Texas Law Review
See Also
Volume 94

Response

Vermeule Unbound

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My book asks *Is Administrative Law Unlawful?* Adrian Vermeule answers "No."[1] In support of his position, he claims that my book does not really make arguments from the U.S. Constitution, that it foolishly denounces administrative power for lacking legislative authorization, that it grossly misunderstands this power and the underlying judicial doctrines, and ultimately that I argue "like a child."[2]

My book actually presents a new conception of administrative power, its history, and its unconstitutionality; as Vermeule has noted elsewhere, it offers a new paradigm.[3] Readers therefore should take seriously the arguments against the book. They also, however, should recognize that the book unavoidably has provoked a strong reaction. The question here, therefore, is whether Vermeule's heated denunciation is more revealing about the book or about the difficulty of defending administrative power.

The answer becomes apparent from Vermeule's repeated false or otherwise misplaced claims, which I will discuss as follows:

- I. My Arguments. Vermeule does not accurately describe my arguments, and this *Response* therefore begins by summarizing them.
- II. Mischaracterization. Vermeule repeatedly mischaracterizes my

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1. Adrian Vermeule, *No*, 93 TEXAS L. REV. 1547 (2015) (reviewing PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014)).

2. Vermeule, *supra* note 1, at 1567.

3. *See* Cass R. Sunstein & Adrian Vermeule, *The New Coke: On the Plural Aims of Administrative Law*, SUP. CT. REV. (forthcoming) (manuscript at 1), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2631873 [perma.cc/6EB8-Y9FM] (referring to Thomas Kuhn's notion of "normal science" and the challenges to it).

> arguments. Criticism does not ordinarily provoke me to respond; in fact, I have never before bothered to answer an academic book review. Vermeule, however, denies that I make my central arguments and attributes to me arguments that I do not make. He even attributes to me arguments that are the very opposite of my positions and that I expressly reject.
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> • III. Not a Nutshell. Although my book offers a new approach to administrative power, Vermeule evaluates it as if it were a Nutshell—as if a book presenting a novel vision of administrative power must parse doctrines and cases in the manner of an introductory summary for students.
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> • IV. Historical Errors. In disparaging my historical arguments, Vermeule misstates history, making serious errors about both the English and the American evidence.
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> • V. Personal Attacks. He indulges in personal attacks, including ad hominems, accusations of extremism, and what look like attempts to police dissent.

These are not the entirety of the problems with Vermeule's review, but they are enough to suggest its character. Such a review says little about my book. More seriously, it fails to confront the realities of administrative power and the realities of the objections to it. It thus distracts attention from the real debate about administrative power.

At stake is not merely my book and Vermeule's critique. More fundamentally, there is a choice between the republican form of government established by the U.S. Constitution and the absolute power that, although once defeated by the Constitution, has reemerged within our republic.

My critique of administrative power relies on the history of absolute power to inform an understanding of the U.S. Constitution. Throughout the history of the common law, absolute power has repeatedly threatened the ideal of rule through and under law. Beginning in the seventeenth century, constitutions therefore rejected absolute power, and no constitution barred it more systematically than the U.S. Constitution. Absolute power, however, survived on the Continent, most notably in Germany, where it was unimpeded by constitutional law and increasingly took administrative form. And from the Continent, especially Germany, this dangerous power eventually (in the late nineteenth and early twentieth centuries) was reintroduced into common law countries. On the basis of this history, my book shows the danger of absolute power, the value of constitutional barriers to it, and in particular how it violates the U.S. Constitution.

Vermeule, in contrast, has defended administrative power from the traditions of German absolutism. In particular, he has made arguments from the inevitability or necessity of unbound executive power; he has

made Schmittian arguments about exceptions from law; he has made arguments for the separation of functions in place of the separation of powers; he has made arguments that the executive merely specifies laws and thus is not legislating. Of course, just because Vermeule echoes these German absolutist arguments is not to say that he self-consciously is embracing this tradition; the Supreme Court also makes some such arguments and also is largely unaware of their origin and tendency. Nonetheless, as explained in my book, the defense of administrative power of the sort made by Vermeule carries forward a dubious intellectual heritage.

The choice is thus very serious, and it deserves sober debate.

Vermeule, however, heads in another direction. He repeatedly makes false or otherwise misplaced claims, and he thereby defends what he has espoused as unbound power in a thoroughly unbound manner.[4] Even this, however, is interesting, for it reveals the indefensible nature of the power he so desperately seeks to defend. Administrative power must be unlawful if this is its best defense against my book.

I. My Arguments

My book makes layers of arguments against administrative power—most basically, a series of conceptual, historical, and, more narrowly, constitutional claims. These arguments do not fall neatly into conventional patterns of originalist or doctrinal scholarship, and precisely because of their new angle on administrative power, they dislodge many familiar assumptions about it.[5]

A. Concepts: Absolute Power

Conceptually, the book shows that administrative power is what used

4. For purposes of understanding Vermeule's earlier scholarship, unbound means unlimited by law. *See* ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC 5 (2010). Although my book concerns only administrative power, this is a large part of what Vermeule calls unbound executive power. For my own view, that administrative power is limited by law. *See infra* subpart I(A).

5. On the question of originalism, my book's introduction explains:

> [A]lthough some defenses of administrative law complain about original intent, this inquiry rests on something closer to original sin. Whatever one thinks about intent—especially if one fears it as a return to the constitutional past—it should be kept in mind that this inquiry focuses on something very different: the danger that the government already has returned to the preconstitutional past. Thus, rather than appeal to any interpretative doctrine, whether the living constitution or original intent, this book draws attention to one of the central dangers that prompted the development of constitutions. Much will be said about the history of the Constitution, but the argument here mainly concerns the revival of a historically dangerous sort of power.

HAMBURGER, *supra* note 1, at 10.

to be called "absolute power."[6] This sounds harsh, but unlike prior criticisms of administrative power that have employed such terms, my book carefully defines what it means by "absolute power."

Extralegal, Supralegal, & Consolidated.—There have long been different understandings of absolute power, and in England much of the king's power—his prerogative—was absolute in three senses. It was extralegal in that it bound not merely through law (and the decisions of the courts), but also through other sorts of edicts.[7] It also was supralegal in that it rose above law, as evident in expectations that the judges were to defer to it, not merely to the law.[8] Last but not least, it was consolidated in that it combined all three powers of government in a single individual or administrative body.[9]

Contemporary administrative power is similar. Like the absolute prerogative power, administrative power binds through edicts other than law and in this sense is extralegal, it gets the deference of the courts and in this sense is supralegal, and it combines all three powers of government in the executive or agencies and in this sense is consolidated.[10] At least in these ways, administrative power is absolute.

Not Unlimited.—At the same time, my book emphatically rejects the notion that administrative power in the United States is generally unbound by law. Whereas Vermeule has argued that the executive is (and should be) largely unbound by law, and although he attributes a version of this position to me, my book expressly rejects so extreme a position.[11] After reciting the three absolutist elements of administrative power, the book explains:

> In contrast, a fourth version of absolute power is much less significant for understanding administrative law—this being the conception of absolute power as unlimited. Extra- and supralegal power often escaped the limits of law, and absolute power therefore could be viewed as unlimited power. Administrative law, however,

6. HAMBURGER, *supra* note 1, at 25.

7. *See id.* An entire section is devoted to defining extralegal power, and this section begins: "Governments often bind their subjects not merely through the law and the orders of the courts, but through other sorts of commands and orders. In this sense, governments sometimes exercise extralegal power." *Id.* at 21.

8. *See id.* at 25.

9. *Id.*

10. *See generally id.* at 227–76 (extralegal), 283–321 (supralegal), 323–408 (consolidated).

11. For Vermeule's view of the executive as unbound, see POSNER & VERMEULE, *supra* note 4, at 4–5; and Saikrishna B. Prakash & Michael D. Ramsey, *The Goldilocks Executive*, 90 TEXAS L. REV. 973, 984–85 (2012), which discusses the overstated character of Vermeule's claim for an unbound executive. For his attempt to attribute a version of such a position to me, see *infra* subpart II(C). For my book's express rejection of this position, see the text immediately below this note.

> is not entirely unlimited. Although it suffers from many problems, it is absolute mostly in the first three ways mentioned here, and this is serious enough.[12]

In short, although administrative power is absolute in some senses, and although it is a large part of Vermeule's unbound executive power, it is not absolute in the fourth sense of being generally unlimited by law.

Extralegal Does Not Mean Unauthorized.—Even where administrative power has statutory authorization, it remains extralegal. In other words, notwithstanding Vermeule's suggestions, "just because a power runs outside the law, rather than through it, does not mean it lacks at least a semblance of legal authorization."[13] Thus, "quite apart from the question of legal authorization, there remains the underlying problem of extralegal power—the problem of power imposed not through the law, but through other sorts of commands."[14] And this matters because "administrative power . . . imposes rules and adjudications in addition to those of the law, and even where these extralegal constraints have statutory authorization, they interfere with the extent of the liberty enjoyed under the law."[15]

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."[16]

That, however, is not all, for "the evasion also gets around the Constitution's institutions and processes."[17] When the executive makes regulations, it can "escape the constitutional 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."[18] This judicial evasion is especially troubling because "it escapes almost all of the procedural rights guaranteed by the Constitution."[19]

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12. HAMBURGER, *supra* note 1, at 25.

13. *Id.* at 23.

14. *Id.*

15. *Id.* at 7–8.

16. *Id.* at 29. Administrative power also is an end run around treaties, but for simplicity's sake this is not pursued here.

17. *Id.*

18. *Id.*

19. *Id.* Although administrative adjudication comes with its "lesser, administrative version of due process," it is unclear "how a fraction of a right can substitute for the whole, or how the due

Indeed, administrative power creates a cascade of evasions, in which each type of administrative lawmaking functions as an evasion of others. Thus, "administrative legislation has developed as a cascade of evasions—initially an evasion of law, but then a series of evasions within administrative lawmaking."[20] And this is very revealing about administrative power. Both its structure and its trajectory can be seen as a cascade of evasions.

Of course, these aspects of absolute power are not my book's only conceptual contributions. But they are enough to lay out the foundation of the book's argument.

B. History: The Revival of Absolute Power

Not only conceptually but also historically, my book shows that administrative power revives absolute power.[21] Indeed, there has been direct continuity between European absolute power and contemporary American administrative power.

Revival of Absolutism.—Although administrative power is widely claimed to be a modern solution to the complexity of modern society, it more clearly is a revival of the ancient and recurring danger of absolute power. The revival of absolute power should not be a surprise, for the temptation to evade established avenues of power by turning to extralegal paths can be as powerful in a republic as in a monarchy. Just as English monarchs employed prerogative power to evade the need to rule though the laws and courts, so too American governments have used administrative power for such purposes.[22]

The revival of such mechanisms reaches even the details of judicial deference. James I sought judicial deference to the statutory interpretations of his prerogative bodies, and similarly the executive now seeks judicial deference to the statutory interpretations of administrative agencies.[23]

Of course, there are many differences. Most significantly, what once was the monarch's personal prerogative power is now the state's bureaucratic administrative power—a shift that was beginning already by the sixteenth century. But this shift to a more institutional version of the power does not alter its extralegal and thus absolute character.

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process of administrative power in an administrative tribunal can substitute for the due process of law in a court. This is like a substitution of water for whisky, and the fact that both are liquid does not hide the evasion." *Id.*

20. *Id.* at 111.

21. *Id.* at 6, 25.

22. *See id.* at 29–30.

23. *See id.* at 315–17, 319–21.

Continuity of Absolutism.—Administrative power does more than revive absolute power; it is in fact a direct continuation of it. This initially may seem improbable, for (as will be discussed shortly) absolutism was defeated by constitutional law in seventeenth-century England and even more systematically by written constitutions in eighteenth-century America. But that was not the end of the matter. Even after it was rejected in common law countries, it survived on the Continent, especially in Germany, and from there it eventually circled back to common law countries.[24]

It was most prominently in Germany, in the sixteenth and seventeenth centuries, that the absolute prerogative of monarchs began to become the administrative power of the state. This was transformative for Germany, because absolute power in administrative form became an instrument of imposing order or *Ordnung*—eventually to the point that many Germans became accustomed to being ruled.[25] Germans were the primary exponents and theorists of administrative power, and they often self-consciously espoused it as an anti-republican and anti-constitutional mode of government.[26]

In the last half of the nineteenth century, many American progressives were becoming discontent with the representative government established by American constitutions, and many of them found German and especially Prussian administrative ideas to be a satisfying alternative.[27] They soon shared their Germanic ideas in American universities, law schools, professional associations, early think tanks, and government departments, and the administrative power drawn from Germany soon enjoyed a growing popularity.[28] The full story is complex, but suffice it to say that, although absolute power had earlier been defeated by constitutional law in England and America, it was reintroduced primarily by way of Germany.

Administrative power thus revives—indeed, continues—the old danger of absolute power. And this history matters, at the very least because it suggests much about the nature of administrative power and why it is so dangerous.

C. Constitutional Law: The Rejection of Absolute Power

It is often said that because administrative power is a modern development, the U.S. Constitution could not have anticipated it, and that it therefore is not barred by the U.S. Constitution. This, however, is deeply

24. *Id.* at 441–78, 493–98.

25. *See id.* at 506–09; *see also* MARY FULBROOK, A CONCISE HISTORY OF GERMANY 71 (2d ed. 2004) (on how German political culture was reshaped when "habits of obedience and servility were stressed, for subjects rather than citizens").

26. *See* HAMBURGER, *supra* note 1, at 447–50.

27. *See id.* at 369–74 (regarding discontent), 450–53 (regarding interest in German ideas).

28. *See id.* at 459–62.

mistaken.

Development of Constitutional Law in Response to Absolutism.—My book lays the foundation for its constitutional argument by observing that absolute power was the primary danger that provoked the development of constitutional law.[29] Vermeule dismisses my argument as poor originalism, saying that it focuses too much on the seventeenth century and on Germany, and not enough on 1789.[30] This, however, misses the nature of my argument, which looks at the preeminent danger that constitutions were designed to prevent. Put generally, constitutional law, in England and America, cannot be understood without recognizing the underlying fear of absolute power—the fear of extralegal, supralegal, and consolidated power.

Absolute power prompted the English in the seventeenth century to explore ideas of constitutional law.[31] Early Americans were vividly aware of the English history and the continuing danger, and although they had to deal with their own dangers, they systematically drafted their constitutions, including the U.S. Constitution, to bar any absolute prerogative or other absolute power. "As put by John Adams in 1776, Americans aimed to establish governments in which a governor or president had 'the whole executive power, after divesting it of those badges of domination called prerogatives,' by which Adams meant, of course, the absolute prerogatives."[32]

The point is that, far from being unable to anticipate the problem, American constitutions were designed to bar absolute power. That is, they were designed to bar extralegal, supralegal, and consolidated power. Of course, the past version of such power was "prerogative," and the new sort would be more "administrative." One way or the other, however, the danger of absolute power was widely familiar, and it therefore is no surprise that American constitutions systematically rejected it.

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29. *See id.* at 12.

30. Vermeule, *supra* note 1, at 1551.

31. Incidentally, the English had to turn to ideas of constitutional law because English kings claimed that they had legal authority for their absolute power. Kings sometimes claimed common law foundations and sometimes statutory grants for their absolute power, and either way, opponents of royal absolute power could not rest simply on the law; instead, they needed to base their claims on a higher sort of law. As I have shown elsewhere, ideas of constitutional law had been familiar among some English lawyers since at least the late fifteenth century, but such ideas flourished only when seventeenth-century English kings made extravagant assertions of absolute power based on law. *See* PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 82–86 (2008). At that point, the idea of an English constitution—a higher sort of English law—seemed a valuable response and thereby became popular. *See id.* at 85.

32. HAMBURGER, *supra* note 1, at 28 (quoting Letter from John Adams to William Hooper (Mar. 27, 1776), *in* 4 THE ADAMS PAPERS: THE PAPERS OF JOHN ADAMS 76 (Robert J. Taylor et al. eds., 1979)).

U.S. Constitution.—My book completes its constitutional argument by showing that many provisions in the U.S. Constitution bar extralegal and other absolute power. They do this primarily by requiring the government to exercise its binding power through the law and the courts. My arguments from specific clauses of the Constitution are too lengthy to be summarized in detail here, but some examples can be listed:

- The first substantive word of the Constitution, the word "All" in Article I, bars any congressional subdelegation of legislative powers.[33]
- Congress cannot delegate judicial power because the Constitution vests Congress only with legislative powers, and Congress cannot delegate a power it does not have.[34]
- Article III's delegation of judicial power to courts staffed by judges with the duty to exercise their own independent judgment precludes any judicial subdelegation of judicial power.[35]
- The Necessary and Proper Clause authorizes Congress to do what is necessary and proper to execute the powers *vested* by the Constitution in the government or in any department or officer thereof. The Clause thereby avoids authorizing any relocation of such powers.[36]
- The privilege against self-incrimination not only limits self-incrimination in the courts but also precludes it in attempts to impose binding adjudication outside the courts.[37]
- The Constitution's guarantees of jury rights, both civil and criminal, not only make juries available in courts but also preclude binding adjudication outside the courts.[38]
- The Fifth Amendment's guarantee of due process of law (like almost every other procedural right) was understood not only to set a standard for the courts but also to preclude adjudication outside the courts.[39]

And so forth. My book thus combines an account of the underlying danger with an analysis of how particular constitutional clauses barred it.

D. Other Arguments

Of course, my book makes other arguments, including some that are sociological. It observes, for example, that the knowledge class has used

33. *Id.* at 387.
34. *Id.* at 396–97.
35. *Id.* at 397–98.
36. *Id.* at 427–29.
37. *Id.* at 252–53.
38. *Id.* at 240–48.
39. *Id.* at 254–56.

administrative power to transfer to itself much of the power that the *demos* traditionally exercised through the legislature.[40] It also notes that the growth of administrative power in nineteenth- and twentieth-century America was tied to the expansion of suffrage; in other words, when equal suffrage gave blacks, women, and other minorities more of a voice in electing their lawmakers, lawmaking power was removed from the legislature.[41] The book further points out that administrative power burdens Americans with a system of governance that dates back to the age of the horse and buggy—indeed, back to the Middle Ages.[42] Most generally, it argues that administrative power is a threat to modern society, modern science, and their blessings.[43]

The full range of my book's arguments, however, need not be explored here. Enough has been said to suggest the gist of its conceptual, historical, and constitutional claims.

II. Mischaracterization

Instead of answering my book's arguments, Vermeule's review persistently mischaracterizes them. The mischaracterizations concern my constitutional, conceptual, and doctrinal arguments, and he thereby condemns my book for arguments it does not make, and for not making arguments it does make.

A. Alleged Failure to Argue from the U.S. Constitution

Vermeule's primary mischaracterization of my constitutional argument is that I don't really argue from the U.S. Constitution. He declares that he cannot understand what my book means when it says that administrative law is unlawful, and after treating my vision of unlawfulness as a great puzzle, he then declares that "I'll try to reconstruct Hamburger's critique" and suggests that I must be arguing not from the U.S. Constitution, but merely from "deep, unwritten principles of Anglo-American constitutional order."[44] He thereby "reconstruct[s]" my argument in a way that deprives it of its constitutional force and then condemns my book for making such a weak argument!

In fact, my book argues that administrative power is unconstitutional

40. *See id.* at 363, 369–72.

41. *Id.* at 502.

42. *See id.* at 481.

43. *See id.* at 484–85.

44. Vermeule, *supra* note 1, at 1548. When he begins speaking of his "reconstruction" of my argument in terms of an amorphous Anglo-American constitutionalism, he says that his reconstruction is "tentative." *Id.* at 1552. Within several pages, however, he speaks more confidently. Writing of my views on authorizing statutes, he claims that I "have to say . . . they violate the deep principles of Anglo-American constitutionalism," and then adds: "As we will see, he does say that . . . ." *Id.* at 1555.

because it violates the U.S. Constitution. It ordinarily would be ridiculous to have to assert this, but Vermeule repeatedly mischaracterizes my book as largely indifferent to the U.S. Constitution.[45]

How much is Vermeule evading when he suggests that my book does not really argue from the U.S. Constitution? Well, some examples of my book's arguments from particular clauses of the Constitution have already been seen in subpart I(C). They include detailed arguments from Articles I and III, from the Necessary and Proper Clause and its focus on the powers *vested* by the Constitution, from the jury guarantees, from the Fifth Amendment's Due Process Clause, and indeed, from almost all the procedural rights guaranteed in the Bill of Rights. But Vermeule mentions none of this. Instead, he dismisses my argument as one based on vague common law principles.

Of course, my book also makes arguments that are not based specifically on the U.S. Constitution. But even many of these other arguments, including many of the historical arguments, contribute to the book's conclusion that the U.S. Constitution bars administrative power.[46]

Vermeule's claim is thus rather odd. Rather than respond to my repeated arguments from the U.S. Constitution, he simply denies that I make such arguments.[47] This "reconstruction" is simply false. No?

B. Alleged Definition of Extralegal as Unauthorized

My book's central conceptual point is that administrative power is "extralegal." Vermeule recognizes that this is my "basic charge," but he

45. Vermeule, having read my book, must know that it argues from the U.S. Constitution, and he therefore avoids directly saying that it does not rest on the U.S. Constitution. Instead, he evades this reality by saying things like: "The *main point*, for [Hamburger], isn't that administrative law is inconsistent with this or that constitutional clause or even the best overall interpretation of the Constitution." *Id.* at 1551 (emphasis added). Similarly, he says that my "*deepest commitment* is to this common law version of Anglo-American constitutionalism," and that it is "of *secondary interest*" to me "whether the written constitutional rules of the United States, as of 1789, correspond to that substantive vision." *Id.* at 1552 (emphasis added). He thereby represents my arguments on the basis of what he attributes to my mental state rather than on the basis of what my book actually says.

46. In support of his mischaracterization, Vermeule quotes my book's explanation that it aims to go beyond the scholarship that studies administrative power by focusing "on the flat question of unconstitutionality"—"as if it were merely a flat legal question about compliance with the Constitution." Vermeule, *supra* note 1, at 1551–52 (quoting HAMBURGER, *supra* note 1, at 5, 15). My book's point, however, is not that administrative unlawfulness should be measured by something other than the U.S. Constitution, but rather that one cannot understand the Constitution's meaning without first considering the underlying depth of historical experience, including the dangers the Constitution was meant to prevent. As put by my book, it is a mistake to "reduce[] administrative law to an issue of law divorced from the underlying historical experience and thus separated from empirical evidence about the dangers." HAMBURGER, *supra* note 1, at 15. And Vermeule knows this is my meaning, for he quotes this passage. Vermeule, *supra* note 1, at 1551–52.

47. *See* Vermeule, *supra* note 1, at 1553.

misstates it in a way that attributes to me a position that I expressly and repeatedly reject.[48]

He claims that when speaking of administrative power as "extralegal," I mean it is without statutory authorization—that it "rests on 'prerogative'" rather than an act of Congress.[49] He then protests that this "would become a far more difficult claim to defend to the extent that administrative law enjoys valid statutory authorization"—as if I were even unaware of the existence of statutory authorization.[50] Both suggestions are obviously false.

Vermeule, however, persists. On the basis of these false claims—that when administrative power has statutory authorization it is "not extralegal" and that I am unaware that "administrative law enjoys valid statutory authorization"—Vermeule adds that "delegation theory is critical for Hamburger, because, . . . it scrambles his categories."[51] Actually Vermeule scrambles my categories.

My book explains that administrative power is extralegal in the sense that it binds not merely through statutes or court decisions, but through other edicts, and that such edicts therefore remain extralegal even when they have statutory authorization.[52] This had been true of prerogative power, and it nowadays is true of administrative power. As put by my book's section defining extralegal power:

> Obviously, just because a power runs outside the law, rather than through it, does not mean it lacks at least a semblance of legal authorization. It will be seen that Henry VIII secured candid statutory authorization for some of his extralegal power, that the prerogative courts made strained claims of statutory authorization, and that early English kings often left it ambiguous whether they were acting under or above the law. Similarly, today, administrative law is said to have legal authorization—sometimes in clear statutory language, sometimes in strained interpretations of statutes, and sometimes in sheer ambiguity.
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> But quite apart from the question of legal authorization, there remains the underlying problem of extralegal power—the problem of power imposed not through the law, but through other sorts of commands. On this basis, when this book speaks of administrative law as a power outside the law—or as an extralegal, irregular, or extraordinary power—it is observing that administrative law purports to bind subjects not through the law, but through other sorts of

48. *Id.* at 1555.
49. *Id.*
50. *Id.*
51. *Id.* at 1556–57.
52. *See supra* subpart I(A).

directives.[53]

In short, extralegal power includes any attempt to issue binding edicts other than statutes and court decisions, regardless of statutory authorization.

Why then does Vermeule misstate my central argument about extralegal power as if it was referring to unauthorized power and as if I do not understand the existence of statutory authorization? Both suggestions are patently false. No?

C. Alleged Doctrinal Errors

Many of Vermeule's mischaracterizations of my book come in the form of strong accusations of doctrinal error. Vermeule declares that my book makes "crippling mistakes about the administrative law of the United States."[54] Indeed, he repeats this like a drumbeat. My book "misunderstands what that body of law actually holds"; it is "light on knowledge of administrative law"; its arguments are "premised on simple, material, and fatal understandings of what is being criticized"; and so forth.[55]

But he does not substantiate it. For starters, notice that he never points to any positive error in any sentence of mine on contemporary administrative doctrine. Instead, my alleged errors turn out to be sins of omission—things such as that I do not discuss a doctrine that is of minimal relevance to my argument, or more generally that I do not discuss doctrine in the respectfully attentive and detailed manner one would expect in a Nutshell. This, according to Vermeule, is to misunderstand doctrine.

To complain that my book should have discussed matters that it did not, and that it should have explored some in greater detail, is not unreasonable. To say that the book is therefore in error about doctrine is just silly. It is more mischaracterization.

Here are just a few examples:

Alleged Failure to Recognize the Supreme Court's Theory of Nondelegation.—Vermeule claims that my book does not recognize that "administrative law denies that there *is* any delegation of legislative power at all so long as the legislature has supplied an 'intelligible principle' to guide the exercise of delegated discretion. Where there is such a principle, the delegatee is exercising executive power, not legislative power."[56] But that is what my book discusses at the head of its chapter on subdelegation. Here are my words: "the Court requires Congress to offer agencies at least

53. HAMBURGER, *supra* note 1, at 23.

54. Vermeule, *supra* note 1, at 1547.

55. *Id.* at 1547–48, 1554.

56. *Id.* at 1558.

an 'intelligible principle'"—the assumption being that "where Congress provides such guidance, the agencies are merely filling in details and thus are not making, but merely executing the law. On this fiction, the Court can pretend that Congress is not delegating legislative power."[57]

There is little difference between Vermeule's presentation of the Court's nondelegation theory and mine, except that I view it skeptically.[58] His claim that my book doesn't recognize the Court's theory is thus clearly false. No?

Alleged Failure to Recognize the Theory that the Executive Merely Fills in Details.—In mischaracterizing my treatment of nondelegation, Vermeule claims that I do not address the theory that "it is an indispensably executive task to 'fill in the details' of statutes with binding regulations" and further that I do not address the associated historical claim that this theory "has been adopted in American constitutional law from the beginning, as evidenced by unbroken legislative and executive practice."[59] As Vermeule puts it, "Hamburger may disagree with that theory or with the historical claim, but shouldn't he address them squarely?"[60] In fact, my book addresses both points in detail.

As for the theory, my book observes that it is a rank fiction.[61] And my book has good company for dismissing the theory as fictional, for James Landis himself explained: "[I]t is obvious that the resort to the administrative process is not, as some suppose, simply an extension of executive power," and those who "have sought to liken this development to a pervasive use of executive power" are "[c]onfused."[62]

On the historical claim, much of Chapter Six is devoted to showing that early federal statutes and executive practice reveal little support for any power in the executive to fill in binding details—a point to which this

57. HAMBURGER, *supra* note 1, at 378.

58. Of course, after recognizing the "official theory" of nondelegation, my book then argues against the delegation of legislative power, for such delegation is a central reality of the administrative state. Vermeule, however, takes my opposition to the reality of delegation as an opportunity to suggest that the book does not recognize the "official theory" of nondelegation. *See* Vermeule, *supra* note 1, at 1557. He even goes so far as to say: "Unfortunately there is no one, or almost no one, on the other side of [his] argument [that delegation is unconstitutional]. Administrative law is in near-complete agreement with Hamburger on this point." *Id.* The reality of administrative delegation, however, is widely recognized, and my book's focus on this reality does not excuse Vermeule's suggestion that the book does not recognize the official theory of nondelegation.

59. *Id.* at 1561–62, 1562 (emphasis omitted).

60. *Id.* at 1562.

61. *See* HAMBURGER, *supra* note 1, at 378.

62. JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 15 (1966). For a discussion of Landis' point, see JOSEPH POSTELL, "THE PEOPLE SURRENDER NOTHING": THE SOCIAL COMPACT FOUNDATION OF THE NONDELEGATION DOCTRINE (forthcoming) (manuscript at 16) (on file with author).

Response will return in subpart V(B).[63] The theory that the executive does not legislate in its administrative edicts, but merely specifies the law, is taken so seriously by my book that it traces the early history of this idea—not back to the early Republic, as Vermeule imagines, but to Prussia. The notion of mere executive administration, as opposed to legislation or politics, was a German and especially Prussian doctrine designed to defeat representative and constitutional government.[64] Such is the real origin of the theory that Vermeule thinks needs to be take seriously as a product of "American constitutional law from the beginning, as evidenced by unbroken legislative and executive practice."[65]

Vermeule thus is mistaken in suggesting that my book does not squarely address the theory and the underlying historical claim. On both the theory and the history, these criticisms are simply false. No?

Alleged Failure to Recognize the Authorization for the Combination of Functions.—Echoing his earlier mischaracterization of my notion of extralegal power, Vermeule suggests that in discussing the separation of powers, I simply don't understand that the three parts of government have authorized the combination of their functions in agencies.[66]

This claim that my book does not recognize the subconstitutional authorization for the combination of functions is of course ludicrous—especially as my book repeatedly discusses the authorization for the combination of powers. Just for example, Chapter Seven begins by explaining that extralegal legislation (usually a combination of legislative and executive powers) "currently enjoys its authority under—or at least in the context of—the 1946 Administrative Procedure Act."[67] Indeed, when complaining about "consolidated power," my book devotes a whole chapter to arguing against the statutory and judicial authorization for such power.[68] Vermeule's suggestion that I don't understand the source of the combined agency functions is thus just inane and false. No?

Alleged Failure to Recognize the Statutory Limits on the Combination

63. *See* HAMBURGER, *supra* note 1, at 83–110.

64. For the German distinction between administration and, on the other hand, politics and lawmaking, see *id*. at 464 n.l. For its place in the more fundamental German distinction administrative and constitutional matters, see *id*. at 463–65.

65. Vermeule, *supra* note 1, at 1562.

66. *See id.* at 1564 ("Where on earth does Hamburger think combined agency functions come from? The combination of functions in agencies *results from* the operation of the system of separated legislative, executive, and judicial powers.").

67. HAMBURGER, *supra* note 1, at 111.

68. *See id.* at 377–402 (discussing subdelegation). For other discussion of the APA or judicial acquiescence in what it authorizes, see *id.* at 112 n.a, 230, 233, 233 n.d, 242, 250, 310–12, 314, 317–18, 351, 361, 482.

of Functions.—Expanding on this mischaracterization, Vermeule says that, "from reading this book, one would never guess that administrative law spends as much time limiting the combination of functions as enabling it."[69] In particular, he suggests that my book does not discuss how the Administrative Procedure Act (APA) "requires strict separation of adjudicative functions from prosecutorial and investigative ones, in formal on-the-record adjudication before an administrative law judge, but not in rule making, and not at the top level of the agency."[70]

My book, however, does discuss how the APA "distinguishes between the executive and judicial functions of administrators," and how it "bars a decisionmaker from deciding a case if he has 'engaged in the performance of investigative or prosecuting functions' in it."[71]

The difference is that whereas he takes satisfaction that the glass is half-full, my book points out that the glass is half-empty and that this is a dangerous threat to due process. For example, Vermeule emphasizes that the APA bars "ex parte contacts in formal adjudication" and that "those rules *do* apply at the top level of the agency."[72] In contrast, my book notes that the heads of agencies "usually are political appointees, who do not enjoy protection in tenure or salary, who can be fully engaged in investigating and prosecuting the cases they decide, and who usually can receive all sorts of internal off-the-record suggestions and advice on a case."[73] Similarly, although we both discuss some of the protections in formal adjudications, my book draws attention to the dangers in informal administrative adjudications, which "are utterly summary," being "without even the pretense of dispassionate adjudicators and proceedings."[74] They are "not even within the Administrative Procedure Act's efforts to separate functions, to allow counsel, to allow confrontation of witnesses, to require a record of hearings, or to require a preponderance of the evidence."[75]

Nonetheless, Vermeule suggests that my book does not recognize the limits on the combination of functions. That is false. No?

Summary.—So numerous are the mischaracterizations that (to spare the reader) some are abbreviated in the note below and others are simply left unmentioned.[76] Enough have been detailed to show how Vermeule deflects

69. Vermeule, *supra* note 1, at 1564–65.

70. *Id.*

71. HAMBURGER, *supra* note 1, at 230, 235.

72. Vermeule, *supra* note 1, at 1565.

73. HAMBURGER, *supra* note 1, at 236.

74. *Id.* at 256.

75. *Id.*

76. Although a full enumeration of Vermeule's mischaracterizations would take up too much space, here are a few others:

my book's critique by mischaracterizing its constitutional, conceptual, and doctrinal arguments.

Looking over Vermeule's "reconstruction" of my arguments, one can see that it comes in three versions. Most candidly, there is what he bluntly calls his "reconstruction," in which he claims I don't argue from the U.S. Constitution. More subtle is his speculation about what I "must be" saying or what I "seem to say," thereby attributing to me positions that are easy to denigrate.[77] Finally, there is the hidden reconstruction, in which he

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Alleged Belief that Executive Power Is Merely the Power to Execute the Laws.—According to Vermeule, I think that the "only power" of the executive is the power "to 'execute' the laws, understood very narrowly—basically the power to bring prosecutions and other court proceedings to ask judges to enforce statutes." Vermeule, *supra* note 1, at 1552. In fact, my book rejects this position and argues, instead, that executive power consists of the authority to exercise all of the government's lawful force. *See* HAMBURGER, *supra* note 1, at 328 n.a, 332.

Alleged Ignorance of the Delegation Justification for Chevron Deference.—My book does not bother to mention the delegation justification for *Chevron*, and on this basis Vermeule suggests that my book "doesn't know" about this justification. *See* Vermeule, *supra* note 1, at 1554. What he fails to mention is that my book's argument against *Chevron* is not statutory, but constitutional, and that the statutory delegation justification is therefore irrelevant. *See* HAMBURGER, *supra* note 1, at 315–16.

Alleged Special Test for Taxation.—According to Vermeule, I think administrative taxation should be subject to a different constitutional test than other administrative lawmaking. *See* Vermeule, *supra* note 1, at 1563. In fact, my book nowhere says this. On the contrary, although my book pays attention to the ways in which determinations, penalties, taxes, nuisance decisions, and licensing can become specialized types of administrative lawmaking, it argues that all binding extralegal lawmaking is equally unlawful, without distinction. HAMBURGER, *supra* note 1, at 115–20. "Whatever the form, it all returns to extralegal legislation." *Id.* at 120.

Alleged Failure to Present Contemporary Evidence of Institutional Bias Among ALJs.—Vermeule claims that my argument about the institutional bias of administrative adjudicators is based on utterly obsolete sources—that it rests "principally on the basis of a discussion of Montesquieu (!)" and other sources that are so old as to be "irrelevant to the incentives and possible biases of the modern administrative law judge." Vermeule, *supra* note 1, at 1565 n.93. Actually, my book has two sections on the bias of administrative adjudicators—one section focusing on the contemporary mechanics of the bias, the other taking a more philosophical approach. *See* HAMBURGER, *supra* note 1, at 231–37, 337–39. Vermeule is silent about my section on the contemporary nuts and bolts and its contemporary sources. Dead silent. Instead, he mentions only my more philosophic section, even rooting around in its philosophical and historical endnotes, to claim, falsely, that my treatment of bias does not argue from contemporary realties. *Id.*

77. For example, Vermeule writes of me that "he must be using the word law in two different senses to say that a body of 'law' is 'unlawful.'" Vermeule, *supra* note 1, at 1551. Well, not really, if one assumes that there are different levels of law and that regulations or statutes can be unlawful under the Constitution. In another instance, he writes: "Hamburger . . . seems to say that officials exercise 'legislative' power whenever, and just so long as, they issue 'binding' commands." Vermeule, *supra* note 1, at 1560. Actually, the book repeatedly distinguishes between binding lawmaking and binding adjudication; so it clearly does not say what Vermeule attributes to it.

misstates my arguments without even a hint of what he is doing. With or without candor, all three modes of reconstruction mischaracterize my book's arguments in ways that conveniently render them feeble or foolish.

Ultimately, the problem is not simply Vermeule's mischaracterization of my book, but his failure to wrestle with the realities of administrative power. Recall these examples:

> • In mischaracterizing the concept of extralegal power and in denying that my book argues from the U.S. Constitution, he fails to confront the reality of extralegal power and its evasion of the constitutionally authorized paths of power.[78]
>
> • In protesting that the official theory is nondelegation—a theory he candidly does not believe and that in fact my book discusses—he fails to deal with the reality of delegation.[79]
>
> • In emphasizing the subconstitutional authorization for the combination of functions and in falsely claiming that I don't understand this authorization, he fails to deal with the reality of consolidated power and how it violates the Constitution.[80]

The mischaracterization thus allows Vermeule to avoid confronting the realities of administrative power and the powerful arguments against it.

III. Not a Nutshell

Vermeule once stood astride the law and declared the executive unbound.[81] Now he hunkers down under doctrine to show that the executive really is bound. He adds that, because I do not crouch with him in the doctrinal trenches, I am out of bounds. But my book is not a Nutshell.

A. Inconsistency

Vermeule previously echoed the little boy who shouted, "The Emperor has no clothes!" The difference was that, unlike the little boy, Vermeule hailed the Emperor's sartorial freedom and asked others to join in celebrating his naked power. Since then, however, my book has argued that it is dangerously unconstitutional for binding power to be exercised through edicts other than law, and Vermeule has become worried that this argument may have the "dangerous" effect of "delegitim[izing] the administrative state" by "tear[ing] out its intellectual struts."[82] Vermeule therefore has changed his tune. Now, he joins the crowd who protest that the Emperor is

78. *See supra* subpart II(B).

79. *See supra* subpart II(C); *see also* Vermeule, *supra* note 1, at 1560 ("[T]he official theory of delegation in American administrative law is not a view that I agree with.").

80. *See supra* subpart II(C).

81. *See* POSNER & VERMEULE, *supra* note 4, at 4–5.

82. Vermeule, *supra* note 1, at 1554.

well clothed in law, and he sputters that it is downright ignorant, even nearly seditious, to suggest otherwise.[83]

In defense of administrative power, Vermeule thus moves from one mistaken extreme to another—from the error of thinking the executive unbound by law to the error of suggesting that it is largely bound by law and entirely lawful. And this leads him to shift gears on doctrine. Having ignored much doctrine to declare the executive "unbound," he now declares it shocking, just shocking, that a book portraying administrative power as legally limited does not recite the limits in tedious detail.[84]

Other scholars have noted Vermeule's *volte face*. Michael Ramsay writes: "But wait . . . I thought that the modern reality *is* (or ought to be) that the executive (and so at least the administrative state that's controlled by the executive) is 'unbound' by law (though checked by politics)."[85] Gabriel Sanchez observes that, although consistency is not necessarily a virtue, candor is: "[I]f one does change their views or alters a position champed earlier in one's career, then just say so. It demonstrates far more intellectual and personal maturity than playing the caginess card."[86]

Vermeule protests that he is not really inconsistent, and he has a point.[87] Rather than inconsistent, perhaps he merely is persistent (even to the point of being willing to weave back and forth) in defense of an otherwise indefensible power.

For purposes of evaluating my book, however, it makes no difference whether Vermeule has been inconsistent. His inconsistency does not matter here, except as another reminder of the contortions that apparently are necessary to defend administrative power.

B. Not a Nutshell

What matters more centrally here is that, in the course of changing positions, Vermeule suggests that my book is flawed because it does not summarize introductory doctrine and cases. He insists that a detailed

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83. For the nearly seditious, see *infra* subpart V(B).

84. For my book's understanding of administrative power as limited by law, see *supra* subpart I(A). For Vermeule's inattention to the doctrinal limits on executive power, see Prakash & Ramsey, *supra* note 11, at 984–85.

85. Michael Ramsey, *Adrian Vermeule Reviews Philip Hamburger's, "Is Administrative Law Unlawful?"*, ORIGINALISM BLOG (Sept. 1, 2014, 6:14 AM), http://originalismblog.typepad.com/the-originalism-blog/2014/09/adrian-vermeule-reviews-philip-hamburgers-is-administrative-law-unlawfulmichael-ramsey.html [http://perma.cc/8YSE-NJKN].

86. Gabriel Sanchez, *Consistent Legal Scholarship?*, OPUS PUBLICUM (Sept. 2, 2014), http://opuspublicum.com/2014/09/02/consistent-legal-scholarship/ [http://perma.cc/YGW8-BU8B].

87. Eric Posner, *Adrian Vermeule on Philip Hamburger's "Is Administrative Law Unlawful?"*, ERIC POSNER: LEGAL SCHOLARSHIP BLOG (Sept. 2, 2014), http://ericposner.com/adrian-vermeule-on-philip-hamburgers-is-administrative-law-unlawful/ [http://perma.cc/QK9P-GADP].

parsing of doctrine or internal legal argument is an essential foundation for a book on administrative power—or at least for my book.[88] And this is puzzling. It is as if Vermeule thinks that an intellectually serious account of administrative power needs to read like a Nutshell, replete with tedious summaries of the APA, the leading cases, and their doctrines. As he puts it, my book has "not enough about . . . the statutes, cases, and arguments that rank beginners in the subject are expected to learn and know."[89] He even protests that there are not enough case citations![90]

But my book is not a Nutshell. Nor is it even a more serious treatise on the statutory and judicial foundations of administrative power. Instead, it is a reconceptualization of administrative power, based on an inquiry into the recurring dangers that informed the Constitution's framing and adoption. This is a serious endeavor, and it is strangely anti-intellectual to suggest that a book cannot question administrative law without delving in Nutshell-like detail into its internal doctrinal justifications.

This is not to say doctrine should be ignored, but why must a book that takes a broadly critical stance regurgitate familiar doctrine as if it were an introductory hornbook? Although my scholarship alludes to doctrine to the extent necessary, it assumes that educated readers do not need to be instructed on further details. Vermeule's demand for more doctrine is thus strangely misplaced.

C. The Inadequacy of Internal Legal Doctrines For Understanding Administrative Power

Vermeule's complaint that my book does not dwell on the "official theory" of administrative power is particularly off-target because one can understand this power only by stepping outside such theory.[91] The realities of administrative power go far beyond what the APA establishes and the courts recognize in their doctrines, and because the courts have failed to understand the constitutional questions, even these cannot be understood in the terms offered by the courts. For these reasons alone, the "internal legal argument" for administrative power is not apt to be very illuminating.

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

88. Vermeule, *supra* note 1, at 1559–60.

89. *Id.* at 1547. Similarly, after reciting some of the cases he teaches, he complains that "none of these are to be found in the index to the book"—as if a book is to be measured by its potential to complement his administrative law class. *Id.* at 1566.

90. *Id.* at 1547, 1557–58, 1565–66.

91. *Id.* at 1556–60.

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."[92]

Hence, the necessity of my book, which argues that the key to understanding administrative power is to recognize it, both historically and conceptually, as extralegal power. Once this is understood, the details, structure, and even trajectory of administrative power make sense in ways they did not beforehand.

For example, when administrative power is understood as extralegal power, one can see how administrative power has largely evaded the Constitution's paths for lawmaking and adjudication and even its guarantees of rights. One also can see how it has largely evaded relatively formal administrative paths in pursuit of others that are less onerous. Thus, both the structure and the trajectory of administrative power (as already noted in subpart I(A)) can be understood as a cascade of evasions. One even can see how administrative doctrine and scholarship, including that by Vermeule, has largely repackaged the old absolutist arguments inherited via Germany—these being the foundation for many of the contemporary justifications of administrative power.

Vermeule must understand the value of not mistaking "internal legal arguments" for reality, for his scholarship regularly offers insight by taking a stance from outside doctrine, with only a cursory exploration of the doctrine's internal logic.[93] Why then does he expect my book to approach administrative power in the manner of a Nutshell?

IV. Historical Errors

Although Vermeule does not generally respond to my history of administrative power, he takes some little potshots, and even in these he misses his mark. The difficulty is not simply that he confuses James I with James II; that is telling, but merely trivial.[94] More serious is his misreading

92. Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEXAS L. REV. 1137, 1180, 1189 (2014). They also write: "[S]omeone whose knowledge of administration was based only on statutes and judicial rulings would be gravely misled about the real dynamics of modern governance." *Id.* at 1141.

93. Indeed, his scholarship sometimes gives strength to its external claim by misstating internal doctrine. My book shows that Vermeule's critique of the maxim against being judge in one's own case is based on an overstatement of the maxim. HAMBURGER, *supra* note 1, at 588 n.31. Moreover, as noted by Saikrishna Prakash and Michael Ramsay, *The Executive Unbound* bases its thesis on an overstatement of the executive's freedom from legal constraints. *See* Prakash & Ramsay, *supra* note 11, at 984–85.

94. Vermeule usually recognizes the difference between the two James, but he clearly confuses the two at one place and perhaps another. *See* Vermeule, *supra* note 1, at 1552–53,

of evidence.

A. Shipmoney and Chevron

Vermeule draws upon two snippets of English evidence to question my account of English constitutional history and to offer historical legitimacy for *Chevron* deference. Leave aside that two snippets of this sort cannot overturn a vast weight of evidence, he does not even get his little bits of history straight. In fact, he takes evidence out of context and thereby gets the history backward.

Against my account of the constitutional rejection of prerogative or extralegal power, and to suggest that "the story is far more nuanced than Hamburger lets on," he briefly alludes to the advisory opinion in the *Ship Money*[95] case: "When in 1637, nine of twelve judges allowed Charles I to levy 'ship-money' taxes in peacetime and without statutory authorization, the game [against the prerogative] was essentially over."[96] But this takes the opinion entirely out of context. Far from ending "the game," the case spurred the nation toward a rejection of prerogative adjudication in 1641 and civil war in 1642.[97] Along the way, six of the judges were impeached for their shipmoney opinions.[98] The case thus does not undercut, but supports my book's account of how the English rejected absolute power.[99]

Not content with this error, Vermeule quotes Edward Coke to suggest that he recognized something like *Chevron* deference: "Distilled to its essence, 'the reality of the common law constitution—and the reason for its failure—was that, as Coke himself explained it in the House of Commons in 1628, "in a doubtful thing, interpretation goes always for the king."' *Chevron avant la lettre*."[100] Actually, the very opposite.

Vermeule is quoting a secondary source by Adam Tomkins, who is quoting another secondary source by Margaret Judson, who in turn is quoting Edward Coke. The quotation thus is two steps removed from its

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1555.

95. 3 Howell's State Trials 825 (1637).

96. Vermeule, *supra* note 1, at 1553 (footnote omitted).

97. *See* HAMBURGER, *supra* note 1, at 61, 177; HAMBURGER, *supra* note 31, at 206–08.

98. Articles of Accusation, exhibited by the Commons House of Parliament now assembled, against Sr. John Bramston Knight, Sr. Robert Berkley Knight, justices of his Majesties bench; Sr. Francis Crawley Knight, one of the justices of the common-pleas; and Sr. Humphrey Davenport Knight, Sr. Richard Weston Knight, and Sr. Thomas Trevor Knight, barons of his Majesties exchequer (1641).

99. Incidentally, Vermeule summarizes the *Shipmoney* case as involving a levy of taxes "without statutory authorization." Vermeule, *supra* note 1, at 1553. Actually, shipmoney was a payment based in custom. Therefore, even though it was without statutory authorization, this is not to say it was without authority in law, and this was a large part of what was in dispute.

100. Vermeule, *supra* note 1, at 1553 (quoting ADAM TOMKINS, OUR REPUBLICAN CONSTITUTION 87 (2005) (quoting MARGARET JUDSON, THE CRISIS OF THE CONSTITUTION: AN ESSAY IN CONSTITUTIONAL AND POLITICAL THOUGHT IN ENGLAND, 1603–1645, at 264 (1949) (quoting Edward Coke, Speech in the House of Commons (July 6, 1628)))).

context. In saying "*Chevron avant la lettre*," Vermeule leaves the impression that Coke was stating a rule of interpretation. Coke, however, was not stating the law. Instead, as Tomkins recognizes (and as Vermeule therefore might have noticed), Coke was merely acknowledging the "reality" that judges often gave way to pressures from the Crown.[101] Coke elsewhere resolutely insisted that the office of the judges precluded any deference to prerogative interpretation.[102] Vermeule thus misinterprets what Coke was saying about interpretation—indeed, flips it on its head.

B. Early Federal Regulations

In challenging my detailed argument that administrative regulations cannot constitutionally bind Americans, Vermeule echoes the claim, which has appeared elsewhere in his scholarship, that early federal statutes authorized binding regulations—the implication being that such regulations have "Founding era credentials."[103]

As shown in detail by my book, however, Vermeule is utterly mistaken in asserting that early federal statutes authorized binding regulations.[104] Except in a very narrow range of cases, which have been thoroughly misread by Vermeule and other scholars, the statutes that are alleged to have authorized such regulations did not do so, and early federal departments (even under men such as Alexander Hamilton) avoided issuing any such regulations.[105]

Of course, Vermeule might deny the relevance of the early history, whether English or American, and then might leave the history alone. That is not, however, what he does. He wants the "credentials" of history for administrative power and thereby ends up making gross historical errors.[106]

V. Attack

Topping off his mischaracterization, his demand for a Nutshell, and his historical errors, Vermeule turns to personal attacks. He thereby misrepresents not only my book but also me.

A. Ad Hominems

On the basis of his mischaracterizations, Vermeule moves beyond condemning my arguments to condemning my competence—as if personal

101. TOMKINS, *supra* note 100, at 87.

102. *See* HAMBURGER, *supra* note 31, at 223–24 (recounting Coke's statements); HAMBURGER, *supra* note 1, at 54.

103. Vermeule, *supra* note 1, at 1560 (citing Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1732–40 (2002)).

104. HAMBURGER, *supra* note 1, at 83, 85–89.

105. *Id.*

106. *See* Vermeule, *supra* note 1, at 1560.

accusations were a substitute for argument. He writes repeatedly of my "misunderstanding" of administrative law, that I have "a desperately shaky understanding of administrative law," and that "Hamburger seems to think he can discuss American administrative law without reading the cases."[107] He adds that I am "like a child wrecking a sculpture by Jeff Koons"; that my book is "irresponsible"; that it is "a portent of the dimming of the legal mind."[108]

This sort of personal invective is reminiscent of the old Saturday Night Live exchange in which Dan Akroyd regularly begins his response to Jane Curtin: "Jane, you ignorant slut!"[109]

Nonetheless Vermeule digs in. In response to Ramsay's complaint that Vermeule is inconsistent in his critique of my book, Vermeule not only defends inconsistency, but adds: Ramsey just "hasn't grasped the sheer pedantic arrogance of my position . . . which is that only those of us who understand the basic doctrines and principles of administrative law are entitled to debunk them."[110]

Res ipsa loquitur.

B. Accusations of Extremism

Vermeule adds to his ad hominem attacks by attempting to associate me with extremism, even of a dangerous sort. According to Vermeule, my book is apt to "delegitimate the administrative state," and it thereby plays "a dangerous game" and "might be pernicious."[111] He adds: "It's irresponsible to go about making or necessarily implying . . . lurid comparisons [to the Star Chamber], which tend to feed the 'tyrannophobia' that bubbles unhealthily around the margins of popular culture and that surfaces in disturbing forms on extremist blogs in the darker corners of the Internet."[112]

It is nearly comic to be accused of extremism by an exponent of Schmittianism. But it is not really funny. What is Vermeule trying to suggest?

C. Policing Dissent.

One effect of Vermeule's attacks is to demarcate outlying opinion—to signal what is mainstream opinion and what is not, what should be taken

107. *Id.* at 1548, 1552, 1557, 1563.

108. *Id.* at 1566–67. Lest the Koons ad hominem not be clear enough, he adds: "Some admire Koons's work, some detest it, but the child isn't in a position to understand *why* it might be detestable, and the act is purely destructive with no illuminating import." *Id.* at 1567.

109. *Weekend Update: Jane, You Ignorant Slut*, SATURDAY NIGHT LIVE, http://www.nbc.com/saturday-night-live/video/point-counterpoint-lee-marvin-and-michelle-triola/2846665 [https://perma.cc/7GVB-F7N8].

110. Posner, *supra* note 87.

111. Vermeule, *supra* note 1, at 1554.

112. *Id.* at 1566.

seriously and what should be dismissed.[113] And Vermeule is not alone, for there have been a series of recent attempts to draw the boundaries of acceptable opinion on administrative power by labeling dissent as "strange," "eccentric," and not "serious."[114]

Lawrence Tribe, for example, encountered this treatment when he challenged the constitutionality of the EPA's proposed "Clean Power Plan." In response, Jody Freeman and Richard Lazarus declared that his arguments were "ridiculous," "wholly without merit," "preposterously extreme," and "radical," and that "[w]ere Professor Tribe's name not attached to them, no one would take them seriously."[115] This led one commentator to observe that the advocates of administrative power "use shaming to enforce the official groupthink in the groves of legal academia."[116]

Vermeule needs to keep in mind some basics of academic inquiry. Mischaracterization does not advance the truth. Dissent is not error. Insult and name-calling are not substitutes for argument. Ad hominem arguments are unpersuasive and ugly. Unsupported accusations of nearly seditious extremism are especially ugly. And all of this, especially when used to police dissent, is profoundly anti-intellectual.

VI. Conclusion

After espousing administrative power as a sort of unbound executive power, Vermeule now attacks my critique of administrative power in an unbound manner. It therefore is difficult to avoid wondering whether there is a connection. On behalf of an indefensible power, is it necessary to adopt an indefensible mode of argument?

In a book as long as mine, there are bound to be some errors. But whatever my book's errors, Vermeule's review does not identify them. In fact, nowhere does he point to any statement of administrative power or doctrine that it gets wrong. Instead, he persistently mischaracterizes my

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113. In a subsequent article, incidentally, he distinguishes my scholarship from "normal science," pulls out the old canard of "the constitution in exile movement," and links my arguments to the Tea Party. *See* Sunstein & Vermeule, *supra* note 3, at 1–2, 6–7.

114. Vermeule, *supra* note 1, at 1562 (discussing the "strangeness" of my argument); Jody Freeman & Richard Lazarus, *Freeman and Lazarus: A Rebuttal to Tribe's Reply*, HARV. L. TODAY (Mar. 21, 2015), http://today.law.harvard.edu/a_rebuttal_to_tribe_reply/ [http://perma.cc/9SUK-V8C8] (regarding the supposedly un-"serious" character of Lawrence Tribe's critique of administrative power); Cass R. Sunstein, *Clarence Thomas, the Eccentric*, BLOOMBERG VIEW (Mar. 16, 2015, 9:00 AM), http://www.bloombergview.com/articles/2015-03-16/clarence-thomas-the-eccentric [http://perma.cc/CGF2-FFL9] (regarding the allegedly "eccentric" views of Justice Clarence Thomas, including his views on administrative power).

115. Jody Freeman & Richard Lazarus, *Freeman and Lazarus: Is the President's Climate Plan Unconstitutional?*, HARV. L. TODAY (Mar. 18, 2015), http://today.law.harvard.edu/is-the-presidents-climate-plan-unconstitutional/ [http://perma.cc/99SC-CQ2D].

116. Francis Menton, *Can the Administrative State Ever Be Reined In?*, MANHATTAN CONTRARIAN (Mar. 25, 2015), http://manhattancontrarian.com/blog/2015/3/25/can-the-administrative-state-ever-be-reined-in [http://perma.cc/4BE2-FFWX].

arguments—denying that I make arguments from the U.S. Constitution, reducing my central conceptual argument to something I expressly reject, and falsely attributing doctrinal errors to me. In addition, he derides my book as if it aimed to be a Nutshell, he insists on clearly erroneous history, and he indulges in personal attacks.

Far from misunderstanding administrative power, my book puts it in a historical and constitutional context that has been missing in administrative law scholarship for more than a century. The book explains that administrative power is a continuation of absolute power—a dangerous sort of power that the English struggled against for centuries, that the U.S. Constitution systematically barred, that Continental nations nonetheless preserved, that the Germans developed as an antidote to constitutional and representative government, and that late nineteenth-century "reformers" brought back into common law lands.

Vermeule, however, makes no response to my actual arguments, whether historical, conceptual, or constitutional. As noted by one observer, "Vermeule does not attempt to rebut Hamburger's historical narrative."[117] Vermeule, moreover, mischaracterizes my central conceptual point and therefore does not respond to that either. And because Vermeule denies that I argue from the U.S. Constitution, nor does he attempt to rebut my constitutional arguments. The review thus scarcely responds at all.

What is needed is a serious and honest debate—one that confronts the realities of administrative power and the realities of the objections to it. In the meantime, Vermeule's review distracts attention from the realities. Indeed, Vermeule uses an unbound style of argument to defend what he celebrates as unbound power. Administrative power must be unlawful if this is its best defense against my book.

117. William Funk, *Is Administrative Law Unlawful? No!*, JOTWELL: ADMIN. L. (June 8, 2015), http://adlaw.jotwell.com/is-administrative-law-unlawful-no/ [http://perma.cc/D7ZZ-23RZ].