

Book Review

LAW'S ABNEGATION*

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1 The Constitution of the United States was signed in 1787.¹ It was crafted 11 years after the Declaration of Independence, by the collective brilliance of its framers. Those same brilliant minds were suspicious of unchecked, autocratic power. They therefore created a complex system of political governance based on the doctrine of check and balance in which the legislative power would be in the hands of Congress, the executive power would be wielded by the President, and the judicial power in an independent Supreme Court which is to ensure that neither Congress nor the President acts in excess of its powers.

2 Laws are made by Congress and implemented by the President who has executive power to implement the laws passed by Congress. In the course of time the world has observed this complex system at work with a mixture of admiration, awe and wonderment. There are times when the general consensus is that the system is too complicated for duplication elsewhere. It remains to this day, *sui generis*.

3 Within the first ten days of his presidency, the 45th President of the United States of America, Donald Trump, had signed executive orders that were controversial. In one, the banning of Muslims from seven countries from entering the US, led to a court ordering a stay of that order. It even resulted in the President sacking the Attorney-General for refusing to appeal against that court's decision. This sets the dramatic and contemporary context for Adrian Vermeule's book, *Law's Abnegation*.

4 If the Executive were merely to implement the Acts of Congress, there would be little that jurists would shout about, but in the implementation of Congressional will, the Executive itself exercises binding legislative and judicial power. The court is the only check when the Executive oversteps its limits. Philip Hamburger has written about

* Harvard University Press, 2016.

1 Ratified in 1789.

his wariness of the binding power of the Executive. He holds the view that:²

The power to bind is a power to constrain liberty. Although only Congress and the courts have the power to bind and thereby confine liberty, this is exactly what executive and other administrative bodies claim to do through the administrative law.

5 Hamburger propounds the view that the consolidated binding and judicial aspects of executive power make it extralegal as well as supralegal.³ Tracing through the history of prerogative power, Hamburger observes that “although prerogative lawmaking and adjudication are long gone, administrative versions have taken their place”.⁴ Hamburger’s claim from history is refuted by Paul Craig.⁵ His claim from law is refuted by Vermeule in a review of *Is Administrative Law Unlawful*.⁶ In this book, Vermeule expands beyond his criticism of Hamburger’s claim in law and propounds his view that administrative law is not only lawful but is flourishing. That is not because the Executive and Congress had shackled the law but that the courts have ceded power to the State. Vermeule’s central thesis is that the administrative state is flourishing not because the law’s empire (a Dworkinian phrase) has been vanquished from the onslaught of external forces, but that the law has ceded power voluntarily. But he concludes that he is not claiming that “law-enforced-by-the-courts and the administrative state cannot co-exist at all, just that both cannot simultaneously be paramount. Only one can be master; and the law has decided to give way”.⁷

6 Vermeule begins by tracing the early pronouncement of Charles Evans Hughes CJ in *Crowell v Benson*⁸ (“*Crowell*”) validating the administrative power of a single deputy commissioner to decide on the claims of injured longshoremen. The reasoning in *Crowell* is regarded by Vermeule. One advocates the control of the administrative state through constitutional law. The other wants the law to be subjugated to the administrative state. Vermeule argues that the modern case of *Chevron*

2 Philip Hamburger, *Is Administrative Law Unlawful?* (University of Chicago Press, 2014) at p 5.

3 See Philip Hamburger, *Is Administrative Law Unlawful?* (University of Chicago Press, 2014) at p 12.

4 Philip Hamburger, *Is Administrative Law Unlawful?* (University of Chicago Press, 2014) at p 281.

5 Paul P Craig, *The Legitimacy of US Administrative Law and the Foundations of UK Administrative Law: Setting the Record Straight* <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2802784> (accessed 1 February 2017).

6 Adrian Vermeule, “‘No’ Review of Philip Hamburger, ‘Is Administrative Law Unlawful?’” (2015) 93 Texas L Rev 1547.

7 Adrian Vermeule, *Law’s Abnegation* (Harvard University Press, 2016) at p 219.

8 285 US 22 (1932).

USA, *Inc v Natural Resources Defense Council Inc*⁹ (“*Chevron*”) has also steered along the *Crowell* position. His argument goes further in that even without *Chevron* or if *Chevron* were to be overruled, the substance would remain because of the weight of history: “Judicial deference to administrative interpretations of law, in various forms and with varying weights, preceded *Chevron* by decades.”¹⁰

7 Vermeule then considers the reliance on the separation of powers to prevent the abuse of power in administrative acts. He says that it is too costly to minimise abuse of power by government officials. Secondly, the trade-off against the “goal of producing the myriad welfare goods that the administrative state supplies, such as poverty relief, health, environmentalism, and consumer protection” is not justifiable. Thirdly, the separation of powers theory is an out-dated 18th century idea. “We inhabit a different world of policy-making than did the theorists of the eighteenth century. One of the main differences is that, for us, time is always of the essence, so institutions are forced to trade off quality of policy against its timeliness.”¹¹

8 Referring to due process, Vermeule argues that here, where one might “expect judges to hold the line against the march of law’s logic, stopping short of abnegation”, due process cases, in fact, provide examples of abnegation.¹² He discusses the cases of *Matthews v Eldridge*¹³ and *Cleveland Board of Education v Loudermill*.¹⁴ The trend, he argues, is to ask only whether the government agency offers a rational justification for providing the process it chooses, rather than for the courts to decide what process is due. In this context, Vermeule sweeps aside the maxim “no man should be judge in his own cause”. He claims that there is no general principle against making institutions judges in their own cause.¹⁵

9 Continuing with his narrative of the process of abnegation, Vermeule confronts the fear of arbitrary decisions. In ch 4, he discusses decision-making under uncertainty by government agencies as well as the court. The main point he makes is that “in the presence of uncertainty, ‘conservative’ assumptions have no necessary priority or superiority”.¹⁶ He maintains that there is a category of agency decisions

9 467 US 837 (1984).

10 Adrian Vermeule, *Law’s Abnegation* (Harvard University Press, 2016) at p 31.

11 Adrian Vermeule, *Law’s Abnegation* (Harvard University Press, 2016) at p 59.

12 Adrian Vermeule, *Law’s Abnegation* (Harvard University Press, 2016) at p 88.

13 424 US 319 (1976).

14 470 US 532 (1985).

15 Adrian Vermeule, *Law’s Abnegation* (Harvard University Press, 2016) at p 121.

16 Adrian Vermeule, *Law’s Abnegation* (Harvard University Press, 2016) at p 129.

in which “it is rational to be arbitrary”.¹⁷ He maintains the argument into the next chapter (“Thin Rationality Review”) in which he repeatedly refers to what goes on in “the real world” and what he regards as the preponderance of cases in which “arbitrary and capricious review entails a predictably and sensibly deferential review of agency policy judgments”.¹⁸

10 In conclusion, Vermeule says that “[l]aw’s abnegation is ultimately sociological: it is the decision by one profession, lawyers, to shift some of their own powers to nonlawyers”.¹⁹ He goes even so far as to challenge the view (*Securities and Exchange Commission v Chenery Corp*²⁰) that agencies must state their legal grounds when they act and not offer grounds during litigation “to save an action whose original rationale is untenable”. He asks: “What exactly is bad about post hoc rationalization?”²¹

11 Vermeule has criticised Hamburger for not having much to say about the Administrative Procedure Act 1946, but the theory of judicial review is developed through case law, and in this area, Vermeule who argues against the “hard look review” regards this as an idea from the bygone age of the 1960s to the 1970s. But has Vermeule created a slant that hands over judicial review entirely to the agencies themselves? In the last paragraph of *Law’s Abnegation* he says:²²

The history and logic of US administrative law suggest that, in our system anyway, law’s empire – in Dworkin’s sense that makes courts the heartland of law – cannot coexist with the administrative state. Again, this is not to say that law-enforced-by-courts and the administrative state cannot coexist at all, just that both cannot simultaneously be paramount. Only one can be master; and law has decided to give way. Law’s reasons, understood through fit and justification, have pointed the way toward law’s abnegation in the face of the administrative state.

12 *Law’s Abnegation* is well argued but does not represent the correct or the best view. It is bound to attract debate. Even if Vermeule is right and law has ceded territory to the State, the question that arises is, how much territory has been ceded? The courts have always maintained the presumption that Congress intended the courts to exercise judicial

17 Adrian Vermeule, *Law’s Abnegation* (Harvard University Press, 2016) at p 129.

18 Adrian Vermeule, *Law’s Abnegation* (Harvard University Press, 2016) at p 160.

19 Adrian Vermeule, *Law’s Abnegation* (Harvard University Press, 2016) at p 197.

20 318 US 80 (1943).

21 Adrian Vermeule, *Law’s Abnegation* (Harvard University Press, 2016) at p 198.

22 Adrian Vermeule, *Law’s Abnegation* (Harvard University Press, 2016) at p 219.

review of administrative action.²³ An equally sound case may be fashioned out of the argument to maintain judicial review in the “real world” where “timeliness” is as important as the prevention of abuse. The courts have dealt with uncertainty long enough and have developed the principle that discretionary powers are rarely disturbed unless they are clearly wrong or the agency had taken into account irrelevant factors. Many will argue that that principle adequately frees administrative actions without ceding the judicial power of review, thus keeping any abuse of power in check – something Vermeule does not seem to regard as important. If Vermeule is right, the proper title of his book should have been, *Law's Abdication*.

23 See *Gutierrez De Martinez v Lamagno* 515 US 417 at 424 (1995) (quoting *Bowen v Michigan Academy of Family Physicians* 476 US 667 at 670 (1986)).