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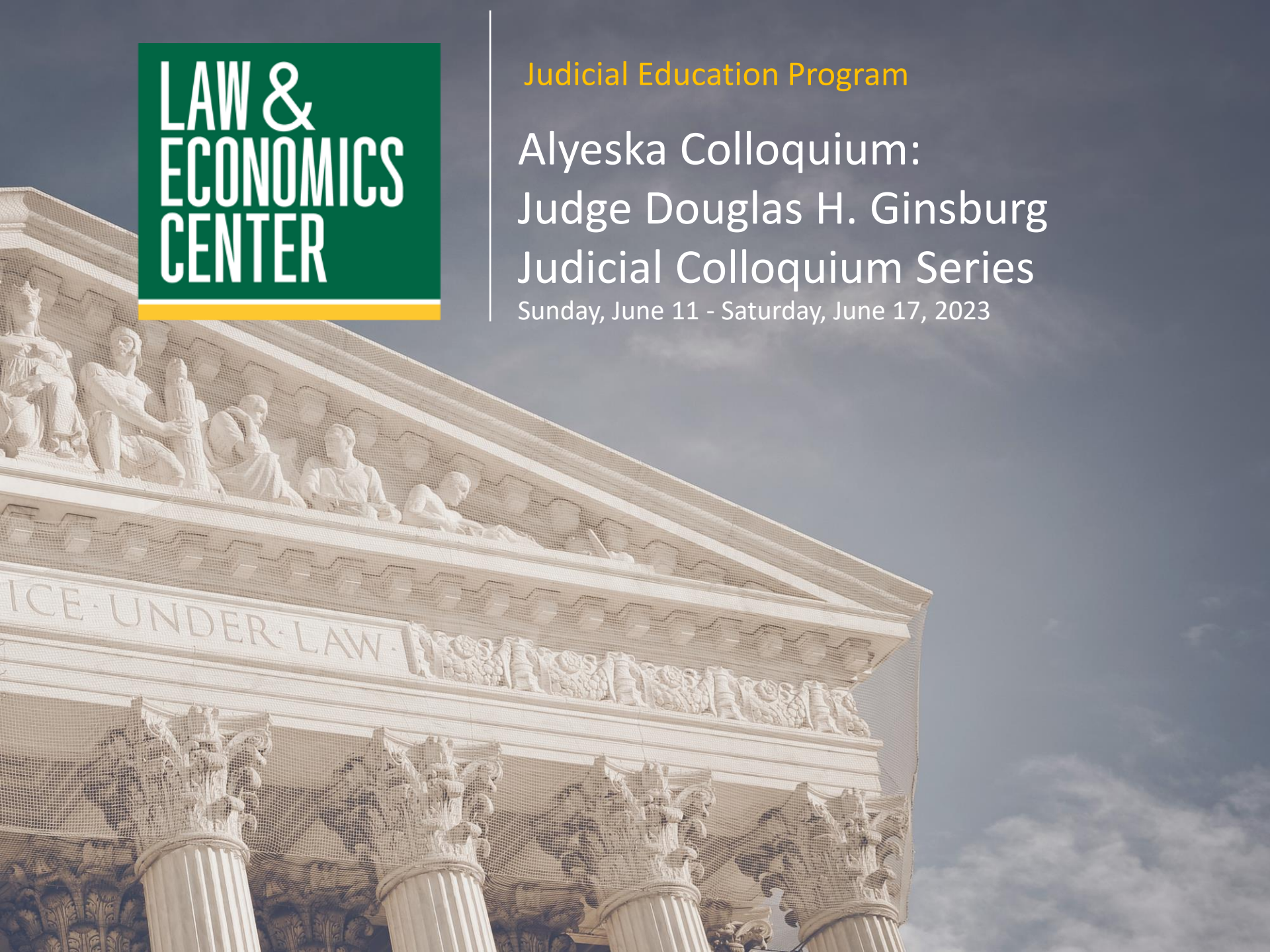
Judicial Education Program

Alyeska Colloquium: Judge Douglas H. Ginsburg Judicial Colloquium Series

Sunday, June 11 - Saturday, June 17, 2023



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Are *INS v. Chadha*, *U.S. v. Butler*, *Bowsher v. Synar*, and *Clinton v. City of New York* Among the Worst SCOTUS Cases Ever?

E. Donald Elliott, Florence Rogatz Visiting Professor of Law, Yale Law School; Distinguished Adjunct Professor of Law, George Mason University Antonin Scalia Law School; former Assistant Administrator and General Counsel,
US Environmental Protection Agency

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Summary of Argument – Judicial Methodology

- *Following Marshall C.J. in McCollough, I disagree with a strict textualist position that judges must attempt to divine from text alone the single correct meaning of constitution standards that were either unstated or left vague to allow later generations to adapt them to the needs of their times.*
- *Marshall's (in)famous line "it is a constitution we are construing" is often taken out of context and seems enigmatic.*
- *In context, it is clear that both text and purpose must*

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Marshall's interpretive method considers both text and purpose

"A Constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. …

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Marshall's interpretive method for new institutions considers both text and purpose

"…That this idea was entertained by the framers of the American Constitution is not only to be inferred from the nature of the instrument, but from the language. Why else were some of the limitations found in the 9th section of the 1st article introduced? It is also in some degree warranted by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget that it is *a Constitution* we are expounding." 17 U.S. at 407.

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Summary of Argument – Criteria for What Makes a Supreme Court Decision Really Bad

- Multiple criteria for badness that are incommensurable. See Mark J. Franck & Mark David Hall, *Supreme Failures from the Court*, Law & Liberty (Jan. 26, 2023).
- For present purposes, two criteria are particularly germane:
  1. Results in significant adverse effects.
     - ✓ Alternative history/backcasting.
  2. Difficult to correct in the light of experience,

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Summary of Argument – Criteria for What Makes a Supreme Court Decision Really Bad

- Many, but not all, of my "dirty dozen" of really bad Supreme Court decisions involved a common pattern:
  1. Upholding expansions of the power of the federal government, but
  2. Failing to require, or striking down, checks and balances, on the expanded powers.

See Randy E. Barnett, *The Wages of Crying Judicial Restraint* , 36 Harv. J.L. & Pub. Pol'y 925 (2013),

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Summary of Argument – Why Do Courts Approve Expansions of Federal Power But Not Related Checks and Balances?

- Most of my "dirty dozen" of worst decisions illustrate the "reverse agency problem" of judges declining to do what they are uncomfortable doing or find unpleasant. *e.g.* standing, deference, Alexander Bickel's "passive virtues."
- *Hypothesis*: In an era of judicial restraint ("we are all textualists now"), many judges are uncomfortable saying what is "proper" (*i.e.* "fit" "suitable" esp. re "established standards of fairness and justice"), or what Marshall called "the

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The One Way Rachet: Courts Strip Out Checks and Balances in the Name of Judicial Restraint rather than considedr whether they are "proper."

Coleridge (1819): "Every reform, however necessary, will … be carried to an excess, that will itself need reforming."

Roger Pilon (1991): "The judiciary, then, must not shirk its duty to secure [both enumerated and unenumerated] rights by deferring to the political branches in the name of 'self government.'"

Ilya Shapiro, *Against Judicial Restraint,* NATIONAL AFFAIRS (Fall, 2016), https://www.nationalaffairs.com/publications/detail/against-judicial-restraint

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Example 1 – INS v. Chada, 462 U.S. 919 (1983).

- Invalidated the "legislative veto" in over 200 statutes.
- Massive transfer of independence/power to the administrative state.
- Hollowed our Congressional staff supervision of agency decisions.
- *Queries*: Would it have been upheld if had been called "the conditional delegation"? Severability?
- See E. Donald Elliott, INS v. Chadha: The Administrative Constitution, the Constitution and the Legislative Veto, 1983 SUP. CT. REV. 125 (1984), https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=6113&context=fss_papers

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Example 2 – U.S. v. Butler, 297 US 1 (1936).

- Ruled that spending to "provide for the general Welfare" was a decision for Congress not the courts.
- Post *Butler*, no federal spending program has been held beyond federal power under the Constitution. *e.g. South Dakota v. Dole*, 483 US 203 (1987) (federally imposed 21 year old drinking age). But some "guardrails."
- See E. Donald Elliott, *Another Contender for the Worst Supreme Court Decision in History: How judges helped create the federal leviathan that reigns tod*ay. THE AMERICAN SPECTATOR (January 19, 2023),

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Example 3 – Bowsher v. Synar, 478 U.S. 714 (1986).

- Invalidated Graham-Rudman-Hollings process for controlling federal spending.
- See E. Donald Elliott, *Regulating the Deficit After Bowsher v. Synar*, 4 YALE J. REG. 317 (1987), https://openyls.law.yale.edu/handle/20.500.13051/4613

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Example 4 – Clinton v. City of NY, 524 U.S. 417 (1998).

- Invalidated the line-item veto.
- National debt has increased from $9 trillion to $32 trillion +.
- Compare state experience. Forty-four of the 50 U.S. states give their governors some form of line-item veto power.
- Created incentives for “must pass” omnibus bills written by leadership and the destruction of “regular order.”

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Example 5 – Undermining the APA

- The 1946 Administrative Procedure Act was written in general language (standards, as well as rules) *e.g.* "procedures require by law" in order to rein in a variety of future abuses by the Administrative State.
- However,, since *Vermont Yankee* (1978), courts have given the APA a narrow, cramped, literal construction, a category mistake.
  - Example: *PBGC V. LTV Corp.*, 496 U.S. 633 (1990).
- See E. Donald Elliott, *How the Supreme Court Blocked Congress's Effort to Redeem the Administrative State*, THE AMERICAN SPECTATOR (August 21, 2022), https://spectator.org/how-the-supreme-court-blocked-

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How the Court Failed to Adapt to the Administrative State and What It Should Do Now

E. Donald Elliott, Florence Rogatz Visiting Professor of Law, Yale Law School; Distinguished Adjunct Professor of Law, George Mason University Antonin Scalia Law School; former Assistant Administrator and General Counsel,
US Environmental Protection Agency

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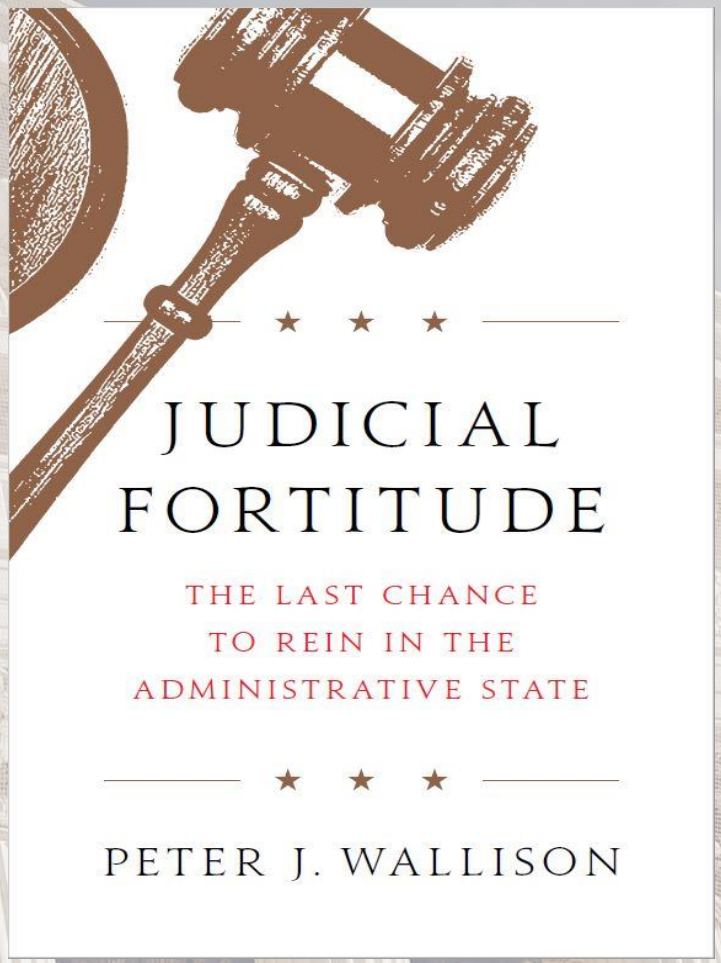
What is to be done now?



https://www.youtube.com/watch?v=AmnmG70qsx0

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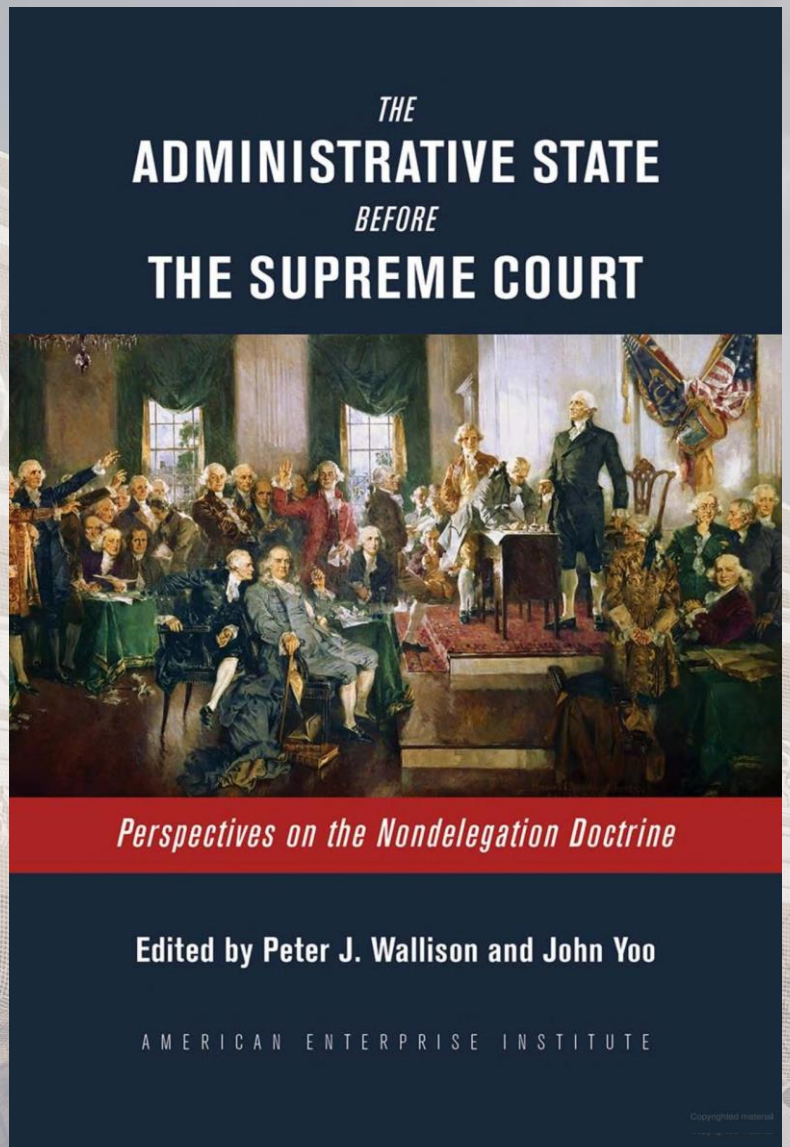

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What is to be done?

Philip Hamburger

Maurice & Hilda Friedman Professor Of Law, Columbia Law School

Philip Hamburger is a scholar of constitutional law and its history at Columbia Law School. He received his bachelor's degree from Princeton University and his J.D. from Yale Law School. Before coming to Columbia, he was the John P. Wilson Professor at the University of Chicago Law School. … Professor Hamburger's contributions are unrivaled by any U.S. legal scholar in driving the national conversations on the First Amendment and the separation of church and state and on administrative power.

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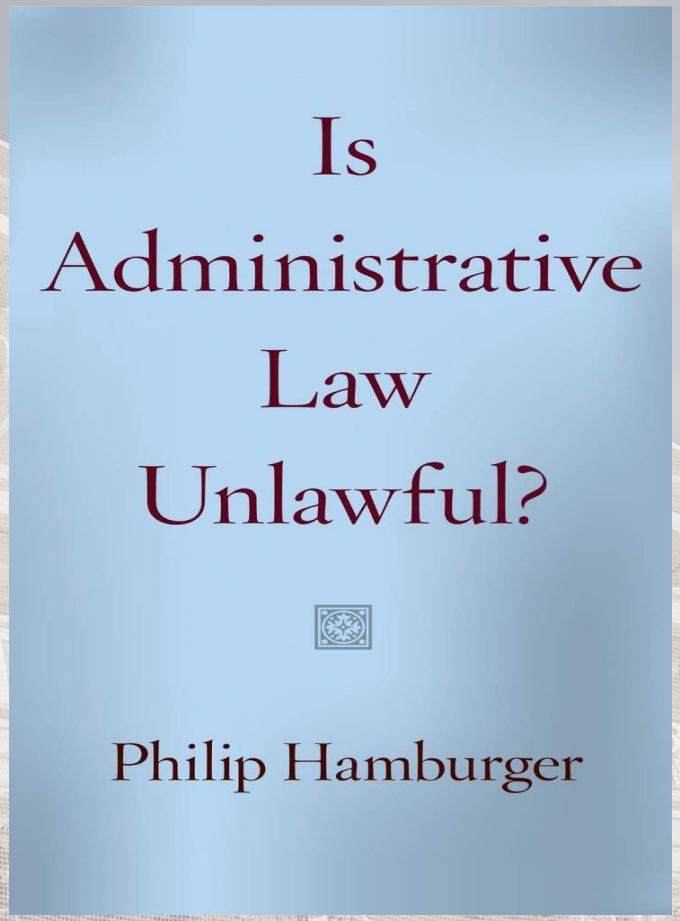
What is to be done now?



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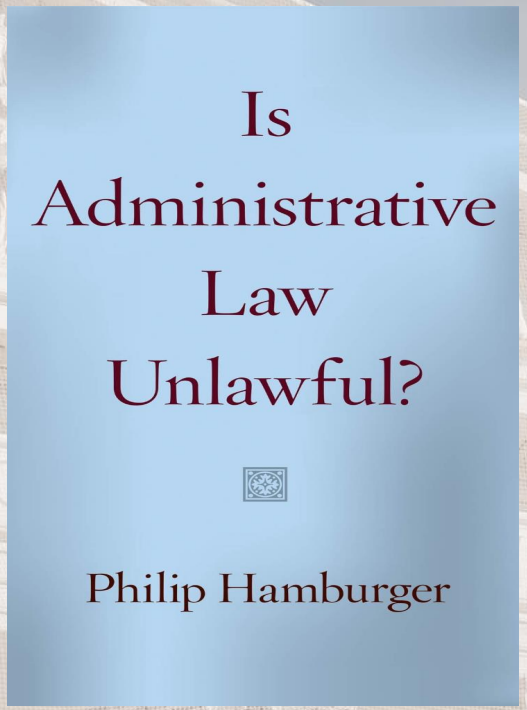

"This book is a wholesale indictment of administrative law in the United States. Philip Hamburger argues, at length and in great detail, that administrative law usurps both legislative and judicial authority. It is nothing less than the recrudescence of the royal prerogative – a form of absolute power. Much of contemporary governance has thus returned to what the English and American constitutional traditions had evolved to constrain. The relentlessly fundamental criticism in this bracing work is rooted in Hamburger's usual prodigious research and deep understanding of constitutional principles. …"

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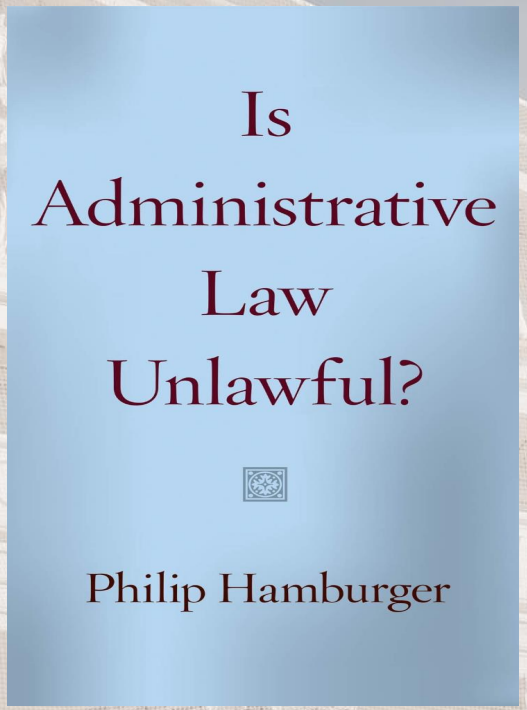
What is to be done now?



"Given that the question of the book's title is answered so affirmatively, Hamburger's careful treatment of the rule of law is pertinent. He discards the common locution "rule of law" as too "vague" and "minimal" to be "relied upon to illuminate what is at stake". He prefers "rule through and under law" because it better captures how liberty is secured when law is understood not only as a limit on state action, but also as the specialized structures, methods, and procedures which the state must abide by when it acts."

http://www.lpbr.net/2015/03/is-administrative-law-unlawful.html


THE AMERICAN SPECTATOR
FOUNDED BY R. EMMETT TYRRELL, JR.

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CONSTITUTIONAL OPINIONS

How the Supreme Court Blocked Congress's Effort to Redeem the Administrative State

Over and over the Court vetoed reform.

by E. DONALD ELLIOTT

August 21, 2022, 11:16 PM

"[T]oday the administrative state is under unrelenting attack. Eminent legal scholars like Richard Epstein of the University of Chicago law school and New York University, Philip Hamburger of Columbia University, and Gary Lawson of Boston University keep writing books and articles with titles like *Is Administrative Law Unlawful?* or *Why the Modern Administrative State Is Inconsistent with the Rule of Law*. Their answer is a resounding "yes, it is unlawful" and their solution **is that the experiment in American government implemented since the New Deal should be abandoned.**"

https://spectator.org/how-the-supreme-court-blocked-congresss-effort-to-redeem-the-administrative-state/

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What is to be done?

Why Now?

- **“Coming Soon to a Court Near You,” new NGO litigants against the Administrative State such as the New Civil Liberties Alliance.**

- **https://nclalegal.org/**

5TH ANNIVERSARY

NCLA

New Civil Liberties Alliance

NCLA is a nonpartisan, nonpro0t civil rights group founded by prominent legal scholar Philip Hamburger to protect constitutional freedoms from violations by the Administrative State. NCLA’s public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans’ fundamental rights.

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What is to be done?

Why Now? – Recent Cases

Gundy v. US, https://www.supremecourt.gov/opinions/18pdf/17-6086_2b8e.pdf rejected a delegation doctrine challenge based on the intelligible principle doctrine 5-3, in an opinion by Justice Kagan on June 20, 2019. Justice Kagan announced the judgment of the Supreme Court and delivered an opinion, in which Justices Ginsburg, Breyer, and Sotomayor joined. Justice Alito filed an opinion concurring in the judgment. **However, Justice Gorsuch filed a strong dissenting opinion, in which Chief Justice Roberts and Justice Thomas joined, indicating an appetite to revisit the anti-delegation doctrine.** Justice Kavanaugh took no part in the consideration or decision of the case, and **Justices Amy Coney Barrett and Kenji Brown Jackson** were not yet on the court.

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What is to be done?

Why Now? – Pending Cases

1. *Cert granted* to "clarify" *Chevron* deference.

Loper Bright Enterprises v. Raimondo, https://www.scotusblog.com/case-files/cases/loper-bright-enterprises-v-raimondo/

> "Whether the court should overrule *Chevron v. Natural Resources Defense Council*, or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency."

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What is to be done?

Why Now? – Pending Cases

2. Jarskey v. SEC, No. 20-61007 (5th Cir,)
https://www.ca5.uscourts.gov/opinions/pub/20/20-61007-CV0.pdf
Held:

(1) the SEC's in-house adjudication of Petitioners' case violated their Seventh Amendment right to a jury trial; (2) Congress unconstitutionally delegated legislative power to the SEC by failing to provide an intelligible principle by which the SEC would exercise the delegated power, in violation of Article I's vesting of "all" legislative power in Congress; and (3) statutory for cause removal restrictions on SEC ALJs violate the Take Care Clause of Article II.

S.G.'s *cert* petition and response distributed for 6/22 conference.

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What is to be done?

Why Now?

- **"Coming Soon to a Court Near You," *or* "Substance is Secreted in the Interstices of Procedure."**
  The transformative effect of AXON ENTERPRISE, INC. v. FEDERAL TRADE COMMISSION ET AL., U.S.S.C. No. 21–86 (April 14, 2023), https://www.supremecourt.gov/opinions/22pdf/21-86_l5gm.pdf (Obviating requirement to **exhaust** administrative remedies for constitutional challenges to agency structure on which the agency has no special expertise).
- Potential state constitutional law challenges to administrative agencies, *e.g.* state constitution guarantees of jury trials in civil cases; deference doctrines; delegation; takings for public use.

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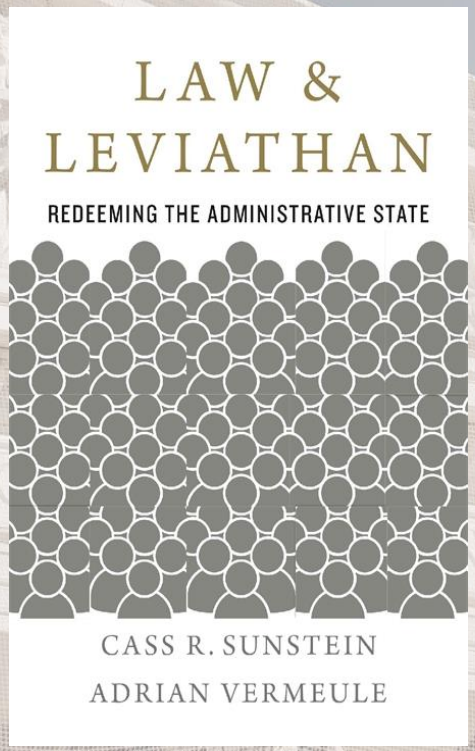
What is to be done next?
"spirit of the Constitution" *i.e.* "proper"



(1) a failure to make rules in the first place, ensuring that all issues are decided on a case-by-case basis;
(2) a failure of transparency, in the sense that affected parties are not made aware of the rules with which they must comply;
(3) an abuse of retroactivity, in the sense that people cannot rely on current rules, and are under threat of change;
(4) a failure to make rules understandable;

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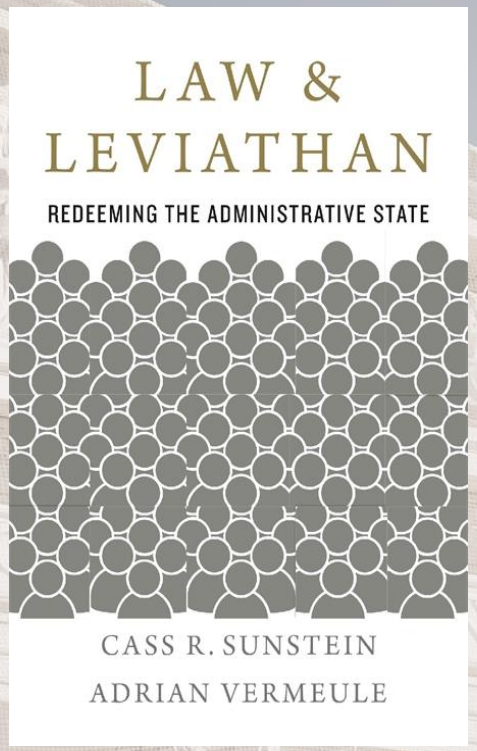
What is to be done?
"spirit of the Constitution" *i.e.* "proper"



(5) issuance of rules that contradict each other;
(6) rules that require people to do things that they lack the power to do;
(7) frequent changes in rules, so that people cannot orient their action in accordance with them; and
(8) a mismatch between rules as announced and rules as administered.

"It is hard to imagine a more violent breach of [the requirement of reasoned decision-making] than applying a rule of primary conduct … which is in fact different than the rule or standard formally announced." *Allentown Mack Sales and Service Inc. v. NLRB*, 522 U.S. 359, 374 (1998)(Scalia, J.)

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What is to be done?
"spirit of the Constitution" *i.e.* "proper"

1. "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny." James Madison, Federalist 47, https://avalon.law.yale.edu/18th_century/fed47.asp
2. Deference to agencies on weak facts – *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).
   a. e.g. EPA's PFAS "health advisory" https://www.epa.gov/newsreleases/epa-announces-new-drinking-water-health-advisories-pfas-chemicals-1-billion-bipartisan

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What is to be done?
"spirit of the Constitution" *i.e.* "proper"

3. Failing to provide reasonable notice of significant new regulatory obligations. E. Donald Elliott and Joshua Galperin, *Agency General Counsels, Beware: Federal agencies can face legal risk if they only provide constructive notice of regulatory changes through publication and FOIA "availability,"* THE REGULATORY REVIEW (Sept 7, 2022), https://www.theregreview.org/2022/09/07/elliot-galperin-agency-notice/

4. Imposing enforceable obligations by guidance. Robert Anthony, *Which Agency Interpretations Should Bind Citizens and Courts*, 7 **Yale** J. Reg. 1, 17 (1990) and "Well, You Want the Permit, Don't You?" Agency Efforts To Make Nonlegislative Documents Bind the Public, 44 ADMIN. L. REV.31 (1992).

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What is to be done next?

"spirit of the Constitution" *i.e.* "proper"

5. ?