

**ADMINISTRATIVE LAW THEORY AND FUNDAMENTALS: AN
INTEGRATED APPROACH**

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Administrative Law Theory and Fundamentals: An Integrated Approach

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*New casebooks can be hard to justify. Many legal doctrines and their canonical cases are well established. But few fields are more in need of fresh thinking than administrative law. My new casebook, *Administrative Law Theory and Fundamentals: An Integrated Approach*, newly out with Foundation Press, seeks to provide such thinking. To my knowledge, it is the only administrative law casebook with the words “theory” and “fundamentals” in its title. And the reason might be that there is at present no coherent theory regarding the nature of administrative power. And the debates surrounding administrative power, on the part of both proponents and opponents of administrative government, have stalled.*

The new casebook proposes a theory of administrative power that better explains constitutional text and structure, as well as historical and modern practice, than competing accounts. It argues that there are “exclusive” powers that only Congress, the President, and the courts can respectively exercise, but also “nonexclusive” powers that can be exercised by more than one branch. This theory of “nonexclusive powers” allows students and scholars of administrative law to make more sense of—or better critiques of—administrative concepts such as delegation, quasi-powers, judicial deference, agency adjudications, the chameleon-like quality of government power, and of the separation of powers more broadly. This five-page introduction seeks to situate this theory within the existing administrative law scholarship.

In many respects, administrative law scholars today continue to have the same debates that occurred in the 1930s.¹ Opponents of administrative government today, as they did then, point to the Constitution’s tripartite scheme of separate powers and claim that administrative government violates this separation of powers.² They argue that

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¹ See Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 6 (2017) (“Although resistance to strong central government has a long legacy in the United States, the real forebears of today’s anti-administrative movement are not the Framers but rather the conservative opponents of an expanding national bureaucracy in the 1930s. Like today, the 1930s attack on ‘agency government’ took on a strongly constitutional and legal cast, laced with rhetorical condemnation of bureaucratic tyranny and administrative absolutism.”).

² For early examples of critics of administrative government on these grounds, see *id.* at 54-59. The progressive proponents of administrative government conceded that administrative government would violate the Constitution’s separation of powers. See, e.g., FRANK J. GOODNOW, *POLITICS AND ADMINISTRATION* 21 (1900) (noting that the “principle of the separation of powers” developed into “an unworkable and unapplicable rule of law” for modern administrative government); *id.* at 23 (“Actual political necessity however requires that there shall be harmony between the expression and execution of the state will. Lack of harmony between the law and its execution results in political paralysis.”); JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 1 (1938) (“In terms of political theory, the administrative process springs from the inadequacy of a simple tripartite form of government to deal with modern problems.”); Woodrow Wilson, *Congressional Government*, in *WOODROW WILSON: THE ESSENTIAL POLITICAL WRITINGS* 141, 167

administrative agencies unlawfully combine legislative, executive, and judicial power by promulgating binding regulations governing individual conduct, enforcing those same regulations, and adjudicating disputes involving their regulations in their own tribunals.³ In the words of Philip Hamburger, who speaks for many critics, administrative law is therefore “unlawful.”⁴ To borrow the phrase of a recent and prominent law review article, these critics believe that our Constitution is an “anti-administrative” constitution.⁵

Proponents of administrative government, on the other hand, maintain that nothing at all is wrong with contemporary administrative law. They normally take one of three positions. The first quite plainly accepts the unconstitutionality of the administrative state as a matter of the Constitution’s original meaning. The advocates of this view argue that the Constitution’s separation of powers has come to be replaced with a different separation of powers: by the “surrogate safeguards” of the Administrative Procedure Act, which requires agencies to separate out rulemaking, enforcement, and adjudicatory functions.⁶ Gillian Metzger takes this argument further and claims that an administrative state, and

(Ronald J. Pestritto ed., 2005) (1885) (“As at present constituted, the federal government lacks strength because its powers are divided, lacks promptness because its authorities are multiplied, lacks wieldiness because its processes are roundabout, lack efficiency because its responsibility is indistinct and its action without competent direction.”); *id.* at 173 (“The Constitution is not honored by blind worship. The more open-eyed we become, as a nation, to its defects, and the proper we grow in applying with the unhesitating courage of conviction all thoroughly-tested or well-considered expedients necessary to make self-government among us a straightforward thing of simple method, single, unstinted power, and clear responsibility, the nearer will we approach to the sound sense and practical genius of the great and honorable statesmen of 1787.”).

³ See, e.g., Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1248 (1994) (“The destruction of this principle of separation of powers is perhaps the crowning jewel of the modern administrative revolution. Administrative agencies routinely combine all three governmental functions in the same body, and even in the same people within that body.”); *City of Arlington v. FCC*, 569 U.S. 290, 312-313 (2013) (Roberts, C.J., dissenting) (“Although modern administrative agencies fit most comfortably within the Executive Branch, as a practical matter they exercise legislative power, by promulgating regulations with the force of law; executive power, by policing compliance with those regulations; and judicial power, by adjudicating enforcement actions and imposing sanctions on those found to have violated their rules. The accumulation of these powers in the same hands is not an occasional or isolated exception to the constitutional plan; it is a central feature of modern American government.”).

⁴ PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014) (answering “yes” to the question posed by the book’s title).

⁵ Metzger, *supra* note 1.

⁶ See, e.g., Metzger, *supra* note 1, at 81 (“Agencies’ structures reveal further internal divisions and checks on administrative decisionmaking. Internal separation of functions and ALJ independence protections guard against biased decisionmaking by keeping agency prosecutors and adjudicators apart.”); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 622–25 (1984) (arguing that the APA’s separation of functions has come to replace the constitutional separation of powers); THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION 262 (Tushnet et al. eds., 2015) (“Later scholars have expanded the scope of the response by classifying the Administrative Procedure Act (APA), the fundamental charter of the U.S. administrative state, as a surrogate safeguard. On this view, the APA’s central notice-and-comment provisions create a kind of surrogate legislative process that allows for representation of all affected interests; APA provisions that ensure the independence of agency adjudicators, and that separate functions at lower levels of the agency, constrain politicized adjudication; and the APA’s expansive judicial review provisions enlist courts to monitor the executive on behalf of Congress and the citizenry.”).

many modern administrative law doctrines, are in fact constitutionally compelled in a world of broad delegations from Congress to agencies.⁷

The second position maintains that administrative law is not unconstitutional even as matter of the Constitution's original meaning. For example, Jerry Mashaw argues in his book *Creating the Administrative Constitution* that Congress has enacted open-ended statutes with broad delegations of power to the Executive since the beginning of the Republic.⁸ Thus, he argues, modern administrative government is neither novel nor unconstitutional, even when agencies promulgate rules and regulations pursuant to broad and open-ended statutory provisions. A variant of this argument by Cass Sunstein and Lawrence Lessig maintains that the Constitution distinguishes "administrative power" from executive power, and permits Congress to structure this administrative power much the way it does today, including by insulating administrative agencies from presidential direction and control.⁹

A third view, most relevant to the new casebook, maintains that it is simply too difficult even to classify most exercises of government power as "legislative," "executive," or "judicial."¹⁰ Scholars argue, for example, that when agencies promulgate rules, the agency is "implementing" the broader laws enacted by Congress—and implementing the law is tantamount to executive power.¹¹ In the view of these scholars, Congress can legislate in as broad and open-ended terms as it likes because in implementing Congress's statutes, administrative agencies will always be executing the law.

My new casebook, *Administrative Law Theory and Fundamentals: An Integrated Approach*, newly out with Foundation Press,¹² seeks to move past these standard debates

⁷ Metzger, *supra* note 1, at 87-93.

⁸ JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* 25 (2012) ("Government has grown larger, along with the country, but the general relationship of the political to the administrative—the degree to which elected officials make and control national policy and its implementation—has changed much less than we conventionally imagine."); *id.* at 90-99, 115, 187 (noting examples of broad delegations from Congress to the administration); *id.* at 290 (concluding that "[t]he notion that early statutes delegated little discretionary authority to administrators is simply a myth").

⁹ Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUMB. L. REV. 1, 35 (1994) (arguing for "another conception of the original understanding—one that imagines that the framers conceived of departments differently, and contends that the President would, by the Constitution, have directory power over only some of those departments").

¹⁰ See, e.g., M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 612 (2001) ("[T]here is no well-accepted doctrine or theory that offers a way to identify the differences among the governmental functions in contested cases. . . . The sporadic judicial efforts to identify the differences among the governmental powers are nearly universally thought to be unhelpful.").

¹¹ *Id.* at 618-19 ("For example, consider the granting of licenses. Congress authorizes the Federal Energy Regulatory Commission (FERC) to grant licenses when they are 'in the public interest' and sets forth a list of factors that indicate when the license would be in the public interest. In determining which of the various applicants should obtain a license, the FERC would be implementing that law. And, just as clearly, by granting or denying a license, the FERC would govern the rights and obligations of a third party [and thus would be legislating].") (footnote omitted) (quoting 16 U.S.C. § 797(e) (1994)). For a more recent account of this view, see Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 313-16 (2021).

¹² <https://faculty.westacademic.com/Book/Detail?id=337041>.

to a rethinking of administrative law. It does so by at least partly accepting as a fundamental premise that the administrative state, or at least an administrative state of some kind, is not only inevitable, but fundamentally constitutional. If we accept for present purposes the modern-day scope of federal power, then we must recognize that an administrative state of some kind is going to exist to “execute” all of the numerous laws that Congress enacts and that the President cannot possibly hope to execute alone. This will also include, and always has included, the power to fill in incidental details of legislative programs in addition to enforcing laws against private individuals.

But even more fundamentally, the casebook tries to make sense of the nature of government power and why it can be so hard to classify. When an agency promulgates a rule filling in the details of a legislative statute with binding effect upon individuals, is the agency executing the law, or exercising legislative power? The power at hand seems to partake in both kinds of power. When an agency issues a license under the standard that a license must be within the “public interest,” it is also exercising a power that seems to partake in legislative as well as executive qualities. And when the National Labor Relations Board creates a new rule of conduct in a retrospective adjudication against a private party, it seems to be exercising a power that partakes of all three qualities—legislative, executive, and judicial.

The casebook advances the debate over the nature of administrative power by recognizing that when administrative agencies undertake such activities, they are usually not combining legislative, executive, and judicial power in a way that violates the separation of powers. Rather, they are exercising powers that partake of multiple qualities. That is, when an agency promulgates a rule, it is not necessarily unlawfully combining legislative and executive powers; rather, it is often exercising a single power with both legislative and executive characteristics. It is exercising a single blended power rather than combining several otherwise separate powers.

The central theory driving the new casebook—the “theory” of the book’s title—is that much administrative power does not comprise unlawfully combined power, but rather this blended power, or what the casebook terms nonexclusive power. It terms such powers “nonexclusive” because more than one branch can exercise them. For example, when President Washington issued regulations respecting when the payments to the invalid veterans of the Revolutionary War would be made, and what proofs would be required of eligibility,¹³ he was enacting rules that could have been enacted by Congress itself. But Congress did not have to exercise such power. It could delegate such power, too—hence one could call it nonexclusive legislative power. Similarly, Congress can assign public rights cases to the courts, or to the Executive.¹⁴ When agencies adjudicate public rights

¹³ These regulations can also be viewed at An Act Providing for the Payment of the Invalid Pensioners of the United States, LIBR. CONGRESS (Oct. 13, 1789) <https://www.loc.gov/resource/rbpe.21201200/?sp=1> [<https://perma.cc/R29C-C9SU>].

¹⁴ The classic statement comes from the Supreme Court in 1856: Congress cannot “withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination,” but “there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of

cases, they aren't exercising the judicial power of the United States; rather, they are exercising a nonexclusive power that can, but need not be, exercised by the federal courts.

To be sure, not all power is nonexclusive. There are also exclusive powers: exclusive (or "strictly" or "purely") legislative, executive, and judicial power. Only Congress can exercise exclusively legislative power, whatever that happens to be. When it delegates its exclusively legislative power, it violates the Constitution. But, I argue, much modern rulemaking does not necessarily fall within that category. Similarly, some power is exclusively executive—such as prosecuting a case in court or exercising discretion left by law—and such power must be exercised or controlled by the President, and cannot be done by Congress or the judiciary. And some power—the power to decide cases under existing law affecting the traditional private rights to life, liberty, and property—are exclusively judicial and must be adjudicated in courts under *de novo* standards of review. To the extent the administrative state exercises exclusive powers inconsistent with the constitutional strictures for each type of power, it acts unconstitutionally. But much of what modern agencies do can be characterized as nonexclusive power.

This theory of nonexclusive and exclusive powers advances the field of administrative law. It explains why the concept of "quasi-legislative" and "quasi-judicial" power¹⁵ is appealing, but ultimately erroneous: because even if some power can be exercised by more than one branch, and thus appears legislative or judicial in form, it still must be exercised by at least one of the three named constitutional actors. It explains the "chameleon-like" quality of government power.¹⁶ It explains why Congress must authorize agencies to promulgate "legislative rules,"¹⁷ which are nonexclusive legislative power, but not interpretative rules or policy statements, which are simply executive power. It explains what Chief Justice Marshall meant when he wrote that Congress cannot delegate power that is "exclusively legislative" in nature, but it can delegate to other departments power that it could have exercised itself, namely, the power to fill in the details pursuant to a more general provision.¹⁸ The theory better explains *Chevron* deference,¹⁹ once it is acknowledged that in most *Chevron* cases agencies are not actually interpreting law, but rather making policy—that is, exercising nonexclusive legislative power.²⁰ And the theory explains why most, but not all, administrative adjudications are constitutional. In summary, administrative law is in need of a serious rethinking and clarification—and my new casebook lays the necessary groundwork. It takes formalism and originalism seriously, but concludes that much, although not all, of the administrative state may be constitutional after all.

judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." *Murray's Lessee v. Hoboken Land & Imp. Co.*, 59 U.S. 272, 284 (1856).

¹⁵ *Humphrey's Ex'r v. United States*, 295 U.S. 602, 624, 628-29 (1935).

¹⁶ *Bowsher v. Synar*, 478 U.S. 714, 750-51 (1986) (Stevens, J., concurring).

¹⁷ *Nat'l Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 674 (D.C. Cir. 1973).

¹⁸ *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42-43 (1825).

¹⁹ *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

²⁰ See Ilan Wurman, *The Specification Power*, 168 U. PA. L. REV. 689 (2020).