

Legal Origins of American Exceptionalism

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On a cold February day, uniformed officers in the city of Boston, Massachusetts, shot and killed five unarmed young men. Naturally, the community was in an uproar. There were massive public protests. Some political leaders and agitators exploited these killings, labeling them a “massacre” before there had even been time for a public inquiry. There were insistent demands for systemic change. Agitators distributed selective accounts of the event, featuring altered images presenting the officers in the worst possible light. No matter what the actual facts may have been, the officers were portrayed as oppressors. Protesters insisted they should be prosecuted, convicted, and punished.

The eight officers involved in the shootings were indeed prosecuted. They might well have been convicted and punished to mollify the angry public, if not for the commitment of one young lawyer to the rule of law. His name was John Adams. Naturally, Adams assumed that defending the perpetrators of the Boston Massacre would be the end of his political career, but defend them he did.

Adams summoned witnesses before the jury to develop the facts of what really had happened. Facts matter, not just appearances or mere emotional responses to events. Then, in a summation that is still one of the great documents of the law in the United States, Adams quoted to the jury the law pertaining to the case. He told them that, if the British soldiers had “reason to believe that they were in danger of attack,” the shooting would be “justifiable or, at least, excusable.” That is, the soldiers didn’t actually need to have been in danger for the shooting to be justified. Rather, to reach a not-guilty verdict on the basis of self-defense, the jury had only to be convinced that the soldiers had fired in the *belief* that they were in danger.

More important, Adams spoke to the jury about the importance of following the law even at a time of great emotion. He told them that we were engaged in the struggle for liberty and property, but if we “cut up the law” (his words), the rest would be of little value. “Rules of law,” he said, “should be universally known whatever effect they may have on politics.” Even more remarkable than the fact that John Adams stepped up to this task of legal representation was that the jury agreed with him. Six of the eight defendants were acquitted outright, and two of them, the ones who were most directly responsible for firing into the crowd, were convicted on reduced charges and given a relatively mild punishment: they were branded on the thumb.

The city of Boston did not descend into riots in response to this verdict. Quite the contrary: the Boston Massacre and the acquittal of the soldiers became a point of pride and one of the hallmarks of the American Revolution. For John Adams had made a point that resonated with his countrymen: a revolution to vindicate the legal rights of American colonists must uphold the legal rights of all.

As Adams said—and as the jury thought, too—fidelity to law is essential, whatever effect it may have on politics. Historians tell us that the American Revolution was remarkably law abiding for a rebellion, especially in contrast to the democratic revolution that was going on

at roughly the same time across the Atlantic, in the streets of Paris. In Paris, if anyone like John Adams was speaking up for law, nobody was listening to him. Instead, there were guillotines, confiscations of property, political trials, mob vengeance, and lots of blood.

The American Revolution was so very different. The Tea Partiers, when they were attacking those vessels in Boston Harbor, scrupulously refrained from taking any private property—any cargo other than the tea that was their political symbol. In fact, when one small item belonging to a captain was broken, the protesters paid to replace it. When one participant in the Tea Party slipped into his pocket some of the tea the others were throwing into the harbor, he was apprehended and severely punished.

This respect for law and for property was intentional and deeply self-conscious. Listen to the words of Thomas Paine in *Common Sense*, the most widely read pamphlet of the American Revolution. “Where, says some, is the king of America? I tell you, friend, that in America the law is king. For as in absolute governments the king is law, so in free countries the law ought to be king and there ought to be no other.”

What is the rule of law? The answer rests on two propositions. The first is that we govern ourselves through known, settled, understandable rules that apply to everyone. The second is that these rules are applied equally and dispassionately, through fair processes and procedures. The rule of law is not a libertarian notion. We can have small government, or we can have big government. Lawfulness is a question of *how* government operates. This rule of law produces a just and prosperous society. In a society observing the rule of law, people have the ability to plan and to invest for the future. Law, just as much as economics and maybe even more so, is the bedrock of prosperity and thus the bedrock of American exceptionalism.

Some worry about declining American exceptionalism, and there may have been some decline in the strength of the rule of law as well. But that does not mean we should despair of our commitment to law. I believe

that, for the most part, American life is still governed by laws applied reasonably dispassionately and through reasonably fair processes. Yet we certainly should not take this for granted. There are problems.

What are the threats today to the rule of law? There are plenty, but I want to mention four and concentrate especially on one. The first is politicized law enforcement. There are dangerous indications that federal and state regulatory agencies have become tools of partisan politics to a degree not seen before. The most conspicuous instance is the targeting by Internal Revenue Service personnel of organizations that were the political opponents of the administration. Even based on what is publicly known, this is the most extreme example of political abuse of power since Richard Nixon. As expressed by the United States Court of Appeals for the Sixth Circuit, “Among the most serious allegations a federal court can address are that an executive agency has targeted citizens for mistreatment based on their political views. No citizen, Republican or Democrat, Socialist or Libertarian, should be targeted or even have to fear being targeted on these grounds.” Perhaps more frightening than the behavior of the IRS, however, was the relative indifference of much of the press and political Washington to that abuse. In August 2016, an opinion by the Court of Appeals for the DC Circuit found that those practices have not yet ceased, that they are still continuing. That should have been front-page news.

We have seen similarly blatant partisan abuse of the justice system at the state level. In Wisconsin from May 2010 to May 2012, prosecutors and police raided private homes in the dark of night and seized private computers and files of conservative political organizations, leaking one-sided accounts of the investigation to the press—all in pursuit of what courts eventually concluded was an entirely baseless investigation of constitutionally protected activity. In Texas, partisan prosecutors brought charges against Governor Rick Perry for the crime of threatening to veto legislation that he disagreed with. That’s

not a crime. The case was eventually dismissed. But the cost in time, resources, and public reputation is fearsome. The harm to our political system has been done.

I worked for the Department of Justice for a number of years and have a great deal of faith in the professionalism of that department and of the FBI, but in the wake of seemingly disparate treatment of such political figures as Scooter Libby, Governor Bob McDonnell, Jon Corzine, David Petraeus, and, dare I say it, Hillary Clinton, many are now wondering whether the Department of Justice and the FBI also have been compromised.

Politicized law *enforcement* is a threat to American democracy, but we are also seeing more politicized law *interpretation*. This is where the courts decide cases, especially about hot-button constitutional questions, in light of their own political predilections and the movements to which they belong, rather than according to what the Constitution and the laws say. This, in turn, has engendered increasing politicization of the process by which federal judges are nominated and confirmed. And this has now been going on, certainly, since the unfortunate events surrounding the confirmation to the Supreme Court of Judge Robert Bork.

Every presidential administration has gotten more extreme in this regard. Each one is worse than the one before, and I think that this is taking a toll. I still believe that the US federal judiciary is one of the great judiciaries of the world, but we cannot be complacent about that in light of this tendency to use the power vested in the courts to accomplish what are essentially political rather than legal ends.

Another problem is a disregard for constitutional limits, particularly in the executive branch. Since the time of George Washington, we have depended very heavily upon the idea that the executive branch and its officials and lawyers will comply with the law. Not because someone's going to punish them if they don't, but because it is the solemn duty

of a government official or a government lawyer to follow the law. But self-restraint has been weakening. One astonishing example is that the prior administration spent some \$7 billion from the federal Treasury that had not been appropriated by Congress. Both the Government Accountability Office and the federal district court concluded that these expenditures had been in violation of the law. That, too, should have been front-page news.

The last threat to the rule of law, and the one that I want to comment on in the most detail, has to do with transformations in the administrative state. There has been a significant shift, even in the time since I began teaching law in the mid-1980s, in the way in which executive agencies operate. What I worry about here is a combination of vast, perplexing, and incomprehensible laws passed by Congress, coupled with very broad administrative discretion as to individual cases. The result is an erosion of any idea that these cases are really governed by rules. Rather, they succumb to case-by-case arbitrariness, with baneful effects on democratic accountability, equality, and prosperity.

One example from the financial regulatory sector is the original banking act of 1864, the first one of its kind in the United States. It was twenty-nine pages long. Similarly, the Federal Reserve Act of 1913, one of the most important acts in American history with regard to the financial sector, was thirty-two pages long. The Dodd-Frank bill came in at over 1,600 pages. This was not the bill of which the then Speaker of the House said, “We have to pass the bill so that you can find out what is in it,” but it might as well have been. Very few people know what’s in it, and it’s almost impossible to read. The *Economist* magazine called it “virtually incomprehensible from any perspective.” It contains a rule called the Volcker Rule that was originally expressed by former Federal Reserve chairman Paul Volcker in a single sentence: “The banks insured by the government may not engage in proprietary trading.” It took the Dodd-Frank bill eleven pages to incorporate that one sentence into law. And the proposed regulations defining that one sentence come in at 298 pages.

Increased length, complexity, and incomprehensibility in law may provide employment for a lot of lawyers, but it defeats the rule of law, and the Founders knew this. They tried to warn against it. James Madison wrote, in Federalist essay number 62, that it would be “of little avail to the people that the laws are made by men of their own choice if the laws be so voluminous that they cannot be read or so incoherent that they cannot be understood.”

The second feature that worries me here is a shift to case-by-case determinations. When I studied administrative law, under Professor Antonin Scalia of blessed memory, I assumed that the way in which agencies operate most of the time—because this is what the Administrative Procedure Act is all about—is by regulation and adjudications, which is to say, regulations are rules and adjudications are applications of those rules.

This is a reflection of the very ideal of the rule of law: we have rules, and we apply them dispassionately. The modern trend in administrative procedure, however, is to operate instead through case-by-case decision making of two forms. First, there are licenses. That’s where the regulated party has to go to the agency and ask permission to act. I call this “Mother, may I?” regulation. Instead of a rule telling you what you have to do, you go to Washington and you tell them what you want to do, and they say yes or no: “Mother, may I?”

Second, there are waivers, which grant permission to do something different from whatever the rules require. Officials enforcing the Affordable Care Act, in the first couple of years, gave 1,231 waivers from its requirements. Four hundred and fifty of those went to labor unions. Most of the others went to large corporations, including Pepsi and McDonald’s. Other applicants that asked for waivers were denied. We have no idea why some are granted and some are denied. This is not, I submit to you, the rule of law. This is the rule of men.

One of the great Supreme Court justices, Robert Jackson, a Franklin Delano Roosevelt appointee, said, “There is no more effective practical

guarantee against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation, and, thus, to escape the political retribution that might be visited upon them if larger numbers were affected.”

When we have a law that requires 1,231 exceptions in particular cases, given to politically powerful entities, it is an indication that something is awry. It means either that the general rule was very badly concocted to begin with (otherwise why would we need that many exceptions?) or that special favors are being traded. It might mean both.

Who benefits from this kind of a system? That’s always a question. Things are not done randomly. Things in Washington don’t just happen. Who benefits? James Madison gave us the answer, over two hundred years ago: complicated and incomprehensible laws give an “unreasonable advantage . . . to the sagacious, the enterprising, and the moneyed few, over the industrious and uninformed mass of the people.”

This complex, case-by-case regulatory system certainly benefits lobbyists and lawyers. According to the *Economist*, the leading financial industry trade association employed 5,490 people to work with the various subcommittees of Congress in connection with Dodd-Frank. They are awake, the rest of us are asleep. They know what’s going on, but nobody else has a clue.

Large firms also benefit. Even when regulation imposes costs on the large firms, they still benefit relative to their smaller competitors because they are large enough to have regulatory lawyers and offices and so forth. Smaller firms don’t. The next time you see the CEO of a large corporation being patted on the back for his public spiritedness in agreeing to regulation of one sort or another—whether minimum wage or labor regulation or environmental greenness—check your wallets. They are not being beneficent, nor should they. I’m not criticizing. Large firms

gain an advantage in the competitive world by having regulations that impose relatively greater costs on smaller competitors than on them.

I have a friend who, with his brother, co-owns a business worth a few million dollars in sales, a small business in the great scheme of things. My friend likes to support libertarian candidates for office. He told me his brother pleads with him to stop making those contributions because they have so many contacts with regulators, many in California at the state level, not all federal. Those regulators have discretion to either get in their face or not—so much discretion. His brother is convinced that those people that they're meeting with check [opensecrets.com](https://www.opensecrets.com), find out where the contributions are going, and treat regulated businesses accordingly. I have no idea if that's right, but I will say there's motive and opportunity.

The rule of law is at the heart of American self-identity, as Thomas Paine said. The rule of law is still, I think, very strong, especially when we compare ourselves to other places around the world. But there are worrying trends to which we should be alert. What can be done about them? This is not an easy question, to say the least. The traditions and institutions behind the rule of law take decades to develop, but they can be destroyed, if not in an instant, then at least in an administration. To reverse this, we need a different approach to both legislation and regulation, one emphasizing clarity, employing simpler rules, reducing case-by-case discretion, and bringing about greater transparency.

To do this, we need various dimensions of reform. Intellectual reform is where I would begin. There's a lot of thought to be done about how to construct our regulatory state in a way that has more fidelity to the rule of law. The 1947 Administrative Procedure Act is way out of date and barely even describes the way the federal government now operates. A Hoover Institution task force I am heading with Charles Calomiris has been working with scholars in law, economics, political science, and history to develop ideas about how the administrative state might be reformed and brought back in accord with the rule of law.

In addition to thinking, we need a new commitment to the common good and greater understanding of economics. We need legislative reform. Congress is no longer operating, really. It's a very strange institution. Just the fact that the two houses are run by Republicans doesn't mean it's actually doing a very good job.

But on some level I'm hopeful about the distrust in government, because I believe we need a new skepticism about the wisdom, *modus operandi*, and capacity of bureaucratic agencies. We should not assume that they are just dispassionate experts promoting the public good.

Ordinary Americans are asking the question, what is going wrong? I think the first answer is that the rule of law is beginning to erode. That is why it is so urgent to recognize the connection between American exceptionalism and rule of law. If we could hew to the law in the maelstrom of the Boston Massacre, we should be able to do so today.