



ALBERT VENN DICEY AND THE IMMUNITY OF THE ADMINISTRATIVE STATE

Welcome to our December 2020 edition of Liberty Matters. In this month's forum Judge Glock has written our lead essay on the [A.V. Dicey](#). Dicey was an English legal scholar at Oxford in the late 19th and early 20th centuries who is best known for having popularized the phrase "the rule of law". Dicey's most famous work was [Introduction to the Study of the Law of the Constitution](#) and was widely read in Britain and America. As Glock notes in his essay, Dicey argued that rule of law, which he saw as equality before the law including those in power, only existed in two countries, Britain and the US. He contrasted those two nations with France where Dicey believed its administrative law tradition did not sufficiently hold government officials to the same standard as its citizens. Glock's essay is a powerful reminder of why Dicey is one of the most important legal scholars of the past 200 years and why his work has been so important in understanding how law and liberty are intertwined in the Anglo-American conception of legal justice..

ALBERT VENN DICEY AND THE IMMUNITY OF THE ADMINISTRATIVE STATE

by Judge Glock

Although most scholars' legacies survive only in footnotes, Albert Venn Dicey won the greater glory of surviving in a phrase: "the rule of law." Dicey popularized the term and made it not just an academic category but, eventually, a battle cry for politicians and policymakers of varied stripes.

The rule of law today means different things to different people. But Dicey's particular conception is most often used to critique the rise of the administrative state. Dicey contrasted the rule of law, which he identified with the ordered liberties of the English speaking world, with the French *droit administratif* or administrative law, which he considered both arbitrary and dangerous.

Yet Dicey's critiques of administrative law have little to do with contemporary concerns. In fact, he contrasted the rule of law not with rule-making regulators, with

whom he had some sympathy, but rather with the legal immunity of government officials. If one is allowed some liberties with his legacy, one can say that Dicey would be most exercised not by bodies like the Federal Communications Commission, but by the doctrine of "qualified immunity," which protects government officials from lawsuits. While the subject of qualified immunity is commonly debated in the realm of police procedure, there is almost no discussion of the immunity of other government officials such as regulators and inspectors.

This article considers Dicey's legacy for the study of modern administrative law, most especially in the United States, and most especially his concerns for equality before the law and the immunity of government officials from suit. These ideas remain perhaps Dicey's most important, yet underrated, contributions to scholarship.

Dicey's Rule of Equality before the Law

Although Dicey both popularized and systematized the idea of the rule of law, the idea had many parents. Dicey attained his fame as the Vinerian Professor of English Law at Oxford University, a seat he held from 1882 to

1909, but it was the first occupant of that chair, William Blackstone, who outlined an early conception of the rule of law. Blackstone wrote that the distinguishing fact about law is that “it is a *rule*; not a transient sudden order from a superior to or concerning a particular person; but something permanent, uniform, and universal.”^[1] This definition, with its focus on rule-bound consistency and universality, would almost perfectly mimic Dicey’s. Other versions of the idea came from the philosopher and economist John Stuart Mill, who used a version of the phrase in a famous debate about Jamaica Governor Edward Eyre, who had massacred Jamaican inhabitants in the midst of a popular revolt. Mill led the call for a prosecution of Eyre, arguing that “government by law” was at stake, and that the failure to indict a high official for such a crime, even when carried out under color of legal authority, disrupted the English legal order.^[2] Dicey shared Mill’s concern for Eyre’s actions, and made the prosecution of misbehaving government officials the heart of his work.^[3]



Sir William Blackstone

It was in Dicey’s most famous book, *Introduction to the Study of the Law of the Constitution*, published in 1885, that he first discussed what he called the “rule, supremacy, or predominance of law.”^[4] To Dicey, the rule of law had three fundamental attributes: first, the absence of arbitrary authority in the executive; second, the formal

legal equality of every person; and third, a constitution of some sort explaining how laws were made and applied.

Yet Dicey focused much of his work on the second attribute, equality before the law, and especially the idea that government officials, even when following orders, should be subject to normal legal procedures. When discussing the “principles of constitutional law,” he saluted “the greatest of all such principles, namely, that obedience to administrative orders is no defense” to suit or prosecution of executive officials.^[5] When discussing French law, he said the “most despotic characteristic of *droit administratif* lies in its tendency to protect from supervision or control of the ordinary law Courts any servant of the State, who is guilty of an act, however illegal, whilst acting in *bona fide* obedience to the orders of his superiors.”^[6] Dicey said the existence of legal remedies for citizens against any individual in government was essential, and claimed “This rule of law, which means at bottom the right of the Courts to punish any illegal act by whomsoever committed, is of the very essence of English institutions.”^[7]

Dicey’s focus on remedies against executive overreach emerged from his obsession with legal procedure, a focus he carried on from his hero, the utilitarian philosopher Jeremy Bentham, for whom, he noted “Procedure, dreary though the matter seems, was the favorite object of [his] intense attention and long study.”^[8] Bentham mocked most declarations of abstract rights, such as those in the *American Declaration of Independence*, because they did not also explain the procedure to enforce them.^[9] Dicey argued that unlike many formal and “rigid” constitutions that created individual rights, the English constitution took freedom as its baseline and focused instead on how to create procedures and remedies for protecting that freedom from invasion, including, of course, allowing lawsuits against officials.^[10] As his friend the legal scholar Henry Maine said, in England, “substantive law has the look at first of being gradually secreted in the interstices of procedure,” and that procedure included the ability to bring actions against anyone.^[11]

The other idea Dicey took from both Bentham and Maine was that the long history of the English

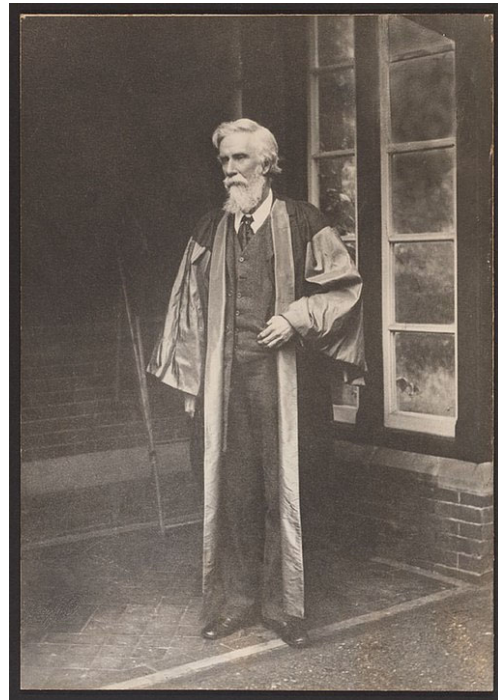
constitution demonstrated the substitution of “status for contract.”^[12] Status meant inherited privilege or privilege granted by government, while contract meant free and equal relations between peers, and in Dicey’s mind the constitution kept evolving to make contract sacrosanct. Dicey thus hated any laws that tended to take account of the status of individuals, such as the Landlord and Tenant Act of Ireland in 1870, which, he thought, “made the rights of Irish landlords and Irish tenants dependent upon status, not upon contract.”^[13] In his conception, there should be no separate “classes” under English law, just equal rights and remedies. He said that “In England the idea of legal equality, or of the universal subjection of all classes to one law administered by the ordinary Courts, has been pushed to its utmost limit.”^[14]

Equality before the law was thus the very centerpiece of Dicey’s idea of the rule of law. Sometimes he even replaced the phrase “rule of law” with the phrase “the rule of equal law.”^[15] Early in his career he claimed that “Half of the evils of modern England arise from the undue prominence of class distinctions.”^[16] Although at first directed against the aristocracy, he later focused his criticisms at the special exemptions given to some working-class groups. The law on which he trained his sharpest barbs was not one creating a new regulatory body, but the Trade Disputes Act of 1906, which, he said, “confers upon a trade union a freedom from civil liability...and in short confers upon every trade union a privilege and protection possessed by another person or body of persons.”^[17] Elsewhere he described the act as “legalized wrong-doing” which meant the “the rule of equal law is in England now exposed to a new peril.”^[18] Anything that moved the English constitution backwards from contract to status was therefore an inexcusable danger, and that would include giving executive officers a special status.

The English Idea of Separation of Powers

In the final degree, most questions of administrative law are questions about the separation of powers. Administrative law concerns how an executive branch handles powers that more often belong to either the legislative or judicial branches, such as when an executive

commission writes a “rule” or a law, instead of the legislature, or when that commission prosecutes a case through an administrative law judge instead of a typical judge in the judicial branch.



Albert Venn Dicey

Yet Dicey was suspicious of the whole idea of “the so-called ‘separation of powers’...” or, in other words, of preventing “the government, the legislature and the Courts from encroaching on one another’s province.” He thought this principle of rigid separation came from Monstequieu’s misunderstanding of earlier English procedure.^[19] In Dicey’s conception, the separation of powers meant the inability of the judicial branch to check the executive. As he said on the final page of his *Introduction to Study of the Law of the Constitution*, the “*separation des pouvoirs* [separation of powers] means, as construed by Frenchman, the right of the government to control the judges.”^[20] In fact, he said that it is the “the ‘separation of powers,’ on which...the *droit administratif* of France depends.”^[21]

Such an understanding of the separation of powers still allowed Dicey to rail against the existence of executive-branch judges. His focus on procedure and remedies meant he understood that no matter what formal rights

were given individuals, if they were tried under judges controlled by the executive, government officials would typically triumph and individual citizens would typically lose. Thus one of the centerpieces of his attack on the *droit administratif* concerned the fact that all French government officials were tried by the Council of State, which was itself an arm of the French government.^[22] Dicey would be dismayed by the rise of what would later be known as “administrative law judges.”



Walter Bagehot

Today, however, most administrative law discussions concern not adjudications by administrative judges but the legislative power of administration commissions. Dicey had little anxiety about such semi-legislative bodies, and the reason comes from his belief in the ultimate sovereignty of Parliament. As one of his contemporaries, Walter Bagehot, wrote in *The English Constitution* (1867), the “secret of the English Constitution may be described as the close union, the nearly complete fusion, of the executive and legislative powers.”^[23]

Dicey’s belief in the total sovereignty of Parliament, which he considered the premier fact of the English constitution, meant he believed it could delegate its rule-making power to other bodies. The second chapter of his *Introduction to the Study of the Law of the Constitution*, in fact, is called “Parliament and Non-Sovereign Law-Making Bodies,” where he described how everything

from colonial governments to railroads could make “bye-laws” with all the force of law. In his conception, in fact, even judges, with their “judge-made law,” were just one type of delegated legislator under Parliament, whose specific expertise, as we would call it, should help filling out general principles set by Parliament.^[24] Thus the focus of modern administrative law critiques on rule-making (and in England what is called “delegated” or “secondary” legislation) would be of little concern for Dicey.^[25] Dicey wanted to protect judges’ independence to protect citizens in individual cases, but his background meant he would have less concern about the executive, or the judiciary, filling out the general rules created by the legislature.

Dicey’s Equal Rule of Law in America

Ironically, perhaps, considering Dicey’s focus on the English constitution, it was in America that Dicey’s work found its greatest reception. One reason is that Dicey often celebrated America’s constitutional heritage. Unlike Bagehot’s *The English Constitution*, which was an extended explanation of why Britain’s Parliamentary government was superior to America’s presidential and congressional government,^[26] Dicey’s *Introduction to the Study of the Law of the Constitution* located the “rule of law” in only two places, England and America, and he found his foil, instead, in France.^[27] Dicey celebrated the “spirit of legalism” that pervaded both England and America, and even, at one point, proposed a common citizenship for the two countries.^[28] At times, he even considered America as the very culmination of English legal ideas that were still incipient in his homeland. He claimed that the English Constitution “more truly than any other polity in the world, *except the Constitution of the United States*, [was] based on the law of the land” or the rule of law.^[29]

Yet Dicey’s love for America was balanced by his concerns for its “rigid” constitution, its “excessive” federalism, and its general focus on separation of powers. He in fact argued that divided powers inherent in federalism created the idea of separation of powers in government, since the “federal spirit...is carried much farther than is dictated by the mere logic of the

constitution. Thus the authority assigned to the United States Constitution is not concentrated in any single official or body of officials.”^[30] Some of Americans’ most trenchant modern critiques of administrative law, resting on a reading of the Constitution and its stark divisions of legislative, executive and judicial powers, simply did not interest Dicey.

Yet Dicey still has much to say on other aspects of the rise of the administrative state in America, and especially the rise of the immunity of executive officers, which in Dicey’s time was exceptional, but which today protects wide swathes of officials and official actions in America.

For most of American history, all government officers were subject to lawsuits for whatever they did, no matter who ordered their actions.^[31] It wasn’t until *Spalding v. Vilas*, in 1896, that the Supreme Court, seemingly out of whole cloth, suggested that some top officers of government could be immune from suits when performing their official duties.^[32] And it was only in the more recent, and half-remembered, case of *Barr v. Mateo* (1959), that the court extended that immunity to most officers of government. The novelty of the idea is indicated by the fact that this latter case elicited five separate opinions from five separate justices, all contesting its meaning.^[33] Eventually, the courts only slightly “qualified,” or limited, that immunity for police officers and lower functionaries.^[34] In 1988 the federal government passed the “Westfall Act” which gives all federal employees absolute immunity from tort law when engaged in their duties, and obliged the suits be transferred to the government. This gives all sorts of regulatory and other officials immunity even when performing plainly unconstitutional or illegal acts.^[35]

As the Westfall Act indicates, the old conception of officer liability at law has been replaced with a waiver of “sovereign immunity” of government from suit, and thus we decided to make the government liable even if individuals are not. But as Dicey said of a similar move at the time in France, which made the government increasingly subject to damages: “It ought to be noted that this extension of the liability of the state must, it would seem, in practice be a new protection for

officials.”^[36] This is indeed what has happened in America.

Today, issues of “qualified immunity” for police officers, mainly for shootings or killings of civilians, are at the forefront of the political debate. There have been consistent calls by legal scholars to remove this immunity, but few connect it to administrative law. ^[37] Even fewer discuss the problem that almost any government official is now immunized against lawsuit no matter what his or her actions, whether it be a housing inspector issuing a fine or an Occupational Safety and Health Administration official invading a premise. In each case, the officer can plead that they were just doing their duty and escape any possibility of sanction.^[38] Dicey would be horrified.

The goal of equality before the law, as Dicey framed it, remains a touchstone for those interested in both equality and liberty in America. Although the extent to which officers should be liable to suit is open for debate, we can legitimately be concerned about the ramifications of the current immunity. The full extent of Dicey’s ideas about the equal rule of law has been largely forgotten. Yet the importance of this idea is Dicey’s greatest gift, one which, if anything, carries more weight than when he first promulgated it back in 1885.

^[1] Blackstone’s *Commentaries*, vol. 1, 44.

^[2] Stefan Collini, *Public Moralists: Political Thought and Intellectual Life in Britain, 1850-1930* (New York: Oxford University Press, 1993), 146.

^[3] Dylan Lino, “The Rule of Law and the Rule of Empire: A.V. Dicey in Imperial Context,” *The Modern Law Review* 81, no. 5 (Sept. 2018): 750-751.

^[4] A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (Indianapolis: Liberty Fund, 1982), 110.

^[5] Dicey, *Study of the Law of the Constitution*, cxlviii.

^[6] Dicey, *Study of the Law of the Constitution*, 225.

^[7] Dicey, *Study of the Law of the Constitution*, 314.

[8] See A.V. Dicey, *Lectures on the Relation between Law & Public Opinion in England during the Nineteenth Century* (Indianapolis: Liberty Fund, 2007), 146.

[9] Dicey, *Law & Public Opinion*, 104 (“He dissected with merciless severity the patent fallacies of the Declaration of Independence.”) Later in his life Dicey came to have some sympathy for such declarations of rights. “For the doctrine of innate rights, logically unsound though it be, places in theory a limit upon the despotism of the majority,” and American Declaration was “after all a formal acknowledgement that sovereign power cannot convert might into right.” Dicey, *Law & Public Opinion*, 219.

[10] Dicey, *Study of the Law of the Constitution*, 118.

[11] Henry Maine, *Dissertations on Early Law and Custom* (New York: Henry Holt & Company, 1886), 389.

[12] See Dicey's desire to abolish all laws based on status. Dicey, *Law & Public Opinion*, 108.

[13] Dicey had the same complaint about workman's compensation act of 1897, *ibid*, 201. *Law & Public Opinion*, 187.

[14] Dicey, *Study of the Law of the Constitution*, 114

[15] Dicey, *Study of the Law of the Constitution*, 122.

[16] Richard Cosgrove, *The Rule of Law: Albert Venn Dicey, Victorian Jurist* (Chapel Hill: University of North Carolina Press, 1980), 31.

[17] A.V. Dicey, *Lectures on the Relation between Law & Public Opinion in England during the Nineteenth Century* (Indianapolis: Liberty Fund, 2007), 373.

[18] Dicey, *Study of the Law of the Constitution*, lviii and 122.

[19] Dicey, *Study of the Law of the Constitution*, 219-220.

[20] Dicey, *Study of the Law of the Constitution*, 229. Like Philip Hamburger today, Dicey also thought administrative law looked a lot like the tendencies of the Tudors and Stuarts. He observes that “the prerogative maintained by Crown lawyers under the Tudors and the Stuarts bear a marked resemblance to the legal and administrative ideas which at the present day under the

Third Republic still support the *droit administratif* of France.” *Ibid*, xxvii. Philip Hamburger, *Is Administrative Law Unlawful?* (Chicago: University of Chicago Press, 2015).

[21] Dicey, *Study of the Law of the Constitution*, 138-139

[22] Dicey, *Study of the Law of the Constitution*, 235-240.

[23] Walter Bagehot, *The English Constitution*, 2nd ed. (London: Chapman and Hall, [1867] 1873), 48.

[24] Dicey, *Study of the Law of the Constitution*, 18, See also, *Ibid*, 36. For his later concerns, however, at the broad discretion given by enactments to some officials, such as Insurance Commissioners, to make new rules, see Dicey, *Law & Public Opinion*, 369.

[25] Michael Taggart “From ‘Parliamentary Powers’ To Privatization: the Chequered History of Delegated Legislation in the Twentieth Century,” *University of Toronto Law Journal* 55 (2005): 575-627

[26] See Bagehot, *English Constitution*

[27] Indeed, many of Dicey's ideas came from conceptions of France in Alexis de Tocqueville's work, where which contrasted the freedom of America with the failures of the ancient regime in his own country. See Bernard J. Hibbets, “The Politics of Principle: Albert Venn Dicey and the Rule of Law,” *Anglo American Law Review* 23 (1974): 10. Dicey once cited Tocqueville as the most important influence on his thinking. Cosgrove, *Rule of Law*, 13.

[28] Lino, “The Rule of Law and the Rule of Empire,” 748-749; Cosgrove, *The Rule of Law*, 198.

[29] Dicey, *Study of the Law of the Constitution*, 314. Emphasis added.

[30] Dicey, *Study of the Law of the Constitution*, 83. See also, “Federalism means the distribution of the force of the state among a number of co-ordinate bodies each originating in and controlled by the constitution.” *Ibid*, 87.

[31] For discussion of history of suits against government officers, including in equity, see John Harrison, “*Ex Parte Young*,” *Stanford Law Review* 60 (2008): 989-1022.

[32] Spalding v. Vilas, 161 U.S. 483 (1896)

[33] Barr v. Mateo, 360 U.S. 564 (1959)

[34] Graham v. Connor, 490 U.S. 386 (1989)

[35] See, e.g., Osborn v. Haley, 549 U.S. 225 (2007).

[36] Dicey, *Study of the Law of the Constitution*, lxiii. Dicey ended his chapter comparing the rule of law and *droit administratif* by citing a French theorist stating a division between two types of countries, those where effort is to “shelter the liability of the State behind the personal responsibility of the servant.” The other where “every effort is made to cover the responsibility of servant of the State behind the liability of the state itself.” Ibid, 267.

[37] See, e.g., Ruth Marcus, “The Supreme Court Invented Qualified Immunity,” *Washington Post*, August 5, 2020, https://www.washingtonpost.com/opinions/the-supreme-court-invented-qualified-immunity-now-a-judges-blistering-opinion-shows-why-it-must-go/2020/08/05/f72778e6-d74a-11ea-930e-d88518c57dcc_story.html

[38] See *Ali v. Rumsfeld*, 649 F. 3d 762 (D.C. Cir 2011) on Westfall Act immunizing officers in War on Terror.

became the model for the kind of privilege that American labor leaders desired. Exemption from the antitrust laws and the abolition of the “labor injunction” came in the Norris-La Guardia Act of 1932. Federal promotion of collective bargaining came in the 1935 National Labor Relations (or Wagner) Act. (For a long time, Wagner’s bill was called the “Trade Disputes Act.”) The Supreme Court’s acceptance of the Wagner Act (hot on the heels of President Roosevelt’s threat to “pack” the Court) marked the beginning of the modern entitlement state. It is one of the shortcomings of Christopher Caldwell’s generally excellent book, *The Age of Entitlement*, that it does not recognize the link between this original entitlement act and the later Civil Rights Act that he says ushered in “the age,” particularly when the latter was in so many ways the product of the former.[1]

“HOWEVER, THESE ACTS SEEM TO BELIE DICEY’S ASSUMPTION OF A TRADITION OF “EQUALITY BEFORE THE LAW”—OR AT LEAST MAKES IT APPEAR TO BE MORE OF AN ASPIRATION THAN A TRADITION.”

INTEREST-GROUP LIBERALISM AND THE ADMINISTRATIVE STATE

by Paul Moreno

Judge Glock introduces a new (to me) insight into A. V. Dicey’s classic view of the constitutional problem of the administrative state. As Philip Hamburger has recently demonstrated, the ways that “administrative law” is unlawful are many. Glock via Dicey focuses on one fundamental problem: the immunity of government officers, which Dicey believed violated the bedrock principle of equality before the law.

Glock rightly points to the Trade Disputes Act of 1906, which gave British labor unions legal immunities, and which Dicey called “legalized wrongdoing.” This Act

However, these acts seem to belie Dicey’s assumption of a tradition of “equality before the law”—or at least makes it appear to be more of an aspiration than a tradition. American Federation of Labor President Samuel Gompers believed that England (his native country) more readily adopted union-empowering legislation like the Trade Disputes Act precisely because it was a class-based, aristocratic society. The *American* insistence on legal equality was the obstacle on this side of the Pond. As the great progressive legal scholar Roscoe Pound would say in 1958, under the Wagner Act unions were free to commits torts against persons and property, interfere with the use of transportation, break contracts, deprive people of the means of livelihood, and misuse trust funds, “things no one else can do with impunity. The labor leader and labor union now stand where the king and government . . . stood at common law.” Rather than a countervailing force to limit corporate power,

unions had themselves gained “a despotic centralized control.”

It is notable that the English Trade Disputes Act did not establish an administrative body like the National Labor Relations Board. Instead, British unions established a political party, the Labour Party, to look after union interests. In the United States, organized labor became the most important interest group in the mid-twentieth century Democratic party, but did not turn the Democrats into a Labor party. Indeed, many labor historians lament this fact, claiming that the American political and legal system blunted the potential for the labor movement to transform American capitalism, repeatedly “deradicalizing” the labor movement.



The radical potential of the American labor movement could be seen in the “sit-down strikes” of 1937. The strike against General Motors in Flint, Michigan, put them in the public eye, and provided the backdrop to President Roosevelt’s plan to “pack” the Supreme Court. It is not implausible that the Court’s dramatic reversal in April, 1937, upholding the Wagner Act, which almost everybody expected it to strike down, was in response to the sit-down strikes, to provide an alternative forum to resolve industrial disputes.

The American administrative law of labor highlighted the uniquely powerful place of courts and judicial review in the American administrative state. The Labor Board displayed all the constitutional pathologies of the twentieth century—the delegation of legislative power, its combination with executive and judicial power, and regulatory “capture.” Thus Congress significantly restructured the Board in the Taft-Hartley Act of 1947,

which was rather like an Administrative Procedure Act specifically for labor relations. The Board nevertheless remained “captured” by the unions. Law Professor Sylvester Petro described “how the NLRB repealed Taft-Hartley” in a 1958 book.^[2] Thus courts had to intervene to address some of their most salient abuses.

The Wagner Act made it illegal for employers to discriminate against union labor, and thus compelled employers to bargain collectively and exclusively with unions that themselves discriminated against blacks. (Ironically, the Wagner Act introduced the term “affirmative action.” If an employer was found to violate the act, the Board could compel it to “cease and desist... and to take such affirmative action... as will effectuate the policies of this act.”)^[3] The leading black civil rights organizations sought but did not obtain a non-discrimination provision in the Wagner Act. The courts began the reform of the Wagner Act. During World War Two the courts established that unions had a duty of “fair representation.” They did not have to admit blacks as members, but could not discriminate against them if they had the power to bargain for them. The Court recognized that the Wagner Act had given unions quasi-sovereign power. Though it is not usually seen as a “nondelegation” case, this was essentially what the Court did—recognized the enormous power that the Wagner Act had given to unions, and tried to hold them to a constitutional standard of equal protection.^[4] The Labor Board remained hostile to civil rights issues, having been “captured” by unions that discriminated against them to one degree or another.

During and after World War Two, presidential commissions were established to prohibit racial discrimination by government contractors. Their impact was limited by the fact that the contractors had to bargain with discriminatory unions. (Many of them did use union discrimination as a convenient cop-out.) In the 1960s the government became more insistent. John F. Kennedy introduced the term “affirmative action” into his 1961 executive order, and employers began to engage in what is sometimes called “soft affirmative action”—letting minorities know that opportunities were available,

advertising in black newspapers and recruiting at black colleges, adopting systematic hiring policies rather than relying on nepotism and the “old boys network.” The major change came in the “Philadelphia Plan” in the Johnson administration. First targeted at certain construction trades in particular cities, it was the first program to demand statistical profiles and “goals and timetables” for increasing minority employment.^[5] This program was in keeping with Johnson’s Howard University commencement address in 1965, which called for “not just equality as a right and a theory but equality as a fact and equality as a result.” But union resistance, and a challenge by the Comptroller General that the plan violated government procurement laws, led the Johnson Labor Department to suspend the plan.

“Affirmative action” was revived by President Nixon. He intervened in Congress to prevent a legal override of his executive order. His Labor Department defended the program in the courts. (Federal district and appellate courts approved of the Philadelphia Plan; the Supreme Court did not review their decisions.) He then extended the program to *all* government contractors. He was accused of cynically trying to “divide and conquer” his liberal opponents by pitting the labor and civil rights movements against each other. But the administration was responding to a genuine problem in the development of the American administrative state: the creation of one entitlement (collective bargaining) had collided with the establishment of another (nondiscrimination). University of Pennsylvania Law Professor Sophia Z. Lee has recently written about this problem (without understanding it) in *The Workplace Constitution: From the New Deal to the New Right* (Cambridge).

The bureaucratic-judicial construction of affirmative action in the government contracting program was largely replicated in the other major employment-discrimination program, the adoption of the “disparate impact” theory under Title VII of the Civil Rights Act of 1964. Many scholars have echoed policy historian Hugh Davis Graham’s observation that the system of racial preferences arose out of “a closed system of bureaucratic policymaking, one largely devoid not only of public

testimony but even of public awareness that policy was being made.”^[6] Race had always been the great exception to equality before the law, “the very centerpiece of Dicey’s idea of the rule of law.” But rather than address that anomaly, the New Deal administrative state established a system of *class*-based policies that exacerbated it.^[7] The controversial system of race-based affirmative action arose largely in response to that first round of administrative state-building, and has been since expanded to a host of other groups, taking the United States ever farther away from its ideals of equality before the law and rule of law.

^[1] I address this at length in the forthcoming article, “Administered Entitlements: Collective Bargaining to Affirmative Action,” *Social Philosophy and Policy*.

^[2] Sylvester Petro, *How the NLRB Repealed Taft-Hartley* (Washington: Labor Policy Association, 1958).

^[3] 49 Stat. 449 (1935), sec. 10(c).

^[4] The leading cases were *Steele v. Louisville & Nashville Railroad*, 323 U.S. 192 (1944) and *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 210 (1944). These cases arose under the Railway Labor Act of 1926, and were extended to the Wagner Act in 1953. See, generally, Paul Frymer, “Acting When Elected Officials Won’t: Federal Courts and Civil Rights Enforcement in the United States, 1935-85,” *American Political Science Review* 97 (2003).

^[5] There were minor adumbrations of this approach by some New Deal agencies in the 1930s, and near the end of the Eisenhower administration’s Committee on Government Contracts.

^[6] “The Great Society’s Civil Rights Legacy,” in *The Great Society and the High Tide of Liberalism*, ed. Sidney Milkis and Jerome M. Mileur (University of Massachusetts, 2005), 376.

^[7] Paul Moreno, “An Ambivalent Legacy: Black Americans and the Political Economy of the New Deal,” *Independent Review* 6 (2002).

DE-IMMUNIZING THE ADMINISTRATIVE STATE: A DICEYAN PRESCRIPTION WITH AN AMERICAN HERITAGE

by Joseph Postell

Judge Glock's essay on Albert Venn Dicey's legacy for modern administrative law helpfully draws our attention to an important yet neglected issue: the legal immunity of administrative officers. Although Dicey is usually cited as a critic of the administrative state in general, Glock argues that his concerns were narrower than those of today's "anti-administrativists,"^[1] whose concerns are predominantly focused on "rule-making regulators" instead of the legal immunity of administrative officials. "Some of Americans' most trenchant modern critiques of administrative law," he writes, "resting on a reading of the Constitution and its stark divisions of legislative, executive and judicial powers, simply did not interest Dicey."



Glock's essay commendably highlights the issue of administrative officers' immunity from personal liability – a modern departure from early American law. However, Dicey's rule-of-law principles apply to a wider array of legal doctrines and principles than Glock lets on. Those principles can be invoked against other administrative law doctrines that place administrative decisions beyond the reach of judicial decision. In my view, therefore, Dicey is even more relevant to modern administrative law than Glock's essay credits him for.

First, however, we must acknowledge that Glock is correct about the limits of Dicey's critique of the administrative state. Dicey was, as Glock notes, a believer in legislative supremacy, which led him to reject the American version of separation of powers and therefore to accept the delegation of legislative power to administrative agencies. Because he started with the "belief in the total sovereignty of Parliament," it followed that all legal authority could be vested by Parliament in other bodies at will. The American doctrine of the social compact, by contrast, starts with the belief that the people are sovereign, and that all government officials, including legislators, are creatures of the people. When the people vest legislative power in elected representatives, that power cannot be further delegated.^[2] Dicey's commitment to British constitutionalism caused him to overlook the problems associated with delegating legislative power to administrative bodies.

Still, Dicey's argument for the rule of law and his criticism of legal immunity of administrative officers is compelling. As a British legal theorist, Dicey understood the threat that executive control over judges posed to individual liberty. His fear of administrative power was rooted in British history, which witnessed assertions of prerogative power over courts by the Crown. His criticism of French *droit administratif*, as Glock explains, was rooted in its use of administrative tribunals, rather than independent courts, to try cases involving French government officials. This fact alone, however, suggests that Dicey's concerns about administrative power went beyond the specific question of officer liability. His concerns focused on the broader issue of subjecting administrative officers to the law and the jurisdiction of ordinary courts.

Defining the rule of law, Dicey famously explained that it meant "no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established before the ordinary courts of the land." Furthermore, he added, "every man...is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals."^[3] Therefore, Dicey boasted, "[w]ith us every official, from the Prime Minister down

to a constable or collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen.” Officers, therefore, are “in their personal capacity, liable to punishment.”^[4] Thus it is true that Dicey directly connected the rule of law to personal liability for government officials. But his principles extended more broadly to the legality of official action as such. If “every man is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals,” officers must be subject to judicial decision when legal controversy arises over the legality of their actions.

This principle of administrative accountability to ordinary courts should be understood as much broader in its application than the issue of personal liability. Early American legal history, which supports Dicey’s conception of the rule of law, illustrates this. In early America administrative officers were indeed personally liable for damages caused by their illegal actions.^[5] But administrators were held legally accountable in other ways as well. When administrators violated the law in the course of carrying out their responsibility, courts could review their decisions and reverse them, particularly when the administrators’ decisions were mandatory. Both at the state level (where most regulatory power resided in the 19th Century) and the national level, courts reviewed administrative decisions and invalidated them if they were not in accordance with law.^[6] Most significantly, courts (rather than bureaucrats) were often the administrators themselves. As Ann Woolhandler writes, “[b]efore the development of more bureaucratic forms of government in the nineteenth century, the primary impact of government on citizens was through the courts,” not administrative agencies.^[7] In sum, the legality of administrators’ decisions could be reviewed by courts generally, and legislatures would often make courts the administrators in lieu of executive officers. All of these arrangements promoted Dicey’s rule of law principles.



Alexis de Tocqueville

This aspect of early American administrative law was once well understood. Alexis de Tocqueville wrote extensively about it.^[8] Decades later, progressive legal theorists such as Ernst Freund and Roscoe Pound noted it as well.^[9] As Pound explained, “nothing is so characteristic of American public law of the nineteenth century as the completeness with which executive action is tied down by legal liability and judicial review.”^[10] In sum, one of the core principles of early American administrative law was that courts should be deeply involved in the administration of the law, including judicial review of the legality of administrative action. This was part of the design of early administration in America, in order to advance the same rule-of-law concepts that Dicey alluded to in his famous definition.

Consequently, Dicey’s argument for the rule of law can be applied to a variety of modern administrative law doctrines, beyond the issue of officer liability. For instance, perhaps the most famous principle of American administrative law is the “*Chevron doctrine*” which requires courts to defer to administrators’ interpretations of law. This doctrine is in serious tension with Dicey’s argument that the rule of law requires government officials to be “subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.”^[11]

Seen in this broader light, Dicey's insights about the rule of law implicate not only the specific issue of official liability, but the general immunity of the modern administrative state from law. The existence of administrative courts and administrative law judges, judicial deference to administrative decisions, and other issues, are all aspects of the modern state that threaten a Diceyan conception of the rule of law. Judge Glock's essay rightfully draws our attention to one of these issues, but Dicey's insights can be usefully applied more broadly to critique the broader legal immunity of the administrative state.

[1] This term, used to denote critics or skeptics of the modern administrative state, was originally coined in Gillian Metzger, "Foreword: 1930s Redux: The Administrative State Under Siege," *Harvard Law Review* 131 (2017).

[2] Joseph Postell, "The People Surrender Nothing?: Social Compact Theory, Republicanism, and the Modern Administrative State," *Missouri Law Review* 81 (2016): 1003-1022. Philip Hamburger also makes this argument in *Is Administrative Law Unlawful?* (Chicago: University of Chicago Press, 2014), 377-402, though he uses the language of "subdelegation" rather than social compact theory. A recent book by Gary Lawson and Guy Seidman, *A Great Power of Attorney: Understanding the Fiduciary Constitution* (Lawrence: University Press of Kansas, 2017), uses the language of agency law to make the same argument against delegation of legislative power to administrative bodies.

[3] A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 3d ed. (London: Macmillan Co., 1889), 175, 181.

[4] Dicey, *Law of the Constitution*, 181.

[5] Joseph Postell, *Bureaucracy in America: The Administrative State's Challenge to Constitutional Government* (Columbia, MO: University of Missouri Press, 2017), 17-18, 69-70, 89-90, 117-120.

[6] This point is contested in the historical scholarship. Jerry Mashaw argues that judicial review of administration was weak and deferential in the 19th

Century, in *Creating the Administrative Constitution: The Lost Hundred Years of American Administrative Law* (New Haven: Yale University Press, 2012), 18ff. Other scholars offer a different assessment than Mashaw. See Ann Woolhandler, "Judicial Deference to Administrative Action – A Revisionist History," *Administrative Law Review* 43 (1991), 199-209; Aditya Bamzai, "The Origins of Judicial Deference to Executive Interpretation," *Yale Law Journal* 126 (2017), 930-962.

[7] Woolhandler, "Judicial Deference to Administrative Action," 206. See also Joseph Postell, *Bureaucracy in America*, 15-16, 69-71, 89-92.

[8] See, for instance, Alexis de Tocqueville, *Democracy in America*, trans. Delba Winthrop and Harvey C. Mansfield (Chicago: University of Chicago Press, 2000), 67-79.

[9] See Ernst Freund, "The Law of the Administration in America," *Political Science Quarterly* 9 (1894): 403-425; Freund, "The Substitution of Rule for Discretion in Public Law," *American Political Science Review* 9 (1915): 666-676; Roscoe Pound, "Executive Justice," *University of Pennsylvania Law Review* 3 (1907)137-146.

[10] Pound, "Executive Justice," 139.

[11] See note 3, above.

QUALIFIED IMMUNITY: A QUALIFIED AMEN TO JUDGE GLOCK

by Michael Greve

I am totally on board with what I take to be one of Judge Glock's key points: the Administrative Law debate of recent decades has been overly concerned with administrative rulemaking (delegation, *Cherron*, and all that), and sadly inattentive to adjudicative and enforcement proceedings. I am likewise on board with the enterprise of re-thinking the law, so-called, of "qualified immunity." But the problem of what to do about official misconduct vis-à-vis citizens is quite

complicated. And I am not sure that A.V. Dicey was entirely right on that broader issue.

The basic framework of government liability operates against a very firm background of sovereign immunity. You cannot sue the sovereign—the government; “the state,” as continental jurists would say—without its consent. (You can in the U.S. sometimes sue a state without its consent. But that just shows that the states aren’t quite as sovereign as they often think they are.) Still, any decent country will want to provide legal redress for government misconduct. There are two basic ways of doing that.

“THE BASIC FRAMEWORK OF
GOVERNMENT LIABILITY OPERATES
AGAINST A VERY FIRM BACKGROUND
OF SOVEREIGN IMMUNITY.”

One is to permit suit against individual *officers*. That was the English system as Dicey described it, and it was our system throughout the 19th century and beyond. Importantly (we’ll see), those “officer lawsuits” were not claims directly under the Constitution. Rather, they were common law actions (for example, trespass), usually brought in state court, that ran against officers just as they would against private actors. The officer would then assert a defense that is not available to private parties: I acted on the lawful authority of the United States. The plaintiff would respond that the officer exceeded his authority (acted *ultra vires*) or else, under our system though obviously not England’s, that Congress had no business conferring that authority. That’s how the Constitution came into play in those days.

The alternative is to bar suits against officers and to permit suits against the government—to waive sovereign immunity, as we say. That was the French system as Dicey described it. And that, over a wide range, is our system now. The Administrative Procedure Act (APA) is a waiver of sovereign immunity. So is the Federal Tort Claims Act (FTCA). In most suits for money against a federal officer, the government will substitute the U.S. as

a defendant (and, if need be, remove the case to federal court).

Why was this difference so important to Dicey? The English system, he argued, embodied the rock-bottom rule-of-law principle that no man is above the law—not even an officer. In contrast, the French system of officer immunity, even and perhaps especially when coupled with relief against the state, encourages officers to go rogue. The argument has great appeal. But is it entirely right?

As to whether the French system encourages rogue conduct: that depends, no? One can easily imagine a legal system that provides prompt and effective redress against the government in an independent court, coupled with an internal administrative system of strict supervision and regularity. Presumably the government will *want* to create such a system, if only to protect the public fisc. Under that scenario it is hard to see the rule-of-law difficulty, except perhaps at a very high level of abstraction.

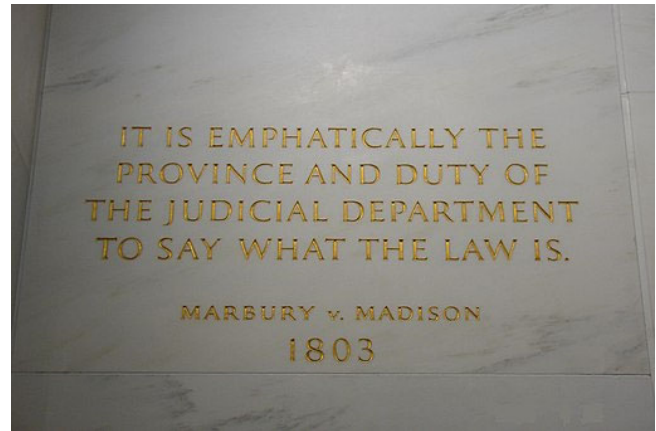
The officer lawsuit model, meanwhile, poses problems that eventually prompted its erosion.

One problem is that the fear of liability might prompt officers to be excessively lax in the performance of their duties. In the U.S. we addressed that problem by having tax collectors and customs agents work on a commission basis. How well did those rival incentives work? It’s hard to say, for want of empirical evidence. But on [Jerry Mashaw’s account](#)—no fan of rule-of-law obsessions he—it seems to have worked quite well. But this is not an abstract rule-of-law question; it is more of a public choice question. One has to think about the officials’ incentives, and it is hard to get them right.

A second question is what to do about innocent mistakes in the process of following official orders. A famous illustration is *Little v. Barreme* (1804). A congressional statute enacted during the quasi-war with France authorized the President to stop and seize American ships sailing to a French port. To prevent evasion, the Secretary of the Navy instructed his commanders that ships were often flying under a false flag (especially Denmark’s). Also, one cannot easily tell where to or from

folks are sailing out there on the open seas. So, commanders were instructed to exercise sound judgment and “do all that in you lies” to implement the true intent of the statute. Pursuant to that order Captain Little capturee the Flying-Fish, sailing under a Danish flag, and dragged her into Boston. Turns out she was actually Danish and was sailing *from* a French port, not *to* one. So the owners wanted their ship back, and they wanted damages—from Captain Little, who acted on direct orders and on all accounts on reasonable suspicion. Chief Justice Marshall’s opinion highlights the conundrum. Initially, he thought that “though the instructions of the executive could not give a right, they might yet excuse from damages,” at least for military officers. But then, his brethren convinced him that the instructions could not “legalize an act which without those instructions would have been plain trespass.” As Dicey recognized and emphasized, there can be no *respondeat superior* liability under the officer model, and no “I was following orders” excuse from liability. The point is to hold each and every individual officer responsible.

But that’s way harsh, no? What’s a conscientious officer like Captain Little to do when faced with financial ruin? Ask Congress for relief, that’s what. Conversely, what’s a plaintiff to do when the officer is judgment-proof? Ditto: ask Congress. Halfway through the 19th century Congress tired of the ceaseless petitions and created a (quasi-)judicial mechanism, which eventually became the Court of Claims. A rough century later Congress enacted the FTCA, for similar reasons: routinize the claims process; provide a federal forum. Both of these solutions have their problems, but the basic point is this. Congress migrated away from the officer suit model not because it threw in the towel on the rule of law but for perfectly intelligible reasons.



Far and away the biggest problem with officer suits is that they are feast or famine. If the officer acted *ultra vires* (or in derogation of a mandatory duty) you get full-scale judicial review and relief. In contrast, so long as the officer acted within his authority, you get *no* relief—no matter how arbitrary, oppressive, and unreasonable the exercise of discretion may have been. The reason is that “reasonableness” review means control of executive discretion, and judges who exert such control might as well *be* the executive. Need a case cite? *Marbury v. Madison*. *That’s* the logic. English law still follows it, although even there courts have begun—under the baleful influence of continental and especially EU jurisprudence—to probe the reasonableness and “proportionality” of administrative decisions. For our part we have enacted the APA, which instructs courts to set aside agency actions that are “arbitrary, capricious, or an abuse of discretion.” That, too, breaks with Dicey-an precepts. But again, you can see the basic impulse: as bureaucratic discretion expands, so does the perceived need for some sort of judicial check. And again, while the APA has its problems (lots of them), it’s hard to characterize it as a horrendous breach with the rule of law.

What, though, of the “qualified immunity” that precludes monetary relief unless the officer knew or should have known that he violated well-established rights? That is indeed completely made-up, and deeply problematic—but not for Dicey-an “no man above the law” reasons. Or, to speak more reverently, the reasons are more complicated than a projection of Dicey-an notions on contemporary law would lead you to suspect.

In a very real sense, qualified immunity is a product of an *excess* of law and of the Warren-Brennan Court’s irrational exuberance about rights. One manifestation was a fantastic expansion of forward-looking declaratory or injunctive relief against public officers in their “official capacity.” But that leaves cases where money is the only meaningful remedy and the claim has to run against the officers in their “individual capacity,” for sovereign immunity reasons. In the 1960s, the Court radically revamped the framework for “Section 1983” actions, which are the principal means of enforcing federal constitutional and statutory rights against deprivations “under color of [state] law.” Such actions, the Court held, could go forward even if the officers’ conduct was quite plainly prohibited by state law, and even if state law provided perfectly adequate legal remedies. In 1971, the Court created so-called *Bivens* actions for monetary relief against *federal* officers, directly under the Constitution—as if that instrument traveled with its own causes of action.



Having opened this barrel of worms, the Court soon backtracked. Wait: there can’t be *Bivens* actions when Congress has provided an alternative remedy, however meager. (At this point, *Bivens* actions are hopeless outside the Fourth Amendment context.) Wait: there can’t be “implied” rights of action against states or their officers. And, wait: to be held individually liable, for money, the officer should have known that he violated clearly established rights. Because otherwise it’s open season on officers. So as the rights expand, the remedies contract.

(This was Justice Scalia’s account of the matter. William Baude, in an important article cited by Judge Glock, has disputed it, but I think it is basically right as a matter of

judicial perceptions and intuitions, if not necessarily doctrine.)

I am no fan of the Jackson Pollock canvas the Court has painted over Section 1983 and the law of constitutional remedies. However, the robed ones are attempting to strike the same balance that the old law sought to strike: find some arrangement to protect individual rights, the rule of law, and effective government. (Dicey himself put the calculus that way.) Thus, if we want to re-examine the “qualified immunity” band-aid the Court has plastered on this *corpus juris*, we ought to examine the wound itself.

That wound is the conviction that the common law is somehow not good enough for a decent society. The Section 1983 cases strongly suggest that. *Bivens* says it *in haec verba*. If the Court could put those dogs out of their misery (as [two of my comrades in arms have urged](#)), the official immunity problem would largely take care of itself. Hit the officers for trespass, battery, and the like: no immunity. And then junk the made-up claims.

This Court, for good but mostly for ill, is not going to do any such thing, for two reasons. One, it is addicted to a policy of narrowing precedents into oblivion, instead of overruling them outright. Two, we are all originalists now, and so we must be hostile to anything that smacks of common law adjudication. (Rote cite to *Erie Railroad*.) The point remains though: we are not going to fix official immunity law in isolation. At an intellectual, academic level, one would have to rehabilitate common-law modes of thought and argument. At a practical level, one would have to find ways of putting this over on *soi disant* originalist judges.

Maybe in this theater, we should all be Diceyans after all.

RESPONSE TO MORENO, POSTELL, AND GREVE

by Judge Glock

I would first of all like to thank Professors Moreno, Postell, and Greves for their insightful responses to my essay. Each brings up important issues about Dicey's legacy and the history of American administrative law that I could not or did not explore in my own piece.

Moreno shows that labor issues were always at the center of the growth of the administrative state, both in terms of expanding administrative authority and expanding the immunity of certain actors. Postell demonstrates that Dicey's critique of the administrative state extended, and should extend, beyond just the issue of officer liability, and into the necessity of judges overseeing the legality of all administrative actions. Greve shows that the Supreme Court's jurisprudence on qualified immunity itself arose out of the Supreme Court's own ham-handed attempts to craft *sui generis* judicial remedies against government officials.

These pieces all question how any fundamental reform to the judicial review of administrative actions, such as that envisioned by Dicey, could be implemented in the modern age. In other words, is Dicey dead?



Only in fact, although not in spirit. There are indeed many lawsuits against government officers today, which Dicey would understand and appreciate. But, as Greves points out, these suits almost all use a single federal law known as Section 1983. This once forgotten part of the so-called Ku Klux Klan Act of 1871 was revived by the Supreme Court in the 1961 case of *Monroe v. Pape*. Any

debate about reviving Dicey's own ideas of judicial review and officer liability needs to tackle what this line of cases means for the control of official actions.

In *Monroe*, as in so many other cases of that era, the Supreme Court confronted the twin issues of pervasive racism and state disinterest in confronting it. That case involved Chicago police officers who invaded the home of a black family without a warrant and forced the parents to stand naked in their living room while ripping their home apart and shouting racial slurs. The court said that the family could use the long-neglected Section 1983 to sue those officers, based on the officers' invasion of the individuals' constitutionally protected rights under the Fourteenth Amendment. [1] Clearly, the *Monroe* family needed some sort of remedy, and the Supreme Court found one, or invented one.

Over the subsequent decades, small libraries have been filled on Section 1983 claims, and the Supreme Court has in turn created, expanded, and cabined rights under that section, including through the "qualified immunity" of officers doctrine. [2] This has been a jury-rigged process, largely untethered from legal text or history. [3]

But what if, instead of relying on the ever-expanding corpus of Section 1983 cases, we returned to the "common law" claims of trespass and tort against government officers, and pared back their immunity even while keeping the more meretricious claims out of court, as Greves suggests?

On the one hand, this would expand the ability of the courts to control executive action, and not limit them to specially "constitutionally protected" rights under the Bill of Rights and Fourteenth Amendment. On the other hand, it would limit the federal government's ability to uphold these rights against state governments, even as it allowed states to again enforce rights against federal officers.

Such a profound shift in jurisprudence would be unlikely in our lifetime. Yet infusing more of the law of officer liability and judicial review of government actions with common law precedents would not be impossible and

could find friends on both the right and the left of the courts.

For instance, instead of allowing suits based on whether the executive actions are “arbitrary and capricious,” for administrative agencies, or violate “clearly established law” for individual officers with qualified immunity, they could be judged on the same reasonableness standards as common law torts.

There is an understandable concern that such a shift to common law standards would make judges effective executives themselves, setting the limits on what officers could and couldn’t do based on their own conceptions of “reasonableness.” But such a shift would instead just revert back to an older understanding of the executive, as a branch which didn’t create immunities or rights, but which merely had authority over the employment of officers. This was indeed the case for most of American history, where judges acted as regular overseers of officers’ actions. Congress was the branch that really controlled such officers, and, although it could not fully immunize them, it could set the boundaries for acceptable rights and actions, and left it to courts to enforce those.^[4]

Sometimes, officer liability meant government employees would face the tough decision of obeying their superiors or obeying the courts. But Dicey recognized this dilemma as regards to military officers even in the 19th century. He said that the legislature could indemnify them, and the executive could pardon them.^[5] Post facto indemnity was thus a compliment, instead of a substitute, for officer liability.^[6]

We don’t have to make all executive officers answerable to courts for every action, as was common in the 19th century, but Congress and courts can at least allow lawsuits to constrain their near unfettered discretion today. Such a movement could make officer liability, and judicial review, a vehicle for once-common common law claims, and could help control administrative actions. It would make Dicey’s celebration of common law procedure and remedies look prescient. Equally important, such prescience would have strong precedents in our law and history.

^[1] *Monroe v. Pape*, 365 U.S. 167 (1961). The main debate among the members of the Court was whether, as Justice William Douglas for the majority stated, Section 1983 allowed suits against officers or individuals even if they had not been acting directly under state orders, or whether, as Justice Felix Frankfurter said in dissent, such suits had to be confined to actions that the state directly sanctioned, or for which there were no state remedies.

^[2] See, e.g., William Baude, “Is Qualified Immunity Unlawful?” *California Law Review* 106 (2018): 45-90

^[3] Section 1983 allowed lawsuits only against those acting “under color of” state laws, but in 1971 the Court, most definitely out of whole cloth, created so-called *Bivens* claims, against federal officers, using the same basic framework. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

^[4] See discussion in Karen Orren, “Officers’ Rights: Toward a Unified Field Theory of American Constitutional Development,” *Law & Society Review* 34, no. 4 (2000): 873-909.

^[5] A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (Indianapolis: Liberty Fund, 1982), 180-200, 406-410.

^[6] See the discretion given to the Secretary of Treasury in America in the 19th century to indemnify certain officers when performing their duties “without willful negligence or intention of fraud.” 4 Statutes at Large 597, the Remission Act of July 14, 1832.

IMPERIA IN IMPERIO

by Paul Moreno

It would indeed be ideal to return to the common law rule of holding government officials liable for their abuses, just as it would be ideal to return to a pre-Wagner Act regime of employment law. But the administrative state only moves in the opposite direction—it is, in economist Robert Higgs’ metaphor, a “ratchet.” It proliferates officers who are immune to or above the law. As Publius warned, “One legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding.”



Justice Robert H. Jackson

The administrative state’s extension of entitlements to privileged groups leads only to further privileging. The Wagner Act essentially turned unions into *imperia in imperio*. In 1941 Justice Robert Jackson expressed his dismay that unions had been exempted (by the Court, rather than by Congress, he claimed) from the antitrust laws.

This Court now sustains the claim of a union to the right to deny participation in the economic world to an employer simply because the union

dislikes him. This court permits to employees the same arbitrary dominance over the economic sphere which they control that labor so long, so bitterly and so rightly asserted should belong to no man.

In 1950, a Norfolk newspaper publisher was resisting unionization by using his “daughters, sons-in-law, nieces and nephews” to carry on publishing during a strike. C.I.O. Committee on Civil Rights member Boyd Wilson suggested that “A daughter’s head will bleed just like a head that isn’t a daughter’s. You simply have to apply that kind of tactics.” When the chairman of the committee objected, Wilson replied, “We put a picket line out there and that daughter, mama or nobody else is going in.” (It really was the “Committee on Civil Rights.”) Wilson expected that strikers could behave like the Chicago police in *Monroe v. Pape*. In 1958 Roscoe Pound, a leading progressive jurist who had by then repented, noted that unions were free to commit torts against persons and property, interfere with the use of transportation, break contracts, deprive people of the means of livelihood, and misuse trust funds, “things no one else can do with impunity. The labor leader and labor union now stand where the king and government . . . stood at common law.” And this was after the Taft-Hartley Act was supposed to have addressed union abuses of the 1930s.

So, when unions abused their quasi-sovereign power to oppress minorities, we got affirmative action to curb their abuse of *racial* minorities, at least. Black civil rights organizations opposed union-privileging legislation, but admitted that they would support it if unions included blacks—if their class interests were not cancelled out by their racial identity. The novelist and activist Charles Chesnutt testified before Congress in 1928 against an anti-injunction bill. He called it “class legislation pure and simple” but admitted that “it would be only human nature, if colored men... benefited equally by [it]... they might not oppose” it. He lost, but the Supreme Court imposed a duty of “fair representation” on unions starting in 1944. This makes it appear that the alternative to the administrative state is an imperial judiciary. We are seeing something similar today as the Court develops a

“religious exceptions” doctrine to administrative impositions as in the *Hobby Lobby* case. This is at best a second- or third-best outcome. It presents the possibility, noted by some political scientists and law professors, that the Madisonian Constitution, with its separation of powers and checks and balances—was designed to prevent the rise of the bureaucratic state but, once that state was established, also makes it hard to undo.

ON OFFICER LIABILITY

by Joseph Postell

In my response to Judge Glock’s initial essay, I suggested that Dicey’s rule-of-law principles could be usefully applied to a broader array of legal questions than that of officer liability. Dicey’s critique of the administrative state, therefore, is not as narrow as Glock’s initial essay argued. However, Glock seems interested exclusively in pursuing the specific question of officer liability, and so I’ll engage the conversation on that point.

Glock is correct that, with a few exceptions, critics of the administrative state have ignored this question, so it certainly merits closer exploration. (I’m proud to be among those exceptions, both in essays for *Law and Liberty* and in other work.^[1]) One striking feature of early American administration that many historians have seized upon is the effect of officer liability on the way that early customs laws were administered. In his superb history of early American administration, Jerry Mashaw notes that because administrators were personally liable for abuses in power, “being a federal administrative agent may have been legally quite treacherous.”^[2] He provides a few examples of specific administrators in early America who were embroiled in litigation as a result of the exercise of their responsibilities.^[3] In one of them, Jeremiah Olney, customs collector in Providence, Rhode Island in the early 1790s, was restrained in the application of the customs laws, even though Treasury Secretary Alexander Hamilton pressed him to be more aggressive.

This aspect of officer liability – its tendency to temper administrative power and render it accountable to

individuals and local communities – is to my mind its most advantageous feature. As Gautham Rao explains in his recent book on early American customs administration, customs officers were deeply influenced by local merchants, who “expected to have the power to shape how the custom house would function” in practice.^[4] In short, early American administration was closely tied to local communities, and national government officials knew they could not trample on the rights and the practices of those communities. The local communities shaped the behavior of the bureaucrats, not vice versa.

Officer liability presumably played an important, but not exclusive role in engendering this local orientation in national officers. This would be a commendable effect of reintroducing it, but it should also be considered as merely part of a broader set of reforms that are needed to restrain the administrative Leviathan.

^[1] Joseph Postell, “Should the Courts Tame Our Administrative State?” *Law and Liberty Forum*, August 1, 2013: <https://lawliberty.org/forum/should-the-courts-tame-our-administrative-state/>; Gary S. Lawson, “Deference to Whom?” *Law and Liberty Forum*, August 1, 2013: <https://lawliberty.org/forum/deference-to-whom/>; Postell, *Bureaucracy in America: The Administrative State’s Challenge to Constitutional Government* (Columbia, MO: University of Missouri Press, 2017), 17-18, 69-70, 89-90, 117-120.

^[2] Jerry Mashaw, *Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law* (New Haven: Yale University Press, 2012), 69.

^[3] Mashaw, *Creating the Administrative Constitution*, 69-73.

^[4] Gautham Rao, *National Duties: Custom Houses and the Making of the American State* (Chicago: University of Chicago Press, 2016), 10.

PATTERNS OF EVASION

by Michael Greve

Thanks to Judge Glock for his kind reply, and also to my fellow commentators. The fruitful exchange is rapidly turning into a Federal Courts mini-seminar. I teach this stuff, so I'm happy to have at it. I am very sympathetic to Judge Glock's project. But I fear that it will prove even more difficult than he expects. Intellectually, actually, it's not all that hard; practically, it's well-nigh intractable, at least in the near future.

“THIS PATTERN OF EVASION STEMS FROM A DEEP DISTRUST IN COMMON LAW THAT IMPEDES JUDGE GLOCK’S PROJECT AT EVERY TURN.”

Here is how this works: you teach one session on officer liability under Section 1983, post *Monroe v. Pape* (duly cited in Judge Glock's response). Then, you teach three or four sessions on the Supreme Court's work-arounds: he's not an officer. He couldn't have known. You cannot sue a state agency on a federal 1983 claim. Implied statutory rights can't be enforced via Section 1983. The offense isn't all that important. (A leading case is *Parratt v. Taylor*, involving a prison inmate's constitutional complaints over the guards' negligent displacement of his hobby kit, valued at \$23.50. It's right there in Hart & Wechsler's *Federal Courts*, starting on page 1016.)

This pattern of evasion stems from a deep distrust in common law that impedes Judge Glock's project at every turn. The cornerstone is Justice Brandeis's 1938 decision in *Erie Railroad*, which said that in diversity cases, federal courts must follow the rules of the state where they sit, not some federal common law: any federal rule of decision must come from Congress. As the late, great Grant Gilmore noted, that case cannot possibly mean what it seems to be saying. And sure enough, it doesn't. There are work-arounds for federal contracts; foreign affairs; labor unions; interstate disputes; federal institutions; maritime law; arbitration. Just as there are for

officer liability. Eight more FedCourts sessions. And here as with officer liability, it's improvisation all the way. Never a re-think.

Why this pattern? Part of the resistance to Dicey-an intuitions stems from a clause-bound, positivist version of originalism that treats *Erie Railroad* as the Holy Grail. It's the anti-*Lochner* (as Sam Issacharoff has put it). And just as *Lochner* was indelibly wrong, so *Erie* must be indelibly right because it stands for the proposition, supposedly, that federal judges can't make things up. To overcome that resistance, you'd need an intellectual re-commitment to what Jim Stoner calls [common law originalism](#). I take Judge Glock's project to partake of that mini-movement in originalist thought.

The other difficulty is generational. Many of our leading jurists had the great misfortune of attending Harvard Law School at the nadir of American jurisprudence, when Federal Courts ideology had become entrenched. They are not about to re-think that stuff. With intellectual effort, the problem may well fix itself over time. But for now, it is a *real* problem, especially for appellate lawyers. You have to recognize the rickety foundation of the law as it stands—and then litigate around it. With every one of those maneuvers, our improvised law, so-called, becomes further entrenched. And so for now, it is what it is.

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