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Public administration and the erosion of the rule of law in the United States

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ABSTRACT

The failure of public administration theorists, researchers, reformers, and practitioners to make the rule of law the foundation of U.S. public administration has contributed to an erosion of constitutionality and legality in the national administration. Prominent contemporary threats to the rule of law include standardless delegations of legislative authority to administrative agencies, the Chevron doctrine and related judicial deference, the use of administrative guidance documents in place of rules, presidential legislation by executive order, aggrandizement through unitary executive branch theory, and policymaking by concerted nonenforcement of statutory requirements. Together, these threats contribute to massive constitutional distortion. This raises questions of whether it is time for public administration theorists, researchers, and practitioners to consider a ‘rule of law restoration’ initiative in the U.S. and use the American case examined here as a potential basis for considering the role of the rule of law in contemporary public administration worldwide.

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Introduction

Often, when we think of threats to the rule of law, our minds turn towards examples of military coups, elected heads of government who progressively or suddenly assume dictatorial powers and corruption. We may also think public bureaucracy and bureaucratization threaten the rule of law. Rarely, however, do we consider public administrative doctrine itself to constitute such a threat. However, the historic and contemporary failure of public administration theorists, researchers, reformers, and practitioners to ground U.S. public administration in the rule of law has contributed to an erosion of constitutionality and legality that now calls on us to rethink the basic premises, principles, and practices of the ‘enterprise of public administration’ worldwide.

In this article, I contend that U.S. public administration has contributed to the erosion of the rule of law by grounding itself in the nonpolitical values of efficiency,
economic, effectiveness, ‘merit’, and performance; defining itself as a field of management rather than government; aggrandizing the U.S. presidency by promoting unity of command; and preferring administrative discretion to administration constrained by law. My overall objective is to contribute to a reorientation of contemporary public administrative doctrine so that its foundational pillar and ‘axiom number one’ are the rule of law.

**A foundational mistake**

For historical reasons, U.S. public administration was founded on management rather than constitutionalism or law. In his confused foundational essay, ‘The Study of Administration’ (1887), Woodrow Wilson famously asserted that ‘The field of administration is a field of business. It is removed from the hurry and strife of politics; it at most points stands apart even from the debatable ground of constitutional study’. Four decades later, Leonard White’s *Introduction to the Study of Public Administration* (1926), generally considered the first American public administration textbook, embedded Wilson’s perspective into the field. White’s Introduction assumed ‘that the study of administration should start from the base of management rather than the foundation of law, and is, therefore, more absorbed in the affairs of the American Management Association than in the decisions of the courts’. By 1937, Luther Gulick, a major leader in the field of public administration, could claim that ‘efficiency is... axiom number one in the value scale of public administration’, which in consequence creates a conflict with the political values.

As Laurence Lynn argues, Frank Goodnow offered the rule of law as an alternative to management as the foundation of public administration. However, U.S. law in Goodnow’s day was largely judge-made common law and the courts were generally hostile to its supersession by administrative discretion and rulemaking. As judged by the number of pages devoted to it in *Public Administration Review*, in the mid-twentieth century the field paid little attention to enactment of the Administrative Procedure Act (APA) of 1946, which is the basic law of federal administration. Notably, in 1953, Kenneth Culp Davis, the nation’s leading expert on administrative law, could sharply criticize the field of public administration for its neglect, ignorance, and misconceptions of administrative law. Although increasing attention has been paid to individual statutes, such as the Freedom of Information Act of 1966, and law generally, as late as the aughts leading contributors to the academic field of public administration could still ignore the rule of law as a foundational pillar. Indeed, as of 2008, students in about 60 percent of Master of Public Administration programs accredited by the National Association of Schools of Public Affairs and Administration could graduate without having taken a single law-oriented course.

There were, of course, exceptions. These included the ‘Blacksburg Group’ at Virginia Polytechnic Institute and State University (‘Virginia Tech’), which produced *Refounding Public Administration*, also known as ‘The Blacksburg Manifesto’, arguing that the U.S. Constitution was the proper foundation for American public administration. Among the group was John Rohr, who was a major contributor to what is now known as ‘The Constitutional School of American Public Administration’. Rohr (and I) studied at the
University of Chicago in the 1960s with Professor Herbert Storing, whose work was foundational to the ‘Constitutional School’. But in trying to demonstrate that, at least in some cases, constitutions matter to public administration, the Constitutional School has always been outside the mainstream of U.S. public administration.

The field continues to pursue research and promote public values with little attention to law. Remarkably, until late 2016, developing a comprehensive legal framework for collaborative governance received scant attention. ‘Social equity’, criticized for being extra-legal in 1975, still lacks an overall legal foundation. Public service motivation is treated as a normative good in the absence of research on its relation to behaving in concert with the rule of law or even whether it promotes legal (or positive) outcomes. Given public administration’s failure to place the rule of law at its center, it is not altogether surprising that it has accepted, embraced, and encouraged deviations from the law and lawful implementation in efforts to promote efficient, economical, and effective management.

**Agencies as lawmakers**

**Standardless delegations of legislative authority: lawmaking in the absence of ‘intelligible principles’**

It is axiomatic that legislatures should make law. The first sentence after the Preamble to the U.S. Constitution is, ‘All legislative Powers herein granted shall be vested in a Congress of the United States’ (U.S. Constitution 1789, Article I, section 1). Today, accuracy would demand modification to read: all laws must be made by Congress or through administrative rulemaking and adjudication, presidential executive orders, memoranda, and other directives and judicial decisions. Leaving the courts and the issue of ‘legislating from the bench’ to others, congressional delegations of legislative authority to the executive branch, including the president, became necessary as the reach of government into the economy and society expanded and public policy became more complex. After years of questioning the legitimacy of vast delegations of legislative authority, by 1946, when Congress enacted the Administrative Procedure Act and Legislative Reorganization Act, delegation became an accepted form of lawmaking. As explained by Congressman Francis Walter, ‘There are the legislative functions of administrative agencies, where they issue general or particular regulations which in form or effect are like statutes of the Congress’. Walter attributed administrative lawmaking to Congress’s lack of ‘time, the staff, and the organization’ to exercise ‘all legislative powers’ as constitutionally prescribed. Lack of capacity is certainly part of the rationale for delegating legislative power to agencies. However, as Morris Fiorina has demonstrated, lack of will and the political advantages that come with avoiding controversial and often costly standards are also factors.

As a constitutional matter, in 1928 the Supreme Court held that delegations of legislative authority are acceptable insofar as they are accompanied by ‘an intelligible principle to which [the agency must]… conform’. Once applied with a degree of strictness, after the mid-1930s the ‘intelligible principle doctrine’ warranted lip service only, if that. For instance, in 1980, the Supreme Court let stand a delegation directing the secretary of labor, ‘in promulgating standards dealing with toxic materials or...
harmful physical agents’ to ‘set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life’.26 Based on the legislative history, Justice Rehnquist called the feasibility requirement ‘a legislative mirage, appearing to some Members [of Congress] but not to others, and assuming any form desired by the beholder’.27 Rehnquist called on the other justices step up and exercise ‘our judicial duty to invalidate unconstitutional delegations of legislative authority’,28 but all declined. In 2001, the Court declined again.29

That appointed officials and employees in agencies, rather than elected legislators make law may constitute a threat to democratic governance and popular sovereignty. However, by itself, if agency lawmaking is regulated by a statute like the APA, principled, and relatively stable, it does not necessarily diminish the rule of law. Enter the ‘Chevron doctrine’.

The Chevron doctrine: empowering agencies to define ambiguous statutory language

A statute with an intelligible principle may nevertheless have ambiguous terms that offer agencies little guidance. *Chevron U.S.A. v. Natural Resources Defense Council* (1984)30 addressed this aspect of the rule of law by providing agencies with considerable leeway in defining their statutory missions. At issue were two words, ‘stationary source’ in 1977 statutory amendments to the Clean Air Act of 1970. The Environmental Protection Agency, which enforces the act, posited different definitions of stationary source for two parts of the act’s overall objective. For the maintenance of air quality, it defined stationary source as a ‘bubble’ over industrial plants or groupings; for the enhancement of air quality, such a stationary source could be a single piece of equipment. Later, the EPA switched its definition for enhancement to a bubble as well.

In its decision, the Supreme Court set forth the three elements of the *Chevron* doctrine: (1) if Congress has directly spoken to the precise issue and its intent is clear, the agency has to implement the statute accordingly; (2) if Congress has not provided precise guidance, then the agency can adopt any ‘permissible construction’ of the statute; (3) guided by APA requirements, the agency’s constructions will be permissible ‘unless they are arbitrary, capricious, or manifestly contrary to the statute’.31 Importantly, in terms of the rule of law, the Court emphasized that multiple constructions of the same words may be permissible:

Our review of the EPA’s varying interpretations of the word ‘source’—both before and after the 1977 Amendments—convinces us that the agency primarily responsible for administering this important legislation has consistently interpreted it flexibly—not in a sterile textual vacuum, but in the context of implementing policy decisions in a technical and complex arena. The fact that the agency has from time to time changed its interpretation of the term ‘source’ does not... lead us to conclude that no deference should be accorded the agency’s interpretation of the statute. An initial agency
interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations.\textsuperscript{32}

Coupled with the weak application of the intelligible principle doctrine, the \textit{Chevron} doctrine, turns imprecise statutory language into nothing more than flexible guidelines subject to multiple and changing agency construction as the basis for administrative rulemaking (i.e. ‘lawmaking’). \textit{Chevron’s} threat to the rule of law was compounded in \textit{City of Arlington, Texas v. Federal Communications Commission}\textsuperscript{33} in which the Court applied the \textit{Chevron} doctrine to an agency’s definition of its own jurisdiction. In a dissent joined by Justices Anthony Kennedy and Samuel Alito, Chief Justice Roberts noted how much additional lawmaking power \textit{City of Arlington} conveys by going beyond \textit{Chevron} to give agencies ‘power to decide’ not just on the meaning of imprecise terms in statutes but also when ‘Congress has given them... power’ to determine what they may regulate under an imprecise law.\textsuperscript{34} In this context, it should be noted that \textit{Chevron} deference also applies to an agency’s interpretation of its own rules.\textsuperscript{35}

\textbf{‘Guidance’ in place of law}

The \textit{Chevron} doctrine mandates judicial deference to agencies’ statutory interpretation. Agency rules following those interpretations can be invalidated by courts for a number of reasons, including being procedurally defective, arbitrary, capricious, in excess of statutory or constitutional authority, and lacking substantial evidence for support.\textsuperscript{36} In some agencies, such as the Environmental Protection Agency, legal challenges to rules are so common as to be essentially part of the rulemaking process. Some administrative law scholars consider rulemaking to be so laden with presidential, statutory, and judicially imposed requirements that it has become ‘ossified’.\textsuperscript{37} Not surprisingly, encumbrances on rulemaking tempt agencies to find alternative approaches to fulfilling their missions.

‘Guidance’ documents are one such alternative.\textsuperscript{38} For instance, in the 1990s, there was ‘a striking increase in the number of FDA [Food and Drug Administration]-issued documents intended to give guidance to the regulated industry but not adopted through public procedures’.\textsuperscript{39}

In general, guidance documents consist of interpretative (also called interpretive) rules, policy statements, and rules regarding agency procedure, practice, and organization.\textsuperscript{40} Guidance documents must be published in the \textit{U.S. Federal Register} but they are not required to go through the same notice and comment or adjudicative-like processes required for legislative (substantive) rules because in theory they are non-binding on entities outside the issuing agency. Yet, distinguishing between these documents and binding legislative rules can be difficult and agencies can sometimes achieve their objectives by issuing guidance rather than rules. An entity seeking to steer clear of agency enforcement may well treat guidance documents as though they are binding legislative rules. In \textit{Chamber of Commerce v. Department of Labor} (1999),\textsuperscript{41} for example, a federal court of appeals, found that although ostensibly based on guidance, the Occupational Safety and Health Administration’s Cooperative Compliance Program, was essentially coercive in violation of APA requirements for legislative rulemaking. As in \textit{Chamber of Commerce}, substituting guidance documents for rules
generally enables agencies to avoid the prospect of ‘ossification’—and full compliance with APA and other legal rulemaking requirements.

The presidency and the rule of law

Article II of the Constitution places the ‘executive power’ in the president and calls upon him (or a future her) to ‘take care that the laws be faithfully executed’. Along with these clauses, history, and contemporary ‘unitary executive branch’ theory, presidents have joined Congress in compromising the rule of law. Three presidential practices, in particular, do so: governing by executive order rather than statute, advocating and acting upon ‘unitary executive branch’ theory; and nonenforcement of clear statutory requirements.

Executive orders

As the scope of the federal government grew and its reach expanded deeper into the economy, society, and state and local governmental levels, executive orders essentially became a form of presidential legislation. Executive orders are extra-constitutional in the sense that they are not mentioned in the Constitution or explicitly authorized by it. They are formally defined as ‘directives or actions by the President’ that when based on constitutional or statutory authority ‘may have the force and effect of law’. Although they ‘are generally directed to, and govern actions by Government officials and agencies’ and cannot reach purely private activity, they can ‘indirectly’ and substantially affect private individuals and entities who interact with or depend on the federal government for benefits of one kind or another.

Executive orders were used relative sparingly during the nineteenth century. President Abraham Lincoln (1861–1865) issued three, some presidents issued none, and President Grover Cleveland (1885–1889 and 1893–1897) issued seventy-one, the most of any president up to the twentieth century. Their use became more common during the first half of the twentieth century, with several presidents issuing more than 1,000. For example, President Theodore Roosevelt (1901–1909) issued 1006; Woodrow Wilson (1913–1921), 1,719; Calvin Coolidge (1925–1929), 1253; and Herbert Hoover (1929–1933), 1004. Among recent presidents, George H. W. Bush (1989–1993) issued 166, Bill Clinton (1993–2001) 364, George W. Bush (2001–2009) 291, and Barack Obama (2009–2017) 276. Many executive orders are ceremonial, technical, and not subject to judicial enforcement. Others, however, are a substitute for legislation. For instance, President Franklin Roosevelt’s executive order 8802 banned discrimination based on race, religion, color, or ethnicity in the defense industry, something that could not be accomplished for the private sector as a whole until enactment of the Civil Rights Act of 1964.

Perhaps Obama was most candid about using executive orders to circumvent the Constitution’s prescribed legislative process. In 2012, he indicated ‘If Congress refuses to act, I’ve said that I’ll continue to do everything in my power to act without them’. The following year, speaking with reference to the Patient Protection and Affordable Care Act (‘Obamacare’), Obama reiterated that ‘Regardless of what Congress does,
ultimately I’m the president of the United States’ and the public ‘expect[s] me to do something about it’. Later, he intimated that he would ‘go it alone’ if he could not acquire sufficient congressional support for his policy initiatives. Prior to the 2014 State of the Union Address, Obama publicly asserted, ‘I’ve got a pen and I can use that pen to sign executive orders and take executive actions and administrative actions that move the ball forward.’

Executive orders further threaten the rule of law due to their inherent instability. As the Congressional Research Service explains ‘By their very nature... executive orders lack stability, especially in the face of evolving presidential priorities. The President is free to revoke, modify, or supersede his own orders or those issued by a predecessor’. The degree of instability can be expected to swell with changes in the president’s political party. Bush II revoked several of Clinton’s executive orders and Obama followed suit by revoking several of Bush’s. In 2017, President Donald Trump issued 55 executive orders, several of which revoked or modified Obama executive orders and initiatives.

**Unitary executive branch theory**

Unitary executive branch theory contends that the president has sole final authority over administration in the executive branch of the federal government. The historical roots of this theory can be traced back to Alexander Hamilton’s writings in the *Federalist Papers* (1787–1788). In supporting and defending the constitutional design for the presidency, Hamilton argued that an ‘energetic’ presidency was ‘essential to the protection of the community against foreign attacks’ and ‘not less essential to the steady administration of the laws;... the protection of property... [and] to the security of liberty’. He argued that ‘unity’ was a leading contributor to such energy.

A century and one half later, the U.S. President’s Committee on Administrative Management (PCAM) (President’s Committee on Administrative Management, also known as the ‘Brownlow Report’), sought to unify the executive branch under presidential control. The Committee was comprised of Louis Brownlow, Luther Gulick, and Charles Merriam, all of whom were top-level leaders in public administration. Their Report contended that efficiency requires the ‘establishment of a responsible and effective chief executive as the center of energy, direction, and administrative management’. In part, this meant that ‘once the Congress has made an appropriation, an appropriation which it is free to withhold, the responsibility for the administration of the expenditures under that appropriation is and should be solely upon the Executive’. As John Rohr noted, the Committee’s reasoning ‘transforms the president from chief executive officer to sole executive officer’. Not surprisingly, the Committee’s initial legislative proposal was denounced in Congress as the ‘dictator bill’. In 1939, however, Congress passed a Reorganization Act that enabled President Franklin Roosevelt to establish the Executive Office of the President as a means of facilitating some of the PCAM’s recommendations and the eventual rise of the greatly aggrandized ‘imperial presidency’.

Building on this history and its accompanying public administrative doctrine, President George W. Bush introduced a theory of the unitary executive branch. In
Bush’s version: (1) the president has a constitutional responsibility to protect the constitutional powers and authority of the presidency from encroachments by the other branches of the federal government; (2) the president’s constitutional responsibility to take care that the laws be faithfully executed and to serve as commander in chief of the armed forces require him not to implement statutory provisions that he believes are unconstitutional; and (3) the president has authority to determine whether a law is constitutional.65 A corollary is that the president may exercise, directly or through appointees, all legislative authority delegated to executive branch agencies. In other words, although Congress delegates its legislative authority to agencies with the expectation that they will use their scientific, economic, and other expertise to set standards and establish supplemental policies, as in the Clean Air Act example of ‘stationary source’ discussed earlier, the president could directly set and establish them himself. Bush explicitly referred to ‘the President’s constitutional authority to supervise the unitary executive branch’ in some of his signing statements regarding major legislation.66

Unitary executive branch theory comports with the PCAM’s overall vision of the presidency at the head of a unified executive branch to the extent that it might place the president above the law. This is precisely what concerned the American Bar Association in 2006 when its Task Force on Presidential Signing Statements and the Separation of Powers Doctrine called on Bush to remember that the ‘Constitution is not what the President says it is’.67 The Association’s call also urged ‘this President and all his successors to fully respect the rule of law and our constitutional system of the separation of powers’.68

Nonenforcement

Bush’s invocation of unitary executive branch theory in signing statements indicating that he might not enforce the law as written raised the question whether the president has constitutional authority to decline to enforce clear statutory provisions. In constitutional terms, does the president’s responsibility to ‘take care that the laws be faithfully executed’ (U.S. Constitution 1789, Article II, section 2, clause 3; italics added) convey discretion not to enforce laws which he considers contrary to the nation’s interests or to prioritize the use of the executive branch’s limited resources by declining to invest them in some enforcement actions and the expense of others?

President Obama introduced nonenforcement as a major means of making domestic policy in the areas of marihuana use, same-sex marriage, and immigration. With respect to the latter, nonenforcement at least temporarily protected some 800,000–1.76 million undocumented immigrants from potential deportation.69 In terms of the rule of law, nonenforcement means that the president, rather than the law is ruling. Moreover, other than impeachment and removal of the president from office, there is no clear constitutional check on nonenforcement and the efficacy of political checks is uncertain.70 As with unitary executive branch theory, nonenforcement places the president above the law.

To the extent that Obama offered a legally oriented defense of nonenforcement, it was largely based on his exercise of ‘prosecutorial discretion’ in deciding which legal
provisions to enforce. The clearest precedent for nonenforcement in U.S. federal administrative law is *Heckler v. Chaney*. The issue there was whether the Food and Drug Administration had to enforce its statutory mandate to approve drugs for human use before the drugs used in lethal injection of condemned prisoners could be lawfully administered.

The Supreme Court created a strong presumption against judicial review of agency nonenforcement on the basis that in deciding where to put their resources and energies, an agency is better positioned than courts to balance ‘a number of factors which are peculiarly within its expertise’. In language further supportive of discretionary administrative nonenforcement, the Court continued:

> we recognize that an agency’s refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to ‘take Care that the Laws be faithfully executed’.

However, there is a considerable difference in deciding not to enforce law in an individual case and dispensing with the law or some of its provisions altogether. Until the courts provide clearer guidance on when nonenforcement is unacceptable and Congress determines when and how it is worth trying to check, nonenforcement will remain an important aspect of presidential power and serious threat to the rule of law.

### Constitutional distortion, public administration and the rule of law

In 1952, Supreme Court Justice Robert Jackson wrote that administrative agencies ‘have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking’. The agencies alone are not responsible for ‘unsettling’ U.S. constitutional design and thinking. As reviewed in this article, public administrative thinking, doctrine, advising, and advocacy of reforms has played a role along with vast delegations of legislative authority, judicial deference to administrative agencies, and an aggrandized presidency. By now, the government has strayed far from the constitutional design. Originally, it was intended that Congress (the subject of Article I) would initiate law, policy, budgets, war, and to some extent administrative organization and design (through the requirement that all offices must be created by law). The president’s role was to respond either through veto or managing the faithful implementation of law. Today, of course, a great deal is initiated by the president, including statutes, budgets, military operations, and administrative change while, if at all, Congress responds. Agencies make law through promulgating rules and make policy through guidance documents. Presidents legislate via executive order and make policy through nonenforcement. The courts, originally thought to be the branch definitively to say what the law is have abjured from enforcing the intelligible principle doctrine, thereby giving Congress free rein to write unintelligible law. Further, the judiciary has ceded a great deal of responsibility to say what the law is to administrators through the *Chevron* doctrine and related deference. There are a variety of ideas on how to fix the U.S. ‘broken Constitution’ and restore the separation of powers.
Public administration had a significant role in the erosion of the rule of law and distortion of the constitutional design. Defining public administration as a field of management with efficiency as axiom no. 1 and advocating for increased presidential power for the sake of cost-effectiveness, continue to have an impact. It is a short logical path from the PCAM to Bush II’s version of unitary executive branch theory and from there to Obama’s nonenforcement. In 2017, Congress began to consider a Separation of Powers Restoration Act. Is it time for public administration theorists, researchers, and practitioners to consider a ‘rule of law restoration’ initiative in the U.S. and use the American case examined here as a potential basis for considering the role of the rule of law in contemporary public administration worldwide?

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