# History of English Administrative Law in the 16th-19th Century

English administrative law is commonly perceived to have modern origins, with Varuhas arguing that there was no 'discrete field of public or administrative law until at least the middle of the twentieth century'.[1] Dicey went further, arguing that, in contrast to the French concept of *droit administratif*, the principles of administrative law were 'unknown to English judges and counsel, and are in themselves hardly intelligible without explanation'.[2] Mitchell concurred with this observation, noting that England lacked separate public law courts and did not recognise a doctrinal distinction between public and private contracts (although, unlike Dicey, he saw this as a shortcoming rather than an advantage).[3] The explanation generally offered for this absence is that state regulation only became noteworthy with the birth of the welfare state in the 20th century,[4] and, as Lord Reid opined in *Ridge v Baldwin* [1964],[5] there was no 'developed system of administrative law—perhaps because until fairly recently we did not need it'. It is submitted that the above accounts do not fully reflect the story told by the primary sources. This essay will demonstrate, principally through an examination of reported cases and legislation from the period, that recognisable principles of administrative law had already emerged between the 16th and 19th centuries.

Numerous administrative laws were enacted on a diverse array of topics during the relevant period, so five representative examples that illustrate how the administrative state operated during this period will be explored below.

The historical government agency which bore the closest resemblance to modern bureaucracy is the Excise Office, which Brewer notes became 'a byword for administrative efficiency'.[6] This was not always the case, as taxes post-Restoration were originally collected in a disorganised manner by a mixture of royal officials, parliamentary commissioners, local

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[1] Jason Varuhas, 'Taxonomy and Public Law' in Mark Elliott, Jason NE Varuhas, and Shona Wilson Stark (eds), *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives* (Hart 2018) 39, 42.
[2] AV Dicey, *The Law of the Constitution*, in J Allison (ed) (OUP 2013) 235.
[3] JDB Mitchell, 'The Causes and Effects of the Absence of a System of Public Law in the United Kingdom' [1965] PL 95; JDB Mitchell, 'The State of Public Law in the United Kingdom' (1966) 15 ICLQ 133; JDB Mitchell, 'The Constitutional Implications of Judicial Control of the Administration in the Nineteenth Century' (1967) 26 CLJ 46.
[4] Graham Lippiatt, 'Founding the welfare state' (*Fridge meeting*, 14 September 2008) <https://liberalhistory.org.uk/wp-content/uploads/2014/10/61_Report_Welfare_state_Sept_08.pdf> accessed 15 July 2025.
[5] *Ridge v Baldwin* [1964] AC 40, 72.
[6] John Brewer, *The Sinews of Power, War, Money and the English State 1688–1783* (Unwin Hyman 1988) 68.

government officials, and tax farmers (private financiers to whom revenue collection was contracted out).[7] However, the expensive wars the government was embroiled in at the end of the 17th century made the efficient collection of taxes increasingly important.[8] As a result, the Excise Office employed 4,908 people in 1782, a fourfold increase from the number of people it employed in 1690.[9] The Commissioners' powers were consolidated by the Excise Management Act 1827, which granted excise officers extensive powers of entry, inspection, and seizure.[10] Additionally, there were 'stringent' oversight mechanisms which attempted to prevent collusion and bribery; collectors could conduct surprise checks of an excise officer's records, and impose fines of up to £500.[11] Disputes between excise officers and traders were adjudicated by the Board of Commissions (or, in rural areas, by justices of the peace) with a possibility of appealing to the Commissioners of Appeal.[12]

Following the passage of the Statute of Bankrupts Act 1571, Commissioners were also used to handle bankruptcy administration[13] (originally, the Statute of Bankrupts Act 1542 assigned this power to high officials, but they had insufficient time to properly discharge these functions).[14] Whilst the title of Commissioner is used in both, the operation was markedly different to Excise Commissioners, with new Bankruptcy Commissioners being appointed on an ad hoc basis for each bankruptcy with limited 'internal institutional oversight',[15] but some de facto continuity began to develop in the 17th century as the same people were often reappointed.[16] Despite the transience of their appointment, such commissioners still wielded significant powers; anyone who failed to answer questions on oath would forfeit double the value of any concealed good and could be imprisoned.[17] Furthermore, a bankrupts who perjured themselves would have their ear cut off![18] The

[7] Doris M Gill, 'The Relationship between the Treasury and the Customs and Excise Commissioners (1660–1714)' (1932) 4 Camb Hist J 94.
[8] PGM Dickson, *The Financial Revolution in England: A Study in the Development of Public Credit, 1688-1756* (Macmillan 1967).
[9] Brewer (n 6) 67.
[10] Excise Management Act 1827, 7 & 8 Geo 4, c 53, ss 22, 39 and 64.
[11] Paul Craig, *English Administrative Law from 1550: Continuity and Change* (OUP 2024) 106.
[12] ibid ss 65 and 81–82.
[13] Statute of Bankrupts Act 1571, 13 Eliz I, c 7.
[14] Statute of Bankrupts Act 1542 34 & 35 Hen 8, c 4, s 1.
[15] Craig, (n 11) 105.
[16] WJ Jones, 'The Foundations of English Bankruptcy: Statutes and Commissions in the Early Modern Period' (1979) 69(3) Trans Am Philos Soc 1, 27.
[17] Statute of Bankrupts Act 1571 (n 13), s 6.
[18] ibid s 9.

regime gradually became less draconian as the Bankrupts Act 1603 encouraged bankrupts to 'disclose problems early and behave honestly'[19] and later legislation acknowledged that 'bankrupts were not always delinquent'.[20]

It is important to note that, as remains the case today, executive bodies had rule-making powers as well as rule-enforcing functions. A good example of Parliament delegating rule-making powers is the Improvement Commissioners, which were local bodies responsible for municipal improvement.[21] The first Improvement Commission was created in 1662 in London,[22] with the number growing to 3000 by 1830.[23] The Improvement Commissions could create bye-laws on various matters related to sanitation and nuisance control using powers conferred by the Towns Improvement Clauses Act 1847,[24] but these laws had to be confirmed by justices of the peace in Quarter-Sessions.[25] Such bye-laws constituted a 'major element of local governance', as central legislation in this area was far less prevalent than it is now.[26]

Similarly, Commissioners of Sewers were longstanding administrative bodies charged with preventing flood damage[27] who were described by Webb as exercising 'judicial, executive and even legislative powers'.[28] Throughout the relevant period, there was frequent Parliamentary activity in this area,[29] but the Commissioners were also authorised under the Statute of Sewers 1531 to supplement such legislation by enacting general rules[30] and making individual decisions concerning repairs.[31] The Commission of Sewers Act 1571 provided that such rules did not require Royal Assent or approval from the Court of

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[19] Bankrupts Act 1603, 1 Ja 1, c 15; Ian Duffy, 'English Bankrupts 1571–1861' (1980) 24 Am J Legal Hist 283, 287.
[20] ibid 286; Bankruptcy (England) Act 1824, 5 Geo 4, c 98; Bankruptcy Court (England) Act 1831 1 & 2 Will 4, c 56; Court of Bankruptcy (England) Act 1833 3 & 4 Will 4, c 47; Relief of Insolvent Debtors 1842 5 & 6 Vict, c 116; Bankruptcy Act 1861 4 & 25 Vict, c 134.
[21] SG Checkland, 'The Urban Historian and the Political Will' (1980) 7 Urban Hist Yearb 5, 8.
[22] Streets, London and Westminster Act 1662, 14 Cha 2, c 2.
[23] Sidney Webb and Beatrice Webb, *English Local Government: Statutory Authorities for Special Purposes* (Longman 1922) 242–43.
[24] Towns Improvement Clauses Act 1847 10 & 11 Vict, c 34, s 9.
[25] ibid s 202
[26] Craig (n 11) 368.
[27] HG Richardson, 'The Early History of Commissioners of Sewers' (1919) 34 Engl Hist Rev 385.
[28] Webb and Webb (n 23) 21.
[29] For example, see London Watercourses (Commissioners of Sewers) Act 1605, 3 Ja 1, c 14; Commissioner of Sewers Act 1708, 7 Ann, c 10; Sewers Act 1833, 3 & 4 Will 4, c 22; Sewers Act 1841, 4 & 5 Vict, c 45; Metropolitan Commissioners of Sewers Act 1848, 11 & 12 Vict, c 112; Sewers Act 1849, 12 & 13 Vict, c 50.
[30] ibid, ss 3(10) and 7.
[31] Statute of Sewers Act 1531, 23 Henry 8, c 5, ss 3(1), 3(4)–3(5).

Chancery and would remain in effect until repealed.[32] The Commissioners of Sewers were also granted wide-ranging judicial powers to imprison, fine, and levy distress (seizure of a debtor's moveable property),[33] leading Robert Callis to argue they should be considered a Court of Record (a court with certain inherent powers whose records were regarded as incontrovertible).

Many administrative bodies were subject to ongoing change in their form and operation, as is exemplified by the Poor Law Commission.[34] The administration of poor relief was originally the responsibility of local parishes under the Poor Relief Act 1601, which gave overseers of the poor the power to levy rates and put 'able-bodied' poor to work.[35] However, this highly localised scheme was difficult to operate in practice as overseers lacked borrowing power, and some would attempt to 'game' the system by moving to richer parishes in order to be entitled to better relief.[36] As a result, resettlement was prevented under the Poor Relief Act 1662 unless it was approved through the system of certification established under the Poor Relief Act 1696.[37] The problem was partially alleviated in the 18th century through the use of local statutes to unite parishes, such as in Bristol, where a Corporation of the Poor, assisted by paid staff, was created, which assumed the responsibility of the 19 individual parishes in the area.[38] This reliance on a patchwork of local legislation was by no means uncommon during this period, with Jupp noting that the executive was primarily focused on 'war and diplomacy' and maintenance of 'law and order' throughout 1688–1760.[39] The Poor Law Amendment Act 1834 marked a shift towards centralised control by creating a national Board of Commissioners, which was required to report annually to Parliament.[40] In 1847, the board was replaced with a ministry reflecting, as Wilson argues, the growing recognition that

[32] Commission of Sewers Act 1571, 13 Eliz 1, c 9, s 1.
[33] Statute of Sewers Act 1531 (n 30), s 3.
[34] Paul Slack, *Poverty and Policy in Tudor & Stuart England* (Longman 1988).
[35] Poor Relief Act 1601, 43 Eliz 1, c 2, s 1; AL Beier, *The Problem of the Poor in Tudor and Early Stuart England* (Routledge Falmer 1983).
[36] Robert Pashley, *Pauperism and Poor Laws* (Longman, Brown, Green and Longmans 1852); Lorie Charlesworth, *Welfare's Forgotten Past, A Socio-Legal History of the Poor Law* (Routledge 2010).
[37] Poor Relief Act 1662, 14 Cha 2, c 12, s 1; Poor Relief Act 1696, 8 & 9 Will, c 30.
[38] Sidney Webb and Beatrice Webb, *English Poor Law History, Part I, The Old Poor Law* (Longmans 1927) ch III; Anthony Brundage, *The English Poor Laws: 1700–1930* (Palgrave 2002).
[39] Peter Jupp, *The Governing of Britain 1688–1848, The Executive, Parliament and the People* (Routledge 2006) 53.
[40] Poor Law Amendment Act 1834, 4 & 5 Will 4, c 76, s 5; Norman Chester, *The English Administrative System: 1780–1870* (OUP 1981) 356–57.

efficacious administration required an accountable representative in central government 'who could be dismissed by Parliament if he failed to use his powers as Parliament wished'.[41]

Let us now briefly examine the causes of action available for those aggrieved by administrative decisions. The remedies most closely resembling modern judicial review are the three prerogative writs. The first was mandamus, which had existed since the 13th century but was significantly expanded in the 17th century to become a general remedy capable of directing a public official or body to perform a legally required duty or to cease an unlawful act.[42] In *Baker* (1762), where church trustees refused to admit a Presbyterian dissenting minister notwithstanding his election to ministry, Lord Mansfield CJ said that mandamus lies 'where the law has established no specific remedy, and where in justice … there ought to be one'.[43] The second writ was certiorari, which allowed the Court of the King's Bench to quash decisions of inferior courts that were legally erroneous, although this remedy could only be used against courts of record (e.g. justices of the peace and Commissioners of Sewers).[44] Prohibition, the third type of writ, applied when inferior courts exceeded their authority.[45] Parliament's response to these judicial developments was mixed; for example. useful procedural reforms like the Municipal Offices Act 1710 and the Prohibition and Mandamus Act 1831 actively facilitated and increased the utility of such writs,[46] but, at the same time, it was not uncommon for 'no certiorari' clauses to be included in legislation (although such clauses were narrowly construed by the judiciary).[47] In addition to the prerogative, other notable remedies were injunctions (a discretionary remedy used to 'restrain … the commission or continuance of some act of the defendant'),[48] quo warranto

[41] FMG Willson, 'Ministries and Boards: some aspects of Administrative Development since 1832' (1955) 33 Pub Adm 43, 52.
[42] Thomas Tapping, *The Law and Practice of the High Prerogative Writ of Mandamus: As It Obtains both in England, and in Ireland* (T & JW Johnson 1853); *James Bagg's Case* (1615) 11 Co Rep 93b.
[43] *R v Barker* (1762) 3 Burr 1264, 1267. See also: *R v Dr Askew* (1768) 4 Burr 2186; *R v Mayor of Fowey* (1824) 2 B & C 584.
[44] *Commins v Massam* (1643) March NC 196; *Cardiffe Bridge Case* (1700) 1 Ld Raym 580; Edith G Henderson, *Foundations of English Administrative Law* (Harvard University Press 1963) 93.
[45] *Warner v Suckerman* (1616) 3 Bulstrode 119; *Chambers v Jennings* (1702) 7 Mod 125; *Chabot v Viscount Morpeth* (1844) 15 QB 446; *Ex Parte Death* (1852) 18 QB 647.
[46] Municipal Offices Act 1710, 9 Anne, c 25, s 1; Prohibition and Mandamus Act 1831, Wm 4, c 21, s 3. See also: Municipal Corporations (Mandamus) Act 1772, 12 Geo 3, c 21 and Writs of Mandamus Act 1843, 6 & 7 Vict, c 67.
[47] Peter Leyland and Gordon Anthony, *Textbook on Administrative Law* (7th edn, OUP 2012) 394; Craig (n 11) 592. See also: Summary Jurisdiction Act 1848, 11 & 12 Vict, c 42.
[48] William Joyce, *The Doctrines and Principles of the Law of Injunctions* (Stevens and Haynes 1877) 1. See also: *Hughes v Trustees of Modern College* (1748) 1 Ves Sen 188; *Rankin v Huskisson* (1830) 4 Sim 13; *Cantrill v*

(requiring an official to show by 'what authority' they held a public office),[49] and habeas corpus (where the court reviewed the lawfulness of a person's detention).[50]

An alternative legal recourse was to bring a private law action, known as a collateral challenge, against the decision-maker or enforcer. Standard tortious actions for trespass to person, chattel, and land could be used where the plaintiff's property or liberty had been interfered with (e.g. detinue or replevin could be pleaded to recover possession of wrongfully detained chattel, and trover or conversion for other unlawful appropriations of property rights).[51] During the 17th to 19th centuries, the courts also began to develop additional torts (civil claims) relating specifically to public office holders.[52] First, the tort of misfeasance in public office had its origins in the dissenting judgment of Holt CJ (which was later upheld in the House of Lords) in *Ashby* (1703), where the plaintiff was wrongfully prevented from voting and Holt CJ argued he ought to be able to bring a civil action against the return officer to vindicate this rights as 'want of right and want of remedy are reciprocal'.[53] This action was restricted to situations where a public officer acted (or failed to act) with targeted malice towards a claimant or knowingly exceeded their powers in a way likely to cause the claimant harm.[54] Similarly, the action of breach of statutory duty was established in *Turner* (1672) and applied where 'an officer does anything against the duty of his place and office, and a damage thereby accrues to the party'.[55] Grey CJ held in *Rowning*

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*Guardians of the Windsor Union* (1836) Donnelly 103; *Stone v Commercial Railway Company* (1839) 4 My & Cr 122; *Webb v Manchester and Leeds Railway Company* (1839) 4 My & Cr 116; *Barnsley Canal Company v Twibell* (1844) 7 Beav 19; *Armitstead v Durham* (1848) 11 Beav 556; *Attorney- General v Guardians of the Poor of Southampton* (1849) 17 Sim 6; *Attorney-General v Great Northern Railway Company* (1850) 4 De G. & Sm 75; *Earl of Ripon v Hobart* (1850) 3 My & K 169; *Dimes v Grand Junction Canal Company (No 2)* (1852) 3 HLC 794; *Attorney-General v Eastlake* (1853) 11 Hare 205; *Manchester Sheffield Railway Company v Worksop Board of Health* (1857) 23 Beav 198; *Somersetshire Coal Canal Company v Harcourt* (1858) 2 De G & J 596; *Imperial Gas Light and Coke Company v Broadbent* (1859) 7 HLC 600; *Ecclesiastical Commissioners for England v Vestry of Clerkenwell* (1861) 3 De G F & J 688.

[49] John Shortt, *Informations, Mandamus and Prohibition* (W Clowes and Sons 1887) 108–10; JH Baker, *John Spelman's Reading on Quo Warranto* (Selden Society 1997).

[50] Petition of Right 1628, 3 Cha 1, c 1; Habeas Corpus Act 1640, 16 Car 1, c 10; *Bushell's Case* (1670) Vaughan, 135; *Kite and Lane's Case* (1822) 1 B & C 101; *Re Seth Turner* (1846) 9 QB 80; *Re John Hammond* (1846) 9 QB 92.

[51] John Baker, *An Introduction to English Legal History* (5th edn, OUP 2019) chs 22–23.

[52] John Baker and SFC Millsom, *Sources of English Legal History: Private Law to 1750* (OUP 2019) ch 14.

[53] *Ashby v White* (1703) 2 Ld Raym 938, 953.

[54] *R v Company of Fishermen of Faversham* (1799) 8 TR 352; *Harman v Tappenden* (1801) 1 East 555; *Tozer v Child* (1857) 7 E & B 377.

[55] *Turner v Sterling* (1672) 2 Ventris 25, 26.

(1773) that this action could be pursued even if there was a statutory penalty as it operated as an 'accumulative sanction'.[56] However, the Court of Appeal signalled a departure from this approach in *Atkinson* (1871), where they held that a £10 statutory remedy precluded the plaintiff from recovering under common law when his house burnt down due to the water undertakers' failure to charge the fire-plugs.[57]

Determining the situations in which a plaintiff was entitled to bring a collateral challenge was contentious; if the public body had acted without jurisdiction—as is illustrated by the *Case of the Marshalsea* (1613) where a tribunal for disputes among royal household servants purported to try a non-household member—a collateral challenge could be brought as 'the whole proceeding is *coram non judice*' (beyond its authority) and thus void *ab initio* (from the beginning).[58] In contrast, if the public body had erroneously decided a matter within its jurisdiction, then the decision could only be challenged by appeal or certiorari (where the plaintiff would not be entitled to damages).[59] The distinction was not always clear-cut, and competing jurisprudence developed. Under the collateral fact doctrine, if the decision maker was mistaken about a fact that affected their jurisdiction, such as in *Terry* (1668), where low-alcohol wines were taxed as strong wines, then a collateral challenge was possible.[60] Conversely, commencement theory argued that the administrator's determination of such facts was conclusive, so the plaintiff in *Brittain* (1819) was not allowed to dispute the magistrates' finding that his vessel was a 'bumboat'.[61]

The remedies outlined above were not merely hypothetical, but were frequently utilised in practice. Craig's research on historic case reports found that, between 1220 and 1867 (the majority of such reports being from the 16th century onwards), there were 6,637 certiorari cases, 5,563 prohibition cases, 7,111 mandamus cases, 2,512 quo warranto cases, and 9,985

[56] *Rowning v Goodchild* (1773) 2 Black W 906. See also: *Ferguson v Kinnoull* (1842) IX Clark & Finnelly 251; *Couch v Steel* (1854) 3 El & Bl 402.
[57] *Atkinson v Newcastle and Gateshead Waterworks Company* (1871) LR 6 Ex 404; Waterworks Clauses Act 1847, 10 & 11 Vict c 17, s 42. See also: *Gorris v Scott* (1874) 30 LT (NS) 431.
[58] C*ase of the Marshalsea* (1613) 10 Co Rep 68b. See also: *Nichols v Walker* (1632– 33) Cro Car 394; *Atkinson v Seetree* (1727) 7 Mod 469; *Grant v Gould* (1792) 2 H BL 69.
[59] *R v Bolton* (1841) 1 QB 66; Henderson (n 44) 126– 27.
[60] *Terry v Huntington* (1668) Hardres 480. See also: *Perkin v Proctor and Green* (1768) 2 Wils KB 382.
[61] *Brittain v Kinnaird* (1819) 1 B & B 432; Bumboat Act 1762 2 Geo 3, c 28. See also: *Wilson v Weller* (1819) 1 B & B 57; *Fawcett v Fowlis* (1827) 7 B & C 396; *R v Justices of Cheshire* (1838) 8 Ad & E 398; *Re Baines* (1840) Cr & Ph 31; *Cave v Mountain* (1840) 1 M & G 257; *Mould v Williams* (1844) 5 QB 469; *Allen v Sharp* (1848) 2 Ex 352.

collateral challenges involving commissioners or justices of the peace.[62] It is likely there were even more cases than this, considering that collateral challenges to other administrative bodies were not accounted for, and a sizable number of cases went unreported since law reporting was private before 1865.[63] Furthermore, it was not uncommon for actions to be brought concerning small sums, such as actions against turnpike trustees contesting the quantum of tolls, suggesting that seeking such remedies was not prohibitively expensive.[64]

Once it had been decided that the plaintiff was entitled to challenge the administrative decision, how did the judges determine the merits of the dispute during this essay's period? The exploration of historic case law below reveals that there were discernible doctrinal principles of administrative law underlying such judicial decisions. As was mentioned at the start of this essay, legislation often granted administrators broad discretion, and the case law below shows that the courts sought to strike a balance by preventing abuses of such discretion without usurping the original decision maker's authority.[65] Even where the legislation did not expressly qualify the administration's discretion, Bacon J in *Estwick* (1648) held that this 'is to be understood [as] sound discretion'.[66] *Kerrison* (1815) affirmed that commissioners' actions are subject to judicial review as they are 'bound within the rule of reason and law'.[67]

There were three general tests the court used in assessing the merits of a decision. Firstly, the requirement of propriety of purpose prevented delegated power from being exercised 'contrary to the intention' of the legislation'.[68] Therefore, in *Sylvester* (1862), justices of the peace could not refuse to renew an ale-house licence on the grounds that the applicant had not taken out an excise license since this was 'not in accord with the language or purpose of

[62] Paul Craig, *Administrative Law* (9th edn, Sweet & Maxwell 2021) 42.
[63] John Baker, 'Law Reporting in England 1550–1650' (2017) 45(3) IJLI 209 <https://doi.org/10.1017/jli.2017.50> accessed 15 July 2025; David Ibbetson, Neil Jones and Nigel Ramsay, 'Part I - Law Reports and Reporting' in *English Legal History and its Sources: Essays in Honour of Sir John Baker* (CUP 2019).
[64] For example, see *R v Justice of the Peace for Nottingham* (1755) Sayer 216; *Inter the Inhabitants of the Parish of Chittinston and Penhurst* (1795) 2 Salk 475; *Inter Inhabitan King's Norton in Wigorn* (1795) 2 Salk 481; *R v The Inhabitants of Denbigh* (1804) 5 East 333; *Ridge v Garlick* (1818) 8 Taunt 424; *Osmond v Widdicombe* (1818) 2 B & Ald 48; *R v The Trustees of the Cheshunt Turnpike Road* (1833) 5 B & Ad 438; *R v The Justices of the West Riding of Yorkshire* (1834) 5 B & Ad 1003.
[65] Craig (n 11) 447.
[66] *Estwick v City of London* (1648) Style 42.
[67] *Kerrison v Sparrow* (1815) 2 Ves, Jun Supp 587.
[68] *R v Mayor of City of London* (1683) 2 Show KB 263; *R v Spencer* (1766) 3 Burr 1827.

the underlying legislation'.[69] Similarly, in *Calder* (1845), a bye-law prohibiting navigation on Sundays was void because the purpose of the enabling statute was to regulate navigation rather than 'moral or religious conduct'.[70] The other two general tests were reasonableness and proportionability, both of which originate from *Rooke's Case* (1598).[71] In this case, although multiple landowners benefited from the riverbank repairs, the Commissioners of Sewers imposed the entire cost on the owner of the land nearest the river. Coke CJ held that the commissioners had exercised their discretion unreasonably as the distribution of burden was disproportionate; the commissioners ought to tax all who are in danger of being … equally, and not him who has the land next adjoining to the river only'.[72]

Proportionality is often viewed as a modern addition to English administrative law introduced through the European Convention on Human Rights.[73] Whilst this is undoubtedly the origin of the formal three-part proportionality test employed today, the general concept arguably had a historic forerunner in the doctrine of proportionability.[74] The word proportionality is almost totally absent from legislation and court judgments in this period, but references to proportionability (a very similar word) abound in statutes from the late 16th century onwards.[75] For example, creditors with future-dated securities were 'intitled to a proportionable Part of the Bankrupt's Estate'[76] and Poor Law Commissions were required to 'ascertain the proportionate Value to every Parish' when setting the amount chargeable to each parish in a Poor Law Union. [77] This abundance of legislative references to proportionability arguably encouraged its parallel development by the judiciary as a

[69] Craig (n 11) 386; *R v Sylvester* (1862) 2 B & S 322.
[70] *Calder and Hebble Navigation Company v Pilling* (1845) 14 M & W 76.
[71] *Rooke's Case* (1598) 5 Co Rep 99b.
[72] ibid.
[73] Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 Colum J Trans L 73, 98–111.
[74] Craig (n 11) 424.
[75] See, for example: Hue and Cry Act 1584, 27 Eliz 1, c 13, s 5; Moss Troopers Act 1662, 14 Cha 2, c 22; Excise Act 1670, 22 & 23 Cha 2, c 5; Taxation Act 1701, 13 & 14 Will 3, c 5; Shipwrecked Mariners Act 1721, 7 Geo 1, c 17; Hue and Cry Act 1734, 8 Geo 2, c 16; Bedford Level Act 1756, 29 Geo 2, c 9; Militia Act 1757, 31 Geo 2, c 26, s 21; Turnpike Roads Act 1822, 3 Geo 4, c 126; Merchant Seaman's Widows Act 1834, 4 & 5 Will 4, c 52, ss 5–6; Prevention of Corrupt Practices Act 1854, 17 & 18 Vict, c 102, s 34.
[76] Bankrupts Act 1720, 7 Geo 1, c 31. See also: *Goddard v Vanderheyden* (1771) 3 Wils KB 262.
[77] Poor Law Amendment Act 1834 (n 40), s 32. See also: *R v The Justices of Westmoreland* (1829) 10 B & C 226; *R v London, Brighton and South Coast Railway* (1851) 15 QB 313; *R v Great Western Railway* (1852) 15 QB 1085.

free-standing ground of review due to the symbiosis between statute and common law.[78] This can be observed in *Vanacre's Case* (1677) where, the court held the Commission of Bankruptcy must distribute the estate proportionably to the respective size of the creditors' claims even though there was no express statutory provision requiring this.[79]

Reasonableness also underpinned many judicial review decisions as courts would not recognise a bye-law or custom as valid law unless it was reasonable (to qualify, customs also had to be certain and must have existed continuously since time immemorial).[80] In *Tyson* (1839), Tindal CJ said that a custom or bye-law would be considered 'repugnant to the law of reason' if it was 'contrary to the public good' or only served narrow sectional interests.[81] For example, in *Broadbent* (1742), Willes CJ held that a custom permitting a lord to dump coal on a tenant's land 'at what time of the year they please[d], and…let them lie there as long as they please[d]' was 'absurd and unreasonable' and therefore void.[82] Reasoning akin to the modern concept of deference can arguably be observed in historic case law, such as *Brook* (1863) where Erle CJ remarked that if a public body had exercised its powers 'in a fair and honest and reasonable manner' the court would presume the bye-law was valid unless there was strong evidence to the contrary.[83] Similarly, in *Bates* (1852) Cranworth LJ said he doubted whether the Bankruptcy Commissioners' decision to bar solicitors related to the bankrupt was expedient, but refused to invalidate the decision as he thought this should only be done when it was very clear 'that discretion has been wrongly exercised'.[84]

In addition to the grounds above, which related to the merits of the resulting decision, the court imposed procedural requirements on administrative decisions. The most eminent

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[78] Paul Craig, 'Proportionality and Judicial Review: A UK Historical Perspective' (2016) 42 RPS <http://dx.doi.org/10.2139/ssrn.2796028> accessed 15 July 2025.
[79] *Vanacre's Case* (1677) 1 Chan Cas 303. See also: *Hetly v Boyer* (1614) 2 Bulstrode 197; *Villa de Market Raisen v Brownlow* (1635– 36) 1 Chan Rep 91; *Vanaker v Nash* (1673) Rep Temp Finch 60; *Bow v Smith* (1795) 9 Mod 94.
[80] *Chapman v Smith* (1754) 2 Ves Sen 606; *Jenkins v Harvey* (1835) 1 CM & R 877; *Bastard v Smith* (1837) 2 M & Rob 129.
[81] *Tyson v Smith* (1838) 9 Ad & E 406, 421. See also: *Barker v Cocker* (1620) Rob 329; *Rockey v Huggens* (1628) Cro Car 220; *Fryer v Johnson* (1755) 2 Wils 28; *Shaw v Pope* (1831) 2 B & Ad 465; *Hilton v Granville* (1845) 5 QB 701; *Blackett v Bradley* (1862) 1 B & S 940; *Mayor and Aldermen of City of London v Cox* (1867) LR 2 HL 239, 258; *Sowerby v Coleman* (1867) LR 2 Exch 96; *Wakefeld v Buccleuch* (1867) L R 4 Eq 613.
[82] *Broadbent v Wilks* (1742) Willes 360, 363.
[83] *Savage v Brook* (1863) 15 CB (NS) 264, 290. See also: *Mayor and Commonalty of London v Bernadiston* (1661– 2) 1 Lev 14; *Cuddon v Eastwick* (1705) 1 Salkeld 143; *Bosworth v Herne* (1737) Cas T Hard 405.
[84] *Ex Parte Bates* (1852) 1 De GM & G 452, 457.

example is the principles of natural justice, which were consistently cited as a ground for invalidating decisions from the 17th century onwards.

In *James Bagg's Case* (1615),[85] the Court of the King's Bench ordered the plaintiff's reinstatement via mandamus as the Plymouth Corporation lacked the authority to disfranchise the burgess for insulting and threatening officeholders, and, even if a valid substantive ground had existed, the plaintiff was not given a chance to respond to the allegations at a hearing. This case was foundational to establishing the right to a hearing,[86] but later cases revealed uncertainty in delimiting what administrative decisions this right applied to. The *Hammersmith Rent-Charge Case* (1849)[87] suggested that the quasi-judicial nature of the administrative proceedings was the determinative factor, whilst other cases like *Bentley's Case* (1723)[88] and *Capel* (1832)[89] placed more emphasis on the effect of the decision (especially if it involved the deprivation of liberty or property).

As was made clear in the *Archbishop of Canterbury Case* (1859),[90] it was not sufficient to hold a symbolic hearing, as both sides must be given a reasonable opportunity to present their case in accordance with the principle of *audi alteram partem* (listen to the other side).[91] However, the court would consider the nature of the decision-maker in determining the extent of the substantive procedural requirements, so the hearing did not have to be oral[92] and, in *Spackman* (1885),[93] an architect empowered to determine whether a building extension was permissible did not have to conduct a formal judicial procedure. Nonetheless, the court was generally unwilling to compromise the principle of natural justice for the sake of administrative efficiency, with Lord Kenyon CJ affirming in *Gaskin* (1799)[94] that the right to be heard applies even when the defendant ecclesiastical officials had acted in good faith in dismissing a parish clerk accused of being intoxicated during Mass. In *Cooper* (1863),[95] Erle J

[85] *James Bagg's Case* (1615) (n 42).
[86] For example, see *R v Ford* (1707) 12 Mod 453; *R v Simpson* (1717) 1 Str 44; *R v Aikin* (1765) 3 Burr 1785.
[87] *Re Hammersmith Rent-Charge* (1849) 4 Ex 87.
[88] *R v University of Cambridge* (1723) 8 Mod 148.
[89] *Capel v Child* (1832) 2 C & J 558. See also: *Bonaker v Evans* (1850) 16 QB 162.
[90] *R v Archbishop of Canterbury* (1859) 1 El & El 545.
[91] *Osgood v Nelson* (1872) LR 5 HL 636.
[92] *R v Bishop of Ely* (1794) 5 TR 475.
[93] *Spackman v Plumstead Board of Works* (1885) 10 App Cas 229.
[94] *R v Gaskin* (1799) 8 TR 209. See also: *R v Smith* (1844) 5 QB 614; *Ex Parte Ramshay* (1852) 18 QB 173; *Fisher v Jackson* (1891) 2 Ch 84.
[95] *Cooper v Wandsworth Board of Works* (1863) 14 CB (NS) 180.

noted that the right to a hearing was even more essential when broad powers had been delegated to an official, such as powers to order the demolition of any house.

The second key principle of natural justice was recognised in *Dr Bonham's Case* (1609)[96] where the College of Physicians was sued for false imprisonment after they punished a doctor for practising without a license. Coke CJ ruled that this violated the principle of *nemo iudex in causa sua* (no-one should be a judge in their own cause). This was reaffirmed in later cases like *City of London v Wood* (1702),[97] where Hold CJ described a mayor acting as both judge and prosecutor in a debt-enforcement action as a 'manifest contradiction'. This exclusionary rule applied more generally where a decision maker had an interest in the outcome, provided there was a real likelihood of bias.[98] This could be a pecuniary interest, as was the case in *Dimes* (1852),[99] where the Lord Chancellor owed shares in the defendant company), or an indirect interest, as was the case in *Hesketh* (1779),[100] where Lord Mansfield held that a bye-law granting freemen monopoly rights could not be enforced by a jury composed solely of freemen.

There were further, more specific, procedural constraints on how discretionary power could be exercised, which mainly developed during the 18th and 19th centuries. The first was the principle of *delegatus non potest delegare* (a delegate cannot delegate), which was based on the principle that where 'Parliament [had] decided to invest a particular minister or administrative authority with powers and duties, it is not for the incumbent of its own volition to shift them to a third party'.[101] As a result, Lord Denman CJ ruled in *Andrews* (1841) that Bankruptcy Commissioners were prohibited from assigning their judicial duties to a clerk.[102] However, this rule was not applied rigidly, and some administrative functions could be delegated without express statutory authority if this could be implied for reasons of

[96] *Dr Bonham's Case* (1609) 8 Co Rep 113b.
[97] *City of London v Wood* (1702) 12 Mod 669, 687; Philip A Hamburger, 'Revolution and Judicial Review: Chief Justice Holt's Opinion in City of London v Wood (1994) 94 Colum L Rev 2091. See also: *R v Allan* (1864) 4 B & S 915; *R v Lee, Ex Parte Shaw* [1882] 9 QBD 394; *R v Gaisford* [1892] 1 QB 381.
[98] *R v Cheltenham Commissioners* (1841) 1 QB 467; *R v Justices of Hertfordshire* (1845) 6 QB 753; *R v Aberdare Canal Company* (1850) 14 QB 854; *R v Rand* (1866) LR 1 QB 230; *R v Meyer* (1875) 1 QBD 173; *R v Hain* (1875) 12 TLR 323; *R v Cumberland* (1875) JJ 4 TLR 294; *R v Huggins* (1895) 1 QB 563.
[99] *Dimes v Grand Junction Canal Co Proprietors* (1852) 3 HLC 759.
[100] *Hesketh v Braddock* (1779) 3 Burr 1847.
[101] Craig (n 11) 364-5.
[102] *Andrews v Marris and Whitham* (1841) 1 QB 3. See also: *R v Glin* (1704) 6 Mod 87.

practical efficacy.[103] Another issue which commonly arose at the time was where a single individual held two conflicting offices, potentially hindering the proper execution of their statutory duties and powers. This can be seen in *Patteson* (1832), where Parke J held that someone could not be both treasurer and a justice of the peace as the former was 'intended to be a mere ministerial officer under the justices, and not to be one of their own body'.[104] However, the courts were wary of upsetting long-standing institutional arrangements, and so were reluctant to conclude that offices were incompatible when they had been traditionally held by the same person for centuries.[105]

Additionally, there were rules to prevent discretion being fettered, which Anderson argued were sometimes 'severely limiting'.[106] In *West Riding Justices* (1833), it was recognised that the ability for an administrator to make discretionary decisions based on rules was limited by the duty to assess individual circumstances.[107] Therefore, in *Wandsworth Board of Works* (1858), the Board lacked authority to mandate the blanket conversion of every privy in its district to water closets and was required instead to assess each one individually.[108] Decisions could also be unduly fettered where contracts the authority had entered into directly or indirectly constrained the way it used its discretionary power. On this basis, the House of Lords held in *Ayr Harbour* (1883) that a contract binding trustees not to use their powers to compulsorily acquire land was void.[109] However, courts avoided interpreting the concept of fettering too broadly, as this would have effectively created a de facto prohibition on governmental bodies concluding contracts (since contracts inherently limit the actions of the parties in some way), which would have been detrimental to administrative efficiency.[110] Thus, Lord Denman CJ and Parke J held in *Leake* (1833) that a contract was not void merely because it could pose a hypothetical fetter, which prevented public authorities from evading contracts simply because they turned out to be bad bargains.[111]

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[103] *R v Ashwell* (1810) 12 East 22; *Rutter v Chapman* (1841) 8 M & W 1; *R v Powell* (1854) 3 El & Bl 377.
[104] *R v Patteson* (1832) 4 B & Ad 9, 29.
[105] *R v Nance* (1741) 7 Mod 337; *R v Gayer* (1757) 1 Burr 245; *R v Trelawney* (1765) 3 Burr 1616; *Milward v Thatcher* (1787) 2 TR 81; *R v Pateman* (1788) 2 TR 777.
[106] Stuart Anderson, 'Judicial Review' in William Cornish et al (eds), *The Oxford History of the Laws of England: Volume XI: 1820–1914 English Legal System* (OUP 2010) 515.
[107] *R v West Riding Justices* (1833) 5 B & Ad 668. See also: *R v Norfolk Justices* (1834) 5 B & Ad 990.
[108] *Tinkler v Wandsworth Board of Works* (1858) 2 De G & J 261.
[109] *Ayr Harbour Trustees v Oswald* (1883) 8 App Cas 623.
[110] Anne Davies, 'Ultra Vires Problems in Government Contracts' (2006) 122 LQR 98.
[111] *R v Inhabitants of Leake* (1833) 5 B & Ad 469. See also: *Attorney General v Lindegren* (1819) 6 Price 287.

In conclusion, whilst it was not akin to the modern welfare state, regulatory activity in the 16th-19th century was certainly not negligible; as Webb observed, Parliament 'weighed out powers to the King's Commissioners with no niggard hand'.[112] Indeed, Craig argues, it was 'precisely because of the extensive regulatory regime that existed in Tudor and Stuart England' that the rich administrative jurisprudence explored in this essay developed.[113] The above analysis shows that, even though England had no separate public law courts, there were established (though imperfect) mechanisms for reviewing and challenging decisions made by public authorities. In fact, the absence of a formal private-public divide arguably helped rather than hindered the development of English administrative law by enabling collateral challenges from which many seminal decisions originated. The vibrancy of administrative law in the relevant period is attested by the volume of reported cases, with the judgments referred to revealing identifiable doctrinal principles such as reasonableness, proportionability, natural justice and non-fettering that developed in the 17th-19th century in response to the trend of increasing regulation beginning in the 15th century. Neither state regulation nor the courts' supervisory role are exclusively modern developments, and administrative law has had a vibrant history which should not be forgotten.

**Word Count: 3,996 Words**

[112] Webb and Webb (n 23) 115.
[113] Paul Craig, (n 62) 42.

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