON, *supra* note 5, at 46-58, 112; CRAIG, *supra* note 5, at 51-62.

considerable number of actions were brought collaterally, via tort claims. Plaintiffs used actions for trespass, case, replevin, trover, false imprisonment, nuisance and negligence to challenge administrative action, more especially where they sought damages, which were not available through the prerogative writs, or where a preclusive clause purporting to exclude review rendered recourse to such a writ more difficult.<sup>10</sup>

The foundational doctrine of administrative law was framed by constitutional principles elaborated by the courts, which shaped the relationship between the executive and Parliament and between the executive and the courts.

In 1611, the *Case of Proclamations* concerned the legality of two proclamations made by the King, which prohibited new buildings in and about London, and the making of starch from wheat. The court held that the King cannot by his proclamation change any part of the common law, statute law or custom. Nor could the King create any new offence by way of proclamation, for that would be to change the law. Indictments could conclude in the form *contra leges et statuta*, but no indictment had ever been known to conclude *contra regiam proclamationem*. The King, therefore, “hath no prerogative, but that which the law of the land allows him”.<sup>11</sup> The case established that the prerogative was bounded, and the boundaries were to be delineated through the courts, which would determine the existence and extent of prerogative powers. The decision became central for relations between the executive and the legislature, since it denied the King a general, free-standing regulatory power, with the consequence that if he wished to attain certain ends this had to be done through statute, and hence the assent of Parliament. The decision did not however, as will be seen below, render rulemaking pursuant to a statute illegal or unconstitutional.

Four years earlier in 1607, *Prohibitions del Roy*<sup>12</sup> established limits to the prerogative insofar as it threatened to impinge on judicial power. The case arose as a result of uncertainty as to the limits of authority of Ecclesiastical judges, and uncertainty also as to the meaning of statutes to be applied by such judges. The King was advised by the Archbishop of Canterbury that “the King may decide it in his Royal person”, and

---

<sup>10</sup> RUBINSTEIN, *supra* note 5, at Chap. 4; CRAIG, *supra* note 5, at 59-62.

<sup>11</sup> (1611) 12 Co. Rep. 74 at 76.

<sup>12</sup> (1607) 12 Co. Rep. 63.

moreover that the judges were but delegates of the King, with the consequence that he could take “what causes he shall please to determine, from the determination of the judges and determine them himself.”<sup>13</sup> Coke CJ was unmoved and duly defended judicial autonomy. He responded, having secured the agreement of “all the judges of England, and Barons of the Exchequer”, by saying that the “king in his own person cannot adjudge any case, either criminal, as treason, felony etc., or betwixt party and party, concerning his inheritance, chattels or goods etc., but this ought to be determined in some Court of Justice, according to the law and custom of England”.<sup>14</sup> When the King was moved to inquire whether the law was founded upon reason, and that if this was so, he too had reason as well as the judges, Coke CJ countered in terms which became famous.<sup>15</sup>

[T]hat true it was, that God had endowed His Majesty with excellent science, and great endowments of nature; but his Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an act which requires long study and experience, before that a man can attain to the cognizance of it: that the law was the golden met-wand and measure to try the causes of the subjects; and which protected His Majesty in safety and peace: with which the King was greatly offended, and said, that then he should be under the law, which was treason to affirm, as he said; to which I said, that Bracton saith, *quod Rex non debet esse sub homine, sed sub Deo et lege*.

We shall return to the meaning and significance of these cases for the overall development of administrative law in due course. Before doing so, it is important to consider its institutional foundations.

### *B. Institutional Foundations*

This section is not designed to provide a detailed history of administration, which is beyond the scope of this work. It is intended to convey an idea of some of the principal bodies exercising administrative power during the foundational period of administrative law.

---

<sup>13</sup> *Id.* at 63.

<sup>14</sup> *Id.* at 64.

<sup>15</sup> *Id.* at 65.



It is important at the outset to understand that there was a lot to administer. We commonly think of government before the twentieth century as having limited responsibility, as doing a whole lot less than now. There is some truth in this, but misapprehension nonetheless exceeds veracity.<sup>16</sup> We must distinguish between centralization of state authority and decentralization of administration. England was highly centralized compared to its continental neighbours, more especially from the Tudors onwards. Social<sup>17</sup> and economic legislation occupied a great deal of time in Elizabethan Parliaments<sup>18</sup> and “was considered, after the granting of taxation, to be the primary function of the House of Commons”.<sup>19</sup> Adam Smith’s free market ideas were two centuries away, and there was statutory regulation of diverse matters, including trades such as leather, alcohol, iron and cloth; wages; bankruptcy; poverty, unemployment and vagrancy; land use; and morality. There was in addition much legislation pertaining to police powers broadly conceived, and to tax and flood defences. The later advent of free market principles led to some diminution in trade regulation, but there was also increased regulation in areas such as factories, health and the like, which is the backdrop to continuing historical debates as to whether the nineteenth century really ever was an era of *laissez-faire*.<sup>20</sup>

The fact that these measures were enacted by Parliament did not mean that they were initiated by central government departments.<sup>21</sup> Moreover, while the legislation was enacted from the centre, the general pattern of administration was decentralized. Central departments of government with generalized administrative responsibility as understood

---

<sup>16</sup> For analysis of the significant volume of public legislation in the eighteenth century, see JOANNA INNES, *INFERIOR POLITICS, SOCIAL PROBLEMS AND SOCIAL POLICIES IN EIGHTEENTH CENTURY BRITAIN* (2009), 21-47.

<sup>17</sup> See, e.g., PAUL SLACK, *POVERTY AND POLICY IN TUDOR AND STUART ENGLAND* (1988).

<sup>18</sup> See, e.g., GEOFFREY R. ELTON, *THE PARLIAMENT OF ENGLAND 1559-1581* (1986); DAVID L. SMITH, *THE STUART PARLIAMENTS 1603-1689* (1999).

<sup>19</sup> R. Sgroi, ‘Elizabethan Social and Economic Legislation’, <http://www.historyofparliamentonline.org/periods/tudors/elizabethan-social-and-economic-legislation> .

<sup>20</sup> See, e.g., ARTHUR J. TAYLOR, *LAISSEZ-FAIRE AND STATE INTERVENTION IN NINETEENTH-CENTURY BRITAIN* (1972).

<sup>21</sup> For important insights as to who initiated legislation in the eighteenth century, INNES, *supra* note 16.

in the twentieth century were not the norm in earlier centuries. A catalyst for their development was the growth of the fiscal-military state towards the end of the seventeenth century, which prompted increased departmentalization in central government.<sup>22</sup>

Administrative responsibilities were nonetheless commonly assigned to a wide range of bodies, with justices of the peace and commissioners performing prominent roles. Justices of the peace had judicial, administrative and regulatory responsibilities.<sup>23</sup> So too did Commissioners, which were the forerunners of modern agencies, with adjudicatory, decisional and rulemaking powers. The concept of commission captured the idea of an authority and duty granted by the Crown, the terms of which could vary significantly. While the commission derived ultimately from the Crown, the person who did the appointing varied, in some instances it might be the monarch, in others the Lord Chancellor, or someone from the Privy Council. Commissioners were not part of the judiciary, nor were they organized according to some homogenous institutional format. To the contrary, they were marked by institutional heterogeneity, although there were common features. They were integral to policy delivery in a plethora of areas. There were commissioners of sewers, excise, inclosure, tithes, improvement, bankruptcy and railways to name but the principal examples, and that is without mention of bodies such as turnpike trustees, which undertook analogous functions in relation to roads, the guardians of the poor who oversaw the poor law, and factory inspectors.<sup>24</sup> Commissioners bestrode the land. They were the chosen medium for administration across diverse areas, they made decisions and regulations that impacted directly on the citizen, and they were therefore not surprisingly the subject of judicial review, direct and

---

<sup>22</sup> P.G.M. DICKSON, *THE FINANCIAL REVOLUTION IN ENGLAND: A STUDY IN THE DEVELOPMENT OF PUBLIC CREDIT, 1688-1756* (1967); JOHN BREWER, *THE SINEWS OF POWER, WAR, MONEY AND THE ENGLISH STATE 1688-1783* (1988); Joanna Innes, *Governing Diverse Societies*, in PAUL LANGFORD (ED.), *THE EIGHTEENTH CENTURY, 1688-1815* (2002), 119-20.

<sup>23</sup> CHARLES A. BEARD, *THE OFFICE OF JUSTICE OF THE PEACE IN ENGLAND IN ITS ORIGIN AND DEVELOPMENT* (1904).

<sup>24</sup> SIDNEY AND BEATRICE WEBB, *ENGLISH LOCAL GOVERNMENT: STATUTORY AUTHORITIES FOR SPECIAL PURPOSES* (1922); BREWER, *supra* note 22.

collateral. Many such bodies were later incorporated into either central or local government in the nineteenth century,<sup>25</sup> in large part because Parliament desired a greater degree of control than was possible when the activity was undertaken by a board, commission or agency. Tribunals, which performed adjudicative functions, came to assume increased importance in the nineteenth century,<sup>26</sup> and have remained central to the administrative landscape since then.

There were political, administrative and legal mechanisms to ensure accountability. The courts were not all-important in this respect, but they did play a significant role, which varied depending, inter alia, on the existence and efficacy of political and administrative modes of accountability. It is equally important to understand that administrators, and the schemes they administered, were not approached with some inherent suspicion. The regulatory schemes were enacted to attain valuable social purposes broadly conceived, even if some were contestable, and courts, while seeking to ensure legal accountability, also strove to attain regulatory efficacy, much as they do today.<sup>27</sup>

## II. RULEMAKING

Philip Hamburger has provided a robust challenge to the legality of administrative law,<sup>28</sup> which is directed at both administrative rulemaking and adjudication and draws on historical jurisprudence from England to sustain his analysis.

### A. *The Thesis on Extralegal Legislation*

---

<sup>25</sup> DAVID ROBERTS, VICTORIAN ORIGINS OF THE BRITISH WELFARE STATE (1960); HENRY PARRIS, CONSTITUTIONAL BUREAUCRACY: THE DEVELOPMENT OF BRITISH CENTRAL ADMINISTRATION SINCE THE EIGHTEENTH CENTURY (1968); SIR DANIEL NORMAN CHESTER, THE ENGLISH ADMINISTRATIVE SYSTEM 1780-1870 (1981).

<sup>26</sup> CHANTAL STEBBINGS, LEGAL FOUNDATIONS OF TRIBUNALS IN NINETEENTH CENTURY ENGLAND (2006).

<sup>27</sup> CRAIG, *supra* note 5, at 69-95.

<sup>28</sup> HAMBURGER, *supra* note 1.

It is central to Philip Hamburger's thesis that administrative legislation or rulemaking constitutes a return to prerogative lawmaking, and that statute cannot cloak it with constitutional legitimacy.<sup>29</sup> Thus he states, that "executive lawmaking creates an extralegal regime – a regime of legislation outside the law and, indeed outside the constitutionally established lawmaking institutions and processes".<sup>30</sup> He points to the Statute of Proclamations<sup>31</sup> whereby Henry VIII secured statutory authority for his royal proclamations, regarding this as "an early version of the sort of statutes that nowadays authorize administrative rulemaking."<sup>32</sup> The statute was repealed in 1547 but lived on as a "memorable warning against legal authorization for prerogative or administrative power."<sup>33</sup>

Hamburger qualifies his argument against rulemaking by the administration, stating that "the argument, however, does not go so far as to question executive action that does not impose binding constraints on subjects."<sup>34</sup> The executive can therefore lawfully issue rules that do not bind, and such norms are, for Hamburger, to be regarded as non-legislative. Legislative acts are, by way of contrast, those that bind subjects. The "executive could not make rules or duties that bound subjects, for these were legislative", but it could adopt rules that were not legally binding, and was "usually not trespassing on legislative territory, for most nonbinding acts were not legislative."<sup>35</sup>

Hamburger applies this criterion so as to distinguish legislative acts from statutes empowering the issuance of regulations to lesser executive officers, the assumption being that such regulations applied merely to such lesser officers and not to the rest of the public.<sup>36</sup> He regards executive action determinative of legal duties as a form of lawmaking, which could easily "stray into the legislative realm", but "where executive

---

<sup>29</sup> HAMBURGER, *supra* note 1, at 48-9, 56-7, 63, 82, 128.

<sup>30</sup> *Id.* at 83.

<sup>31</sup> Statute of Proclamations 1539, 31 Henry 8, c. 8.

<sup>32</sup> HAMBURGER, *supra* note 1, at 36.

<sup>33</sup> *Id.* at 38.

<sup>34</sup> HAMBURGER, *supra* note 1, at 83.

<sup>35</sup> *Id.* at 85.

<sup>36</sup> *Id.* at 85-6.

officers confined themselves to exercising understanding or judgment in discerning the law and the underlying circumstances, they could avoid any imputation of exercising the legislative will.”<sup>37</sup>

*B. The Expansive Dimension: The Elision of Prerogative and Administrative Rulemaking*

Hamburger’s thesis draws heavily on English constitutional history. He repeatedly elides prerogative and administrative rulemaking. It is indeed central to his thesis. This does not capture legal or constitutional reality. There were two kinds of constraint on rulemaking in England.

The first constraint concerned the prerogative, which is a species of executive power that exists independent of statute, such as the power to conclude a treaty. The scope of a particular prerogative power could however be contestable. Thus, while the monarch might have a prerogative to regulate certain aspects of trade, its ambit could be unclear. This is the backdrop to the *Case of Proclamations*,<sup>38</sup> which is clear constitutional authority for the proposition that the prerogative that enabled the Crown to regulate some aspects of trade did not extend so as to accord it a generalized regulatory power to make rules concerning trade broadly conceived. The message was clear: if the King wished to attain regulatory goals this had to be done by and through Parliament. The existence and extent of prerogative power were thus determined by the courts. This constitutional principle is equally applicable to any branch of the executive, whether in the seventeenth or the twenty-first century.

The second constraint concerned statute. The Parliament that became sovereign in the seventeenth century enacted various specific statutes empowering the administration to make rules, as will be seen below. It might have enacted a general statute concerning rulemaking, containing procedural provisions for the making of such rules, although it did not do so. What was especially constitutionally problematic was the grant of a general

---

<sup>37</sup> *Id.* at 97.

<sup>38</sup> (1611) 12 Co. Rep. 74.

statutory authority akin to the Statute of Proclamations 1539,<sup>39</sup> whereby Parliament gave an open-ended substantive regulatory power to the executive, which was not subject-matter specific, to make rules without further recourse to Parliament, which rules would then be given the force of an Act of Parliament.<sup>40</sup> It is because the King invested his proclamations with the force of primary statute that the 1539 statute was so heavily criticized. If this practice had continued the sovereignty of Parliament would have been but a formal doctrine, with statute investing the executive with power to make any rules that it chose, without the need for recourse to Parliament. Parliament's sovereignty would have been an empty vessel, since the King would have been given authority to legislate in his own name, without the need for approval from the House of Commons or House of Lords. It is for this reason that the statute was regarded as constitutionally illegitimate, and was seen in Lockean terms as an unjustified delegation of legislative authority.

The Lockean injunction against exercise of legislative-type power by a body other than the legislature was undoubtedly regarded as important. Rulemaking by the administration was, nonetheless, different from the scenarios in the two preceding paragraphs. There are two paradigms for such rulemaking.<sup>41</sup>

The first paradigm is rulemaking by an administrative authority pursuant to a particular statute that accords it express power to make rules for that area. The administrative authority is charged by Parliament with a specific task, such as poor relief, the collection of tithes or river defence, and the legislature decides to grant it rulemaking

---

<sup>39</sup> Statute of Proclamations 1539, 31 Hen. 8, c. 8, "The King for the Time being, with the Advice of his Council, or the more Part of them, may set forth Proclamations under such Penalties and Pains as to him and them shall seem necessary, which shall be observed as though they were made by Act of Parliament; but this shall not be prejudicial to any Person's Inheritance, Offices, Liberties, Goods, Chattels or Life; and whosoever shall willingly offend any article contained in the said Proclamations, shall pay such Forfeitures, or be so long imprisoned, as shall be expressed in the said Proclamations; and if any offending will depart the Realm, to the Intent he will not answer his said offence he shall be adjudged a Traitor."

<sup>40</sup> Historical opinion continues to be divided as to its object and effect, M.L. Bush, *The Act of Proclamations: A Reinterpretation*, 27 AMERICAN JOURNAL OF LEGAL HISTORY 33 (1983).

<sup>41</sup> CARLETON KEMP ALLEN, *LAW AND ORDERS: AN INQUIRY INTO THE NATURE AND SCOPE OF DELEGATED LEGISLATION AND EXECUTIVE POWERS IN ENGLISH LAW* (1965); CECIL T. CARR, *DELEGATED LEGISLATION: THREE LECTURES* (1921); ROBERT BALDWIN, *RULES AND GOVERNMENT* (1995)

power. Parliament would decide in furtherance of its sovereign power whether such rulemaking authority was warranted. It would do so for the very same reasons that are prevalent in the modern day. Parliament might not be able to foresee all eventualities when enacting the primary legislation, thereby requiring the filling in of detail through exercise of delegated rulemaking authority, more especially in those areas where the subject matter regulated was technical, where it could be affected by a range of external factors, or where time was of the essence in relation to the regulatory intervention. The conditions for the making of such rules could perforce vary, as could the authorization that would have to be secured before such rules could take effect, as we shall see below.<sup>42</sup> It was axiomatic that the rules thus made would be bounded by the terms of the primary legislation, and that such rules were hierarchically inferior to the primary legislation pursuant to which they were made.

The second paradigm is rulemaking by the administration where the empowering legislation contained no express provision for this. Parliament assigned a specific statutory task to an administrative authority, and accorded it discretion as to how the task should be accomplished. The options in this respect were much the same in the seventeenth as in the twenty-first century. The administration could attain its task through single case decision-making, fulfilling its statutory remit through individual decisions reached in an adjudicatory manner after due process, where the individual determinations developed the administrative authority's perception of the legislation over time. It might also issue rules, which were then applied to individual cases that fell within their remit. The rationale for using rules is well-known: it facilitates the treating of like cases alike; it provides an opportunity for thinking through the implications of a policy strategy in a considered manner; it enables those affected by the system to have a clearer idea of agency policy; and it can enhance administrative efficiency. It was not uncommon for administrative authorities from the seventeenth century onwards to use some admixture of rulemaking and adjudication, in a manner that was not especially different from their modern counterparts. To be sure, the legal force of these rules differed from delegated legislation. These administrative rules were nonetheless accorded binding force. The

---

<sup>42</sup> See below, Part II D.

judicial approach was to accept that an administrative body could exercise its discretion through rules or policies, provided that it considered whether there was something exceptional to warrant a departure from the rule in the instant case.<sup>43</sup> Subject to this caveat, the rules were binding. They were recognized as a lawful way of exercising the statutory discretion conferred on the administrative authority, and thus could be dispositive of cases that came before the agency, provided that it gave due consideration as to whether departure from the rule was warranted. The rules could moreover be challenged by way of judicial review on procedural and substantive grounds.

There are endemic problems with rulemaking pursuant to primary legislation.<sup>44</sup> There are issues as to whether legislative delegation should be conditioned on the primary legislation spelling out the essential principles to govern the area, which can then be enforced through a non-delegation doctrine. There are pressing issues as to the method of rendering such rules accountable, whether this should be through Parliamentary oversight and approval from the top, participatory input from the bottom, or some admixture of the two. There are equally pressing issues concerning the transparency and availability of the rules thus made.

This can be readily acknowledged, but it does not alter the preceding analysis. Grant of rulemaking authority was not taken lightly. The Lockean injunction against exercise of legislative-type power by a body other than the legislature may well have been the principled starting point, but it was qualified by legislative practice. Legislative authorization of administrative rulemaking in a particular statute was not regarded in the same way as claims to generalized prerogative regulatory power of the kind made in the *Case of Proclamations*, or as an open-ended grant of executive regulatory authority such

---

<sup>43</sup> *Boyle v. Wilson* [1907] AC 45; *R v. Port of London Authority, ex p Kynoch Ltd* [1919] 1 KB 176; *R v. Torquay Licensing Justices, ex p Brockman* [1951] 2 KB 784; *Merchandise Transport Ltd v. British Transport Commission* [1962] 2 QB 173, 186, 193; *R v. Commissioner of Police of the Metropolis, ex p Blackburn* [1968] 2 QB 118, 136, 139; *British Oxygen Co Ltd v. Board of Trade* [1971] AC 610; *R v. Commissioner of Police of the Metropolis, ex p Blackburn (No 3)* [1973] QB 241; *R v. Tower Hamlets London Borough Council, ex p Kayne/Levenson* [1975] 1 QB 431; D. Galligan, *The Nature and Function of Policy within Discretionary Power* [1976] PUBLIC LAW 332.

<sup>44</sup> P. CRAIG, *ADMINISTRATIVE LAW* (2012), Chap. 15.



as the Statute of Proclamations, which invested the regulations thus made with the force of primary legislation. When Parliament decided in a particular statute to accord rulemaking authority to the administration it was accepted that the rules thus made were bounded by the terms of the statute, that they were hierarchically inferior to the primary legislation pursuant to which they were made, and that they could be subject to judicial review.

### *C. The Qualifying Dimension: Legislative and Non-Legislative Rules*

Philip Hamburger's strictures concerning extra-legal legislation are, as seen above, qualified by his definition of legislative act. Hamburger frames this in terms of "non-binding and thus non-legislative", stating that "the natural dividing line between legislative and nonlegislative power was between rules that bound subjects and those that did not."<sup>45</sup> The executive "could not therefore make rules or duties that bound subjects, for these were legislative", but "when the executive adopted rules that did not legally bind, it usually was not trespassing on legislative territory, for most nonbinding acts were not legislative."<sup>46</sup> Hamburger applies his distinction so as to classify as non-binding, and hence non-legislative, regulations addressed to, for example, executive officers, on the ground that they do not bind the rest of the public.<sup>47</sup>

It can be readily acknowledged that the definition of legislative power is problematic. This is not the place for a detailed exegesis of the different criteria that might be used to answer this inquiry, although the relative generality versus specificity of the provision is normally regarded as relevant in this respect. The object is rather to test the coherence of Hamburger's preferred criterion, which makes the distinction turn on the binding or non-binding quality of the rules thus issued. Viewed from this perspective there are two complementary difficulties with the analysis.

First, Hamburger's distinction between legislative and non-legislative is problematic for the following reason. Primary legislation legally binds all, but is only

---

<sup>45</sup> HAMBURGER, *supra* note 1, at 84.

<sup>46</sup> *Id.* at 85.

<sup>47</sup> *Id.* at 85-7, 89-90,

factually relevant for those that fall within its subject matter remit. A statute on asylum seekers is legally binding on everyone, but factually irrelevant save for those concerned with this area. This is equally true for all primary legislation. There is little if any difference in this respect with administrative regulations. They were framed so as to address those that fell within the relevant subject matter area, whether that was the poor law, the terrain occupied by the commissioners of sewers, or the inclosure commissioners. If I was not engaged in any such activity then the regulations were irrelevant to me, in the same way as with primary legislation that did not impinge on areas that I was factually involved in. They were, however, binding on all those that came within these areas, and this included those who were concerned about a regulatory provision, even if they were not immediately affected by it.<sup>48</sup> Thus a regulation validly made by the poor law commissioners would, subject to the normal principles of judicial review, have legal force in relation to a concerned citizen who felt that the regulation was too harsh, even if she did not seek to avail herself of poor relief. The regulations paradigmatically fleshed-out more abstract provisions in the primary legislation. It is for these very reasons that we justly regard the rules as legislative in nature, and are concerned that there are appropriate methods of accountability for such measures.

The second problem is the converse of the first. Hamburger's reasoning makes the legislative/non-legislative distinction turn on whether citizens are bound by the relevant norm. It is unclear from his analysis how many citizens must be bound for the norm to be regarded as legislative. The choices in this respect are conceptually problematic. It might be contended that the provision must be addressed to and bind the entirety of the public to be classified as legislative, with the consequence that if it did not it would not therefore fall within Hamburger's category of extralegal legislation, and would not be constitutionally suspect or infirm. It would be seen as falling legitimately within the realm of rule-type measures that could be adopted by the executive. This would however emasculate the very heart of Hamburger's project. His avowed *raison d'être* is to lay bare extralegal legislation that is constitutionally infirm. This definition of legislative rule means, however, that much regulatory activity would be characterized as non-legislative

---

<sup>48</sup> See generally Part II D.

and thus not constitutionally suspect. The alternative choice is, however, also conceptually problematic, since if a norm can be regarded as legislative if it was binding on merely one person or a mere handful then the category of legislative acts would embrace many provisions that would commonly be regarded as administrative or executive orders.

#### *D. The Reality of Rulemaking*

Rulemaking by the administration is a standard feature of modern UK administrative law, and it can assume either of the paradigms adumbrated above. Where Parliament grants express rulemaking power this may be in the form of a statutory instrument, which is the principal species of delegated legislation. The test for whether a rule constitutes a statutory instrument is, however, one of form: denomination as a statutory instrument means that the rules concerning delegated legislation are applicable.<sup>49</sup> The degree of legislative scrutiny over rules deemed to be statutory instruments is dependent on provisions in the primary legislation: the instrument may simply have to be laid before Parliament; it may be subject to the negative resolution procedure, whereby the measure is valid unless annulled by Parliament; or it may be subject to the affirmative resolution procedure, which as the nomenclature suggests, requires approval by the legislature before the measure takes effect.<sup>50</sup>

Where rulemaking is expressly sanctioned by Parliament, but the rules thus made are not deemed to be statutory instruments then there is no legislative oversight. The same is true in relation to the many situations where agencies develop policy or rules in the absence of express power from Parliament. There is however judicial oversight in both instances.

The ensuing discussion is not, however, directed towards the modern day. The focus is rather on prominent instances of rulemaking power accorded to administrators by Parliament from the sixteenth century onwards, much of which occurred during the period before the American revolution, and might have influenced American thinking.

---

<sup>49</sup> Statutory Instruments Act 1946, 9 & 10 Geo. 6, c. 36.

<sup>50</sup> CRAIG, *supra* note 44.

Grant of such power was not, as Hamburger maintains, regarded as extralegal, or as constitutionally illegitimate. The following pages provide examples of the diverse regulatory contexts in which such rulemaking power was given.

### *1. Health, Safety and Trade Regulation*

The best known historical instances of rulemaking by administrators concerned the poor law and flood protection. They will be considered below. There were, however, less well-known examples, which occurred in just the sort of areas that one might intuitively expect: health, safety and trade regulation.

Danger to health is a common rationale for according express rulemaking authority to the administration. Individual decisions will often not suffice to meet the problem, and exigencies of time mean that recourse to further primary legislation will normally not be viable. It is unsurprising that the same imperatives were felt in the seventeenth and eighteenth centuries as in the modern day. This is exemplified by the Distemper amongst Cattle Act 1757,<sup>51</sup> which stated in the preamble that “contagious Distemper now rages amongst the Horned Cattle in this Kingdom”. The King, with the advice of the Privy Council, was empowered “to make such Rules, Orders and Regulations, or to vary or repeal the same”<sup>52</sup> as were felt to be expedient to control movement of cattle and hence halt spread of the disease, and also to prevent the sale of hides that might be infected. The rules were to be “observed and obeyed by all his Majesty's Subjects”<sup>53</sup> with penalties specified for non-compliance.

Safety hazards are another common reason for the grant of rulemaking power. The rules thus made can deal with the problem in a more detailed manner than primary legislation; they can address the issues more effectively than individualized orders; and they facilitate use of expertise. This is exemplified by the Thames Watermen Act 1698, the preamble of which states that “it hath oftentimes happened, that divers People passing by Water upon the said River, have been put in Danger of their Lives and Goods, and

---

<sup>51</sup> Distemper amongst Cattle Act 1757, 30 Geo. 2, c. 20.

<sup>52</sup> *Id.* at s. 1.

<sup>53</sup> *Id.* at ss. 2, 11.

many Times have perished and been drowned, and this occasioned by the Unskilfulness and Want of Experience in Wherry-men and Watermen.”<sup>54</sup> This was because the “Rulers, and Overseers of the Company or Society of Watermen are not sufficiently impowered to make Rules” to govern such matters. The Watermen Society was duly authorized “to make, ordain, and provide such reasonable and lawful Rules, Orders and Constitutions, as in their Discretion they shall think fit, with reasonable Pains and Penalties to the same annexed”,<sup>55</sup> subject to approval by the Mayor and aldermen of London, and confirmation by a senior judge.

Trade regulation was common from the fourteenth century onwards, one dimension being product quality. This was the concern of the Norfolk Worsteds Act 1554, which identified the problem as being that “divers Persons which do make untrue Bales of all Manner of Worsteds, not being of the Assise in Length nor in Breadth, nor of good Stuff and right making as they ought to be, and of old time were accustomed.”<sup>56</sup> Trade was thereby damaged, “because they be of no right making, nor good Stuff, they be reported and esteemed deceitful and unlawful Merchandise, and of little Regard, to the great Damage of our Lord the King, and great Prejudice of his loyal Subjects.”<sup>57</sup> The remedy was to incorporate the Norwich worsted traders, who could “ordain such Rules and Ordinances within the said Craft, as often as it shall seem needful or necessary for the Amendment of the said Worsteds and Craft; and that all such Rules and Ordinances, so made and ordained by them, shall be obeyed and kept by the said Artificers.”<sup>58</sup>

## *2. Flood Protection*

Sidney and Beatrice Webb began their account of the Commissioners of Sewers by noting the difficulty faced by the twentieth century observer in appreciating just how much of England had been composed of vast fens and marshes.<sup>59</sup> Therein lies the

---

<sup>54</sup> Thames Watermen Act 1698, 11 Will. 3, c. 21.

<sup>55</sup> *Id.* at s. 4.

<sup>56</sup> Norfolk Worsteds Act 1554, 7 Edw. 4, c. 1.

<sup>57</sup> *Id.* at Preamble.

<sup>58</sup> *Id.* at s. 1.

<sup>59</sup> SIDNEY and BEATRICE WEBB, *supra* note 24, at 13.

explanation for the early attention given to drainage and defences against the sea, leading to the Statute of Sewers 1531,<sup>60</sup> which gave statutory foundation for the Commissioners of Sewers and the Courts of Sewers. They resembled in many respects justices of the peace for the counties, albeit with a specialized jurisdiction over rivers, sewers, ditches, bridges, locks, weirs, sea defences and the like. Their jurisdiction was akin to that of a modern environmental agency. This analogy can be pressed further, insofar as the Commissioners of Sewers “combined in themselves, judicial, executive and even legislative powers”.<sup>61</sup> It is with the rulemaking powers that we are presently concerned.

The Statute of Sewers 1531 authorized Commissioners of Sewers to undertake flood defences broadly conceived, and gave them extensive powers to fulfil this remit. They could make individual decisions concerning repairs that were needed to river banks, sea walls, streams, ditches, gutters and the like, and apportion the costs.<sup>62</sup> They were also authorized to make rules. The Commissioners could use the laws and customs of Romney Marsh as a boilerplate, or devise provisions according to their own discretion. They could thus,<sup>63</sup>

[M]ake and ordain Statutes, Ordinances, and Provisions from time to time, as the Case shall require, for the Safeguard, Conservation, Redress, Correction, and Reformation of the Premises, and of every of them, and the Parts lying to the same, necessary and behoful, after the Laws and Customs of *Rumney* Marsh in the County of *Kent*, or otherwise by any Ways or Means after your own Wisdoms and Discretions.

This rule-making capacity was extensive. The 1531 Statute stipulated that the Commissioners’ rules remained effective for the tenure of their office, which at that time was three years, but were ineffective thereafter. This temporal limit was, however, subject to an exception, whereby the rules could retain their binding force if they were

---

<sup>60</sup> Statute of Sewers Act 1531, 23 Henry 8, c. 5.

<sup>61</sup> SIDNEY and BEATRICE WEBB, *supra* note 24, at 21.

<sup>62</sup> Statute of Sewers Act 1531, 23 Henry 8, c. 5, s. 3.

<sup>63</sup> *Id.* at s. 3. See also s. 7, which provided that “[T]he Commissioners hereafter to be named in any of the said Commissions, according to the Purport and Effect of the same Commissions, have full Power and Authority to make, constitute, and ordain Laws, Ordinances, and Decrees, and further to do all and every Thing mentioned in the said Commission, according to the Purport, Effect, Words, and true meaning of the same and the same Laws and Ordinances so made, and to reform, repeal, and amend, and make new, from time to time, as the Cases necessary shall require in that Behalf.”

“made and ingrossed in Parchment, and certified under the Seals of the said Commissioners into the King's Court of Chancery, and then the King's Royal Assent be had to the same.”<sup>64</sup>

The Commissioners’ powers were further augmented in the Elizabethan era. The Commission of Sewers Act 1571 extended the Commissioners’ tenure to ten years. It also provided that the Commissioners’ rules could take effect without the certificate to the Court of Chancery, and without the Royal Assent. The rules remained in force until they were “altered, repealed or made void by the Commissioners after to be assigned and appointed for Sewers in those Parts where the same Laws, Ordinances and Constitutions were made, ordained and constituted, or by six of them.”<sup>65</sup>

The Commissioners’ regulatory power was backed up by broad remedial authority. Thus the Commissioners could compel obedience to their orders and rules by such “Distress, Fines, and Amerciaments, or by other Punishments, Ways, or Means”<sup>66</sup> which seemed to the Commissioners most expedient to effectuate the objectives of the legislation.

There is force in the Webbs’ comment that “truly, the Parliaments of Henry the Eighth and Elizabeth weighed out powers to the King’s Commissioners with no niggard hand.”<sup>67</sup> The regime inaugurated by the legislation of Henry VIII and Elizabeth I continued with modification for over three hundred years,<sup>68</sup> although the relevant focus of the Commissioners’ action perforce differed in rural and urban settings.<sup>69</sup> The rulemaking powers accorded to the Commissioners in 1571 were reaffirmed in 1833.<sup>70</sup>

---

<sup>64</sup> Statute of Sewers Act 1531, 23 Henry 8, c. 5, s. 1.

<sup>65</sup> Commission of Sewers Act 1571, 13 Eliz. 1, c. 9, s. 1.

<sup>66</sup> Statute of Sewers Act 1531, 23 Henry 8, c. 5, s. 3.

<sup>67</sup> SIDNEY and BEATRICE WEBB, *supra* note 24, at 24.

<sup>68</sup> See, e.g., London Watercourses (Commissioners of Sewers) Act 1605, 3 James 1, c. 14; Commissioners of Sewers (City of London) Act 1708, 7 Ann., c. 9; Commissioners of Sewers Act 1708, 7 Ann., c. 10; Sewers Act 1833, 3 & 4 Will. 4, c. 22.

<sup>69</sup> SIDNEY and BEATRICE WEBB, *supra* note 24, at 13-106.

<sup>70</sup> Sewers Act 1833, 3 & 4 Will. 4, c. 22, s. 7.

### 3. *Poor Law*

Provision of poor relief began in earnest with the Elizabethan poor law. The Poor Relief Act 1601<sup>71</sup> placed the primary obligation of support on the parish. This public statute was later complemented by many local Acts, whereby parishes joined together in order to discharge their responsibilities, since this was a more effective and efficient method of doing so.<sup>72</sup>

The overseers of the poor had extensive powers and duties, which extended to rulemaking. This is exemplified by the Poor Relief Act 1662,<sup>73</sup> section 11 of which empowered the relevant authorities “from Time to Time to make and constitute Orders and By-laws for the better Relieving, Regulating and setting the Poor to work, and the apprehending and punishing of Rogues, Vagabonds and Beggars within the Cities, Liberties and Places aforesaid, that have not wherewith to maintain themselves, and for other the Matters aforesaid.” The orders and by-laws had from “Time to Time”<sup>74</sup> to be approved by the justices of peace at Quarter-Sessions.

The Poor Law Amendment Act 1834<sup>75</sup> enshrined more far-reaching powers in this respect. The Act made provision for three Poor Law Commissioners, who were “authorized and required, from Time to Time as they shall see Occasion, to make and issue all such Rules, Orders, and Regulations for the Management of the Poor”.<sup>76</sup> The rules could in effect be made in relation to any issue that would serve to execute the Act “as they shall think proper”, and this included discretionary power to “suspend, alter, or rescind such Rules, Orders, and Regulations, or any of them.”<sup>77</sup> There was a duty to inform parishes and unions of every rule before it came into effect.<sup>78</sup>

---

<sup>71</sup> Poor Relief Act 1601, 43 Eliz. 1, c. 2.

<sup>72</sup> Relief of the Poor Act 1782, 22 Geo. 3, c. 83; SIDNEY and BEATRICE WEBB, *supra* note 24, at 107-51.

<sup>73</sup> Poor Relief Act 1662, 14 Cha. 2, c. 12.

<sup>74</sup> *Id.* at s. 12.

<sup>75</sup> Poor Law Amendment Act 1834, 4 & 5 Will. 4, c. 76.

<sup>76</sup> *Id.* at s. 15.

<sup>77</sup> *Id.* at s. 15. See also, ss. 42, 52.

<sup>78</sup> *Id.* at s. 18.



This rulemaking authority was subject to executive oversight. Thus a general rule issued by the Commissioners did not take effect for forty days after a copy had been sent to a secretary of state, who had a veto power.<sup>79</sup> There was also provision for general rules to be laid by a secretary of state before Parliament.<sup>80</sup> These obligations only pertained to general rules, which were rules that applied to more than one parish or union, where the content of the rule was the same.<sup>81</sup> The requirement for the secretary of state to lay the rules before Parliament was only a limited form of legislative oversight. It did not demand parliamentary approval before the rule became effective, nor did it give Parliament any right to amend the rule. If a Member of Parliament were minded to contest a particular rule, there were moreover procedural obstacles to doing so, since there was no ready procedural avenue whereby this could be done.

The Poor Law Commission was replaced by a government department in 1847. Bodies such as the Poor Law Commission allowed greater continuity of policy, being less affected by the ebbs and flows of political change, and they were more flexible to the particular needs of decentralized administration than were government departments.<sup>82</sup> The demise of such bodies, and their supersession by a ministerial pattern, was reflective of Parliament's desire that there should be a person in Parliament that could be held directly accountable for the relevant activity.<sup>83</sup> The institutional wheel turned once more in the twentieth century, which saw increased recourse to agencies established outside the direct confines of government departments.<sup>84</sup>

The apposite point for present purposes is that the Poor Law Board Act 1847<sup>85</sup> betokened little change in relation to the previous rulemaking powers. The poor law regime was still run by Commissioners, the difference being that the Poor Law Board was abolished, its functions now being undertaken by Commissioners who could sit in

---

<sup>79</sup> *Id.* at s. 16.

<sup>80</sup> *Id.* at s. 17.

<sup>81</sup> *Id.* at ss. 42, 109.

<sup>82</sup> ROBERTS, *supra* note 25, at 133.

<sup>83</sup> PARRIS, *supra* note 25, at 83.

<sup>84</sup> CRAIG, *supra* note 44, at Chap. 4.

<sup>85</sup> Poor Law Board Act 1847, 10 & 11 Vict., c. 109.

Parliament. The Commissioners' powers under the previous legislation were transferred to the Commissioners appointed post-1847. They continued to possess the previous rulemaking power,<sup>86</sup> and rules made pre-1847 continued to be valid unless rescinded.<sup>87</sup> There was change in the procedure for making general rules, which continued to be defined as in the earlier legislation. Henceforth, scrutiny was confined to executive oversight, exercised by the Privy Council, which could disallow any general rule.<sup>88</sup> The 1847 legislation thereby reaffirmed the legitimacy of rulemaking in this area, and Parliament was content for oversight to be through further recourse to the executive in the form of the Privy Council.

#### *4. Excise*

Excise duties were a prominent source of revenue for the King, more especially from the seventeenth century onward.<sup>89</sup> Administrative authority was accorded to Commissioners of Excise, and the nature of this regime will be explicated in more detail below, when considering their adjudicative powers. It is clear that rulemaking was part of this regime, as is apparent from the Excise Management Act 1827, which was consolidating legislation that brought together and clarified the powers of the Commissioners that had hitherto been scattered over countless statutes dealing with particular excise duties.<sup>90</sup>

The statute makes provision for different kinds of rulemaking. Thus there is express recognition that Commissioners of the Treasury may make “Rules, Regulations, and Directions”<sup>91</sup> concerning the pay and terms and conditions of employment of officers who undertook excise collection. The Commissioners of Excise had authority to issue rules, as attested to by the legislative provision which stated that Commissioners appointed for Scotland and Ireland “shall observe, perform, and fulfil, and cause to be

---

<sup>86</sup> *Id.* at s. 14.

<sup>87</sup> *Id.* at s. 18.

<sup>88</sup> *Id.* at s. 17.

<sup>89</sup> For US parallels, see, MASHAW, *supra* note 2, at 35-8.

<sup>90</sup> Excise Management Act 1827, 7 & 8 Geo. 4, c. 53.

<sup>91</sup> *Id.* at ss. 4, 49.

observed, performed, and fulfilled ... the several Orders, Rules, Directions, and Regulations, touching or relating to the said Revenue, which shall have been or shall be made or given by the Board of Commissioners of Excise.”<sup>92</sup> The breadth of this rulemaking power is noteworthy, given that it is cast in terms of anything touching or relating to collection of the revenue. Further indication of rulemaking power is to be found in the provisions dealing with the search of premises conducted by excise officers, where they are authorized to make entry, taking account of all matters relating to a taxable business “according to the several Laws, Provisions, and Regulations relating thereto.”<sup>93</sup>

The existence of rulemaking power in this area is scarcely surprising. The bureaucracy for excise collection was the largest in the land, and its authority stretched the length and breadth of the land. Rulemaking was a natural way to ensure the efficient application of the revenue laws, more especially for hard-pressed Commissioners seeking to maximize revenue returns and ensure uniformity in the application of the legislation by excise officers in different parts of the country.

### III. ADJUDICATION

#### A. *The Thesis on Extralegal Adjudication*

While rulemaking was important, the reality is that most of English administrative law was concerned with individualized decision-making and it is to this that we now turn. Space precludes detailed analysis, but the following captures the core of Hamburger’s argument. He defines extralegal adjudication as “the exercise of judicial power not through the judgments of the courts, but outside them.”<sup>94</sup> He contends that administrative law as developed by the English courts in the seventeenth century “impeded extralegal adjudication by concluding that their constitution placed the judicial power in the

---

<sup>92</sup> *Id.* at s. 6.

<sup>93</sup> *Id.* at s. 22.

<sup>94</sup> HAMBURGER, *supra* note 1, at 129.

courts.”<sup>95</sup> Hamburger notes the role played by the Star Chamber as a means whereby the King could engage in administrative adjudication, although he recognizes that it had some statutory underpinning.<sup>96</sup> He points to the tensions between what he terms “prerogative or administrative adjudication”<sup>97</sup> and the jurisdiction of the ordinary courts.<sup>98</sup> For Hamburger, the abolition of the Star Chamber in 1641 meant that the Crown was “confined to its true ‘constitutional office’, which included executing the law, but not adjudicating it.”<sup>99</sup> The ills of prerogative adjudication, for Hamburger, resided in the fact that while common law adjudication was conducted by judges and juries, prerogative adjudication was “done by Crown officers, who sometimes were called judges, but who did not have the office of a common law judge and did not act with juries.”<sup>100</sup> The English tamed prerogative adjudication “by clarifying that the constitutional power to issue binding orders and warrants was judicial”,<sup>101</sup> with the consequence that it belonged exclusively to the courts and the judges, and that all judicial power was limited by due process.

Hamburger nonetheless acknowledges that the executive could legitimately do much that seemed like judicial power, “only as long as it did not thereby bind subjects in the manner of actual judicial power.”<sup>102</sup> His thesis is therefore crucially dependent on the meaning of judicial power, which only becomes apparent later in the analysis.<sup>103</sup>

To be precise, the core of judicial power, which belonged exclusively to the courts, was the power to make binding adjudications, not merely in the sense that they were determinative, but more basically in the sense that they bound subjects, whether by obliging them to appear, to testify, to produce their documents, to pay damages, or otherwise relinquish their liberty or rights. And already here it should be evident that these binding adjudications did not include decisions about government benefits or privileges, unless they had “vested” and become rights.

---

<sup>95</sup> *Id.* at 130.

<sup>96</sup> *Id.* at 133-5.

<sup>97</sup> *Id.* at 136.

<sup>98</sup> *Id.* at 136-7.

<sup>99</sup> *Id.* at 141.

<sup>100</sup> *Id.* at 143, 144-55.

<sup>101</sup> *Id.* at 175.

<sup>102</sup> *Id.* at 191.

<sup>103</sup> *Id.* at 191.

For Hamburger the distinction between binding and non-binding adjudication is crucial, and he goes to considerable lengths to sustain the distinction. Thus executive adjudication as regards benefits and privileges is regarded as non-binding and did not offend against the idea that judicial power resided exclusively with the courts.<sup>104</sup> In analogous vein Hamburger distinguishes judicial power and binding adjudication, from executive adjudication as a mechanism for determining and giving notice of legal duties, on the ground that it was the “law rather than any executive determination that was binding”.<sup>105</sup> He exemplifies this by administrative assessment of taxes, where the binding obligation is said to flow from the law, with the consequence that the executive could lawfully make such determinations on its own. In like manner, Hamburger conceptualizes the decisions of the Commissioners of Sewers as merely determinations, being non-binding adjudications in the preceding sense.<sup>106</sup>

*B. The Expansive Dimension: The Elision of Prerogative Adjudication and Administrative Adjudication*

Philip Hamburger sheds interesting light on certain aspects of English legal history, but his thesis nonetheless conveys a misleading picture of administrative law and adjudication as it developed in the seventeenth century and thereafter. There are difficulties with what may be termed the expansive and the qualifying dimension of his argument, which are dealt with in this and the following section. There are two core difficulties with the expansive dimension of the argument.

The initial difficulty is Hamburger’s repeated elision of prerogative adjudication and administrative adjudication, treating the two as synonymous. This is mistaken as a matter of positive law, and problematic from a broader normative perspective of constitutional theory concerning the relationship between the prerogative and statute. It is particularly important given that almost all administration was based on statute, not the

---

<sup>104</sup> *Id.* at 193-203.

<sup>105</sup> *Id.* at 203.

<sup>106</sup> *Id.* at 205-6.

prerogative. There were in reality two respects in which adjudicative power independent of the ordinary courts was constrained, and neither, as we shall see, impacted on the paradigm instance of such power exercised by the administration.

First, the courts placed limits on the exercise of prerogative adjudication. *Prohibitions del Roy*<sup>107</sup> is the seminal decision concerning the relationship between the courts and the executive as personified in the King. It established, as we saw above, that the King did not have a free-standing judicial power derived from the royal prerogative. We need, however, to press further to understand the nature of the ruling and its limits. The King was claiming a generalized power independent of statute and independent of the established courts to resolve legal issues if he so chose: where “there is not express authority in law, the King himself may decide it in his Royal person; and that the Judges are but the delegates of the King, and that the King may take what causes he shall please to determine, from the determination of the Judges, and may determine them himself. And the Archbishop said, that this was clear in divinity, that such authority belongs to the King by the word of God in the Scripture.”<sup>108</sup> It was this challenge to which Coke CJ responded on behalf of all the judges of King’s Bench, Common Pleas and Exchequer, denying the King this judicial capacity. The prerogative did not accord the King this judicial power, which resided with the established courts.

Second, by the mid-seventeenth century the courts would equally frown on a statute that accorded the monarch, or some other executive authority, a general adjudicatory power, free from constraint by the ordinary courts. This would have been regarded as unconstitutional, although whether it would have been strictly illegal is more questionable. The rise and fall of Star Chamber is apposite in this context. Its original rationale was to render the powerful judicially accountable. Its statutory demise bore testimony to how far it had departed from that mission, becoming in the hands of the Stuarts a vehicle for monarchical will.<sup>109</sup> Thus a statute concerning adjudication would be regarded as constitutionally problematic if it established a judicial organ with general subject matter authority that was separate from the regular courts, which was subject to

---

<sup>107</sup> (1607) 12 Co. Rep. 63.

<sup>108</sup> *Id.* at 63.

<sup>109</sup> Edward P. Cheyney, *The Court of Star Chamber*, 18 *American Historical Review* 727 (1913).

no review or appeal by any other regular judicial organ, and which was under the control of the executive, in the sense of serving its will. This is in effect what the Star Chamber became in the seventeenth century, hence its abolition.

The fact remains that *Prohibitions del Roy* says nothing about the exercise of adjudicative power pursuant to a statute by an administrative authority. The monarch's prerogative claim to general judicial authority independent from the ordinary courts is wholly different from an administrative authority fulfilling its statutory mandate by making decisions demanded of it by the empowering legislation, which determination is then subject to judicial review by the ordinary courts. There is, moreover, a clear difference between a free-standing generalized judicial power accorded to the executive by statute, which would provoke the adverse reaction adumbrated in the previous paragraph, and the administrative reality in seventeenth and eighteenth century England. The paradigm during this period was the grant of administrative responsibilities pursuant to regulatory legislation embodying valuable public objectives, which performance had to be enforced through decisions made by those accorded responsibility in the legislation, these decisions then being amenable to judicial review by the ordinary courts.

There is a related difficulty with Hamburger's thesis, which flows from the ambiguity in his use of the term extralegal. He appears to accept that much administrative adjudication has a firm base in statute, and thus is legally authorized. He nonetheless insists that it is still extralegal. This phrase is used in a plethora of ways throughout the work. Thus, to take but one example, he contends that,<sup>110</sup>

But 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 commands. On this basis, when this book speaks of administrative law as a power outside the law--or as 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.

There are numerous difficulties with this formulation. Suffice it to say the following in relation to English law as it developed in the sixteenth and seventeenth century. Where Parliament invested administration with a task it thereby authorized and obliged it to fulfil its remit. This duality is important, both conceptually and normatively.

---

<sup>110</sup> HAMBURGER, *supra* note 1, at 23. See also 411-12.

It is embodied in the prerogative writs, which included the power to quash and prohibit, exercised through certiorari and prohibition respectively, to ensure that the administration remained within its remit; and also the power to command, manifest through mandamus, to ensure that the administration fulfilled the legal duty cast on it. The decisions made by the administration were legally binding, subject to judicial review. They were not regarded as some form of directive that purported to bind the subject otherwise than through the law. These decisions were not perceived as “irregular commands”;<sup>111</sup> nor were they seen as “extraordinary substitutes” for ordinary adjudication;<sup>112</sup> and nor were they viewed as an exercise of “mere state power” outside the law.<sup>113</sup> To the contrary, the administration was fulfilling through the law the very mandate accorded to it by Parliament. It was for Parliament to decide on the institutional structure through which such decisions were made, and in most instances it left the matter to the administrative authorities charged with implementing the legislation, such as commissioners, inspectors, poor law guardians or turnpike trustees. Parliament did not regard this as illegitimate, or contrary to constitutional principle, and nor did the courts.

They did not proceed on the assumption that administrative adjudication pursuant to the empowering statute was unlawful or extralegal. They did not seek to arrogate initial jurisdiction in such cases to the superior courts. This was not regarded as necessary as a matter of constitutional principle, nor would it have been practicable given that King’s Bench had but four judges at the turn of the seventeenth century, with a similar number in Common Pleas and Exchequer Chamber.<sup>114</sup> Nor did the superior courts believe that decisions made by administrative authorities pursuant to statute would necessarily have to be sanctioned by some lower court before they became effective. The primary legislation might provide for this, in which case it would be duly enforced by the superior courts on review. Where there was no such provision, the superior courts did not require it.

---

<sup>111</sup> *Id.* at 24.

<sup>112</sup> *Id.* at 24.

<sup>113</sup> *Id.* at 24.

<sup>114</sup> JOHN SAINTY, *THE JUDGES OF ENGLAND 1272-1990: A LIST OF JUDGES OF THE SUPERIOR COURTS* (1993).



Much the same was true in relation to matters of appeal. The legislation might provide for some measure of appeal to a lower court, in addition to exercise of the superior courts' inherent jurisdiction via judicial review. Such appeal was however de facto and de jure predicated on the assumption that the initial administrative determination was legally binding, subject to exercise of any appeal. Such appeals were commonly time limited and there were disincentives to challenge the initial legal determination, since if the appellant lost he would be liable for costs, and in some instances the penalties were increased.

What the superior courts did demand is that the decisions of such bodies should be amenable to judicial review. This was the focus of seventeenth century thought. King's Bench had already sought to render itself *primus inter pares* as regards the other superior courts, as attested to most notably by its battles with the Court of Common Pleas.<sup>115</sup> Its approach in relation to the administrative state broadly conceived was to ensure that the decisions were amenable to review in accord with the procedural and substantive precepts that were developed during this time.

The prevalence of such review reveals moreover a deeper problem with Hamburger's thesis. He seeks to show that exercise of judicial power and binding adjudication were the exclusive preserve of the ordinary courts, and that administrative adjudication was constitutionally proscribed. Yet in certain respects the precepts of judicial review inclined in the opposite direction. These precepts included a right to be heard by a decision-maker that was not biased. They demanded process rights mirrored on those of ordinary courts. The message was clear: the more "judicial" was the determination made by the administration, the more likely it was to pass muster if challenged by way of review. The rationale was equally apparent: the administration was making binding legal determinations of the matters within its statutory remit, and should therefore ensure that they were made in accord with something analogous to the adjudicatory model used in ordinary courts.<sup>116</sup>

---

<sup>115</sup> JOHN H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* (2002).

<sup>116</sup> It can be accepted that process rights might be fashioned differently from those of ordinary courts, and that they might better serve the needs of the particular statutory scheme, JERRY L. MASHAW, *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS* (1983); JERRY L. MASHAW,

### *C. The Qualifying Dimension: Judicial Power and Administrative Adjudication*

Hamburger's thesis is also problematic as regards the meaning he ascribes to judicial power, which in turn defines the circumstances in which administrative adjudication is to be regarded as "unlawful" or "extralegal". For Hamburger, administrative adjudication is only constitutionally proscribed where it involves the exercise of judicial power, which is said to belong exclusively to the courts. It is the power to make binding adjudications, in the sense that they are not merely determinative, "but more basically in the sense that they bound subjects, whether by obliging them to appear, to testify, to produce their documents, to pay damages, or otherwise relinquish their liberty or rights."<sup>117</sup> This thesis is conceptually problematic and is not supported by the English jurisprudence.<sup>118</sup> These problems will be considered in turn.

The first conceptual difficulty with Hamburger's use of the term judicial is that it is ambiguous in crucial respects. On one reading his formulation of judicial appears to mean that exercise of any power that bound individuals in any way would be judicial and hence off bounds to the administration: the obligation to appear, or to testify, or to produce their documents, or to pay damages, or otherwise relinquish liberty or rights, would, read disjunctively, suffice to condemn administrative power as illegitimate. This does not withstand examination in terms of the legislation, or the case law interpreting it, as will be seen below.<sup>119</sup> Parliament repeatedly gave the administration power of these kinds, and the courts did not regard this as unconstitutional or illegitimate. The alternative reading is that the forbidden "judicial" line would only be crossed if the administration exercised most, or all, of the preceding powers. This is, however, equally problematic. Is it most, or is it all? Are they all equally important? Powers to fine and

---

DUE PROCESS IN THE ADMINISTRATIVE STATE (1985). This does not, however, alter the force of the point being made in the text.

<sup>117</sup> HAMBURGER, *supra* note 1, at 191.

<sup>118</sup> See Part III D.

<sup>119</sup> See Part III D.

imprison had to be exercised by courts of record.<sup>120</sup> However the very meaning of court of record and the concept of the record are complex.<sup>121</sup> The legal reality was that a body with such power was deemed to be a court of record.<sup>122</sup> It was not so regarded in relation to exercise of its other administrative responsibilities over the relevant regulatory area; and it was only so regarded if the punishment was for commission of an offence, and did not therefore include instances such as imprisonment by commissioners of bankruptcy where the alleged bankrupt refused to be examined by them.<sup>123</sup> The consequences of this appellation should also be borne in mind, since it served in certain respects to limit contestation of the finding embodied in the roll that constituted the record.<sup>124</sup>

The second conceptual problem in Hamburger's definition of judicial power relates to his treatment of benefits and privileges. He makes it clear that the concept of judicial power and binding adjudication "did not include decisions about government benefits or privileges, unless they had 'vested' and become rights."<sup>125</sup> This however elides two quite distinct issues: what degree of judicial protection should be accorded by administrative law to interests that do not qualify as rights *stricto sensu*, and how should we characterize the process by which this determination is made. The answer to the former, whatsoever it might be, tells one nothing in and of itself as to the latter. It might be decided to diminish legal protection for interests that do not qualify as vested rights, but the decision thus made can still properly be regarded as an exercise of judicial power and adjudication that gives effect to this normative choice.

The third conceptual problem concerns Hamburger's distinction between judicial power/binding adjudication, and executive adjudication as a mechanism for determining and giving notice of legal duties. In the latter instance it was for Hamburger the "law

---

<sup>120</sup> DR. GROENVELT v. DR. BURWELL (1700) 1 Ld. Raym. 454 at 467.

<sup>121</sup> See S.E. THORNE, *ESSAYS IN ENGLISH LEGAL HISTORY* (1985), 61-74; AMNON RUBINSTEIN, *JURISDICTION AND ILLEGALITY* (1965), 54-80.

<sup>122</sup> GROENVELT, *supra* note 120; KEMP v. NEVILLE (1861) 10 C.B. (N.S.) 523 at 547.

<sup>123</sup> GROENVELT, *supra* note 120, at 467.

<sup>124</sup> *Id.* at 468; KEMP, *supra* note 122, at 547-552.

<sup>125</sup> HAMBURGER, *supra* note 1, at 191.

rather than any executive determination that was binding”.<sup>126</sup> Thus in relation to administrative assessment of taxes, the binding obligation is said to flow from the law, with the consequence that the executive could lawfully make such determinations without infringing any principle concerning the exercise of judicial power by the administration. This does not withstand examination. In a reductionist sense it is always the “law” that is binding. Excise statutes were in fact notoriously complex, and excise officers had to undergo rigorous training to master their craft.<sup>127</sup> Considerable judgment was required in the application of the statutory rules. If notwithstanding this the resultant decision is regarded as “non-judicial” on Hamburger’s definitional taxonomy then it begs the question as to which of the many other statutory responsibilities cast on administrators should also be classified in this manner. Consider the examples of cases that routinely came before the courts set out below, and try to decide whether they should be seen as the administrators exercising judicial power and making binding adjudication, or whether they should be viewed merely as instances of an executive determination of the pre-existing law. This reveals moreover a deeper tension with Hamburger’s argument. If he wishes to distinguish the other instances of administration from the excise example then he must proffer convincing reasons for doing so. If alternatively he regards many such instances as analogous to the excise example, then it means that in most circumstances the administration when making decisions is not infringing Hamburger’s stricture against the exercise of judicial power, with the consequence that administrative law is not “unlawful” as judged by his own criterion.

Hamburger’s thesis is, as stated at the outset of this section, also problematic when viewed in terms of the jurisprudence of the UK courts, which does not support his distinction as to when administrative adjudication was regarded as legitimate and when it was not. The numbers are instructive in this respect.<sup>128</sup> Between 1220 and 1867 there were 6,637 separate citations to certiorari, 5,563 to prohibition and 7,111 to mandamus. The very great majority of this judicial activity occurred from the late sixteenth century

---

<sup>126</sup> *Id.* at 203.

<sup>127</sup> BREWER, *supra* note 22.

<sup>128</sup> CRAIG, *supra* note 5, at 26-8.

onward,<sup>129</sup> and the population at the turn of the seventeenth century was 4.8 million. There were in addition 2,512 citations to quo warranto, which was the action used to challenge the entitlement of a person to hold office. The figures are crude,<sup>130</sup> but instructive nonetheless. They do not cover collateral challenges, where the claimant used an action in tort, assumpsit or restitution to challenge an illegality, as exemplified by an action to recover the cost of livestock wrongfully seized for the payment of a charge that was wrongly levied on the claimant. Thus the figures for tort challenges involving Commissioners were as follows: trespass, 3,200; trover, 1,942; action on the case, 1,138; and replevin, 1,001.

The actions were brought by individuals that felt aggrieved by administrative action. It mattered nothing to them as to whether they fell one side of the line or the other of Hamburger's definition of judicial. More important for present purposes, it had little if any impact on the courts in relation to the incidence of judicial review. Courts were routinely faced by claimants contending that they had, for example, been charged an excessive toll for the carriage of goods on a turnpike; that the excise levied on goods was calculated wrongly; that the burden of riparian embankment repair was disproportionately imposed on a particular person; that a doctor had been wrongly excluded by the College of Physicians; that a poor levy had been assessed on the wrong district; that a tithe had been improperly calculated; that land had been wrongfully enclosed; or that a factory inspector had abused his power.

In all such instances the administrative decisions were determinative for those affected, unless successfully challenged, and in all such instances those affected were bound *de facto* and *de jure* by them, which was precisely why they challenged them. This was recognized and accepted by the courts, which was why they subjected such determinations to judicial review. They did not, however, regard the administrative adjudication that led to such determinations as constitutionally invalid or illegitimate. The

---

<sup>129</sup> There were, for example, 1,169 cases involving poor law guardians, 1,028 cases involving turnpike trustees, and 408 involving inspectors.

<sup>130</sup> This is in part because there can be more than one digital citation to the same case, the consequence of their being more than one report, and in part because the same passage can on occasion be cited under more than once.

administration was discharging the responsibility vested in it by Parliament, and making the decisions required in furtherance of the statutory grant of authority. The decisions were subject to legal accountability via judicial review, and if they successfully negotiated that hurdle that was an end to the matter.

Hamburger might respond that his definition of “judicial” only catches binding decisions that are truly determinative, and thus if a decision made by the administration is susceptible to review it is not determinative in this respect, with the consequence that it is therefore unproblematic from his perspective and does not constitute “extralegal adjudication”. This however proves too much, since it condemns his central thesis to irrelevance. The category of extralegal adjudication would be empty, given that all administrative adjudication was subject to review, save only for very limited instances where Parliament enacted a preclusive clause and the courts interpreted such provisions very narrowly. It would denude his critique of modern US law of all meaning, given that administrative adjudication is, with very limited exceptions, subject to judicial review.

#### *D. The Reality of Administrative Adjudication*

It may be helpful, as in the context of the earlier discussion of rulemaking, to flesh out the preceding critique by reference to prominent areas in which the state exercised administrative power from the seventeenth century onwards. It should be emphasized that what follows are but examples, the number of which could readily be multiplied. It will be seen that administrators were commonly given broad powers to make legally binding decisions, which would in Hamburger’s terms be regarded as “judicial”. The grant of such power was not, however, regarded as constitutionally illegitimate by Parliament or the courts, nor was it perceived to be the exercise of extralegal authority. It was the normal method for discharging regulatory legislation, with the courts ensuring that the decisions were subject to judicial review. The four areas considered below reveal moreover the difficulty with Hamburger’s distinction between what he regards as “judicial”, and what he classifies as “non-judicial” on the ground that the binding obligation is said to flow from the “law” rather than any determination made by the administrator.

## *1. Bankruptcy*

There was much economic and social regulation in the sixteenth and seventeenth centuries, and bankruptcy was a prominent concern, as attested to by the number of statutes dealing with the matter. Thus there were major pieces of legislation dealing with bankrupts in 1542, 1571, 1603, 1625, 1705, 1706, 1731, 1745, 1763, 1772, 1783, 1821, and 1822, with the law being consolidated in 1824.<sup>131</sup> The initial legislation was enacted in the reign of Henry VIII, and the preamble attests to the social ill to be combatted, this being the fact that,<sup>132</sup>

Divers and sundry Persons craftily obtaining into their Hands great Substance of other Mens Goods, do suddenly flee to Parts unknown, or keep their Houses, not minding to pay or restore to any their Creditors, their Debts and Duties, but at their own Wills and Pleasures consume the Substance obtained by Credit of other Men, for their own Pleasure and delicate Living, against all Reason, Equity and good Conscience.

The 1542 legislation assigned regulatory competence to high officials such as the Lord President, the Lord Treasurer and judges of the King's Bench, who were accorded broad discretion to effectuate the principles contained therein. This regime lasted but thirty years until 1571, when legislation enacted during the reign of Elizabeth I laid the pattern for regulatory enforcement thereafter.

The new legislation noted at the outset that “notwithstanding the Statute made against Bankrupts in the thirty-fourth Year of the Reign of our late Sovereign Lord King Henry the Eighth, those Kind of Persons have and do still increase into great and excessive Numbers, and are like more to do, if some better Provision be not made for the Repression of them.”<sup>133</sup> The “better Provision” took the form of a new enforcement mechanism, whereby regulatory authority was given to commissioners. This was unsurprising in that it had become readily apparent in the years after 1542 that high

---

<sup>131</sup> Bankruptcy (England) Act 1824, 5 Geo. 4, c. 98.

<sup>132</sup> Statute of Bankrupts Act 1542, 34 & 35 Henry VIII, c. 4.

<sup>133</sup> Statute of Bankrupts Act 1571, 13 Eliz I, c. 7.

officials such as the Lord President and judges of the King's Bench did not have the time to devote to the task at hand. The Lord Chancellor was empowered to appoint,<sup>134</sup>

[S]uch wise and honest discreet persons as to him shall seem good: Who or the most Part of them, by Virtue of this Act and of such Commission, shall have full Power and Authority to take by their Discretions such Order and Direction with the Body and Bodies of such Person wheresoever he or she may be had, either in his or her House or Houses, Sanctuary or elsewhere, as well by imprisonment of his or her Body or Bodies; ...as also with all his or her Lands, Tenements, Hereditaments, as well Copy or Customary Hold as Freehold, which he or she shall have in his or her own Right before he or she became Bankrupt.

The Commissioners were therefore given the power to determine bankruptcy, deal with the person of the bankrupt and seize his goods. These powers were complemented by detailed provisions concerning the legal consequences of the bankrupt seeking to evade capture by leaving his normal abode and hiding elsewhere.<sup>135</sup>

The Commissioners' powers were reinforced by later provisions of the statute. An endemic problem in all instances of bankruptcy is the temptation to avoid the relevant legal rules by assigning the goods that were liable to be seized to a third party, and then reclaiming them later on payment of some due recompense. The problem was as prevalent in the sixteenth century as it is today, and the legislative drafters made due provision.

The persons making the complaint of bankruptcy could if they knew, suspected or supposed that goods or debts of the bankrupt were in the hands of others make this known to the Commissioners, who were empowered to "send for and call before them by such Process, Ways or Means as they shall think convenient by their Discretions, all and every such Person and Persons so known, suspected or supposed"<sup>136</sup> to have any such goods. The Commissioners could examine them on oath and "by such Ways and Means as the said Commissioners or the more Part of them by their Discretions shall think meet

---

<sup>134</sup> *Id.* at s. 2. The remainder of section 2 shows the sixteenth century zeal to go after the assets of the bankrupt where ever they might be found, including goods held by family members and assets of the bankrupt held by other parties with the intent of avoiding seizure under this legislation.

<sup>135</sup> *Id.* at s. 9.

<sup>136</sup> *Id.* at s. 5.



and convenient.”<sup>137</sup> The penalties were sharp and peremptory: if a person failed to take the oath, or tell the truth when examined by Commissioners, then they “shall lose and forfeit double the Value of all such Goods, Chattels, Wares, Merchandises and Debts by them or any of them so concealed, and not wholly and plainly declared and shewed,”<sup>138</sup> the penalty being levied on all their assets. There were analogous provisions dealing with those who detained the goods of the bankrupt.<sup>139</sup>

The shift from the Tudors to the Stuarts betokened change in many respects, but not in this area. There is indeed a sense of modernity in much legislation enacted during this period, manifest in the willingness to revisit a regulatory domain and render it more efficacious where experience had revealed deficiencies. Thus it was in the very first year of James I of England, VI of Scotland, that Parliament enacted the Bankrupts Act 1603, the rationale being that,<sup>140</sup>

For that Frauds and Deceits, as new Diseases, daily increase amongst such as live by buying and selling, to the Hindrance of Traffick and mutual Commerce, and to the general Hurt of the Realm, by such as wickedly and wilfully become Bankrupts: (2) And for that the Description of a Bankrupt in former Statutes is not so fully expressed, nor the Power given thereby to the Commissioners for Bankrupts so large, as is meet in such Cases of Deceit, to prevent the deceitful Actions of Bankrupts.

The statute broadened the definition of bankrupt, closing gaps revealed in the earlier definition, and applied the Commissioners’ remedial powers to the new regulatory order.<sup>141</sup> Where the bankrupt sought to avoid creditors by disposing of the goods to family or other persons, the Commissioners’ powers were strengthened, since they could now sell such goods as if they were still owned by the bankrupt.<sup>142</sup> The statute acknowledged the limited remedial powers in relation to such third parties, noting that these limits were “to the great Encouragement of all Bankrupts and their wicked Confederates and Accessories, and to the great Hindrance of the just Remedies of the

---

<sup>137</sup> *Id.* at s. 5.

<sup>138</sup> *Id.* at s. 6.

<sup>139</sup> *Id.* at s. 7.

<sup>140</sup> Bankrupts Act 1603, 1 Ja. 1, c. 15.

<sup>141</sup> *Id.* at ss. 2-3.

<sup>142</sup> *Id.* at s. 5.

Creditors of the said Bankrupts, for their true and just Debts to them owing.”<sup>143</sup> The Commissioners’ powers were duly afforded by enabling them to imprison alleged confederates that refused to be sworn on oath, or refused to answer the questions posed.

The Commissioners’ powers against the bankrupt himself were recast, the rationale being that “the Practices of Bankrupts of late are so secret and so subtil, as that they can very hardly be found out or brought to Light.”<sup>144</sup> The legislation noted that earlier statutes, while giving power to Commissioners to examine others than the bankrupt, had not provided sufficient authority to examine the bankrupt himself on oath. This was remedied by detailed provisions concerning bankrupts that had absconded, the Commissioners having authority to make binding determinations that they were bankrupt, albeit after warning notices had been duly placed. The Commissioners could issue warrants for their arrest. When apprehended they were examined by the Commissioners. If they refused to answer it was lawful for the Commissioners “to commit the said Offender or Offenders to some strait or close Imprisonment, there to remain until he, she or they shall better conform him or herself.”<sup>145</sup> If the bankrupt was found guilty of perjury to the prejudice of creditors matters became rather more serious, with indictment before a court of record and if convicted the bankrupt “shall stand upon the Pillory in some publick Place by the Space of two Hours, and have one of his Ears nailed to the Pillory and cut off,”<sup>146</sup> which provision reveals some limits to the modernity of legislation in this area. Two centuries later the penalty was scarcely less draconian: if convicted the bankrupt be “deemed guilty of Felony, and be liable to be transported for Life, or for such Term, not less than Seven Years, as the court before which he shall be convicted shall adjudge; or shall be liable to be imprisoned only, or imprisoned and kept to hard Labour in any Common Gaol, Penitentiary House or House of Correction, for any Term not exceeding Seven Years.”<sup>147</sup>

---

<sup>143</sup> *Id.* at s. 10.

<sup>144</sup> *Id.* at s. 6.

<sup>145</sup> *Id.* at s. 8.

<sup>146</sup> *Id.* at s. 9.

<sup>147</sup> Bankruptcy (England) Act 1824, 5 Geo. 4, c. 98, s. 108.

The legislation post-1603 continued to refine and augment the powers of the Commissioners, in order to render them the more efficacious. It is a fascinating story in its own right, but space precludes further elaboration. Nor is it required for present purposes, which is to test the soundness of Hamburger's thesis against concrete examples of regulatory intervention.

The legal reality is that Commissioners exercised power *de jure* and *de facto* that constituted binding determination of the matters that came within their remit. They exercised many powers that Hamburger characterizes as being judicial. They could enter premises and seize goods; they could examine the bankrupt and any associated with him on oath; they could impose penalties for non-attendance and for failure to respond to their questions; they made the binding determination as to whether a person was bankrupt in the light of evidence tendered by creditors; they could authorize the sale of the bankrupt's property; and they could attach assets of third parties complicit in the bankrupt's efforts to protect his own property.

There was, contrary to Hamburger's thesis, nothing to indicate over a period of three hundred years that exercise of this power was regarded as "extralegal" or "constitutionally illegitimate". Parliament repeatedly sanctioned intervention, fine-tuning the regulatory schema and adding to the Commissioners' powers. There was nothing to suggest that the Commissioners' adjudicatory power should be regarded as akin to the claims to generalized judicial power made by the King pursuant to the royal prerogative; nor was there anything to suggest that the Commissioners' power should be treated as analogous to the kind of general judicial power claimed by Star Chamber.<sup>148</sup>

---

<sup>148</sup> This conclusion is not affected by the creation of the Court of Bankruptcy in 1831, which was deemed to be a Court of Record. The principal rationale for its creation was to provide an expeditious method of appeal and review by a specialist court from the Commissioners' determination. It was the Commissioners who made the initial adjudication pursuant to powers accorded by previous legislation, which could then be appealed to the Court of Bankruptcy, see Bankruptcy Court (England) Act 1831, 1 & 2 Will. 4, c. 56, ss. 1, 2, 7, 16, 17, 31. The authority of the court created in 1831 was subsequently shifted, see Bankruptcy Act 1847, 10 & 11 Vict., c. 10. The Bankrupt Law Consolidation Act 1849, 12 & 13 Vict., c. 106, vested many powers directly in the Court of Bankruptcy, but it is central to the architecture of this legislation that, save where the Act otherwise provided, "each and every of the Commissioners for the Time being acting in London and in the several Districts in the Country shall, singly and simultaneously, or otherwise as

The Commissioners were subject to statutory procedural requirements, which laid down detailed rules concerning the giving of notice to the bankrupt and an opportunity to be heard, as well as precepts of due process derived from the common law. The bankruptcy decisions were moreover subject to judicial review by the ordinary courts.<sup>149</sup>

This could arise in collateral actions seeking judicial review, as exemplified by *Doswell*,<sup>150</sup> where the plaintiff brought an action for trespass and false imprisonment against the Commissioners of Bankrupts. The Commissioners suspected that he was concealing the property of the bankrupt, questioned the plaintiff, were dissatisfied with his answers, and thus imprisoned him. He contested this via an action for trespass and false imprisonment. Abbott C.J. held that such an action would lie against persons with limited authority, such as the Commissioners of Bankrupts if they acted beyond the limit of their authority, but if the act was done within the limits of that authority there would be no such action, and this was so notwithstanding that the decision was erroneous. The judgment contains an astute insight into the difficulty of applying this distinction, and the rationale for the choice thus made.

The courts also frequently heard cases concerning bankruptcy arising from tortious disputes,<sup>151</sup> or actions between creditors and debtors, as exemplified by the

---

Occasion may require, be and form the Court for every Purpose under this Act, or in execution of any Duty which may hereafter be imposed on the Court”, s. 6.

<sup>149</sup> See, e.g., *Miller v. Seare* (1746-79) 2 Black. W. 1141; *Wilkins v. Carmichael* (1779) 1 Dougl. 101; *Ex parte Turner* (1795) 9 Mod. 418; *Hussey v. Fiddall* (1796) 12 Mod. 324; *Newton v. Trigg* (1795) 1 Salkeld 109; *Ridley v. Taylor* (1810) 13 East 175; *Gibson v. Phillips* (1827) 7 B. & C. 529; *Watson v. Bodell* (1845) 14 M. & W. 57; *Kirkpatrick v. Tattersall* (1845) 13 M. & W. 766; *Queen v. Dunn* (1847) 12 Q.B. 1026; *Lewis v. Harris* (1848) 11 Q.B. 724; *Ex p. William Stanton* (1851) 1 De G.M. and G. 224 ; *Badger v. Shaw* (1860) 2 El. & El. 472.

<sup>150</sup> *Doswell v. Impey* (1823) 1 B. & C. 163.

<sup>151</sup> See the delicate semantic distinction drawn in *Langley and Colson’s Case* (1653) Godb. 151: “An action upon the case was brought by Langley against Colson, for these words, viz. Richard Langley is a bankrupt rogue, I may well say it, for I have payed for it: and it was adjudged for the plaintiff; for by all the justices the first words are actionable, although the word bankrupt be spoken *adjective*, because they scandalize the plaintiff in his trade. At the same time another action was brought by another man for speaking these words, viz. Thou art a bankruptly knave, and canst not be trusted in London for a groat; and it was adjudged that the words were not actionable, because the words were spoken *adjeetiv* and

characteristically elegant judgment of Lord Mansfield in *Alderson*,<sup>152</sup> where he expatiated on the issue, central to bankruptcy law, of the notion of a fraudulent conveyance, opining that,<sup>153</sup>

All acts to defraud creditors, or to defraud the public law of the land, as the Statutes of Bankruptcy are, are absolutely void. It has been determined, that a conveyance of all a man's property in trade to pay a bona fide creditor of the most meritorious nature, though not amounting to half the debt, is fraudulent. Why? Because it is not an act in the ordinary course of business, and must inevitably produce an act of bankruptcy, and it defeats the equality intended by the law. So if the conveyance be not of all, but of great part, and the excepted part is merely colourable, it is also void.

## 2. *Excise*

Money matters and it mattered a great deal to successive sovereigns in the Tudor and Stuart periods. It mattered even more when a King was minded to go to war. There is much in sixteenth and seventeenth century history that turns on Crown finances and the King's need for recourse to Parliament for revenue.<sup>154</sup>

Without regular taxation, the Crown's political manoeuvrability was extremely limited, hence the many successful attempts to maximize those income streams that were available to the king. Under James VI and I the use of impositions, the selling of monopolies and titles, searching out old debts, and the revival of feudal rights were all exploited. Nevertheless, by 1617, even before the full effect of Buckingham's impact on royal finances had been felt, and at a time when England was still at peace, the debt stood at £726,000, approaching a doubling of the Tudor legacy.

The problems of finance were exacerbated during war, as became evident post 1688. James II had fled to France, to be replaced by William of Orange, whose reign was marked by military commitment on the continent. This led to frequent summons of Parliament, in order to vote subsidies. It led also to the regime of deficit financing, which originated in the last decade of the seventeenth century and continued thereafter.<sup>155</sup> This

---

*adverbialiter*, and are not so much as if he had called him bankrupt knave, but bankruptly, viz. like a bankrupt." Italics in the original.

<sup>152</sup> *Alderson v. Temple* (1768) 1 Black. W. 660.

<sup>153</sup> *Id.* at 662.

<sup>154</sup> KEITH BROWN, *Monarchy and Government in Britain, 1603-1637*, in J. WORMALD (ED.), *THE SEVENTEENTH CENTURY* (2008), at 35-6.

<sup>155</sup> P.G.M. DICKSON, *THE FINANCIAL REVOLUTION IN ENGLAND: A STUDY IN THE DEVELOPMENT OF PUBLIC CREDIT, 1688-1756* (1967).

entailed the floating of public loans on the security of future taxes, and the issue of government stock in the Bank of England established in 1694, thus heralding the birth of the National Debt.<sup>156</sup>

Herein lies the connection between deficit financing, the excise and the professionalization of the administrators responsible for its collection. The regime of deficit financing was crucially dependent on an assured flow of future tax, since without this the investors would have lacked the confidence to proffer the loans. Much early eighteenth century bureaucracy was relatively ramshackle and inefficient as judged by modern standards,<sup>157</sup> but the need to secure the requisite flow of tax provided the spur to organizational reform, in which the Commissioners of Excise played the central role.

The excise grew more than fourfold between 1690-1782, and “from the 1720s more men worked for the Excise than for all the other revenue departments taken together”.<sup>158</sup> Excise was an indirect tax levied on goods, either when produced or distributed. The range of goods thus taxed expanded over time. It was initially imposed on alcohol, but under the pressure of financial exigency it was expanded to cover goods such as soap, salt, leather and candles. The excise became the largest source of tax revenue for the Crown, and this required an administrative organization that was fit for purpose. In the words of John Brewer, “excises became the largest category of taxes, excisemen the biggest body of officials, and the Excise Office a byword for administrative efficiency”.<sup>159</sup>

The Commissioners of Excise were at the apex of this administrative regime. The provinces were divided into collections, which corresponded approximately to the English counties, presided over by a collector who toured his area circa eight times per annum, receiving the money from traders that had been assessed by his officers, this being then sent on to London. The number of such officers ranged from between 1000 in

---

<sup>156</sup> D. HAYTON, *Contested Kingdoms, 1688-1756*, in PAUL LANGFORD (ED.), *THE EIGHTEENTH CENTURY* (2002), at 39-40.

<sup>157</sup> *Id.* at 42.

<sup>158</sup> BREWER, *supra* note 22, at 67.

<sup>159</sup> *Id.* at 68.

1690 to 2800 in 1780. There was an analogous system for towns.<sup>160</sup> Excise officers were required to pass an exam plus a practical test, the work being complex and technical, involving long hours, as attested to by the fact that a “footwalk” surveyed each day by an officer was normally between 12-16 miles, while an “out ride” could often be 40-50 miles.<sup>161</sup> Excise officers were therefore a visible manifestation of central power, with authority to tax.<sup>162</sup>

The exciseman was a ubiquitous presence in eighteenth century England, for he worked not merely in the ports and on the coast, like the customs officer, but in every small town and hamlet where beer and ale were brewed or tea sold over the counter. He was a state official, an executive rather than judicial officer, working under a system of statutory administrative law. As such, he was the symbol of a new form of government. He was also a sign of the state’s determination to extract sufficient revenues from the public to ensure that England secured its place as a major international power.

The Commissioners’ powers were contained in the statutes concerning excise enacted from the mid-seventeenth century onward. There were hundreds of such statutes, which characteristically dealt with the excise duties payable on a particular product. The Excise Management Act 1827<sup>163</sup> consolidated the Commissioners’ powers, clarifying and making more transparent the powers that had existed hitherto.

There were thirteen Commissioners, any four of whom could constitute a Board, with authority to exercise all powers given by the legislation. The Commissioners were authorized to appoint officers, who would collect the excise duties. There were strict rules preventing Commissioners or officers from taking bribes, or colluding with those liable to pay excise, with penalties of £500 for any such offence, a very considerable sum in nineteenth century terms. The same penalties were imposed on the private party attempting to bribe. The deterrent nature of these provisions was reinforced by what was in effect a prisoner dilemma clause: if such collusion had taken place, the party that informed on the other would be indemnified, the penalty falling solely on the party that had not confessed.<sup>164</sup>

---

<sup>160</sup> *Id.* at 102-4.

<sup>161</sup> *Id.* at 105.

<sup>162</sup> *Id.* at 114.

<sup>163</sup> Excise Management Act 1827, 7 & 8 Geo. 4, c. 53.

<sup>164</sup> *Id.* at s. 13.

The powers of the Commissioners and their offices were extensive. It was lawful for an officer to enter any premises subject to excise duties, and inspect the premises. The officer was legally “authorized and required” to levy any excise duties on those liable to pay them.<sup>165</sup> There were penalties for any person impeding the officer in the discharge of this duty.<sup>166</sup> Excise had to be paid at the assigned place and time; if it was not the amount was doubled.<sup>167</sup> If goods were fraudulently removed the penalty was treble the value of the goods.<sup>168</sup> An officer had authority to seize goods that were forfeit, and any person obstructing such an officer was liable to a penalty of £200.<sup>169</sup>

Proceedings for recovery of any penalty were heard by a Board of Commissioners in London, and some other cities, or by justices of the peace in more rural areas. They would “hear, adjudge and determine” the matter,<sup>170</sup> and could administer oaths, summon witnesses and the like, with penalties for non-attendance and perjury.<sup>171</sup> The burden of proof of showing by way of defence that the goods were not subject to excise, or that the duty had already been paid, lay with the private party.<sup>172</sup> If the Commissioners or justices upheld the initial decision made by the officer, they were then authorized and obliged to issue a warrant for execution of their ruling.<sup>173</sup> There was the possibility of further onward appeal to Commissioners of Appeal, or justices sitting in quarter sessions.<sup>174</sup> The Commissioners were empowered to sell goods to meet unpaid penalties, and to levy distress.

Philip Hamburger is ambivalent about the power wielded by Commissioners of Excise. He regards much of what they did as not judicial in his sense of the term, such that the Commissioners’ executive adjudication merely gave effect to determinations that

---

<sup>165</sup> *Id.* at s. 22.

<sup>166</sup> *Id.* at s. 24.

<sup>167</sup> *Id.* at s. 25.

<sup>168</sup> *Id.* at s. 32.

<sup>169</sup> *Id.* at ss. 39, 64.

<sup>170</sup> *Id.* at s. 65.

<sup>171</sup> *Id.* at ss. 65, 74. See also, ss. 29, 31.

<sup>172</sup> *Id.* at s. 76.

<sup>173</sup> *Id.* at s. 65.

<sup>174</sup> *Id.* at s. 82.



were already made binding by the law. He nonetheless also regards the powers wielded by Excise Commissioners as unacceptable, encroaching on terrain that properly belonged to the ordinary courts. Hamburger concludes that “Commissioners exercised judicial power outside the courts of law and without juries or other due process of law,”<sup>175</sup> and regards this as an example of extralegal adjudication that was constitutionally infirm.

The difficulties with the first part of this argument were considered above. The statute did not in itself determine the outcome. Excise statutes were notoriously complex, and excise officers had to undergo rigorous training to master their craft. Considerable judgment was often required in the application of the statutory rules. If notwithstanding this the resultant decision is regarded as “non-judicial” on Hamburger’s definitional taxonomy then it begs the question as to which of the many other statutory responsibilities cast on administrators should also be classified in this manner.

There are also considerable difficulties with the second part of the argument. We need to tread carefully here. People did not like paying taxes in the seventeenth and eighteenth century any more than they do now. It can, moreover, be accepted that excise was regarded by the Crown as a source of revenue to be repeatedly tapped, as attested to by the frequency of excise legislation increasing and extending the amount of duty to be paid. This could well seem arbitrary, and in certain respects it undoubtedly was.

It is nonetheless important to disaggregate dissatisfaction with the substantive legislation and evaluation of the regime of administrative adjudication embodied therein. We should pause before regarding the regime of administrative adjudication as “extralegal” or “constitutionally illegitimate”, whether viewed from the perspective of Parliament or the courts.

The Excise Management Act 1827 consolidated a regime of administrative adjudication going back nearly two centuries. To put the same point the other way round, Parliament had in very many statutes over circa two hundred years accorded Excise Commissioners the kind of powers consolidated in the 1827 enactment. The statutes reflected and embodied Parliament’s considered decision as to the chosen mechanism for administrative enforcement. It can be accepted that legislative imprimatur does not

---

<sup>175</sup> HAMBURGER, *supra* note 28, at 203-4, 206-8.

necessarily cloak a measure with constitutional legitimacy. Such legislative approval nonetheless considerably raises the stakes for someone minded to argue that an administrative regime is constitutionally suspect, more especially when that approval has been given repeatedly over nearly two centuries.<sup>176</sup>

We should be equally cautious when considering the excise regime from the perspective of the ordinary courts. Some excise statutes contained a no certiorari clause, seeking to limit the courts' power of judicial review. The ordinary courts did not view with equanimity the denial of their jurisdiction, any more than they do now,<sup>177</sup> and used various devices to limit the effect of such clauses. Thus where statutes precluded resort to certiorari the courts used mandamus or prohibition instead; where they were worded in more omnibus fashion to prevent all use of the prerogative writs the plaintiff could proceed via collateral attack in a tort action; and if they were formulated in yet more general terms so as to bar all challenge courts interpreted this so as to not to prevent judicial oversight in cases involving jurisdictional invalidity. Whether courts chose to exercise this degree of activist oversight would depend, *inter alia*, on the character of the particular judges hearing the case and the nature of the alleged error.

There is, however, no indication that the ordinary courts felt that the administrative regime for excise collection was extralegal or constitutionally suspect. The courts' approach was double-edged. They sought to ensure the continued vitality of judicial review, including the precepts of due process.<sup>178</sup> They also sought to ensure the regulatory efficacy of the statutory regime, giving judgments that reinforced the legislative objectives.<sup>179</sup> Nor is this double-edged approach surprising. There would have been very considerable practical difficulties in having determinations concerning

---

<sup>176</sup> See moreover with respect to US experience, MASHAW, *supra* note 2, 35-9, 82-5.

<sup>177</sup> See, e.g., *The King v. Smith and others Commissioners of Sewers* (1682) 1 Lev. 288.

<sup>178</sup> See, e.g., *Terry v. Huntington* (1655) Hardres 480; *Collett v. Young* (1695) 1 Keb. 634; *Warwick v. White* (1722) Bunb. 106; *Fuller v. Fotch* (1741) Carth. 346; 5; *Bredon v. Gill* (1795) 2 Salk. 555; *Miller v. Seare* (1777) 2 Black. W. 1141; *Austin v. Whitehead* (1795) 6 T.R. 436; *Attlee v. Backhouse* (1838) 3 M. & W. 633; *R v. Excise Commissioners* (1845) 6 Q.B. 97.

<sup>179</sup> See, e.g., *Cooper v. Booth* (1785) 3 Esp. 135; *The King v. The Commissioners of Excise* (1788) 2 TR 381; *R. v. Surrey JJ* (1788) 2 T.R. 505; *Christie v. A-G.* (1796) 6 Bro. P.C. 520; *R. v. Steventon* (1802) 2 East 362; *Attlee v. Backhouse* (1838) 3 M. & W. 633; *Regina v. Speller* (1847) 1 Exch. 401.

disputed tax made by ordinary courts and juries, as Hamburger desires. There is the further tension that insofar as he maintains that such issues were largely to be viewed as executive determinations applying straightforward precepts in the legislation, it is not clear why juries would be suitable or necessary. You cannot play both sides of the street at the same time, seeking to argue that excise assessment was merely an executive determination of pre-existing law, and at the same time bemoan the administrative mechanism for its failure to involve juries.

### *3. Inclosure*

W H E R E A S there are, in several Parishes and Places in this Kingdom, several Wastes and Commons, and several Open and Common Fields, which, by reason of the different Interests the several Land Owners and Occupiers, or Persons having Right of Common, have in such Wastes, Commons, and Fields, cannot be improved, cultivated, or enjoyed, to such great Advantage for the Owners and Occupiers thereof, and Persons having Right of Common, as they might be, and are capable of, if an improved Course of Husbandry was to be pursued, respecting such Open and Common Fields, in each Parish respectively, and such Wastes, or Commons of Pasture, were to be properly drained, or otherwise amended.<sup>180</sup>

Thus began the preamble to the Inclosure Act 1773, setting out the rationale for regulatory intervention in this area, viz that better use could be made of such land if it were enclosed and divided into allotments. There were a great many local acts authorizing inclosure in a particular area,<sup>181</sup> and these were followed by legislation in 1801 and 1845, which established the generally applicable rules for inclosure, drawing heavily on many earlier statutes dealing with inclosure in particular areas. Commissioners were once again the medium through which the legislation was to be administered and they were accorded extensive power.

This is readily apparent from the Inclosure Consolidation Act 1801.<sup>182</sup> Parish boundaries could be uncertain, and this could hinder inclosure schemes. The

---

<sup>180</sup> Inclosure Act 1773, 13 Geo. 3, c. 81.

<sup>181</sup> See, e.g., Land Inclosure Herefordshire Act 1606, 4 Ja. 1, c. 11; Bedford Level Act 1663, 15 Cha. 2, c. 17; Inclosure Act 1756, 29 Geo 2, c. 36; Inclosure Act 1773, 13 Geo. 3, c. 81; Tetney Lincolnshire Inclosure Act 1774, 14 Geo. 3, c. 33; Knaresborough Inclosure Act 1789, 29 Geo 3, c. 76; Anwick Inclosure Act 1791, 31 Geo. 3, c. 93.

<sup>182</sup> Inclosure Consolidation Act 1801, 41 Geo. 3, c. 109.

Commissioners were therefore “authorized and required to ascertain, set out, determine, and fix the same respectively; and after the said Boundaries shall be so ascertained, set out, determined, and fixed, the same shall and are hereby declared to be the Boundaries of such Parishes, Manors, Hamlets, or Districts.”<sup>183</sup> The Commissioners were obliged to give notice of the intended parish division, and this could be appealed to justices in quarter sessions, but this does not alter the fact that the Commissioners made the initial binding determination of parish boundaries.

The Commissioners were required to produce land surveys and were given legal authority to enter land to do so.<sup>184</sup> It was the Commissioners who made the legal determination of allotment shares. They did not have authority to determine title to land, but they were nonetheless authorized to “assign and set out the several Allotments directed to be made unto the Person or Persons, who, at the Time of the Division and Inclosure, shall have the actual Seisin or Possession of the Lands, Tenements, or Hereditaments, in lieu or in right whereof such Allotment shall be respectively made.”<sup>185</sup> The statute drives this point home by providing that no dispute touching title to any lands “shall impede or delay the Commissioner or Commissioners in the Execution of the Powers vested in him or them, by virtue of any such Act; but the Division or Inclosure directed to be made shall be proceeded in, notwithstanding such Difference or Suit.”<sup>186</sup> The allotments once assigned were to be in “full Bar of and Satisfaction and Compensation for their several and respective Lands, Grounds, Rights of Common, and all other Rights and Properties whatsoever”,<sup>187</sup> which people previously had over the land and, subject to the procedural obligation to post a notice of the allotment scheme, all such prior rights “shall cease, determine and be forever extinguished”.<sup>188</sup> The Commissioners’ determination concerning the partition of allotments was embodied in a formal award,

---

<sup>183</sup> *Id.* at s. 3.

<sup>184</sup> *Id.* at ss. 4-5.

<sup>185</sup> *Id.* at s. 7.

<sup>186</sup> *Id.* at s. 7.

<sup>187</sup> *Id.* at s. 14.

<sup>188</sup> *Id.* at s. 14.

which shall “to all Intents and Purposes, be binding and conclusive”, subject to any statutory provision to the contrary.<sup>189</sup>

If a person refused to accept their allotted share within two months it was forfeited.<sup>190</sup> If they refused to inclose it as instructed by the Commissioners, the latter could do so and charge the recalcitrant individual.<sup>191</sup> If the people affected refused to contribute to the costs of the inclosure scheme the Commissioners could exact their contribution by way of distress, or take the rents from the particular allotment.<sup>192</sup> The penalties imposed by the legislation, and those imposed by the Commissioners, were enforced by the justices of the peace.<sup>193</sup>

The statute conferred considerable procedural powers “for the better enabling such Commissioner or Commissioners to determine the several Matters and Things by this or any such Act referred to his or their Determination.”<sup>194</sup> They could summon people to appear, testify concerning land disputes, and require them to take an oath.

The picture here is very much the same as in relation to bankruptcy, and is equally at odds with Hamburger’s thesis. The Commissioners made legally binding determinations of the issues that were central to the regulatory schema, viz, the determination of the parish boundaries, and allocation of the allotments that constituted the inclosure scheme. They also made dispositive decisions on a host of more ancillary matters. They exercised powers that Hamburger would regard as judicial. The Commissioners’ determinations were subject to appeal insofar as provided for in the statute, and also to judicial review by the ordinary courts.

There is no hint that this regulatory model was regarded as extralegal or constitutionally illegitimate by Parliament. The 1801 legislation in large part consolidated consistent practice of earlier local statutes enacted over many years, and thus constituted legislative affirmation of this grant of power to the Commissioners. This general schema

---

<sup>189</sup> *Id.* at s. 35.

<sup>190</sup> *Id.* at s. 17.

<sup>191</sup> *Id.* at s. 24.

<sup>192</sup> *Id.* at s. 29.

<sup>193</sup> *Id.* at s. 39.

<sup>194</sup> *Id.* at s. 35.

was continued, with some modification, in the Inclosure Act 1845,<sup>195</sup> although much inclosure had already been completed by this date.

There is equally no hint that the regime in this legislation was regarded as constitutionally illegitimate by the courts. There was statutory provision for appeal on certain points to quarter sessions, although this had to be done within thirty days after notice of the Commissioners' determination, and if this deadline was not met the determination was final and conclusive.<sup>196</sup> There was also more general recourse to the superior courts that exercised supervisory oversight through judicial review, either via direct actions using the prerogative writs or through collateral challenge via an action in tort, assumpsit or some related action. The courts would in the course of such actions interpret and apply the relevant inclosure statute in much the same way as in any other area.<sup>197</sup>

---

<sup>195</sup> Inclosure Act 1845, 8 & 9 Vict., c. 128. The salient differences for present purposes were that: some inclosures required direction from Parliament, s. 25; Commissioners embodied the conditions of a proposed inclosure in a Provisional Order, and sought the consent of interested parties, s. 27; the Commissioners continued to determine disputed parish boundaries, but the rules for contesting this determination were altered, s. 39, although it is also noteworthy that if a person sought to contest the Commissioners' determination by, for example, challenge before a jury, the challenger would have to enter security for costs and bear the costs if the action failed, ss. 42-43; it expanded on previous legislation by making provision for the completion of previous inclosures that were imperfect in some respect, ss. 154, 157.

<sup>196</sup> *Id.* at ss. 56-57.

<sup>197</sup> See, e.g., *Rex v. Inhabitants of Flecknow* (1758) 1 Burr. 461; *The King v. The Justices of Wiltshire* (1811) 13 East 352; *The King v. The Commissioners for Inclosing Land in the Parish of Dean* (1813) 2 M. & S. 80; *The King v. The Justices of Lancashire* (1818) 1 B. & Ald. 630; *The King v. The Inhabitants of St Mary in Bury St. Edmunds* (1821) 4 B. & Ald. 462; *The King v. The Inhabitants of Washbrook* (1825) 4 B. & C. 732; *Logan v. Burton* (1826) 5 B. & C. 513; *Doe d. Sweeting v. Hellard and Griffiths* (1829) 9 B. & C. 789; *Smith v. Jones* (1830) 1 B. & Ad. 328; *The King v. The Commissioners under the Cockermouth Inclosure Act* (1830) 1 B. & Ad. 378; *The King v. The Inhabitants of Hatfield* (1835) 4 Ad. & E. 156; *Turner v. Blamire* (1853) 1 Drewry 402; *Grubb v. Inclosure Commissioners for England and Wales* (1861) 9 C.B. (N.S.) 612; *Church v. Inclosure Commissioners* (1862) 11 C.B. (N.S.) 664; *Edison v. Brooks* (1864) 17 C.B. (N.S.) 606.

#### 4. Turnpike Trusts

Roads were essential for travel, commerce and the maintenance of order.<sup>198</sup> The King's highway sounded suitably grand, but was much less so in reality. The roads of the sixteenth and seventeenth century were often in a parlous state, more especially in winter. It was the parish that bore the burden of maintenance at common law, and this obligation was enshrined in statute in 1555.<sup>199</sup> Failure to comply could lead to indictment and fines. The strains of this system led to the emergence of turnpike trusts, which levied tolls for road usage. The numbers are noteworthy in this respect, there being over 11,000 such trusts by 1835, which were only exceeded in number by the "immemorially ubiquitous"<sup>200</sup> parish and manor.

Increased traffic was manifest in the proliferation of various forms of wheeled vehicle, which was the natural consequence of growing commerce and greater industrialization. This led to recourse to turnpike trusts, whereby a body endowed with statutory authority would levy a toll that was meant to be used to maintain the road. There were thousands of separate statutes, but their format was remarkably uniform. They authorized a turnpike trust for a specific stretch of road, which could levy tolls on particular kinds of traffic, the tariff often being set out in considerable detail in the enabling legislation. There were provisions empowering the trustees to erect toll houses, engage officers, and purchase material for road maintenance. They could in certain instances buy land compulsorily to widen roads, and "close-up ancient highways, divert others at their pleasure and compel everyone to travel by the new road they had constructed."<sup>201</sup> These provisions were complemented by those limiting encroachment by adjacent land. The powers were normally granted for 21 years, but it was standard practice to apply for a new statute at the end of the term, thereby making such trusts semi-permanent. It was common practice for the trustees to farm out the practicalities of toll collection. This was in effect a form of contracting out, whereby the trustees would sell the right to collect the toll to another entity, the latter bidding what it thought the

---

<sup>198</sup> SIDNEY AND BEATRICE WEBB, *STORY OF THE KING'S HIGHWAY* (1913).

<sup>199</sup> Highways Act 1555, 2 & 3 Philip and Mary, c. 8.

<sup>200</sup> SIDNEY AND BEATRICE WEBB, *supra* note 24, at 152.

<sup>201</sup> *Id.* at 165.

asset was worth, with the incentive thereafter to profit by being zealous in collection of the tolls.

The Turnpike Roads Act 1773<sup>202</sup> was the first general legislation in this area. It contains a wealth of detail, inter alia: making provision for the tolls that could be charged; specifying that weighing machines could be used to ascertain additional tolls for excessive weight in relation to different kinds of vehicle; enacting regulatory provisions against narrow-wheeled vehicles that did most damage to roads; making rules to prevent users evading tolls; establishing the procedures for farming out collection of tolls; detailing the penalties for those whose land encroached closer than a certain distance to the center of the road; specifying the offences for those who willfully damaged highway structures, toll gates and the like; stipulating the behaviour of highway users, the rationale being that “many bad Accidents happen, and great Mischiefs are frequently done upon the Streets and Highways, being Turnpike Roads, by the Negligence or wilful misbehaviour of Persons driving Carriages thereon”,<sup>203</sup> and requiring each wagon used for hire to have the owner’s name painted thereon, “for the better Discovery of Offenders against this Act.”<sup>204</sup> There was a further general legislation in the form of the Turnpike Roads Act 1822.<sup>205</sup>

Philip Hamburger would have to decide how to characterize this body of law and the thousands of administrative determinations made thereunder. It is a zero sum game. He might regard it as an instance of extralegal adjudication that was constitutionally illegitimate. He might alternatively draw on his qualification to the previous hypothesis and classify this as not being truly “judicial” in accord with his definition set out above,<sup>206</sup> and contend that it should rather be regarded as an instance where the binding obligation is said to flow from the “law” rather than any determination made by the administration, more especially given the level of detail as to tolls and the like contained in the empowering legislation.

---

<sup>202</sup> 13 Geo. 3, c. 84.

<sup>203</sup> *Id.* at s. 40.

<sup>204</sup> *Id.* at s. 68.

<sup>205</sup> 3 Geo. 4, c. 126.

<sup>206</sup> See above, p.



The reality is that neither characterization captures the way in which administrative decisions were treated in this area. There is no evidence politically or legally to suggest that the determinations made by turnpike trustees as to tolls and the like were regarded as extralegal or constitutionally illegitimate. There was to be sure disquiet concerning the way in which some trusts operated, but that was for entirely different reasons, the principal malaise being that trustees would not uncommonly borrow money on the security of future tolls, and then be unable to repair the highway because the toll receipts were consumed by interest on the mortgage.

The alternative characterization is, however, equally misleading. The decisions made by toll keepers were legally binding, subject to any appeal to the justices of the peace, or to appeal/review by the superior courts. They were legally empowered to levy the tolls pursuant to the legislation, and their decisions were legally valid and enforceable unless and until proven to the contrary. They did not need to administer oaths or summons, because they controlled access to a commodity, the highway, valued by others. This did not diminish the legally binding nature of their determinations, which was reinforced by factual reality. The trader did not get to carry his goods from Oxford to Woodstock unless and until he had paid the toll. The fact that he might be proven correct if he challenged the toll thereafter would not diminish the commercial importance of getting his goods to market on time, or meeting a contract deadline. The difficulties with the related argument, to the effect that the toll keeper was merely executing the law and not making any binding determination were adumbrated above.<sup>207</sup> These difficulties are thrown into sharp relief by the case law. It reveals very many legal cases fought concerning the meaning of supposedly straightforward terms in the turnpike legislation. The law reports are replete with disputes as to decisions involving turnpikes, whether in the form of direct challenge via the prerogative writs, or indirect challenge via a collateral challenge in tort, assumpsit, debt or money had and received.<sup>208</sup>

---

<sup>207</sup> See above, p.

<sup>208</sup> See, e.g., *The King v. The Inhabitants of Denbigh* (1804) 5 East 333; *Ridge v. Garlick* (1818) 8 Taunt 424; *Osmond v. Widdicombe* (1818) 2 B. & Ald. 48; *The King v. The Trustees of the Cheshunt Turnpike Road* (1833) 5 B. & Ad. 438; *The King v. The Justices of the West Riding of Yorkshire* (1834) 5 B. & Ad. 1003; *Regina v. Inhabitants of Preston* (1838) 2 Lewin 193; *Jewel v. Scott* (1855) 6 El. & Bl. 350; *The*

## CONCLUSION

There will be no attempt to summarize the entirety of the preceding argument. It is nonetheless important by way of conclusion to make a broader point. Any reader of Philip Hamburger's book cannot but come away with the strong impression of the administrative state as something dangerous and alien, forever prone to the dangers of "extralegal rulemaking and adjudication", subverting thereby important values. This is a mistaken depiction of the modern administrative state, but what is apposite for the present analysis is that it misconceives the administrative state and the way in which it was perceived during the seventeenth century and thereafter, the very time period on which he draws when using material from England. His analysis is shot through with a vision of administration and its more general place within societal ordering that ill-accords with political or legal reality during this time frame.

Consider the political reality. There was, as indicated earlier,<sup>209</sup> a very great deal of regulation from the fifteenth century onwards in diverse areas, including trades such as leather, alcohol, iron and cloth; wages; bankruptcy; poverty, unemployment and vagrancy; land use; morality; police powers broadly conceived; tax; flood defences; highways; and safety. Each society decides on the scope of regulation and from the fifteenth century onwards this was broadly conceived. The people were accustomed to regulation, and this included politicians and lawyers. It shaped the very world they lived in. There would inevitably be some legislation that some individuals disliked, but this does not alter the fact that society enacted legislation that was regarded as for the public good, whether that was in relation to, for example, poverty, flood protection, bankruptcy

---

Queen v. The Trustees and Commissioners of the South Shields Turnpike Road (1854) 3 El. & Bl. 599; Beckett, Baronet v. Upton (1855) 5 El. & Bl. 629; Gerrard v. Parker (1857) 7 El. & Bl. 497; Veitch v. Trustees of the Exeter Turnpike Road (1858) 8 El. & Bl. 986; The Trustees of the Sunk Island Turnpike Road v. Surveyors of the Highways of the Parish of Patrington (1861) 1 B. & S. 747; Warmby v. Deakin (1863) 14 C.B (N.S.) 124; Longland v. Doling (1865) 3 H. & C. 564.

<sup>209</sup> See Part I B.

or factories. The legislation was often amended, refined and reaffirmed over three hundred years.

The regulatory legislation perforce had to be administered and the legislature used a plethora of institutional forms during this time, with justices of the peace, commissioners and inspectors assuming particular importance. It is inevitable that those who are at the sharp end of delivering administration will be subject to criticism from those affected, and that was as true in the seventeenth century as it is in the twenty first. The administration was not, however, regarded as some unnatural interloper, nor was it viewed in terms of some dangerous administrative leviathan. To the contrary, if you wanted flood protection, then someone had to do it, and if you wanted to control the ills resulting from bankruptcy then the legislative schema had to be administered.

The legislation duly empowered those charged with administration and they could, as shown in the previous analysis, make rules and binding individual determinations. There was no sense in which it was generally thought that the seventeenth century Parliament was doing anything “extralegal” or “constitutionally illegitimate” when granting such power, nor did people equate such statutory grant of power as equivalent to claims to prerogative regulatory or judicial power made by the King for himself. It was readily acknowledged that the administrators should be held accountable, and this was through an admixture of political, legal and administrative mechanisms, the precise blend of which would vary from area to area.

Consider now the legal reality. The courts rightly controlled claims to prerogative rulemaking and judicial power made by the King, and they would not have tolerated analogous claims made by any branch of the administration. The administrative state was, however, based on legislative authority duly accorded by Parliament to attain a specific statutory mandate. The courts insisted that a central facet of the rule of law was that the administrators should be susceptible to judicial review, and developed doctrinal precepts to review issues of law, fact, discretion, process and the like.<sup>210</sup> The legislature might

---

<sup>210</sup> There are moreover difficulties with HAMBURGER’S analysis of specific aspects of UK judicial review during this period. This includes his assumptions concerning the extent of review for law and fact, and the extent to which courts would defer to agency expertise. Space precludes treatment of these issues within this article.

well have put in place statutory appeal mechanisms to lower courts, and these too would be duly enforced. This should not conceal the legal reality which was that when the administration made a decision within its assigned area of authority it was legally determinative unless and until contested successfully on appeal or review. This general schema was not regarded by the courts as “extralegal” or “constitutionally illegitimate”.

Yet even this gives only a partial picture of how the administration was seen by the courts. The truth is that judicial review from its very inception had a Janus perspective. The better known face was that set above, viz the way in which such review was used to ensure that the administrators were legally accountable. The lesser known face was the way in which judicial review actions were the forum through which courts enhanced the regulatory efficacy of the legislation that came before them. The claimant lost and the courts used the judicial review action, whether direct or collateral, to render the regulatory scheme more effective. This is a facet of modern judicial review, but it was evident from its very birth. This is readily apparent if you consider any area in which the courts judicially reviewed administration from the seventeenth century onwards.<sup>211</sup> This does not of course mean that the courts always got it right. They are, like all institutions, imperfect.

What it does reveal is the lack of fit between Hamburger’s analysis and what the courts were actually doing. Legislation that Hamburger would classify as embodying “extralegal adjudication” or “extralegal rulemaking” was not thus regarded by the courts, which interpreted the statutory grant of power so as best to attain the legislative objectives. This was true of all leading judges during this period, including Coke, Hale, Holt, Mansfield, Blackstone, Kenyon, Tenterden, Abbott, Blackburn, and Coleridge.

US courts and commentators will, as stated at the outset, rightly form their own view of the salience of Philip Hamburger’s arguments in the context of modern US administrative law, framed as it by the US constitution. They may be influenced in this respect by the English experience, given that it is central to Hamburger’s analysis. The purpose of this article is to set the record straight as to what the historical record actually reveals.

---

<sup>211</sup> CRAIG, *supra* note 5, at 62-5, 69-95.

