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THE ADMINISTRATIVE EVASION OF PROCEDURAL RIGHTS

Philip Hamburger *

ABSTRACT: Administrative power does profound harm to civil liberties, and nowhere is this clearer than in the administrative evasion of procedural rights. All administrative power is a mode of evasion, but the evasion of juries, due process, and other procedural rights is especially interesting as it most concretely reveals the administrative threat to civil liberties.

In contemporary doctrine, due process and most other procedural rights are understood mainly as standards for adjudication in the courts. Traditionally, however, they were understood, at least as much, to bar adjudication outside the courts.

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That is, they were understood to block evasions of the courts and their procedural rights. Nonetheless, administrative power evades procedural rights – not only in agency tribunals but also in the courts themselves.

The resulting administrative adjudication gives the government ambidextrous paths for enforcement. And it thereby transforms procedural rights from constitutional guarantees into mere options for government power.

Turning to theory, this argument about procedural rights is part of a broader thesis about the nature of administrative power. Current doctrine and scholarship presents administrative power as an expression of law, but it makes much more sense to understand it as power – a sort of power that flows in a cascade around pre-existing structures and rights, whether established by the Constitution or the Administrative Procedure Act. Despite its pretense of being administrative “law,” it really is a mode of evasion.

Overall, the administrative evasion of procedural rights illustrates how seriously administrative power threatens civil liberties. Whatever one thinks of administrative power as a structural or sociological matter, it is also a civil liberties problem.

INTRODUCTION

As 2016 wound down, the administrative law judges (ALJs) at the Securities and Exchange Commission had issued more than 150 decisions.¹ The year before, they racked up more than 200 decisions before celebrating New Year’s Eve.² These individuals work hard,

¹ *ALJ Initial Decisions Archive 2016*, U.S. SEC. & EXCH. COMM’N, <https://www.sec.gov/alj/aljdec/aljdecarchive/aljdecarc2016.shtml> (last modified Dec. 1, 2017).

² *ALJ Initial Decisions Archive 2015*, U.S. SEC. & EXCH. COMM’N, <https://www.sec.gov/alj/aljdec/aljdecarchive/aljdecarc2015.shtml> (last modified Sept. 9, 2016).

and they are fine exemplars of the devoted people who serve in a judicial capacity within federal agencies.

Exactly what they do, however, deserves more attention. When the SEC charges an individual with securities fraud, it can choose to proceed in the courts – by bringing a civil enforcement action or by referring the case to the Justice Department for criminal prosecution. Either way, the defendant enjoys the full range of the Constitution's procedural protections. But the commission also has the option to charge defendants administratively, before its administrative law judges. And when it thus pursues a case in-house, rather than in the courts, the defendant does not get a jury, a real judge, or the real due process of law.

In fact, at a host of agencies, administrative adjudication bypasses some of the most basic procedural rights. The Constitution protects some substantive rights – famously, the freedoms of speech and religion. Most of its guarantees of liberty, though, secure judicial procedures, such as juries and the due process of law. Any one of the procedural rights may, to some observers, seem a mere technicality. But taken together, they are the primary constraint on how the government proceeds against Americans in particular instances – forming a crucial barrier to government misconduct. Nonetheless, administrative adjudication largely evades such rights.

Significance. The administrative evasion of procedural rights is revealing about both administrative power and about procedural rights. It shows how much procedural rights have been eviscerated, even to the point of being transformed from constitutional guarantees to mere government options; and it thereby shows how profoundly administrative power threatens civil liberties.

Administrative power is a means of binding Americans – that is, of imposing legal obligation on them – in ways that run outside the

Constitution's pathways for binding legislation and adjudication.³ Of course, this is not to say that administrative power is usually unauthorized by acts of Congress or the courts, but rather that it allows the government ultimately to bind Americans with other sorts of acts.⁴ And when the government escapes the courts by binding Americans through administrative adjudications, it largely evades the Constitution's procedural rights.

This Article focuses on the administrative evasion of procedural rights, because this sort of evasion most concretely reveals the administrative threat to civil liberties. When administrative power is understood in merely structural terms about separation of powers or checks and balances, or in sociological terms about the regulatory

³ PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* 387 (2014) (showing how the first substantive word of the Constitution, "All," confined lawmaking to Congress).

This understanding of administrative power—as a power that binds, in the sense of imposing legal obligation—is not the only conception of administrative power. Defenders of administrative power (such as Kenneth Davis, Jerry Mashaw, Eric Posner, Cass Sunstein, and Adrian Vermeule) have often taken a much broader view of it, in which it includes not only binding but also non-binding edicts (such as those distributing benefits and instructing executive officers to exercise lawful force), and on this basis they cite eighteenth-century federal statutes on benefits, etc., to justify binding twentieth-century administrative rules and adjudications. See HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* at 83 (and works cited there). So broad a conception of administrative power, however, confuses the executive power that has always been lawful in the United States with binding administrative edicts—a sort of power that is very different. In contrast, in this Article, administrative power is understood to include only binding power—that is, the power to impose legal obligation.

Of course, at the edges, it can be difficult to discern whether an executive action is a distribution of a benefit or an imposition of legal obligation—a problem that can be observed, for example, in federal land management decisions and some licensing. In this Article on administrative power, however, a basic range of binding administrative actions should be clear enough—for example, the decisions by administrative law judges to demand testimony and information, to impose fines, and to bar otherwise lawful conduct.

⁴ See HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?*, *supra* note 3, at 23; Philip Hamburger, *Vermeule Unbound*, 94 *TEX. L. REV.* SEE ALSO 205, 209, 215-17 (2016).

needs of contemporary society, the dangers for constitutional rights are not always obvious. In contrast, when one focuses on administrative adjudication and recognizes it as an evasion of the Constitution's procedural rights, it becomes painfully clear that administrative power seriously undermines these freedoms.

Administrative power evades procedural rights not only in agency tribunals but also in the courts themselves. For example, Supreme Court doctrine requires judges to accommodate administrative power by deferring to agencies on both the facts and the law. As a result, judges deny defendants their right to the independent judgment of judge and jury, and where the government is a party, judges engage in systematic bias in its favor in violation of due process. The evasion thus happens even in the courts.

Functionally, administrative adjudication gives the government ambidextrous paths for enforcement. It thereby transforms the very nature of procedural rights—from constitutional guarantees for the people to mere options for government power.

This Article's argument about the evasion of procedural rights is part of a broader, theoretical claim: that the administrative state needs to be understood not as a type of law, but as power—a sort of power that serves as a mode of evasion. Current doctrine presents administrative power as an expression of law, but what really is at stake here is a type of power—one which flows in a cascade around the structures and rights established by law, whether the Constitution or the Administrative Procedure Act.

The evasion of procedural rights is thus sobering, and once it is understood, the constitutional threat from administrative power cannot easily be brushed aside. Whatever one thinks of administrative power as a structural or sociological matter, it is also a civil liberties problem. And the evasion of procedural rights illustrates how serious a problem it is.

Prior Scholarship. Thus far, scholars of administrative power have failed to recognize the extent of the problem. Some critics of administrative power have drawn attention to the costs for particular

procedural rights: Gary Lawson and Suja Thomas have pointed to the loss of jury rights, and Nathan Chapman and Michael McConnell have shown the loss in due process.⁵ Nonetheless, the more structural point about a broad evasion of procedural rights has yet to be explored.

Interestingly, the defenders of administrative power have long acknowledged some costs for constitutional rights, but have tended to speak in coded ways that minimize the loss. Woodrow Wilson already anticipated that administrative power would override individual rights, arguing that the “inviolability of persons,” as protected by a bill of rights, did “not prevent the use of force by administrative agents for the accomplishment of . . . the legitimate objects of government.”⁶ Frank Goodnow, in even more Germanic fashion, welcomed administrative power precisely as a means of suppressing individual freedom. Fearing that an “insistence on individual rights” could “become a menace when social rather than individual efficiency is the necessary prerequisite of progress,” he took satisfaction that “the actual content of individual rights is being increasingly narrowed” and urged judges to accept administrative power and the way it “modif[ied] the content of private rights.”⁷ Looking back on such developments, a contemporary commentator, Peter Strauss, observes the judicial “reinterpreting” of “citizens’ rights in light of the changed arrangements.”⁸

⁵ Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1247 (1994) (regarding deference to agency fact-finding); SUJA A. THOMAS, *THE MISSING AMERICAN JURY: RESTORING THE FUNDAMENTAL CONSTITUTIONAL ROLE OF THE CRIMINAL, CIVIL, AND GRAND JURIES* 142 (2016); Nathan S. Chapman and Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672 (2012).

⁶ *Notes for Lectures at Johns Hopkins (1891-94)*, in 7 PAPERS OF WOODROW WILSON 121-22 (Arthur S. Link ed., 1969).

⁷ FRANK JOHNSON GOODNOW, *THE AMERICAN CONCEPTION OF LIBERTY AND GOVERNMENT* 21 (1916).

⁸ PETER L. STRAUSS, *ADMINISTRATIVE JUSTICE IN THE UNITED STATES* 13 (2002).

These comments, as far as they go, are suggestive, but they fail to do justice to the reality of what has happened to procedural rights. When taking the line that there has been some modification or reinterpretation of procedural rights, the defenders of administrative power fail to recognize the breadth and depth of the evasion. Rather than merely an adjustment of particular rights, administrative adjudication is a more systemic and thus structural change. It evades almost all of Constitution's procedural rights applicable to either civil or criminal proceedings, and (as will be discussed further below) this systemic evasion of procedural rights has profound consequences—not least, by turning guarantees against government into options for government.

It is therefore all the more disturbing that the Supreme Court not only participates in the administrative evasion of procedural rights but also tries to persuade the public that nothing is amiss—for example, when the Court obscures the loss in freedom with phrases such as “public rights” and “all the process that is due.” The Supreme Court thereby papers over the chasm with vapid phrases, and all too many scholars echo the court. The repetition of legitimizing phrases, however, cannot cover up the depth of the loss.

Methodology. Although this Article relies on history, including the history of some rights guaranteed by the U.S. Constitution, its argument is not originalist; nor is it even about preserving past forms of adjudication. Instead, it relies on an historical understanding of constitutional rights as a measure of change—the point being to reveal the costs resulting from the evasion of procedural rights.

The argument thus leaves room for counterarguments that constitutionally protected procedural rights have changed. But the evaded rights are widely considered important; and they are still recognized in non-administrative cases. It is therefore difficult to conclude that there is merely a change in the extent of the affected rights, not an evasion of them.

Indeed, far from focusing on the definitions of particular rights, this Article (as will be seen in Part IX) argues that the evasion has

largely converted such rights from constitutional guarantees into mere government options. This Article's reliance on history is therefore not so much about a constitutionally-privileged time (the founding) as about the loss of constitutionally-privileged procedures. Whatever the particular definition of procedural rights, and whether such rights are historical or evolving, the more basic problem is that the government can simply evade the Constitution's procedural rights.

Organization. This Article begins (I) by giving an overview of the evasion of procedural rights. It then illustrates the problem by examining (II) juries and (III) due process. These are not the only possible examples, but they should suffice to show the evasion of central procedural rights.

Next, this Article considers some excuses for the evasion: (IV) that administrative adjudication is fair because ALJs are independent and their process is evenhanded, (V) that administrative adjudication merely delays procedural rights until defendants appeal to the courts, (VI) that it comes with expanded procedural rights, and (VII) that government without such adjudication would be impractical. All of these excuses turn out to be illusory.

The most sweeping excuse (VIII) is that the constitutional problems are cured by judicial review. In fact, the administrative evasion of procedural rights persists in the courts. Administrative power doubly evades procedural rights, not only in administrative tribunals but also in the courts themselves.

It thus becomes apparent (IX) that administrative power gives the government ambidextrous paths for enforcement. And this has transformed the very nature of procedural rights—changing them from guarantees for the people into options for the government.

Finally (X) this Article notes that the evasion of procedural rights fits within a more general thesis that evasion is the defining characteristic of administrative power. When administrative power is recognized as an evasion of law (including the courts and their procedures), its structure and even its trajectory become clear.

Overall, administrative power is a profound threat to civil liberties, and nothing makes this clearer than its evasion of procedural rights.

I. PROCEDURAL RIGHTS

Procedural rights have a long history, but much has changed during the past century or so.

Already at common law, the English developed a wide range of procedural protections, and eventually they elevated them as constitutional rights. Jury trials, for example, were not a right when they emerged in the thirteenth century, but by the eighteenth century the English widely valued them as an ancient constitutional liberty.⁹ Americans learned the value of procedural rights by reading the history of English prerogative power, and they experienced the contemporary value of procedural rights in the struggles that led up to their revolution.¹⁰ They therefore enumerated such rights in detail—initially in their state constitutions and then in the U.S. Constitution.

The systemic American circumvention of procedural rights came only much later, with the growth of administrative power. Late nineteenth-century American progressives tended to have an elitist disdain for representative government and individual claims of rights, and they adopted German ideas about administrative power to get around republican institutions and the procedural rights protected in the courts.¹¹ By shifting lawmaking and adjudication

⁹ For example, Blackstone wrote about “the constitutional trial by jury.” WILLIAM BLACKSTONE, 3 COMMENTARIES ON THE LAWS OF ENGLAND 350 (1768; 1979).

¹⁰ For example, prior the Revolution, Americans suffered under the Stamp Act, which cut off jury rights by shifting proceedings to admiralty courts.

¹¹ HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL?, *supra* note 3, at 441 (on the German connection); *id.* at 466-67 (quoting Wilson and Goodnow on the

into administrative agencies, the government could get around the paths that the Constitution established for binding lawmaking and adjudication, as demarcated in the body of the Constitution and its Bill of Rights.¹²

As a result, administrative tribunals have become parallel court systems. Whereas the U.S. Constitution vests the judicial power of the United States in the courts, Congress has declared that most administrative agencies can enforce their dictates through their own tribunals, with their own procedures, which do not match those of the courts.¹³ Of course, agencies can lawfully rely on their own proceedings to distribute benefits, such as social security, but when agencies venture into binding adjudications – those that impose legal obligation – they sidestep the courts and the Constitution’s procedural rights.¹⁴

Admittedly, the Constitution secures different rights for civil and criminal proceedings, and it can be difficult to determine when administrative adjudication evades the one set of standards or the other. Administrative adjudication is often considered civil – as when the Supreme Court worries about the evasion of Seventh Amendment right to a jury but not the evasion of Article III and Sixth Amendment juries.¹⁵ Where, however, administrative power is designed to penalize or correct, its adjudication often seems criminal in nature, and it then appears to evade the Constitution’s guarantees

administrative reduction of rights). Somewhat similar developments occurred in other common law nations, notably England, as relatively educated persons turned to Continental ideas of administrative power. *Id.* at 454.

¹² *Id.* at 467.

¹³ U.S. CONST. art. III, § 1 (vesting judicial power in courts).

¹⁴ On the distinction between binding and nonbinding power, see HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL?, *supra* note 3, at 2-5.

¹⁵ See *Atlas Roofing Co. v. Occupational Safety and Health Review Comm’n*, 430 U.S. 442 (1977).

of criminal procedure. To avoid complexity, this Article's examples—juries and due process—do not depend on identifying whether a particular case is civil or criminal in nature. Nonetheless, the administrative escape from both civil and criminal standards is a reminder of the evasion's breadth.

Administrative adjudication is most familiar to Americans from the Internal Revenue Service. Informally, the IRS can ask a taxpayer to attend an audit of his returns; more formally, it can summon him for an examination and thereby demand attendance, testimony, and records, without a summons, subpoena, or other order from a judge.¹⁶ Serving as prosecutor, jury, and judge all bundled into one, an IRS examiner can accuse and question the taxpayer, find him in violation of IRS regulations, and demand back taxes and impose penalties.

Unlike the IRS, many agencies offer versions of at least some of the Constitution's procedural rights. For example, though agencies do not use juries and real judges, many provide hearings, employ allegedly independent ALJs, and otherwise adopt procedures that mimic those of regular courts.¹⁷ Yet these agency procedures tend to be pale imitations that fall far short of the Constitution's protections.

The loss of one right after another has become so commonplace that it often goes unnoticed. To someone fined by an agency, it is

¹⁶ 26 USC § 7602 authorizes the Secretary of the Treasury to take specified actions for "the purpose of ascertaining the correctness of any return, . . . determining the liability of any person for any internal revenue tax," or other such ends. What Americans call an "audit" is what the Internal Revenue Code calls an "examination" under 26 USC § 7602, which authorizes the Secretary of the Treasury to "examine any books, papers, records, or other data which may be relevant or material to such inquiry." This section also authorizes him more formally to "summon the person liable for tax . . . to appear before the Secretary . . . and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry." *Id.*

¹⁷ Some ALJs are not employed by their agency, but by a separate adjudicatory agency—notably the Occupational Safety and Health Review Commission.

obvious enough that he has not had the sort of justice he could expect from a court. What is less well understood, even by legal academics, is that administrative adjudication systemically evades the Constitution's procedural rights.

II. JURIES

Jury rights illustrate the loss. Although the government must comply with the Constitution's jury guarantees when it takes the high road of proceeding against Americans in court, it can evade juries simply by taking the low road of acting against Americans through agencies.

A. RIGHT TO A JURY

No right was more insistently protected by the Constitution. Article III guarantees a jury in the "trial of all crimes," and the Sixth Amendment echoes this, stipulating that the accused shall enjoy a jury in "all criminal prosecutions."¹⁸ The Seventh Amendment, moreover, preserves the right of trial by jury in "suits at common law"—meaning all civil cases outside of equity, admiralty, and military jurisdiction.¹⁹ With these exceptions, juries were guaranteed, regardless of whether a case was criminal or civil.²⁰

¹⁸ U.S. Const. art. III; *id.* amend. VI.

¹⁹ U.S. Const. amend. VII.

²⁰ The only exception was for cases up to \$20. This fixed and rather low monetary floor is often thought to reflect a failure among the founders to understand inflation. In fact, it echoes the traditional baseline for the right to a jury in civil cases. There simply was no right to a jury in cases below the jurisdictional floor of the common law courts, and in England, when the courts sat in civil cases, this baseline had been 40 shillings. American states enacted a range of dollar equivalents, and although they sometimes raised the floor on account of inflation, they did not go above \$20. In this context, the Constitution adopted its \$20 floor for civil jury rights. For the 40 shillings, see PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 410 (2008).

Are the jury clauses, however, so broad as to bar administrative adjudication? The question is answered already by Article III, which vests the judicial power in the courts, and thus precludes the government from exercising judicial power outside the courts.²¹ But what about the jury clauses themselves? Did they merely set standards for the courts, or did they also bar jury-less adjudication outside the courts?

Already in Magna Charta, the right to be tried by one's peers was understood to be a barrier to binding proceedings outside the courts. When the English barons in 1215 famously secured from King John the stipulation, in Article 39 of Magna Carta, that "no free man shall be . . . imprisoned or disseised . . . except by the lawful judgment of his peers or by the law of the land," they were not narrowly alluding to trial by jury.²² They nonetheless were enunciating a widely familiar principle about trial by peers that would soon acquire substance in juries, and were asserting this principle in opposition to what nowadays would be called administrative adjudication.²³ John had tended to act against the barons and their retainers not through the courts, but rather through administrative decisions; and the barons therefore sought the king's assurance about trial by the law of the land or at least by their peers.²⁴ As put by J.C. Holt – the leading historian of Magna Carta – Article 39 was aimed primarily against "arbitrary disseisin at the will of the king," against "summary process," and against "arrest and imprisonment on an administrative

²¹ This vesting of judicial power was exclusive, as explained in HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL?, *supra* note 3, at 396-8.

²² WILLIAM SHARP McKECHNIE, MAGNA CHARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 375 (1914).

²³ J.C. HOLT, MAGNA CARTA 75 (1992) (explaining that Magna Carta's "insistence on judgment by peers . . . was a generally recognized axiom").

²⁴ *Id.* at 277, 279 (regarding arbitrary imprisonment and disseisin).

order.”²⁵ King John’s biographer, W.L. Warren, even more bluntly explains that Article 39 targeted “executive action.”²⁶ Thus, even though this early provision was not yet understood to concern juries, it remains suggestive, for it reveals that, already at the beginnings of the common law, the guarantee of trial by one’s peers not only set a standard for the courts but also, at least as significantly, took aim at adjudication outside the courts.

Almost all governments feel tempted to escape lawful paths of power and associated procedural rights; it therefore is no surprise that early Americans took an interest in the right of trial by jury. When Parliament in 1765 required Americans to pay a stamp duty on paper used for legal documents, it understood that this might provoke opposition from juries. It therefore, in its notorious Stamp Act, authorized enforcement of the duties in admiralty courts, which employed non-common law and jury-less proceedings.²⁷ Americans were outraged by this evasion of one of their central constitutional rights as British subjects. The Continental Congress protested that “trial by jury is the inherent and invaluable right of every British subject in these colonies.”²⁸ Thus, “by extending the jurisdiction of the courts of admiralty beyond its ancient limits,” Parliament was “subvert[ing] the rights and liberty of the colonists.”²⁹

A little over a decade later, the states themselves were tempted to skirt jury trials, this time by turning to administrative proceedings in front of justices of the peace. In 1778, when the Revolution had devolved in some New Jersey counties into a sort of civil war, the

²⁵ *Id.* at 327.

²⁶ W.L. WARREN, KING JOHN 234 (1978).

²⁷ An Act for Granting and Applying Certain Stamp Duties . . . 1765, 5 Geo. 3 c. 12.

²⁸ *Continental Congress, Resolutions* (Oct. 19, 1765), in DOCUMENTS OF AMERICAN HISTORY (Henry Steele Commager ed., 1948).

²⁹ *Id.*

legislature tried to discourage trading with the enemy by permitting any individual to seize goods transported across enemy lines and to secure title to them in a proceeding before a justice of the peace acting with only a six-man “jury.”³⁰ A jury, however, was traditionally understood to mean a body of twelve qualified persons. Accordingly, the next year, in *Holmes & Ketcham v. Walton*, the state’s supreme court held the statute unconstitutional.³¹ Although the court focused on the truncated size of the jury, what matters here is that the right to a jury applied not only in court but also outside it. This right barred administrative and other binding proceedings outside the regular courts.

Similar cases occurred in New Hampshire. In 1785, amid a financial crisis caused by poor harvests and a shortage of specie, the New Hampshire legislature attempted to facilitate the collection of small debts by authorizing justices of the peace to hear claims for debts up to ten pounds without a jury.³² Though the statute permitted defendants to appeal these administrative proceedings to the Inferior Courts and thereby get full *de novo* jury trials, these courts in 1786, in what are known as the *Ten Pound Cases*, repeatedly held the statute unconstitutional for violating the right to a jury.³³ Common law courts traditionally had jurisdiction where the disputed amount was over forty shillings, and it thus came to be understood that there was a right to a jury in any such case.³⁴ The

³⁰ HAMBURGER, LAW AND JUDICIAL DUTY, *supra* note 20, at 409 (quoting and explaining 1778 statute).

³¹ *Holmes & Ketcham v. Walton* (N.J. 1780), *discussed in* HAMBURGER, LAW AND JUDICIAL DUTY, *supra* note 20, at 420-22.

³² HAMBURGER, LAW AND JUDICIAL DUTY, *supra* note 20, at 423 (quoting and explaining 1785 statute).

³³ *Id.* at 422-35.

³⁴ *Id.* at 425, 427-28, 435; *see also id.* at 410 (for underlying question of 40 shilling jurisdictional floor).

Inferior Courts therefore explained that the New Hampshire statute was “manifestly contrary to the constitution of this state.”³⁵ These early constitutional decisions confirm that the right to a jury barred adjudicatory proceedings outside regular courts – at least where the disputed amount was above the traditional jurisdictional floor of common law courts.

B. EVASION

Nowadays, the Supreme Court allows the administrative evasion of jury rights. It recognizes the conflict between administrative procedure and the Seventh Amendment’s guarantee of juries in civil cases.³⁶ But rather than let this amendment bar administrative adjudication, the Court simply declares that the government interest in such adjudication always overcomes the right to a jury.

Equity. One justification for denying jury rights is that much administrative adjudication could be understood to grant equitable remedies, thus placing it outside the Seventh Amendment’s guarantee of a jury in “Suits at common law.”³⁷ For example, the Securities Exchange Commission’s ALJs can issue cease-and-desist orders, industry bans, and disgorgement, and some scholarship therefore suggests that administrative adjudication can be

³⁵ *Macgregore v. Furber* (N.H. Rockingham Cty. Inf. Ct. 1786), *quoted in* HAMBURGER, LAW AND JUDICIAL DUTY, *supra* note 20, at 427.

³⁶ *Atlas Roofing Co. v. Occupational Safety and Health Review Comm’n*, 430 U.S. 442, 450 (1977) (“when Congress creates new statutory ‘public rights,’ it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment’s injunction that jury trial is to be ‘preserved’ in ‘suits at common law.’”).

³⁷ U.S. Const. amend. VII.

considered equitable.³⁸ But the agency adjudication of regulatory claims is not analogous to equity, for agency adjudicators are not judges.

The whole point of equity is to have a judge exercise equitable discretion about law and remedies, and from this perspective, although there cannot be a jury, there has to be a judge. Indeed, because of the absence of a jury, the role of a judge in equity is even more important than at law. Equity, in other words, is singularly dependent on the presence of a judge—meaning not just any adjudicator, but a real judge, who enjoys and exercises real independence, and who is learned enough to make decisions about equity.

Administrative adjudicators, even ALJs, do not meet this standard. They are not drawn from a pool that includes the highest ranks of the legal profession; they are not chosen with the scrutiny that comes with presidential appointment and Senate confirmation; indeed, they are selected by the very agencies whose cases they decide.³⁹ However well meaning, they generally lack the intellectual breadth traditionally expected of judges sitting in equity.⁴⁰ And

³⁸ David Zaring, *Enforcement Discretion at the SEC*, 94 TEX. L. REV. 1155, 1205 (2016) (such remedies “look more like equitable remedies than the sorts of damages remedies that look like common law relief”).

³⁹ Agencies allegedly choose their ALJs only from the top three candidates, but in fact they can also choose from the vast pool of ALJs at other agencies. For example, at the SEC, 3 of the agency’s 5 ALJs are apparently drawn from that larger pool. See Amicus Brief of the New Civil Liberties Alliance at 4-6, *Lucia v. Sec. & Exch. Comm’n*, 2018 WL 1326145 (U.S. 2018) (No. 17-130).

⁴⁰ On the tendency of ALJs to lack the intellectual breadth necessary for an exercise of equitable discretion, note Judge Rakoff’s comments about their “narrow, tunnel-vision view of the law.” Stephanie Russell-Kraft, *Rakoff Continues Crusade Against SEC Admin Courts*, LAW360 (Nov. 21, 2014, 1:46 PM), <http://www.law360.com/articles/598561/rakoff-continues-crusade-against-sec-admin-courts> [<https://perma.cc/2QBH-BUBJ>] (reporting on Rakoff’s remarks at a panel at Columbia Law School), *quoted by Zaring, supra* note, 38 at 1217.

because they are required to follow agency rules, interpretations, and other policies, and can be disciplined for doing otherwise, they have little room to act equitably.⁴¹ Indeed, their decisions ultimately are not even their own, as many ALJs cannot make final decisions but must leave finalization to agency heads; and even when ALJs can make final decisions, these are usually reviewable by their agency heads. Some ALJs (as will be seen) have complained about pressure from their agency heads and more generally about a lack of independence.⁴² Last but not least, there is reason to fear that many ALJs shift the burdens of proof and persuasion to defendants and that some are consistently biased in favor of their agencies.⁴³

None of this is consistent with equity. It gets equity exactly backwards to conclude that an analogy to equity can justify administrative adjudication.

Statutory Actions. Another justification for denying jury rights is that the Seventh Amendment's phrase "suits at common law" means common law actions, as opposed to actions authorized by statute.

Another commentator writes that their opinions "ooze parochialism and tunnel vision, again showing the administrative forum is no place for enforcement actions of . . . magnitude," *SEC ALJ in Bebo Case Refuses to Consider Constitutional Challenge and Denies More Time to Prepare Defense*, SEC. DIARY (Apr. 8, 2015), <http://securitiesdiary.com/2015/04/08/sec-alj-in-bebo-case-refuses-to-consider-constitutional-challenge-and-denies-more-time-to-prepare-defense> [https://perma.cc/K7NS-EDZK], quoted by Zaring, *supra* note 38, at 1214.

Adrian Vermeule observes the danger of attributing too much to judges who are not the intellectual equivalents of Hercules, and his point is especially apt with regard to ALJs and other administrative "judges." Adrian Vermeule & Ernest A. Young, *Hercules, Herbert, and Amar: The Trouble with Intratextualism*, 113 HARV. L. REV. 730 (2000).

⁴¹ See *infra* pp. 742-47 and accompanying notes.

⁴² See notes 93-100.

⁴³ See notes 93-100, 102, & 105.

Such was the theory once put forward in cases such as *NLRB v. Jones & Laughlin Steel Corp.* and *Curtis v. Loether*.⁴⁴

What led to the adoption of the Seventh Amendment, however, were widespread demands for jury rights generally in civil actions.⁴⁵ The Amendment therefore carefully guarantees juries in *suits at common law*—that is, in all civil cases outside of equity, admiralty, and the military—not merely in *common law actions*.⁴⁶

The Philadelphia Convention had spent much time on the subject. As William Spaight—one of the North Carolina delegates—explained, “the trial by jury was not forgotten in the Convention; the subject took up a considerable time to investigate it.”⁴⁷ But the Convention found it “impossible to make any one uniform regulation for all of the states, or that would include all cases where it would be necessary.”⁴⁸ Anti-Federalists, however, cried out for the guarantee of juries in civil cases. Just ten days after the Convention completed the Constitution, Richard Henry Lee prosed a bill of rights providing that “the trial by Jury in Criminal and Civil cases . . . shall

⁴⁴ *NLRB v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 48-49 (1937) (“The instant case is not a suit at common law or in the nature of such a suit. The proceeding is one unknown to the common law. It is a statutory proceeding.”); *Curtis v. Loether*, 415 U.S. 189, 194-95 (1974) (discussing cases that acknowledge the “congressional power to entrust enforcement of statutory rights to an administrative process or specialized court of equity free from the strictures of the Seventh Amendment.”).

Perhaps the narrowest interpretation of the Seventh Amendment comes from David Zaring, who argues: “The problem with the jury-trial argument is that it only applies to ‘Suits at common law,’ and the SEC’s administrative proceedings, designed to protect investors in kinds of markets that did not exist at the time of the framing of the Constitution, are not those kinds of suits.” Zaring, *supra* note 38, at 1205. From this point of view, the right to a jury is not guaranteed where new markets develop.

⁴⁵ See, e.g., *infra* text accompanying note 50 (quoting Hamilton).

⁴⁶ See HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL?, *supra* note 3, at 246-47.

⁴⁷ 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 144 (Jonathan Elliot, ed. 1836).

⁴⁸ *Id.*

be held sacred.”⁴⁹ The demand for a right to a jury in civil cases rapidly became one of the most prominent arguments against the Constitution. William Davie informed James Madison that the people of North Carolina “insist on the trial by jury being expressly secured to them in all cases.”⁵⁰ Alexander Hamilton admitted in the *Federalist*: “The objection to the plan of the convention, which has met with most success in this state, and perhaps in several of the other states, is *that* relative to *the want of a constitutional provision* for the trial by jury in civil cases.”⁵¹

To put such concerns to rest, Congress proposed the Seventh Amendment. Of course, many in Congress and among the people understood that a right to juries in civil cases would come with some inconvenience, for this had been thoroughly discussed in 1787 and 1788. Nonetheless, in the Seventh Amendment, Congress recognized the popular expectation that juries should be guaranteed in both criminal and civil cases. And outside of equity, admiralty, and the military, this meant “in all cases.”⁵²

Acknowledging the gist of this history, the Supreme Court has abandoned its earlier theory that the Seventh Amendment does not apply to statutory actions. Notably, in *Atlas Roofing Company, Inc. v. Occupational Safety and Health Review Commission*, it concedes that the Amendment’s phrase “Suits at common law” had traditionally been construed to refer to “cases tried prior to the adoption of the Seventh

⁴⁹ Proposed Amendments (Sept. 27, 1787), reprinted in 1 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 337 (1976).

⁵⁰ Letter from William R. Davie to James Madison (June 10, 1789), reprinted in CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 246 (Helen E. Veit et al. eds. 1991).

⁵¹ THE FEDERALIST NO. 83, at 558 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

⁵² Letter from William R. Davie to James Madison (June 10, 1789), reprinted in CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 246 (1991). The only exception was for cases of \$20 or less.

Amendment in courts of law in which jury trial was customary, as distinguished from courts of equity or admiralty, in which jury trial was not.”⁵³

Public Rights. Instead of drawing a line between common law and statutory actions, the Supreme Court in *Atlas* held that when the government administratively asserts “public rights” under a statute, its public rights triumph over the merely private assertion of the Seventh Amendment right to a jury.⁵⁴ Public rights, however, are an odd foundation for denying the Constitution’s jury rights.

The Court had traditionally used the term “public rights” as a label for the lawful sphere of executive action.⁵⁵ Nonetheless, in a series of cases, including *Atlas Roofing* in 1977, the Court unmoored the phrase from its traditional usage and used it to dispense with the Seventh Amendment’s right to a jury in agency proceedings against Americans.⁵⁶ An ALJ (acting, of course, without a jury) heard charges against Atlas and fined it \$600 for violating safety standards, after which Atlas appealed to the Occupational Safety and Health Review Commission and then to the courts—each time being told that the ALJ’s findings of fact, as adopted by the commission, displaced

⁵³ 430 U.S. 442, 449 (1977) (citing *Parsons v. Bedford*, 3 Pet. 433 (1830)).

⁵⁴ In *Atlas*, the Court explained: “At least in cases in which ‘public rights’ are being litigated—*e.g.*, cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact—the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible.” 330 U.S. at 450. It added: “In sum, the cases discussed above stand clearly for the proposition that, when Congress creates new statutory ‘public rights,’ it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment’s injunction that jury trial is to be ‘preserved’ in ‘suits at common law.’” *Id.* at 455.

⁵⁵ HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL?, *supra* note 3, at 247.

⁵⁶ *Atlas*, 430 U.S. at 455.

Atlas's right to a jury.⁵⁷ As it happens, binding agency adjudication, including fact finding, is not within the scope of the Constitution's grant of executive power; but even if it were, it would not defeat the Seventh Amendment, for the Constitution's rights are limits on government power.⁵⁸ In other words, rights trump power. Understanding this obstacle, the Supreme Court in *Atlas Roofing* recast administrative power as a right—indeed, as a “public right”—which by implication trumped any private claim of right, even if based on the Constitution.⁵⁹

This shift in locution—by which a government power of dubious constitutionality was renamed a “public right,” and by which a constitutional right was implicitly denigrated as “private”—has inverted the relationship between government power and the right to a jury.⁶⁰ Whereas James Madison considered rights as exceptions to power, administrative power is now an exception to the right to a jury.⁶¹ To be sure, government interests can be relevant for understanding the extent of a constitutional right.⁶² Here, however, a central constitutional right is invariably swept away whenever the government proceeds outside the courts simply because of the “public” or governmental character of administrative enforcement.⁶³

The incompatibility of the “public rights” argument with the U.S. Constitution, and the origins of this argument in a notoriously unfree

⁵⁷ *Id.*

⁵⁸ Philip Hamburger, *The Inversion of Rights and Power*, 63 *BUFF. L. REV.* 731, 738-52 (2015) (explaining that constitutional rights are “exceptions” to power).

⁵⁹ *Atlas*, 430 U.S. at 455.

⁶⁰ Hamburger, *Inversion*, *supra* note 57, at 757-62 (noting how the public rights doctrine inverts rights and power).

⁶¹ *Id.* at 749.

⁶² *Id.* at 765-75.

⁶³ Although *Atlas* confines this doctrine to government actions authorized by statute, 430 U.S. at 455, this is scarcely a limitation.

theory of government, can be left aside here.⁶⁴ More central, for purposes of this Article, is the Supreme Court's astonishing position. The Court concedes that administrative adjudication would ordinarily be barred by the right to a jury. But it allows such adjudication to escape the constitutional right by elevating government power as a public right, which defeats the private assertion of the Constitution's right. Might trumps right.

III. DUE PROCESS

The fate of due process reveals an even worse evasion of procedural rights. Unlike juries, which are easily identifiable institutions employed by courts, the due process of law has seemed an open-ended principle. The Constitution's assurances of due process (in the Fifth and Fourteenth Amendments) have thus seemed to serve as catch-all protections for procedural fairness. But regardless of the exact breadth of this right, it traditionally was not merely a standard for the courts; more concretely, it was a barrier against what might happen outside the courts.

A. DUE PROCESS

As with juries, the underlying principle for due process dates back to Magna Carta and Article 39's assurance that "no free man shall be . . . imprisoned or disseized . . . except by the lawful judgment of his peers or by the law of the land."⁶⁵ Like the guarantee about judgment by one's peers, the alternative guarantee about the law of the land was a response to the king's tendency to act against men not through his courts, but through administrative decisions.

⁶⁴ See HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?*, *supra* note 3, at 247-48 note m (tracing civilian origins of idea of public right).

⁶⁵ McKechnie, *supra* note 22, at 375 note d.

The principle that the king should act against Englishmen only through the law of the land eventually became the more familiar principle of due process of law – most notably in two statutes during the reign of King Edward III. These enactments remain significant, for they confirm that due process, from its formation, barred administrative adjudication.

Not content to hold his subjects to account in the courts of law, Edward also summarily called them before his council for questioning and punishment. In 1354, Parliament therefore enacted: “No man of what estate or condition that he be, shall be put out of land or tenement, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought in answer by due process of the law” – meaning the process of the courts of law.⁶⁶

King Edward failed to live up to this statute, and within a decade, he once again was hauling men into his council instead of working through the courts. Parliament therefore passed another due process statute in 1368.⁶⁷ After reciting that the attempts to hold subjects accountable “before the king’s council” were “against the law,” this statute provided that “no man be put to answer without presentment before justices, or matter of record, or by due process and writ original, according to the ancient law of the land.”⁶⁸ As summarized on the margin of the Parliament roll, “None shall be put to answer without due process of law.”⁶⁹ Thus, any move—even merely with a summons—to compel subjects to answer questions or charges in the king’s administrative proceedings was unlawful. This

⁶⁶ 28 Edw. 3 c. 3.

⁶⁷ 42 Edw. 3 c. 3.

⁶⁸ *Id.*

⁶⁹ *Id.* That this was not the original title of the statute, but was added in the margins, becomes clear from the image in *The Parliament Rolls of Medieval England, 1275-1504*, on CD-Rom: *Rotuli Parliamentorum* (Scholarly Digital Editions).

due process statute barred any royal attempt at binding administrative adjudication.

Incidentally, one of the most curious aspects of the 1368 Due Process Statute was its final clause, which instructed the courts that “if anything henceforth be done to the contrary, it shall be void in law, and held for error.”⁷⁰ This has long puzzled commentators. Some have fancifully suggested that Parliament was inventing “judicial review,” but the notion that an unlawful act was void had long been familiar, and there was no need for Parliament to invent it. Why, then, the final clause? In all probability, the judges in some cases had deferred to the king about the lawfulness of his conduct or had hesitated to hold the king’s actions void – both of which have equivalents in contemporary judicial review of administrative actions.⁷¹ Parliament therefore instructed the judges to hold that any royal acts contrary to the 1368 due process statute were void.

The practical implications were immediate. In 1368, after a commission established by King Edward seized and imprisoned a man and took his goods, the judges held the commission void, saying that it was “against the law” because it authorized the commissioners “to take a man and his goods without indictment, suit of a party, or due process.”⁷² Adjudication outside the courts was contrary to due process, and the judges held it unlawful.

For Americans, the role of due process as a barrier to adjudication outside the courts remained familiar because of its role in the constitutional controversies of the seventeenth century. Due process was a foundation of the 1628 Petition of Right (a predecessor of the U.S. Bill of Rights) and of the 1641 statute abolishing the Star

⁷⁰ 42 Edw. 3 c. 3.

⁷¹ Cf. the tendency of courts, even when they hold agency actions unlawful, to remand to the agency rather than simply hold the actions void.

⁷² Commission, 42 Ass. pl. 5 (1368).

Chamber (one of the enactments that, at least for a while, largely ended “prerogative” or centralized administrative adjudication in England).⁷³ Studying this history, Americans learned that the evasion of the courts was a recurring danger. They also learned that due process guarantees were not just standards for the courts, but more prominently were barriers to adjudication outside courts. And this matters for the U.S. Constitution. When the Fifth Amendment guaranteed the due process of law, it continued in the tradition of Magna Carta, the due process statutes, the Petition of Right, and the statute abolishing the Star Chamber.

The Fifth Amendment’s words reveal its breadth: “No person shall . . . be deprived of life, liberty, or property, without due process of law.”⁷⁴ If the amendment had aimed merely to limit what the courts could do, it would have stated (in the active voice): “*No court shall deprive any person of life, liberty, or property, without due process of law.*” But, like the other procedural clauses in the Bill of Rights, the Fifth Amendment had to do more than confine the courts; it also had to bar adjudication outside the courts. Such adjudication was an old, recurring threat, and guarantees of due process and other procedural rights would have been meaningless if the government could have avoided them by simply sidestepping the courts. Therefore, like so many procedural rights, the Fifth Amendment’s Due Process Clause is written in the passive voice and it thereby limits all parts of government.⁷⁵

Also revealing is the location of the Fifth Amendment. To bar adjudication outside the courts, the Fifth Amendment and the other

⁷³ Petition of Right, 3 Car. c. 1 (1628); An Act for the Regulating of the Privy Council and for Taking Away the Court Commonly called the Star Chamber, 16 Car. c. 10 (1641) (both reciting 1368 due process statute).

⁷⁴ U.S. Const. amend. V.

⁷⁵ *Id.*

procedural rights could not simply modify Article III of the Constitution, for they then would have limited only the courts. Instead, they also had to limit the executive, established in Article II.⁷⁶ They additionally had to confine the Congress, established in Article I, lest that body authorize adjudication outside the courts.⁷⁷

The drafters of the Bill of Rights therefore changed how they wrote it. They originally framed amendments that would have rewritten particular articles in the body of the Constitution—altering their wording article by article, section by section.⁷⁸ Ultimately, the drafters decided, instead, to add their amendments at the end of the whole Constitution.⁷⁹ This proved crucial, for it enabled the procedural amendments to limit all parts of government. These two drafting techniques—using the passive voice and putting amendments at the end—give the procedural rights their breadth.

The implication for due process was recognized by one of the earliest academic commentaries on the U.S. Bill of Rights. St. George Tucker was a Virginia judge who taught constitutional law at William and Mary in the 1790s. Among his bound notes are loose pages, apparently from 1796, in which he quotes the Fifth Amendment's Due Process Clause and then concludes: "Due process of law must then be had before a judicial court, or a judicial magistrate"—a point he also stated in the main body of his lectures.⁸⁰

⁷⁶ U.S. Const. art. II, III.

⁷⁷ U.S. Const. art. I.

⁷⁸ House Committee Report (July 28, 1789), *reprinted in* CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 29-33 (Helen E. Veit et al. eds. 1991).

⁷⁹ House Resolution and Articles of Amendment (Aug. 24, 1789), *reprinted in* CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 37-41 (Helen E. Veit et al. eds. 1991).

⁸⁰ St. George Tucker, Law Lectures, p. 4 of four loose pages inserted in notebook 2, Tucker-Coleman Papers, Mss. 39.1 T79, Box 62, Special Collections Research Center, Earl Gregg Swem Library, College of William and Mary, <https://digital>

As later put by Chancellor James Kent, the due process of law “means law, in its regular course of administration, through courts of law.”⁸¹

This was particularly clear because of the core meaning of due process. Although the due process of law has increasingly been understood to govern all of a court’s proceedings, it most centrally was a matter of legal process: the original process by which individuals were brought into court, the mesne process employed by courts during litigation, and the final process by which judgment was executed.⁸² On this basis, it was inescapable that the due process of law could be had only from a court.

The Fifth Amendment thus generally bars the government from imposing any legally obligatory adjudication on Americans outside the courts and their processes. This was the breadth of the principle

archive.wm.edu/handle/10288/13361. When, in the main body of his lecture notes, he discussed the courts, he commented: “No person shall be deprived of life, liberty, or property, (and these we shall remember are the objects of all rights) without due process of law; which it is the province of the judiciary to grant.” *Id.* at 5: 203-04.

⁸¹ JAMES KENT, 2 COMMENTARIES ON AMERICAN LAW 13. *See also* JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION §1783 (“this clause in effect affirms the right of trial according to the process and proceedings of the common law”).

⁸² Commenting on the fourteenth-century due process statutes, Keith Jurow explains: “the word ‘process’ itself meant writs. To be more precise, it referred to those writs which summoned parties to appear in as well as those by which execution of judgments was carried out.” Keith Jurow, *Untimely Thoughts: A Reconsideration of the Origins of Due Process*, 19 AM. J. LEGAL HIST. 265, 272-73 (1975). When he gets to the eighteenth century, Jurow writes: “Blackstone made no separate reference to due process of law in his commentaries, he did have a chapter on process which, like earlier treatises, divided it into original process, mesne process, and final process.” *Id.* at 278.

Against the background of such understandings of “process,” it makes sense that the 1368 Due Process Statute recited that “no man be put to answer without presentment before justices, or matter of record, or by due process and writ original, according to the ancient law of the land.” It also thus makes sense that the early summary and eventual title of the statute was: “None shall be put to answer without due process of law.” *See supra* text accompanying notes 65-71.

from its very beginnings; this was how the Fifth Amendment was drafted; and this was how it was understood in the 1790s.

B. EVASION

Nowadays, the Supreme Court assumes that most adjudication outside the courts does not violate due process.⁸³ When it does apply Fifth Amendment's Due Process Clause to administrative adjudications, it is not to bar such proceedings, but to explain that they require much less process than the due process of law in the courts—usually little more than an administrative hearing.⁸⁴

Even an administrative hearing is no longer predictably required. As the Supreme Court explained in 1976 in *Mathews v. Eldridge*—a disability-payments termination case—a hearing is guaranteed only when needed to prevent an erroneous government deprivation of a private interest and when not outweighed by the government's interests, including any fiscal and administrative burdens.⁸⁵ Outside such circumstances, “the ordinary principle” is that “something less than an evidentiary hearing is sufficient prior to adverse administrative action.”⁸⁶ Due process thus usually gets reduced to even less than the triviality of an administrative hearing.

The triviality of such a hearing becomes clear when one realizes that the Court understands a “hearing” to include a determination

⁸³ *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970). (holding that due process requires the government to offer a hearing before denying some types of welfare benefits). Echoing the Supreme Court, Peter Strauss, for example, writes about due process: “As originally understood, this instruction chiefly concerned the ordinary processes of courts. . . . There was no reason to think that it applied to procedures followed within the government bureaucracy.” PETER L. STRAUSS, *ADMINISTRATIVE JUSTICE IN THE UNITED STATES* 13 (2002).

⁸⁴ *Id.*

⁸⁵ *Mathews v. Eldridge*, 424 U.S. 319 (1976).

⁸⁶ *Id.* at 343.

without an oral presentation.⁸⁷ Thus, even where due process requires an “evidentiary hearing,” this does not mean that affected persons will actually be heard.⁸⁸

Just how much the government can thereby avoid anything remotely like a court’s due process of law can be illustrated by the Comprehensive Environmental Response, Compensation, and Liability Act—more familiarly known as CERCLA. Under this statute, the Environmental Protection Agency adjudicates by issuing “unilateral administrative orders.”⁸⁹ As landowners, large and small, have learned to their surprise, the EPA can simply order individuals or businesses (even those without negligence or other fault) to clean up their land. The EPA thereby adjudicates and commands private action without so much as a hearing.

The underlying point of the Supreme Court’s due process doctrine, as the judges noted in *Morrissey v. Brewer*, is that “due process is flexible and calls for such procedural protections as the particular situation demands.”⁹⁰ From this flexible and contextual perspective, administrative process (always without a jury, and often without even a hearing) is “all the process that is due.”⁹¹

Of course, less open-ended procedural rights, such a jury or the privilege against self-incrimination, cannot by themselves be understood so flexibly. Nonetheless, the evasion of the full range of procedural rights often gets summed up as a problem of due process, and the relatively concrete rights thereby get dismissed on the theory that due process is flexible, according to its context. Procedural rights

⁸⁷ *Id.* at 344-45.

⁸⁸ *Id.* (distinguishing an “evidentiary hearing” from an “oral presentation to the decisionmaker”).

⁸⁹ 42 U.S.C. §9606(b) (2016).

⁹⁰ *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

⁹¹ *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 547 (1985).

thus become elastic barriers that the government can adjust at its convenience.

If administrative tribunals offered extra procedural guarantees that were especially reassuring, it might seem reasonable to accept some diminished due process. But the Constitution does not allow such rebalancing of gains and losses. In any case, there clearly are massive losses in procedural protections and only dubious marginal gains.⁹²

Indeed, the dilution of due process creates incentives for violations of the Constitution. The government's circumvention of the courts is rewarded with the opportunity to avoid procedural rights, and the government's escape from procedural rights is rewarded with the assurance that this is all the process that is due.

The evasion of the courts and their processes, which once tempted kings, has thus returned on a greater scale than ever before. Though the due process of law developed as a constitutional right against administrative adjudication, it now is rephrased as "the process that is due" in order to excuse such adjudication. Far from preventing the evasion, due process now legitimizes it.

⁹² The clearest plausible gains are the relatively high speed and low cost of administrative hearings, compared to court cases. But these are not additional procedural protections; rather they are side effects of the systemic loss of such protections. And for defendants that need their procedural rights to defend themselves, the side effects of losing these rights are not advantageous. That administrative adjudication is not a good procedural bargain for many defendants becomes clear from the fact that the government does not offer it as a choice, in the manner of alternative dispute resolution, but instead forcibly imposes it. The government evidently recognizes that a significant number of parties do not think that the putative gains outweigh the losses.

IV. FAIRNESS

One might justify administrative adjudication by saying that it is fair.⁹³ After all, it is frequently overseen by ALJs, most of whom are very conscientious. In this spirit, commentators tend to assume that administrative adjudicators exercise independent judgment and that their process is even handed. But neither assumption is sustainable. Far from being fair, administrative adjudication violates basic principles of due process.

A. INDEPENDENT JUDGMENT

Do administrative adjudicators really have independent judgment? Many of them are not ALJs and thus lack any protection for their independence. Accordingly, any claim for the independence of administrative adjudicators comes down to the decisions of ALJs, and this is sobering because even they are not really independent.

In a 1992 survey of ALJs, 15 percent complained of threats to their independence, with 8 percent saying that this was a frequent problem.⁹⁴ Giving texture to such statistics, the Wall Street Journal in

⁹³ Along similar lines, David Zaring defends the SEC's ALJs on the basis of *Mathews v. Elridge's* due process test, the alleged similarities between ALJ and district court proceedings, and the "statutorily protected independence" of ALJs. Zaring, *supra* note 38, at 1198, 1200. But such arguments are strained. *Mathews* offers only a weak standard developed in a benefits case (as explained *infra* pp. 749-50); ALJ proceedings are very different from district court proceedings (for example, in not offering equal discovery, in not predictably offering the usual burdens of proof and persuasion, and in not having juries); and the statutory independence of ALJs does not extend to the key questions about the lawfulness of administrative rules—questions that come up in all ALJ cases (as explained *infra* pp. 742-47).

⁹⁴ For the 1992 survey, see Charles H. Koch, Jr., *Administrative Presiding Officials Today*, 46 ADMIN. L. REV. 271, 278 (1994). The numbers were more than twice as high for administrative law judges in the Social Security Administration, but as they decide benefits, the argument here rests on the figures from administrative law judges outside that agency.

2015 published the complaint of Lillian McEwen—a former ALJ at the Securities Exchange Commission—that she had been pressured to reach decisions favoring the Commission.⁹⁵ The Journal also revealed that one of the Commission’s ALJs “ha[d] found the defendants liable in every contested case he ha[d] heard”—an astonishing record of fealty to his agency.⁹⁶ As summarized by New York Times reporter Gretchen Morgenson, the “mind-set” of the SEC ALJs “reflects the agenda of the agency, which in this arena is enforcement.”⁹⁷ There are thus some initial reasons to be concerned about the independence of ALJs.

The seriousness of the problem with ALJs becomes apparent from the institutional limits on their independence. It is often said that ALJs are protected in their tenure and salary by the Federal Merit Systems Protection Board.⁹⁸ But ALJs can be removed, suspended, or

⁹⁵ Jean Eaglesham, *SEC Wins With In-House Judges*, WALL ST. J. (May 6, 2015), <https://www.wsj.com/articles/sec-wins-with-in-house-judges-1430965803>.

⁹⁶ Jean Eaglesham, *Fairness of SEC Judges Is in Spotlight*, WALL ST. J. (Nov. 22, 2015), <https://www.wsj.com/articles/fairness-of-sec-judges-is-in-spotlight-1448236970> (reporting about ALJ Cameron Elliot).

⁹⁷ Gretchen Morgenson, *At the S.E.C., a Question of Home-Court Edge*, N.Y. TIMES (Oct. 5, 2013), <http://www.nytimes.com/2013/10/06/business/at-the-sec-a-question-of-homecourt-edge.html> [<https://perma.cc/43Q3-RP4Z>] (quoting securities law practitioner Lewis D. Lowenfels).

⁹⁸ As I have written before: “The sanctions on administrative law judges are imposed by the federal Merit Systems Protection Board, thus conveniently allowing agencies to say that they cannot punish their administrative law judges for nonconformity.” HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL?, *supra* note 3, at 572, n.9. For example, the Environmental Protection Agency declares:

[N]or can the Agency decrease an ALJ’s salary or otherwise negatively [a]ffect the other terms and conditions of their employment. Further, all ALJs are appointed essentially “for life,” in that there is no mandatory retirement age for ALJs and ALJs can only be removed from their positions for “good cause” established and determined by the Federal Merit Systems Protection Board on the record after a hearing, and thus cannot be removed arbitrarily or for political reasons.

have their salary docked for “good cause,” including their failure to follow their agency’s policies.⁹⁹ And when an agency is dissatisfied with an ALJ, it can simply remove him through a “reduction-in-force action” – as the Commodity Futures Trading Commission did with one in 2012.¹⁰⁰

EPA OFFICE OF ADMINISTRATIVE LAW JUDGES, PRACTICE MANUAL 3 (July 2011). But this appearance of independence is belied by the reality.

⁹⁹ After an opportunity for hearing before the Merit Systems Protection Board, an agency can remove, suspend, demote, or reduce the pay of its ALJs for “good cause.” 5 U.S.C. § 7521. And neither this statute nor regulations have defined “good cause.”

Nor have the courts defined “good cause” – except by specifying a few things that it is not. *Long v. Soc. Sec. Admin.*, 635 F.3d 526, 534 (Fed. Cir. 2011) (internal quotation marks omitted). Although a charge of good cause cannot be “base[d] . . . on reasons which constitute an improper interference with the ALJ’s performance of his quasi-judicial functions,” *Brennan v. Dep’t of Health & Human Servs.*, 787 F.2d 1559, 1563 (Fed. Cir. 1986), this nonetheless leaves room to remove and otherwise penalize ALJs for conduct “inconsistent with maintaining confidence in the administrative adjudicatory process.” *Long*, 635 F.3d at 536.

It is therefore widely assumed, not least by the Merit Systems Protection Board, that ALJs are subject to removal and other punishment for failing to follow agency policies, including agency rules and interpretations. *See, e.g., Social Sec. Admin., Office of Hearing and Appeals v. Anyel*, 58 M.S.P.R. 261, 268-69 (M.S.P.B. June 25, 1993), *opinion after remand* 66 M.S.P.R. 328 (finding “good cause” in an ALJ’s “adjudicatory errors” and her “[i]ndependence’ consisting of freedom to ignore binding agency interpretations of law”).

¹⁰⁰ 5 U.S.C. § 7521(b); Letter from Susan A. Poling, Gen. Counsel, Gov’t Accountability Office, to Rep. Robert Aderholt & Rep. Jack Kingston (Jan. 23, 2013) (available at <https://www.gao.gov/assets/660/651588.pdf>) (last visited on February 28, 2018); *see* Amicus Brief of the New Civil Liberties Alliance at 15, *Lucia v. Sec. & Exch. Comm’n*, 2018 WL 1326145 (U.S. 2018) (No. 17-130) (regarding “the ALJ purge that occurred at the U.S. Commodity Futures Trading Commission”).

Incidentally, there are also national security limits on the independence of ALJs. The head of an agency may suspend any of its ALJs without pay when the agency head “considers that action necessary in the interests of national security.” And he can then remove such an ALJ if, “after such investigation and review as he considers necessary, he determines that removal is necessary or advisable in the interests of national security. The determination of the head of the agency is final.” 5 U.S.C. § 7532 (2016). ALJs thus must be cautious about disagreeing with their agency about what is necessary for national security.

Even if ALJs could not be removed for good cause and reductions in force, their independence would remain illusory because they are profoundly constrained in their judgments. According to the Supreme Court, agencies (and thus their ALJs) cannot judicially overrule the rules that the agencies have adopted in their quasi-legislative capacity.¹⁰¹ And some agencies bar their ALJs from questioning the lawfulness of the agencies' authorizing statutes—as when the SEC declares that the agency and thus its ALJs have “no power to invalidate the very statutes that Congress has directed [it] to enforce.”¹⁰² Indeed, courts have repeatedly said that ALJs are “subordinate” or “subject” to their agency heads in matters of law, interpretation, and policy.¹⁰³ It is therefore difficult to find cases in which ALJs have held their agency's organic statutes, rules, or interpretations void for being unconstitutional or otherwise unlawful.¹⁰⁴

¹⁰¹ *Arizona Grocery Co. v. Atchison*, 284 U.S. 370 (1932).

¹⁰² *Milton J. Wallace*, Exchange Act Release No. 11252, 1975 SEC LEXIS 2238, at *7 (Feb. 14, 1975), at <https://www.sec.gov/alj/aljorders/2015/ap-2675.pdf>.

¹⁰³ See, e.g., *Nash v. Bowen*, 869 F.2d 675, 680 (2d Cir. 1989), *cert. denied*, 493 U.S. 812 (1989) (regarding “policy and interpretation of law”); *Mullen v. Bowen*, 800 F.2d 535, 540-41 n.5 (6th Cir. 1986) (regarding “law and policy”); *Ass'n of Administrative Law Judges v. Heckler*, 594 F.Supp. 1132, 1141 (D.D.C. 1984) (regarding “law and policy”).

¹⁰⁴ In one recent SEC case, for example, the ALJ almost summarily rejected the defendant's constitutional claims and said of one of them—regarding the ALJ's appointment—that it was “more properly addressed to the Commission.” *In the Matter of Gregory T. Bolan, Jr. & Joseph C. Ruggieri*, 3 (Sept. 14, 2015), at <https://www.sec.gov/alj/aljdec/2015/id877jsp.pdf>. In another SEC case, the ALJ rejected the defendant's constitutional claims at slightly greater length, and explained, as to the appointment question, that “the Commission has repeatedly held that it lacks the authority “to invalidate the very statutes that Congress has directed [it] to enforce.” *In the Matter of Charles Hill, Jr.*, Order Denying Respondent's Motion for Summary Disposition on Constitutional Issues, 2, quoting *Milton J. Wallace*, Exchange Act Release No. 11252, 1975 SEC LEXIS 2238, at *7 (Feb. 14, 1975), at <https://www.sec.gov/alj/aljorders/2015/ap-2675.pdf>.

The various barriers to ALJ decisions about the unlawfulness of agency rules and authorizing statutes are especially disturbing because of the number of cases in which such rules and statutes are of dubious legality. Not merely in a few cases, but in all administrative proceedings, there are inescapable questions of unlawfulness—sometimes, for example, under the Administrative Procedure Act, and always under the Constitution.¹⁰⁵ ALJs are thus deprived of their independence on the most persistent and serious legal issues.

The layers of interference with ALJs mean that, whenever the government is a party to administrative proceedings, the ALJs are systematically biased in favor of the legal position of one of the parties—the most powerful of parties—in violation of the Fifth Amendment’s due process of law. Even if, at a personal level, ALJs are always conscientiously independent, the institutional restrictions on their decisionmaking deprives them of independence and renders them biased on central legal issues.

Making matters worse, the decisions of ALJs are often subject to review or finalization by agency heads. The latter are political appointees who do not hear the witnesses or arguments in the cases, who do not need to read the record, and who often made the decision to prosecute or who at least adopted the underlying prosecutorial policies. In other words, these agency leaders—the ultimate decisionmakers in their agencies—usually lack even the pretense of independence. Many defendants therefore do not bother to appeal

¹⁰⁵ It is worth emphasizing that this Article understands administrative adjudications to include only adjudications that bind, in the sense of imposing legal obligation, in contrast to lawful executive determinations, such as those about the distribution of benefits. *See supra* note 5 and accompanying text.

from their ALJs.¹⁰⁶ And there is reason to fear that the ALJs themselves try to avoid disagreeing with their agency heads.¹⁰⁷

Thus, even in agencies with ALJs, the independence of administrative adjudicators does not bear close examination. Rather than display fairness, the adjudicators repeatedly and grossly violate the due process of law.

B. SKEWED PROCESS

Not only the “judges” but also their process is skewed. A quick summary of agency process reveals how far it is from the Constitution’s due process.

Agencies rely on subpoenas for discovery, usually without allowing the same discovery for defendants. The agencies can also introduce hearsay, preclude counterclaims, and bar motions to dismiss. And even when agency proceedings are criminal in nature,

¹⁰⁶ According to a BNA report in 2016, “Respondents appealed only 11 out of the 36 initial decisions—or 30.5 percent—in 2013,” and that figure “dropped to 15 out of 63 or 23.8 percent in 2014, and 13 out of 60 or 21.6 percent last year.” Among the reasons given for the declining appeals was that “the appeals process is “very slow,” that the SEC “can actually increase the sanctions imposed by ALJs,” and that “the agency’s current configuration, with Chairman Mary Jo White and Commissioner Kara Stein, who are perceived as very pro-enforcement and if anything, tougher than the enforcement division, may also contribute to the dwindling number of appeals.” Cameron Finch, *Appeals of SEC ALJ Decisions Are Low and Declining*, BNA (July 22, 2016) (internal quotations marks omitted), <https://www.bna.com/appeals-sec-alj-n73014445155/>.

¹⁰⁷ At the SEC, for example, there have been concerns that ALJs anticipate the predispositions of the commissioners. Eaglesham records what happened when defendants asked an SEC ALJ to reject the charges against them without a hearing: “Clad in a black robe, Judge Brenda Murray explained to the brokers that the commissioners who run the SEC and approve all the civil charges filed by the agency don’t want its judges second-guessing them. ‘So for me to say I am wiping it out,’ Ms. Murray said at the hearing last year, ‘it looks like I am saying to these presidential appointee commissioners, I am reversing you. And they don’t like that.’” Jean Eaglesham, *Fairness*, *supra* note 95.

juries are absent. An agency can take as long as it wants to prepare its cases, but it can force respondents to defend themselves at hearings for which they have little time to prepare. The SEC, for example, recently gave a company about four months to prepare its defense, though the investigative file was 22 million pages long—“larger than the entire printed Library of Congress.”¹⁰⁸

Moreover, the applicable burdens of proof and persuasion, whether civil or criminal, are often reversed. Unlike a district court judge, an ALJ can take “official notice” of a material fact even when it does not appear in the record, even when it is not adjudicative, even when it is not within the agency’s expertise, even when it is within reasonable dispute, and even without a hearing.¹⁰⁹ And whenever an ALJ takes “official notice” of a fact, the defendant ends up having to undertake the burdens of proof and persuasion. The reversal of burdens is especially far reaching when it results from an understated agency assumption—such as the expectation, alleged by McEwen at the SEC, that “the burden was on the people who were accused to show that they didn’t do what the agency said they did.”¹¹⁰ Thus, even where agency actions are criminal in nature, defendants often have to prove their innocence.

In sum, neither the personnel nor the process justifies the conclusion that administrative adjudication is fair. And even if it were, it is a pale imitation of the due process of law. It is like being served water instead of whisky.

¹⁰⁸ Adam Klasfeld, ‘Big Short’ Villain’s Due-Process Is Just Dandy, COURTROOM NEWS SERVICE (Dec. 11, 2014), <https://courthousenews.com/big-short-villains-due-process-is-just-dandy/>. The casefile apparently was shared with the defendants in December 2013. *Id.* The first day of hearings was March 31, 2014. *Harding Advisory LLC and Wing F. Chau*, Release No. 734, File No. 3-15574, 1 (Initial Decision Jan. 12, 2015), <https://www.sec.gov/alj/aljdec/2015/id734ce.pdf>.

¹⁰⁹ Fed. R. Evid. 201(b); 5 U.S.C. § 556(e).

¹¹⁰ Eaglesham, *SEC Wins*, *supra* note 94.

V. MERE DELAY

Of course, even if one does not get one's procedural rights initially, in an administrative hearing, one sometimes can get them later by appealing to the courts. But delayed procedural rights are not enough.

Juries, due process, and other procedural rights are constitutional rights already in the first instance, not merely in later proceedings. Although, in the *Ten Pound Cases*, the statute authorizing the administrative proceedings allowed losing defendants to appeal to the courts and thereby get a trial *de novo*, with a jury, the courts nonetheless held the statute unlawful.¹¹¹ A delayed jury trial did not cure the denial of a jury in the earlier administrative hearings. From this perspective, administrative adjudication already violates procedural rights, regardless of any review in court.

Imagine that federal district courts denied juries, due process, and other constitutionally guaranteed procedural rights on the theory that defendants could get such rights later on appeal. This would be farcical. This delay of procedural rights clearly would be unconstitutional and profoundly dangerous. And the same is true when administrative tribunals are said to be merely delaying such rights.

The delayed access to procedural rights is especially harmful because of the doctrine of exhaustion of administrative remedies –

¹¹¹ In *Macgregore v. Furber*, for example, the plaintiff's attorney argued that the state's constitution did not "say that in causes triable of more than forty shillings value, that the party shall have a right to trial by jury in the first instance," and "nor does the law restrain the party aggrieved from appealing to the Inferior Court where he may have the same cause tried by a jury in as full and ample a manner as if it had originated at an Inferior Court." The justice of the peace upheld such arguments, but on appeal to the Inferior Court, the statute was held "manifestly contrary to the constitution of this state." *Macgregore v. Furber* (N.H. Rockingham Cty. Inf. Ct. 1786), quoted in HAMBURGER, *LAW AND JUDICIAL DUTY*, *supra* note 20, at 427.

requiring persons suffering administrative injuries to pursue all their administrative remedies before they seek relief in the courts. Taking advantage of this doctrine, an agency will often exhaust a defendant's finances in administrative proceedings, after which he cannot afford to appeal effectively to the courts. The exhaustion of administrative remedies thus often operates as the exhaustion of administrative defendants.

Even if delay and exhaustion were constitutional, the "mere delay" excuse fails because the evasion of procedural rights does not end with the administrative adjudication. Rather, it continues on appeal in the courts. This evasion of procedural rights in court will be examined in Part VIII. In the meantime, it is enough to observe that rights delayed are rights denied, particularly when administrative defendants are exhausted.

VI. EXPANDED RIGHTS

On behalf of the evasion of procedural rights, it may be said that such rights have been expanded, and this is partly true. For example, ever since *Goldberg v. Kelly* in 1970 and *Mathews v. Eldridge* in 1976, there has been a due process right to a hearing before the government cuts off some types of welfare benefits, and this has expanded the availability of some administrative process.¹¹² This conventional narrative, however, is only part of the story.

Goldberg and *Mathews* offer only a smidgeon of process for denials of some *benefits*, and are part of a broader jurisprudence that accepts a profound denial of due process when the government imposes administrative *constraints*. There once was a constitutional right to the full due process of law in the courts of law for binding adjudications—for adjudications that impose legal obligation—

¹¹² *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970).

whether in cutting off life or restricting liberty or property. This essential right, however, has been reduced to a mere administrative “hearing” (often where one cannot be heard) and more typically “something less.”¹¹³

The consequences can be seen in *Hamdi v. Rumsfeld*.¹¹⁴ After a U.S. citizen was captured as an enemy combatant, the United States simply detained him. Rather than protect Hamdi’s due process right to a trial in court with a jury and the full due process of a criminal prosecution, the Court relied on *Mathews* to conclude that the government owed Hamdi nothing more than an administrative decision about his status by neutral adjudicator.¹¹⁵

The sort of doctrine evident in *Goldberg* and *Mathews* therefore strains at a gnat and swallows the proverbial camel. It secures negligible administrative process in some benefit cases while accepting profound denials of due process in constraint cases. The overall effect is to expand due process very marginally and to eviscerate the right at its core.¹¹⁶

VII. IMPRACTICABILITY

Is it impracticable to abandon administrative adjudication? A serious defense of such proceedings is that the courts could not handle the vast amount of adjudication currently handled by agencies.

Apologists for administrative power protest that there are over 10,000 administrative adjudicators, whose work obviously could not

¹¹³ *Mathews v. Eldridge*, 424 U.S. 319, 343 (1976).

¹¹⁴ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

¹¹⁵ *Id.* at 529-31, 533-34.

¹¹⁶ For more on the implications of *Goldberg* for the distinction between benefits and constraints, see HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL?, *supra* note 3, at 3 n.b.

be handled by the courts.¹¹⁷ But the vast bulk of such adjudication does not impose legal obligation and thus (as explained in Part I) is not what this Article considers administrative power. Instead, most such adjudication is merely the ordinary and lawful exercise of executive power—for example, in determining the distribution of benefits or the status of immigrants.¹¹⁸

Accordingly, to understand whether courts could really take the place of administrative adjudicators, one must look specifically at those agency adjudications in which adjudicators impose legal obligation. For example, the SEC employs only 5 administrative law judges, the Occupational Safety and Health Review Commission has 12, and the National Labor Relations Board has 30.¹¹⁹ In total, outside the Social Security Administration, there are only 257 ALJs.¹²⁰ This number is not overwhelming, and it suggests that the scale of

¹¹⁷ Paul Verkuil, *Response to Philip Hamburger: A “Dicey” Proposal*, in *Hamburger v. Verkuil*, REALCLEAR POLICY (Oct. 24, 2016), http://www.realclearpolicy.com/articles/2016/10/25/hamburger_v_verkuil_1753.html (“There are 660 district and 179 circuit judges presently, and somewhere between 10,000 and 12,000 administrative adjudicators. How many new judges would be necessary under the Hamburger regime? And who would want those jobs?”)

¹¹⁸ The case load of ALJs has increasingly shifted from regulation to benefits. Daniel J. Gifford, *Federal Administrative Law Judges: The Relevance of Past Choices to Future Directions*, 49 ADMIN. L. REV. 1, 59-60 (1997).

¹¹⁹ *New Administrative Law Judges at the Securities Exchange Commission (SEC)*, THE NAT’L LAW REV. (July 10, 2014), <http://www.natlawreview.com/article/new-administrative-law-judges-securities-exchange-commission-sec> (5 ALJs), *Administrative Law Judges*, OSHRC, <https://www.oshrc.gov/about/administrative-law-judges/> (last accessed Mar. 29, 2018) (12 ALJs); *Division of Judges Directory*, NLRB, <https://www.nlr.gov/who-we-are/division-judges/division-judges-directory> (last accessed Mar. 29, 2018) (30 ALJs). For the Association of Administrative Law Judge’s list of U.S. federal agencies utilizing ALJs or Administrative Judges, see <https://web.archive.org/web/20171029005220/https://www.aalj.org/agencies-employing-administrative-law-judges> (archived snapshot of AALJ’s website, which has since removed the list).

¹²⁰ William Funk, *Slip Slidin’ Away—The Erosion of APA Adjudication*, 122 PENN ST. L. REV. 141, 142 (2017).

administrative adjudication is grossly overstated. At least the binding adjudications conducted by ALJs could be handled with only a moderate expansion of the judiciary.¹²¹

Another concern about the practicability of doing without administrative adjudication focuses on juries. Trial by jury is expensive, and increasingly uncommon because parties settle. It may therefore seem unrealistic, even romantic, to defend jury rights.

The argument here, however, is not for more jury trials, but rather against the evasion of jury rights. Even if the government were prevented from administratively evading jury rights, most defendants would still want to settle. At least, however, they would be able to do so on the foundation of their right to a jury and thus from a position of strength.

Even if the number of jury trials were initially to increase, the preservation of the right to a jury has systemic benefits that outweigh the costs. When England abandoned juries in most civil actions, judges in such cases no longer had to instruct juries, and they therefore tended to make the law more complex and to blur the distinction between law and fact.¹²² This is a reminder of one of the structural roles of juries. When judges must instruct juries about an area of law, the judges are more likely to distinguish the law and the facts and are less likely to render doctrine incomprehensible for laypersons. The existence of juries thus shapes the law in ways that enable the public to settle disputes and otherwise avoid unnecessary litigation. Accordingly, it cannot be assumed that the administrative

¹²¹ Although the small number of non-social-security ALJs would seem to be dispositive, one must also take into account the administrative judges who issue binding decisions, and this is more difficult to calculate. For many, even if not all such adjudicators, see Kent Barnett, *Against Administrative Law Judges*, 49 U.C. DAVIS L. REV. 1643, 1652, 1709-18 (2016). Such administrative judges include, for example, some administrators who reach licensing decisions and those who impose civil penalties under the Clean Water Act.

¹²² J.H. BAKER, INTRODUCTION TO ENGLISH LEGAL HISTORY 81-82 (1979).

evasion of juries really reduces judicial caseloads. On the contrary, the protection of jury rights is probably beneficial over the long term not merely for the people but even for the judges.

Overall, there is reason for skepticism about the claims that an abandonment of administrative adjudication would be impracticable. At the very least, it is practicable to abolish the ALJs who engage in binding adjudication.

VIII. EVASION OF PROCEDURAL RIGHTS IN THE COURTS

It may be thought that judicial review is a cure – that even if (as seen in Part V) delayed procedural rights are problematic, one can at least be confident of eventually getting such rights in court. But in fact, the evasion of procedural rights persists in the courts. The result is a dual administrative evasion of procedural rights, initially in administrative tribunals and then in the courts themselves.

When a defendant appeals an administrative decision to the courts, the judges review and largely defer to the government's administrative record. Thus, even in court, defendants do not get the decision of a jury or even the independent judgment of a judge on the facts. And where the government is a party, the judges' deference to the administrative record systematically favors one party's version of the facts. This is an institutionalized judicial bias that brazenly violates the Fifth Amendment's due process of law.¹²³

Similarly, on the law, the judges defer to the government. Most notably, they defer in varying degrees (under the *Chevron*, *Auer*, and *Mead-Skidmore* doctrines) to the government's interpretations of statutes and of agency rules.¹²⁴ In other words, not only on the facts

¹²³ Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187, 1203 (2015).

¹²⁴ *Id.* at 1211 (regarding bias in *Chevron* deference); *id.* at 1202 (regarding bias in *Auer* deference and *Mead-Skidmore* deference).

but also on the law, defendants do not get the independent judgment of a judge. And where the government is a party to a case, the judicial deference amounts to an institutional predisposition or systematic bias in favor of the legal position of one of the parties.¹²⁵

There is judicial bias, in other words, on both the facts and the law. What, then, is left for the unbiased judgment required by the due process of law?

The denial of due process continues after judges hold an agency action unlawful, for they then often hesitate to declare it void—instead remanding it to the agency.¹²⁶ And when a district or circuit court interprets a vague statute administered by an agency, the Supreme Court, under the *Brand X* doctrine, allows the agency in subsequent matters to disregard the judicial precedent and requires the district or circuit court to follow the agency's later interpretation (in accord with *Chevron*). The judges thereby deny Americans the benefit of securing precedent through litigation.¹²⁷

All this is especially disturbing because one would ordinarily expect the administrative evasion of courts and of procedural rights to be met with heightened judicial scrutiny. Instead, end-runs

¹²⁵ *Id.* at 1202, 1211. Incidentally, the judges do not need any such deference, for (as explained elsewhere) after they apply their usual tools of interpretation, if they can find no further meaning in a statute, they should simply declare that the ambiguous provision has no discernible meaning—thereby leaving the ambiguity to be cured by Congress. *See id.* at 1241-42.

¹²⁶ For an early and salient example, see *U.S. v. Morgan*, 307 U.S. 183, 196 (1939) (holding the district court order invalid but not void on the theory that the court had been acting in equity). *See also* William M. Martin, *The Morgan Case as a Threat to the Full Hearing Requirement in Rate Making Proceedings*, 3 WASH. & LEE L. REV. 93, 95-96 (1941) (noting this discrepancy).

¹²⁷ *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005). For confirmation of how judges, even after holding an administrative act unlawful, nonetheless tend to deny due process, *see* Nicholas R. Parrillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power* 131 HARV. L. REV. 685 (2018) (arguing that judges hesitate to apply contempt sanctions against agencies and heads of agencies).

around procedural rights are rewarded with deference and other judicial accommodation of agencies.

In short, later court proceedings, rather than finally offering procedural rights, grossly violate such rights—thus reinforcing the original administrative evasion. The result is a dual evasion of rights.

The excuses for the evasion thus offer little consolation. Administrative proceedings are not independent, evenhanded, or otherwise fair; rights delayed are rights denied, especially when the delay exhausts administrative defendants; the alleged expansion of procedural rights is a distraction from the broader assault on such rights; it is not impracticable to abolish or at least cut back on administrative adjudication; and far from a cure, judicial review doubles down on the evasion of procedural rights.

IX. AMBIDEXTROUS ENFORCEMENT AND THE CHANGED NATURE OF PROCEDURAL RIGHTS

As a consequence of the administrative evasion of procedural rights, the government now enjoys ambidextrous enforcement. The government once could engage in binding adjudication against Americans only through the courts and their judges. Now, instead, it can choose administrative adjudication. In some instances, Congress alone makes this choice; in other instances, it authorizes an agency, such as the SEC, to make the selection. One way or another, the government can act ambidextrously—either through the courts, with their judges, juries, and due process, or through administrative adjudication and its faux process.

The evasion thereby changes the very nature of procedural rights. Such rights traditionally were assurances against the government. Now they are merely one of the choices for government in its exercise of power. Though the government must respect these rights when it proceeds against Americans in court, it has the freedom to escape them by taking an administrative path. Procedural rights have thereby been transformed. No longer guarantees, they are now merely options.

The evasion of constitutionally guaranteed procedures thus has profound consequences. Rather than simply allow government to escape valuable procedural rights, it changes the very character of such rights.

X. ADMINISTRATIVE POWER AS EVASION

The administrative evasion of procedural rights is only part of a broader problem of evasion. In fact, all administrative power can be understood as a mode of evasion, and this explains both its structure and its trajectory.

In earlier scholarship, I have argued that administrative power is extralegal power—in the sense that it imposes legal obligation not merely through law (including the acts of courts), but through other mechanisms.¹²⁸ Another way of putting this, as I have also previously argued, is that administrative power is a “Mode of Evasion”:

Being extralegal in the sense that it binds through edicts other than law, administrative power evades constitutionally authorized paths of power. The central evasion is the end run around acts of Congress and the judgments of the courts by substituting executive edicts, thus creating an alternative system of law, which is not quite law, but that nonetheless can be enforced against the public.

That, however, is not all, for the evasion also gets around the Constitution’s institutions and processes. When the executive makes regulations, it can escape the constitutional

¹²⁸ Hamburger, *IS ADMINISTRATIVE LAW UNLAWFUL?*, *supra* note 3, at 2. As I have made clear there and elsewhere, this point about administrative power being extralegal has nothing to do with whether it is authorized by statute. *Id.* at 23; Hamburger, *Vermeule Unbound*, *supra* note 4, at 215-17.

requirements for the election of lawmakers, for bicameralism, for deliberation, for publication of legislative journals, and for a veto, and when the executive adjudicates disputes, it can sidestep most of the requirements about judicial independence, due process, grand juries, petit juries, and judicial warrants and orders. This judicial evasion is especially troubling because it escapes almost all of the procedural rights guaranteed by the Constitution.¹²⁹

In other words, evasion explains the basic trajectory and structure of administrative power. It is an ever-expanding end-run around the Constitution's pathways and procedures.

But that is not all, for administrative power has also largely evaded relatively formal administrative paths and procedures in pursuit of ever less onerous mechanisms for agency lawmaking and adjudication:

Thus, administrative legislation has developed as a cascade of evasions—initially an evasion of law, but then a series of evasions within administrative lawmaking. And this is very revealing about administrative power. Both its structure and its trajectory can be seen as a cascade of evasions.¹³⁰

Evasion reveals both the form of this power and its tendency over time.¹³¹

¹²⁹ Hamburger, *Vermeule Unbound*, *supra* note 4, at 209, quoting Hamburger, *IS ADMINISTRATIVE LAW UNLAWFUL?*, *supra* note 3, at 29 (quotation marks omitted).

¹³⁰ Hamburger, *Vermeule Unbound*, *supra* note 4, at 210, quoting Hamburger, *IS ADMINISTRATIVE LAW UNLAWFUL?*, *supra* note 3, at 111 (quotation marks omitted). See also Hamburger, *Vermeule Unbound*, *supra* note 4, at 225.

¹³¹ Incidentally, the notion of evasion is an incomplete but important initial step toward understanding why Americans did not establish an equivalent of the *Rechtsstaat*. Having had too much experience with administrative power, liberal

The force of this explanation, which focuses on the flow of power, becomes particularly clear when it is contrasted to an explanation based in law or doctrine. For example, Adrian Vermeule has recently emphasized that administrative power is the product of the internal development of legal doctrine.¹³² But this is odd. Of course, almost all later doctrine tends to draw on earlier doctrine, and of course this happens through a process of judicial reasoning. But prior doctrine has never been very predictive about the structure or trajectory of administrative power. Thurman Arnold noted that the entire structure of administrative law was “equipped with noiseless elevators and secret stairways, by means of which the choice was always open either to take a bold judicial stand or make a dignified

Germans sought at least to subject it to a constitution and the regular courts, without deference—this being what they called a *Rechtsstaat*. Although they failed to secure this in the wake of 1848, they subsequently managed at least to get a weak version of a *Rechtsstaat*, in which administrative power would be exercised in relatively law-like ways, subject to fully independent administrative courts. Americans drew much from the Germans, but not even the weak version of a *Rechtsstaat*, for whenever they obtained one expansion of administrative power, they then sought to evade it with less formal versions. Evasion is thus a partial hint as to why American administrative power, although drawn largely from Germany, is so different from a *Rechtsstaat*. A more complete explanation would have to include why so many Americans sought the evasions, and this would ultimately require an exploration of sociological questions, including issues of class, which cannot be pursued here. For the class aspects of administrative power, see HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL?, *supra* note 3, at 367-75, 502-05; PHILIP HAMBURGER, THE ADMINISTRATIVE THREAT 55-57 (2017). For the American failure to adopt a *Rechtsstaat*, see Daniel R. Ernst, *Ernst Freund, Felix Frankfurter, and the American Rechtsstaat: A Transatlantic Shipwreck, 1894-1932*, 23 STUD. AM. POL. DEV. 171, 173, 175-76, 184, 188 (2009).

¹³² See, e.g., ADRIAN VERMEULE, LAW'S ABNEGATION (2016).

On another aspect of the problem, however, Vermeule's scholarship is in accord with mine. I have emphasized the judges' “abandonment of judicial office.” See, e.g., HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL?, *supra* note 3, at 316. Similarly, Vermeule's has written about “law's abnegation,” by which he seems to mean the judges' abnegation. The difference is that Vermeule admires this development.

escape.”¹³³ And the doctrine is so complex and artificial that it does not seem very revealing about the underlying reality of administrative power. As I have argued in response to Vermeule:

The most basic mistake made by Vermeule is to view “official theory”—primarily the APA and judicial doctrines—as revealing about the underlying structure of administrative power. Much of the APA and many judicial doctrines serve to justify administrative power, and in casting the realities of this power in legitimizing terms, the APA and the doctrines may have some value as apologetics, but not so much as a window into reality. Far from disclosing the actual landscape of administrative power, the “official theory” often obscures it. As put by Daniel Farber and Anne O’Connell, there is a “gap between theory and practice,” which leads to an “increasingly fictional yet deeply engrained account of administrative law.”¹³⁴

In contrast, the evasion thesis is illuminating. Indeed, it is the key to understanding administrative power.

Gary Lawson aptly observes that America has witnessed “The Rise and Rise of the Administrative State,” and this continual growth of administrative power is no coincidence.¹³⁵ What drives administrative power is not doctrine or other law, but power—a power that overflows its constitutional banks, and then runs along all sorts of ever-less-confining paths. But mere power, not exercised through law, is . . . well, mere power. It is exactly what should not be and, in fact, is not constitutional.

¹³³ THURMAN ARNOLD, *THE SYMBOLS OF GOVERNMENT* 5-6 (1935).

¹³⁴ Hamburger, *Vermeule Unbound*, *supra* note 4, at 224-25.

¹³⁵ Lawson, *supra* note 5.

CONCLUSION

Although administrative adjudication is conventionally justified in terms of due process, it actually evades the Constitution's procedural rights—as illustrated here by jury rights and the due process of law. And because courts accommodate administrative power, the initial administrative evasion of jury rights and due process is echoed in the courts themselves.

The administrative evasion of procedural rights has structural consequences, for it gives the government ambidextrous paths for enforcement. It thereby transforms the very nature of procedural rights from constitutional guarantees into mere options for government power.

This Article's point about the evasion of procedural rights is part of a broader thesis about the character of administrative power. Although administrative power is presented in doctrine as an expression of law, it can more accurately be understood as power—a sort of power that flows in a cascade around one boundary after another, including the structures, procedural rights, and other freedoms established by the Constitution. Put succinctly, administrative power is a mode of evasion.

The costs for civil liberties are profound. And nothing more concretely illustrates the loss than the administrative evasion of procedural rights.