

# Book Reviews

## LIONS UNDER THE BUREAUCRACY: DEFENDING JUDICIAL DEFERENCE TO THE ADMINISTRATIVE STATE

by Evan Bernick

A Review of:  
Law's Abnegation: From Law's Empire to the  
Administrative State, by Adrian Vermeule  
<https://www.amazon.com/Laws-Abnegation-Empire-Administrative-State/dp/0674971442>

### Note from the Editor:

This book review discusses and critiques Adrian Vermeule's book about the administrative state.

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• Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 MICH. L. REV. 1355 (2016), <http://repository.law.umich.edu/mlr/vol114/iss8/1/>.

• Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393 (2015), [https://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/uploads/82\\_1/14%20Sunstein%20%26%20Vermeule\\_ART\\_Internet.pdf](https://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/uploads/82_1/14%20Sunstein%20%26%20Vermeule_ART_Internet.pdf).

• Cass R. Sunstein & Adrian Vermeule, *The New Coke: On the Plural Aims of Administrative Law*, 2015 SUP. CT. REV. 41 (2015), <http://www.journals.uchicago.edu/doi/abs/10.1086/684806>.

• Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511 (1989), <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3075&context=dlj>.

### About the Author:

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Criticism of the modern administrative state is an enduring theme in American legal and political discourse.<sup>1</sup> This is unsurprising since the administrative state is a complex bureaucracy that operates in ways that are often incomprehensible to members of the general public, that exercises regulatory authority over everything from the air we breathe<sup>2</sup> to our use and enjoyment of our property<sup>3</sup> to our speech<sup>4</sup> to our access to potentially life-saving medicines,<sup>5</sup> and that seems to consolidate powers that the Constitution is designed to keep separate. In Federalist 51, James Madison described the “accumulation of all powers, legislative, executive, and judiciary, in the same hands” as “the very definition of tyranny.”<sup>6</sup> Today, federal agencies routinely make rules that govern our conduct, investigate whether those rules have been violated, adjudicate alleged violations, and impose heavy fines or imprisonment upon violators.<sup>7</sup> If this is not “tyranny,” it does raise uncomfortable questions—questions that have been pressed for more than a century.

Recent years have seen the publication of striking academic and judicial attacks on the legal and political-philosophical premises on which the administrative state rests, as well as the jurisprudence that has facilitated its expansion—jurisprudence characterized by judicial deference to all sorts of assertions of administrative power.<sup>8</sup> Few scholars have defended the administrative state

1 See JAMES O. FREEDMAN, CRISIS AND LEGITIMACY 11 (1978) (describing “a strong and persisting challenge to the basic legitimacy of the administrative process”).

2 See *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457 (2001).

3 See *Sackett v. EPA*, 132 S. Ct. 1367 (2012).

4 See *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

5 See *Abigail Alliance for Better Access v. Von Eschenbach*, 495 F.3d 695 (D.C. Cir. 2007).

6 THE FEDERALIST No. 51 (James Madison), at 271 (Liberty Fund, 2001).

7 See Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1247 (1994) (describing the “typical enforcement activities of a typical federal agency”); Adrian Vermeule, *Optimal Abuse of Power*, 109 NW. U. L. REV. 673, 679 (2015) (recognizing the “brute fact” that agencies “legislate,” “enforce,” and “adjudicate”); STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 743-87 (7th ed. 2011) (detailing the “combination of functions” within agencies).

8 See, e.g., DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993); PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2015); CHARLES MURRAY, BY THE PEOPLE: REBUILDING LIBERTY WITHOUT PERMISSION (2015). This scholarship is working its way into judicial opinions. See, e.g., *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (questioning the constitutionality of judicial deference to agency interpretations of statutes and citing IS ADMINISTRATIVE LAW UNLAWFUL? at 287-91); *De Niz Robles v. Lynch*, 803 F.3d 1165, 1171 n.5 (10th Cir. 2015) (questioning the constitutionality of “delegating to the Executive the power to legislate generally applicable rules of private conduct” and citing IS ADMINISTRATIVE LAW UNLAWFUL? at 285-321); *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 1213-1218 (2015) (Thomas, J., concurring) (questioning the “legitimacy of our precedents requiring

and administrative jurisprudence against such critiques more zealously than Adrian Vermeule.<sup>9</sup> Vermeule’s new book, *Law’s Abnegation*, is a cogent presentation of a bright, optimistic vision of our administrative jurisprudence—one comforting to what Vermeule refers to as the “traditional legal mind.”<sup>10</sup> On Vermeule’s account, judicial deference to administrative power is the result of *abnegation*,<sup>11</sup> that is, the voluntary renunciation of power by those whose “province and duty” it is to “say what the law is.”<sup>12</sup> To borrow Francis Bacon’s iconic image, our judicial “lions” have leashed themselves “under the throne”—which is to say, under the bureaucracy.<sup>13</sup> Adopting an interpretive model developed by legal philosopher Ronald Dworkin, Vermeule contends that judicial deference to administrative power both fits with and justifies our administrative jurisprudence—that it is not only consistent with our institutional history, but is normatively desirable. In Dworkin’s terms, deference gives our administrative jurisprudence *integrity*. And, Vermeule avers, deference is here to stay.

Like all of Vermeule’s work, *Law’s Abnegation* is taut, insightful, and provocative—a must-read for anyone interested in administrative power and the duty of judges who confront it. Yet Vermeule’s case for judicial deference is ultimately unpersuasive. In Part I of this article, I summarize Vermeule’s arguments for deference. In Part II, I critique those arguments. In Part III, I sketch an alternative approach that better equips judges to discharge their constitutional duties in cases involving administrative power.

## I. THE CASE FOR DEFERENCE

### A. *The Sound of Dworkin’s Silence*

The title and introduction to Vermeule’s book take their inspiration from Ronald Dworkin’s influential 1986 volume,

*Law’s Empire*.<sup>14</sup> In that volume, Dworkin offered a systematic articulation of his theory of the law, which he called “law as integrity.”<sup>15</sup> Law as integrity has two components: “fit” and “justification.”<sup>16</sup> Dworkin’s ideal judge—“Hercules”—adjudicated cases in a way that was both consistent with “language, precedent, and practice” and which served the best normative justification of the law as a whole.<sup>17</sup>

As evinced by his description of courts as “capitals of law’s empire,” Dworkin’s legal universe was profoundly jurocentric.<sup>18</sup> Vermeule thus finds it curious—and significant—that Dworkin utterly failed to discuss the administrative state, which, as Vermeule notes, had “come to structure citizens’ experience of government” long before Dworkin was born.<sup>19</sup> Vermeule attributes this omission to “willful self-blinding”; he contends that Dworkin knew that there was no answer that he could give concerning the courts’ long-since-established practice of deferring to administrative power that was consistent with his jurocentric vision.<sup>20</sup> Vermeule adopts an insight by David Dyzenhaus, who has written that “[t]here is no room in [Dworkin’s] account for administrative agencies that have an authority to make or interpret the law in the sense that such administrative decisions are ones to which courts have reason to defer.”<sup>21</sup> And yet our judiciary has ratified precisely such authority, in what Vermeule describes as “a considered, deliberate, voluntary, and unilateral surrender” on the part of “the law” (by which Vermeule means primarily, although not exclusively, Article III judges) to administrative power.<sup>22</sup>

It is the project of Vermeule’s book to demonstrate that judicial deference to administrative power both fits with and justifies “the settled fabric of [administrative] law as it has developed across the Anglo-American world.”<sup>23</sup> Law’s empire, in Vermeule’s telling, has been undone from within, not by coercion or treachery, but on the basis of “valid lawyerly reasons” that “good Dworkinians” ought to accept.<sup>24</sup>

### B. *Why Deference Fits*

Tracing the trajectory of our administrative jurisprudence entails identifying a baseline from which we can measure the withdrawal or advance of the administrative state upon law’s “heartland,” that is, “courts, and judicial review.”<sup>25</sup> Vermeule

deference to administrative interpretations of regulations” and citing PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* (2008)). For a summary and critique of these developments, see Cass R. Sunstein & Adrian Vermeule, *The New Coke: On the Plural Aims of Administrative Law*, 2015 SUP. CT. REV. 41 (2015).

9 See, e.g., Adrian Vermeule, *No, ’93* TEX. L. REV. 1547 (2015) (critiquing Hamburger’s case against the lawfulness of administrative law); Sunstein & Vermeule, *supra* note 8 (generally critiquing academic and judicial critiques of various administrative law doctrines); *Optimal Abuse of Power*, *supra* note 7 (critiquing separation-of-powers arguments against the administrative state); Adrian Vermeule, *What Legitimacy Crisis?*, CATO UNBOUND (May 9, 2016), <https://www.cato-unbound.org/2016/05/09/adrian-vermeule/what-legitimacy-crisis> (last visited December 27, 2016) (denying that the administrative state is currently facing a legitimacy crisis).

10 ADRIAN VERMEULE, *LAW’S ABNEGATION* (2016).

11 See Merriam-Webster Online, “abnegate,” <http://www.merriam-webster.com/dictionary/abnegate> (last accessed December 27, 2016) (defining “abnegate” as “deny, renounce.”).

12 *Marbury v. Madison*, 1 Cranch 137, 177 (1803).

13 Francis Bacon, Essay LVI, “Of Judicature,” in *ESSAYS* 140 (1995). Bacon, who was Lord Chancellor of England at the time, deployed this metaphor to make plain the subservient attitude he expected from judges in the face of claims of royal authority. The metaphor recalled the biblical throne of Solomon, as well as the carved animals which supported the English throne. See *LAW AND JUDICIAL DUTY*, *supra* note 8, at 155.

14 RONALD DWORKIN, *LAW’S EMPIRE* (1986).

15 *Id.* at 95.

16 *Id.* at 273.

17 *Id.*

18 *Id.* at 407.

19 *LAW’S ABNEGATION*, *supra* note 10, at 3.

20 *Id.* at 6.

21 David Dyzenhaus, “The Rule of Law as the Rule of Liberal Principle,” in *RONALD DWORKIN* 56, 71 (Arthur Ripstein ed., 2007).

22 *LAW’S ABNEGATION*, *supra* note 10, at 6.

23 *Id.* at 4.

24 *Id.* at 8.

25 *Id.* at 7.

chooses *Crowell v. Benson*, a 1932 case in which the Supreme Court upheld against an Article III challenge a statute that empowered administrative tribunals to adjudicate workmen's compensation claims arising from activities on navigable waters.<sup>26</sup> According to Vermeule's summary of *Crowell*, Chief Justice Charles Evans Hughes, writing for the majority, sought to "achieve a stable accommodation of the claims of law and the imperative of bureaucratic government" by distinguishing between questions of "law" and questions of "fact," as well as between "ordinary" facts, "jurisdictional" facts and "constitutional" facts.<sup>27</sup> Questions concerning the interpretation of the law, jurisdictional facts, and constitutional facts were to be determined by the courts de novo—without deference to administrative power—but Congress could give agencies exclusive power to decide any ordinary questions of fact in cases involving "public rights" (cases between government officials and citizens).<sup>28</sup> In cases involving "private rights" (between citizen and citizen), Congress could give agencies power to determine ordinary facts, subject only to deferential judicial review to ascertain whether those determinations were supported by "substantial evidence."<sup>29</sup> These distinctions and categories would subsequently be incorporated into the Administrative Procedure Act of 1946 (APA).<sup>30</sup>

Hughes's attempt to synthesize an accommodation between law and administrative power failed. "[E]very important element of the *Crowell* framework has come unglued," and the result has been the steady advance of judicial deference to administrative power.<sup>31</sup> Federal courts now defer broadly to administrative agencies' interpretations of statutes, as well as to agencies' interpretations of their own regulations.<sup>32</sup> Hughes failed to anticipate the rise of informal, off-the-record rulemaking, which is now the principal method of administrative decision-making.<sup>33</sup> Even "hard-look review," a standard for judicial scrutiny that is used to implement the APA's instruction that courts set aside actions that are "arbitrary, capricious, or not in accordance with law,"<sup>34</sup> is in practice highly deferential to agencies.<sup>35</sup>

Vermeule finds the failure of the Hughesian synthesis instructive. It is not "a tale of the conquest of law's empire from

without," a top-down coup initiated by progressive political scientists and politicians and ratified by judges who bowed to mere political will or expediency.<sup>36</sup> It is, rather, the victory of a thoroughly orthodox understanding of the law over a species of idolatry, the latter of which treated "the classical separation of powers as an inviolable command, whatever the sacrifice required to respect it, even if those sacrifices worked to the overall detriment of law itself."<sup>37</sup>

As for latter-day idolaters—among them Philip Hamburger,<sup>38</sup> Gary Lawson,<sup>39</sup> Jeremy Waldron,<sup>40</sup> and the late Justice Antonin Scalia<sup>41</sup>—they come in for rough treatment. Vermeule takes seriously arguments that the administrative state (or at least core features of it) is unconstitutional and that certain judicial doctrines which command judicial deference to administrative power are illegitimate. Yet he ultimately finds these arguments to suffer from crippling flaws.

Vermeule's criticism of both Hamburger and Lawson focuses on the nature of executive power and the way in which the supposed departures from the Constitution that these scholars identify came about. He charges Hamburger in particular with a profound misunderstanding of the theory which animates current legal doctrine concerning "delegation"—whereby Congress statutorily authorizes agencies to issue general rules that bind members of the public. Everyone agrees, argues Vermeule, that legislators cannot *subdelegate legislative* power that is constitutionally delegated exclusively to Congress by

26 285 U.S. 22 (1932).

27 LAW'S ABNEGATION, *supra* note 10, at 12.

28 *Id.* at 25.

29 *Id.*

30 5 U.S.C. §706 (2)(E).

31 LAW'S ABNEGATION, *supra* note 10, at 12.

32 See *Chevron USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (deference to statutory interpretation); *Auer v. Robbins*, 519 U.S. 452 (1997) (deference to interpretation of regulations).

33 For a concise overview of the "rulemaking revolution," see Ronald M. Levin, *The Administrative Law Legacy of Kenneth Culp Davis*, 42 SAN DIEGO L. REV. 315 (2005).

34 5 U.S.C. §706(2)(A).

35 LAW'S ABNEGATION, *supra* note 10, at 190-9 (collecting all Supreme Court merits arbitrary-and-capricious holdings from 1983 to 2014 and finding that agencies win arbitrariness challenges in the Supreme Court about 87 percent of the time).

36 *Id.* at 36. Compare Gary L. McDowell, *The Corrosive Constitutionalism of Edward S. Corwin*, 14 LAW AND SOCIAL INQUIRY 603 (1989); HADLEY ARKES, *THE RETURN OF GEORGE SUTHERLAND: RESTORING A JURISPRUDENCE OF NATURAL RIGHTS* (1994); Thomas G. West, "Progressives and the Transformation of American Government," in *THE PROGRESSIVE REVOLUTION IN POLITICS AND POLITICAL SCIENCE: TRANSFORMING THE AMERICAN REGIME* (John A. Marini and Ken Masugi, eds., 2005); RICHARD A. EPSTEIN, *HOW THE PROGRESSIVES REWROTE THE CONSTITUTION* (2006).

37 LAW'S ABNEGATION, *supra* note 10, at 56.

38 See generally IS ADMINISTRATIVE LAW UNLAWFUL?, *supra* note 8 (arguing that the answer to the titular question "yes"). Vermeule's criticism of Hamburger is a distillation of a lengthier (and much harsher) critique in 'No,' *supra* note 9. For Hamburger's rebuttal to the latter critique, see Philip A. Hamburger, *Vermeule Unbound*, 94 TEX. L. REV. 205 (2016).

39 See Lawson, *supra* note 7 (contending that "[t]he post-New Deal administrative state is unconstitutional and its ratification by the judiciary amounts to nothing less than a bloodless constitutional revolution").

40 See Jeremy Waldron, *Separation of Powers in Thought and Practice?*, 54 B.C.L. REV. 433 (2013) (arguing that the Constitution requires that "[t]he legislature, the judiciary, and the executive—each must have its separate say before power impacts on the individual" and that the modern administrative state runs afoul of this requirement).

41 See *Talk America v. Michigan Bell Telephone*, 131 S. Ct. 2254, 2266 (2011) (arguing that it "seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well"); *Decker v. Northwest Environmental Defense Center*, 113 S. Ct. 1326, 1341 (2013) (Scalia, J., concurring in part and dissenting in part) (calling for the Court to overrule *Auer v. Robbins*, in which the Court affirmed that courts are to defer to agency interpretations of regulations that the agencies promulgate); *Perez*, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment) (same).

“We the People” through Article I.<sup>42</sup> But, he goes on, the statutory authorization of agency rulemaking involves legislators *legislating* and executive officials *executing* the law, as they should, and Hamburger is wrong to claim that this arrangement is a subdelegation of legislative power to the executive branch.<sup>43</sup> The Supreme Court has so held in its better moments,<sup>44</sup> even if it is not above indulging a fiction that an “intelligible principle” must guide the exercise of delegated discretion to ensure that it is an exercise of executive rather than legislative power.<sup>45</sup>

Further, Vermeule contends that it is incoherent and pointless for Hamburger and Lawson to complain about the status quo.<sup>46</sup> For in Vermeule’s telling, the rise of the administrative entities that Hamburger and Lawson decry because they (allegedly) consolidate legislative, executive, and judicial powers was facilitated “by judges exercising the intrinsically and quintessentially judicial power for statutory interpretation and judicial review” that Hamburger and Lawson believe it proper for them to exercise.<sup>47</sup> To call this a “dereliction of duty”<sup>48</sup> on the part of the judiciary is to indict oneself of “hubris”<sup>49</sup> and indeed to be “unfaithful . . . to the original public understanding of the Constitution”<sup>50</sup> by departing from the founding generation’s allowance for the “liquidation of ambiguous written legal rules by practice and precedent.”<sup>51</sup> The administrative state, Vermeule points out, has been so entrenched by “consistent recognition by Congress, President, and Court that capacious delegation of statutory authority is fundamentally legitimate.”<sup>52</sup> Vermeule summarizes his argument elegantly: “When critics of the administrative state call for a return to the classical Constitution,

they do not seem to realize they are asking for the butterfly to return to its own chrysalis.”<sup>53</sup>

For his part, Vermeule admires both butterfly and chrysalis. As he sees it, the “classical lawmaking institutions”<sup>54</sup> have properly recognized that we “inhabit a different world of policy-making than did the theorists of the eighteenth century.”<sup>55</sup> In this world, those institutions must “trade off the quality of policy,”<sup>56</sup> the “impartiality”<sup>57</sup> of decision-making, and indeed the “very goal of minimizing abuses of power”<sup>58</sup>—once of primary importance—in order to capture the benefits of “timeliness”<sup>59</sup> and “expertise.”<sup>60</sup> Owing to the rate of change in the policy environment in an increasingly complex economy, “[l]egislative institutions are structurally incapable of supplying policy change at the necessary rates.”<sup>61</sup>

Vermeule concludes his book by summarizing various doctrines that exemplify and facilitate deference. Certain examples are obvious. Take the doctrine of deference associated with *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*<sup>62</sup> and *United States v. Mead Corp.*,<sup>63</sup> which requires judges to defer to “reasonable” agency interpretations of “ambiguous” statutory language where Congress has demonstrated an intention to delegate law-interpreting power to the agency. “*Chevron* deference” disempowers lawyers and judges by allowing agencies to choose between a range of permissible policies rather than insisting that agencies arrive at one legally correct answer.<sup>64</sup> But other examples are counterintuitive. In *SEC v. Chenery Corp.*,<sup>65</sup> the Court ruled that agency actions can be upheld only on the rationale that the agency itself articulated when taking action, and thus that the agency may not employ post hoc rationalizations during litigation.<sup>66</sup> Allowing post hoc rationalization would make it easier for those actions to survive judicial review, but it would also empower the agency “lawyers who formulate ex post reasons that are presented to a court.”<sup>67</sup> Thus, *Chenery* constrains lawyers

42 See LAW’S ABNEGATION, *supra* note 10, at 50-1. Compare Vermeule *Unbound*, *supra* note 38, 218 (“There is little difference between Vermeule’s presentation of the Court’s nondelegation theory and mine, except that I view it skeptically.”).

43 LAW’S ABNEGATION, *supra* note 10, at 52.

44 See, e.g., *Field v. Clark*, 143 U.S. 649 (1892), *United States v. Grimraud*, 220 U.S. 506 (1911), *J.W. Hampton v. United States*, 276 U.S. 394 (1928), *Yakus v. United States*, 321 U.S. 414 (1944).

45 See ‘No,’ *supra* note 9, at 1559 (stating that this is “not a view that [he] agree[s] with”).

46 LAW’S ABNEGATION, *supra* note 10, at 42.

47 *Id.* at 41.

48 *Id.* at 45.

49 *Id.*

50 *Id.*

51 *Id.* See THE FEDERALIST No. 22 (Alexander Hamilton), *supra* note 6, at 110 (“Laws are a dead letter without courts to expound and define their true meaning and operation.”); THE FEDERALIST No. 37 (Madison), *supra* note 6, at 183 (“All new laws . . . are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.”). Public understanding originalists seek to ascertain “the public or objective meaning that a reasonable listener would place on the words used in the [relevant legal] provision at the time of its enactment.” RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 92 (2004).

52 LAW’S ABNEGATION, *supra* note 10, at 45.

53 *Id.* at 46.

54 *Id.* at 60.

55 *Id.* at 59.

56 *Id.*

57 *Id.* at 60.

58 *Id.*

59 *Id.*

60 *Id.*

61 *Id.* at 67.

62 467 U.S. 837 (1984).

63 533 U.S. 218 (2001).

64 LAW’S ABNEGATION, *supra* note 10, at 201.

65 318 U.S. 80 (1943).

66 LAW’S ABNEGATION, *supra* note 10, at 196 (“A reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency.”).

67 *Id.* at 199.

and empowers “scientists, engineers, and other technical experts, political appointees within agencies, and civil servants,” all of which help formulate policy before the fact.<sup>68</sup> *Chenery*, too, is a kind of legal retreat from administrative power, even if it does not initially appear to be.

### C. Why Deference is Justified

Even if deference to administrative power fits with our law, it falls to Vermeule to offer a normatively appealing justification for it—as Dworkin put it, to derive from existing legal materials “an overall story worth telling now.”<sup>69</sup> According to Vermeule, the synthesis attempted by Hughes in *Crowell* has come undone because the very reasons which drove the synthesis in first place counseled in favor of broader deference to administrative power—and those reasons are *good* reasons.

What are these good reasons? Vermeule writes that “the implicit question [in *Crowell*] is whether judicial review, at the margin, adds net value to the process of institutional decision-making that begins with agency decision-making.”<sup>70</sup> Hughes concluded that “judicial review promises little additional benefit and threatens to impose incremental delay and litigation costs that will make the overall system worse, not better.”<sup>71</sup> Hughes failed, however, to properly apply this marginalist analysis to certain kinds of factual questions and to questions of law.<sup>72</sup> It fell to subsequent courts to do so, and they concluded that agencies had a comparative advantage in answering questions of law as well as questions of fact. Whereas Hughes “assumed that courts were naturally superior to agencies on questions of law,”<sup>73</sup> it later became clear that it was “impossible to disentangle legal questions from policymaking decisions, at least as to the complex regulatory statutes that predominate in the modern state,”<sup>74</sup> and, thus, that “agencies, at least as compared to courts, were better positioned both to make ultimate value choices relevant to regulatory questions . . . and also to determine facts, causation, and the likely consequences of alternative interpretations.”<sup>75</sup>

Vermeule candidly acknowledges that judicial deference to administrative power carries with it “risks of error and abuse.”<sup>76</sup> Yet he urges that “accept[ing] increased risks of official abuse and distorted decision-making” is required “in order to give government officials more power to suppress ‘private’ abuses, in order to increase the activity level of the government as a whole,

and in order to give administrators sufficient information to combat the evils that arise in complex sectors of the economy.”<sup>77</sup> Thus, it is all to the good that courts have gradually developed a jurisprudence that does precisely that by following “a predictably and sensibly deferential review of agency policy judgments.”<sup>78</sup>

### D. Toward a Deferential Future

Vermeule does believe that our administrative jurisprudence can be improved, and he has several suggestions for nudging it in what he believes to be the right direction—that is, toward more deference. Perhaps the most intriguing of these suggestions concerns judicial review of agency actions under Section 706(2)(A) of the APA, which provides that agency actions can be overturned if found to be “arbitrary, capricious, or not in accordance with law.”

Vermeule contends that judges should expressly recognize that agencies facing conditions of uncertainty “may have excellent reason to make some decision or other,” yet not a particular decision—and that arbitrary-and-capricious review must be sensitive to this reality.<sup>79</sup> Surveying the case law, Vermeule finds that judges evaluating the rationality of agency actions “for the most part”<sup>80</sup> do allow agencies to make what he terms “rationally arbitrary decisions,” but that reviewing courts have yet to entirely jettison “a cramped and erroneous conception of rationality” that “requires agencies to do the impossible by giving reasons as to matters where reason has exhausted its powers.”<sup>81</sup> While agencies must act on the basis of reasons, Vermeule argues that judges must “recognize[] that limits of time, information, and resources may give agencies good second-order reasons to act inaccurately, nonrationally, or arbitrarily in a first-order sense.”<sup>82</sup>

What does a rationally arbitrary decision look like? Vermeule offers the example of a 2007 decision by the Fish and Wildlife Service to delist the Yellowstone grizzly bear as a “threatened” species, despite the potential that a decline in the prevalence of whitebark pine might limit a source of sustenance for grizzlies.<sup>83</sup> The agency rested its decision on the grounds that “grizzlies are notoriously flexible and adaptable about their sources of food . . . bears have proven they can go without [whitebark pine] . . . and other populations of grizzlies have flourished despite the loss of whitebark pine.”<sup>84</sup> In 2011, this decision was held “arbitrary” by a panel of the Ninth Circuit on the ground there was no evidence in the record “demonstrating grizzly population stability in the face of whitebark pine declines.”<sup>85</sup> Yet, as Vermeule points out,

68 *Id.* at 200.

69 LAW’S EMPIRE, *supra* note 14, at 227.

70 LAW’S ABNEGATION, *supra* note 10, at 13. For a short summary of the marginalist revolution in economic theory, see Steven E. Rhoads, “Marginalism,” in THE CONCISE ENCYCLOPEDIA OF ECONOMICS, available at <http://www.econlib.org/library/Enc/Marginalism.htm> (last visited December 27, 2016).

71 LAW’S ABNEGATION, *supra* note 10, at 13.

72 *Id.* at 28.

73 *Id.* at 214.

74 *Id.* at 212.

75 *Id.* at 214.

76 *Id.* at 59.

77 *Id.* at 58.

78 *Id.* at 160.

79 *Id.* at 126.

80 *Id.* at 127.

81 *Id.* at 150.

82 *Id.* at 187.

83 *Id.* at 142.

84 *Id.* at 143.

85 Greater Yellowstone Coalition, Inc. v. Servheen, 665 F.3d 1015, 1030 (9th Cir. 2011).

“there was no information in the record either way . . . and no cost-justified procedure for obtaining such information.”<sup>86</sup> The agency had to make *some* decision, and neither pessimism nor optimism concerning grizzly population stability was warranted by the evidence.

Vermeule calls for judges to explicitly and consistently apply a kind of “thin rationality review” that is generally consistent with what they are doing already.<sup>87</sup> Concretely, this means that courts should not impose even a presumptive requirement of quantified cost-benefit analysis on agencies as a measure of rationality,<sup>88</sup> require agencies to conduct comparative policy evaluations,<sup>89</sup> compel agencies to demonstrate the superiority of a chosen policy to past choices, make agencies opt for any particular assumptions (whether pessimistic or optimistic) in the face of uncertainty, demand a “rational connection between the facts found and the choices made,”<sup>90</sup> or require agencies to explain or convey their reasons “to the satisfaction of a panel of generalist judges.”<sup>91</sup>

## II. CRITIQUE

Vermeule’s book offers a profound challenge to critics of judicial deference to administrative power. It presents judicial deference as consistent with the Constitution, consistent with the APA, consistent with precedent, normatively desirable, and in some sense inevitable. In what follows, I will challenge Vermeule’s case for fit and justification and address his argument that deference is in some sense inevitable.

### A. Unfitting

In making his case for fit, Vermeule attaches tremendous significance to what he takes to be the fact that law was not violently “overcome” by administrative power or compromised through “treachery.”<sup>92</sup> Rather, judges, acting freely and in “good faith,” decided to defer to administrative power for legal reasons that they found convincing.<sup>93</sup> Voluntariness and good faith constitute the foundation of his argument that deference cannot

be characterized as “abdication” and that public understanding originalists should not find the result legally objectionable.<sup>94</sup>

One need not reject Vermeule’s premises to recognize the weakness of his further argument. To take a key example upon which Hamburger’s critique has focused much attention: If in fact Article III’s authorization of “[t]he judicial power” imposes upon judges a constitutional duty to exercise independent judgment concerning the meaning of a statute or a regulation, without regard to the beliefs or desires of government officials concerning what the statute or regulation means, voluntarily chosen deference to the latter would amount to a partial relinquishment of the judicial power.<sup>95</sup> Such relinquishment would be the very definition of abdication.<sup>96</sup> Thus, when Vermeule claims that myriad doctrines which Hamburger and Lawson criticize “were developed by judges exercising the intrinsically and quintessentially judicial power for statutory interpretation and judicial review,” he begs the question: Were they really exercising that power?<sup>97</sup> Or were they *declining* to exercise power that is delegated to them and *ratifying* power that is not delegated to the executive branch—neither of which they have the legal power to do?

Vermeule does not provide a convincing answer to this question. He asserts that Lawson is “surely unfaithful to the original public understanding of the Constitution” in claiming that the Constitution bars the kind of delegation that has produced and which perpetuates the administrative state.<sup>98</sup> Yet although Vermeule alludes at various points to his theories of the proper scope of legislative, executive, and judicial power,<sup>99</sup> he does not demonstrate that they are grounded in the Constitution’s text, as enriched by the publicly available context at the time of its enactment.<sup>100</sup> His originalist case, such as it is, ultimately rests upon the “liquidating force of the consistent recognition by Congress, President, and Court that capacious delegation of

86 LAW’S ABNEGATION, *supra* note 10, at 144.

87 *Id.* at 167.

88 *Id.* Vermeule carefully distinguishes between cost-benefit analysis in the “thin tautological sense in which rationality requires that decision-makers do what is better, as opposed to what is worse” and quantified cost-benefit analysis as a “highly sectarian decision-procedure.” *Id.* For an overview of quantified cost-benefit analysis, see Eric Posner & Matthew D. Adler, *Rethinking Cost-Benefit Analysis*, 109 YALE L.J. 165 (1999).

89 LAW’S ABNEGATION, *supra* note 10, at 167.

90 As the Supreme Court did in the 1983 case of *Motor Vehicle Mfrs. Assn. of the United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

91 LAW’S ABNEGATION, *supra* note 10, at 167.

92 *Id.* at 6.

93 *Id.* at 55.

94 *Id.* at 45.

95 See IS ADMINISTRATIVE LAW UNLAWFUL, *supra* note 8, at 285-322; Philip A. Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187 (2016).

96 See Merriam-Webster Online, “abdicate” <https://www.merriam-webster.com/dictionary/abdicate> (last visited December 27, 2016) (defining “abdicate” as “to cast off” or “to relinquish (as sovereign power) formally”).

97 LAW’S ABNEGATION, *supra* note 10, at 54.

98 *Id.* at 45 (emphasis added).

99 Vermeule’s considered position appears to be that, so long as agencies are acting within the bounds of statutory authorization, they are not in fact exercising legislative power at all but, rather, executive power. *Id.* at 53. Yet his language is not always clear. Thus, he speaks of the “brute fact, which horrifies separation-of-powers traditionalists, that agencies quite often combine the powers to legislate binding rules, to enforce the rules through the prosecution of complaints, and to adjudicate whether the rules have been violated” and refers to the Federal Trade Commission “legislat[ing] rules about unfair competition.” *Id.* at 63.

100 See Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 519 (2013) (explaining that “[t]he basic idea of contextual enrichment is that given the publicly available context of constitutional communication, the text conveys communicative content that is unstated, because, for example, the meaningfulness or sensibility of the text assumes the additional content”).

statutory authority is fundamentally legitimate.”<sup>101</sup> Vermeule claims that originalists must embrace such delegation because “the founding generation allowed for ‘liquidation’ of ambiguous written legal rules by practice and precedent.”<sup>102</sup> Here, Vermeule begs another key question. Even if the founding generation allowed for the liquidation of ambiguous legal rules through practice and precedent, and even if that allowance was somehow incorporated into the Constitution’s original meaning, is it really the case that the written rules in question are ambiguous?<sup>103</sup>

We know from intense Founding-era debates over the wording of constitutional provisions that there was widespread agreement that the Constitution’s language ought to be precisely drafted. “Anti-Federalist” opponents of the proposed, unamended 1787 Constitution warned that imprecise grants of federal power would give rise to usurpations and abuses; the Constitution’s “Federalist” supporters responded that the Constitution’s terms had been drafted as precisely as possible.<sup>104</sup> In such a context, it cannot be assumed that constitutional language is ambiguous—that is, that it can bear two or more distinct meanings, one of which could potentially authorize the power grants that Vermeule believes to be constitutionally legitimate.<sup>105</sup> Lawson, Hamburger, and others have adduced considerable evidence that the subdelegation of legislative power is unambiguously forbidden by the Constitution *and* that many modern congressional grants of power to agencies are unambiguously instances of subdelegation.<sup>106</sup> Vermeule cannot establish an ambiguity against the weight of the evidence—at the very least, he must show that the evidence is in equipoise.

Vermeule does not adduce sufficient evidence to even muddy the waters. He cites Jerry Mashaw’s scholarship (which purports to trace administrative power back to the Founding Era),<sup>107</sup> cites a line of cases beginning in the late nineteenth century,<sup>108</sup> and observes that, “with the arguable exception of Justice [Clarence] Thomas, no modern Justice has fundamentally contested the

legitimacy of delegation.”<sup>109</sup> The Founding-era governmental practices documented by Mashaw are relevant to original public understanding,<sup>110</sup> but, like all such practices, their existence is not dispositive of their own constitutionality, nor is it proof that the relevant text is ambiguous; those responsible for the practices may well have been mistaken about whether their actions were authorized by the Constitution, and Vermeule makes little effort to show that their beliefs were justified. Both Hamburger and Michael Greve have highlighted salient differences between the practices identified by Mashaw (think of the Steamboat Inspection Service, which regulated a single piece of equipment on a single type of vessel) and the kind of delegation that pervades the modern administrative state (think of the Occupational Safety and Health Act, which authorizes the Secretary of Labor to issue standards that are “reasonably necessary or appropriate to provide safe or healthful employment or places of employment”<sup>111</sup> and impose those standards on industries across the nation).<sup>112</sup> Finally, the late nineteenth century cases are obviously not evidence of original public understanding, nor are the opinions of modern Justices.

Originalists who have any interest in staying grounded in reality certainly must acknowledge that Congress, President, and Court have recognized capacious delegation of statutory authority for quite some time. But Vermeule fails to demonstrate that such delegation—however longstanding and widespread—fits with the Constitution’s original meaning.<sup>113</sup>

#### B. Unjustified

Vermeule evidently believes that both the Constitution and the APA are shot through with vagueness<sup>114</sup> and ambiguity.<sup>115</sup> Interpreting the text can thus only get us so far—there will be contexts in which it does not yield a single determinate answer. *Chevron*, *Auer*, and thin rationality review can all be understood as rules of *construction* that are necessary to give legal effect to

101 LAW’S ABNEGATION, *supra* note 10, at 45.

102 *Id.*

103 The constitutional status of liquidation is far more controversial among originalists than Vermeule’s strident claims might lead one to believe. See Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 552-3 (2003) (writing that it seems “more plausible” that “present-day originalists are free to consider alternative approaches to the Constitution’s indeterminacies” than that “members of the founding generation understood the Constitution itself to require adherence to settled liquidations”).

104 See Philip A. Hamburger, *The Constitution’s Accommodation of Social Change*, 88 MICH. L. REV. 239, 308 & n.261 (1989) (collecting sources).

105 See Solum, *supra* note 100, at 469-70 (2013) (distinguishing between linguistic vagueness and ambiguity).

106 See, e.g., Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327 (2002); Douglas H. Ginsburg & Steven Menashi, *Nondelegation and the Unitary Executive*, 12 U. PA. J. CONST. L. 251 (2010); IS ADMINISTRATIVE LAW UNLAWFUL?, *supra* note 8, at 377-403.

107 See JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* (2013).

108 See cases cited at *supra* note 44.

109 LAW’S ABNEGATION, *supra* note 10, at 44.

110 See John O. McGinnis & Michael B. Rappaport, *Original Interpretative Principles as the Core of Originalism*, 24 CONST. COMMENT. 371 (2009) (explaining how the “expected applications” of constitutional concepts “can be strong evidence of the original meaning” of those concepts).

111 29 U.S.C. § 652(8).

112 See Michael S. Greve, *Not Originally Intended*, CLAREMONT REV. OF BOOKS (Summer 2013), available at <http://www.claremont.org/crb/article/not-originally-intended/> (last visited December 27, 2016) (Mashaw’s examples “reflect a far more modest orientation than the New Deal ambition of regulating entire industries, not to mention the modern-day aspiration of improving ‘the workplace,’ ‘highway safety,’ or ‘the environment’ on a global basis.”); IS ADMINISTRATIVE LAW UNLAWFUL?, *supra* note 8, at 83 n.a (arguing that Mashaw’s examples of New Deal precursors all involve regulations of executive officers or people who were not subjects of the United States, not members of the public).

113 See Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 13 (2001) (noting that Madison, in discussing liquidation, drew a “sharp distinction between the question of ‘whether precedents could expound a Constitution’ and the question of ‘whether precedents could alter a Constitution’”).

114 LAW’S ABNEGATION, *supra* note 10, at 68 (“broad and vague delegations, vague constitutional powers”).

115 *Id.* at 45 (“ambiguous written legal rules”).

vague or ambiguous constitutional and statutory guarantees.<sup>116</sup> Vermeule’s justification for all of these constructions is simply stated: agencies have a “comparative advantage” in resolving the questions at stake, and judges add little marginal value to agency decision-making.<sup>117</sup>

Insofar as a normatively desirable but unfitting prescription would lack integrity, Vermeule’s justification depends upon the premise that it is fitting for judges to engage in a *particular kind* of marginalist analysis. There is a general sense in which judges, like all fallible human beings who operate under the constraints of time and space, necessarily must decide how to focus their intellectual efforts, and it behooves them to consciously do so with reference to value that they seek to capture. Yet Vermeule has something more specific in mind. Judges, he argues, should understand themselves to be part of a “process of institutional decision-making that begins with agency decision-making,” and they ought to judge with an eye to adding something to that process.<sup>118</sup> Is it fitting for judges to engage in *this kind* of marginalist analysis?

Robert Natelson, Guy Seidman, and Gary Lawson have convincingly argued that the Constitution’s structure and content reflect its character as a *fiduciary* document—a document that entrusts government officials (the fiduciaries) with discretionary power to act on behalf of members of the public (the beneficiaries) for limited purposes, through specified means.<sup>119</sup> Owing to the vulnerability of beneficiaries, the law imposes a set of stringent duties on private fiduciaries, including the duty to follow the beneficiary’s instructions, the duty of utmost good faith (that is, honesty), and the duty to take reasonable care and competently pursue the beneficiaries’ interests.<sup>120</sup> With discretionary power in the hands of private fiduciaries, those who entrust them with that discretionary power are correspondingly vulnerable; with discretionary power in the hands of public fiduciaries, the entire

citizenry is correspondingly vulnerable.<sup>121</sup> Founding-era writings are replete with references to government officials generally and judges in particular as fiduciaries, whether “agents,” “trustees,” or “representatives.”<sup>122</sup>

It is doubtful that the marginalist analysis commended by Vermeule is compatible with judges’ fiduciary duties. Judges’ fiduciary duties are centrally concerned with ensuring that officials in the other branches of government adhere to *their* fiduciary duties by making an independent determination of what the law *is* in cases, regardless of whether that helps or hinders the other branches’ goals.<sup>123</sup> Vermeule’s focus on contributions to decision-making that begins with agencies risks transforming the judicial role in cases involving administrative power from an independent one into a collaborative one.

Even if it is appropriate for judges to engage in marginalist analysis along the lines that Vermeule suggests, any such marginalist analysis must incorporate the very real risks of abuse of administrative power. Vermeule rightly warns of the dangers of relying upon unsupported generalizations about agencies’ motivations and judgements.<sup>124</sup> Yet there is no denying that the discretionary power wielded by agencies is susceptible of being abused. There is, for instance, a rich literature on the phenomenon of “regulatory capture,” wherein the comparative overrepresentation of regulated private interests in the process of agency decision-making results in agency bias in favor of these interests rather than the public interest.<sup>125</sup> The development of hard-look review of the kind deployed in *Motor Vehicle Mfrs. Assn. of the United States, Inc. v. State Farm Mut. Automobile Ins. Co.*<sup>126</sup> can be understood as being in part the product of judicial

116 For a delineation of the distinction between the interpretation of text and the formulation of rules of construction, see generally KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* (1999); Randy E. Barnett, *The Interpretation–Construction Distinction*, 34 HARV. J.L. & PUB. POL’Y (2011); Solum, *supra* note 100.

117 LAW’S ABNEGATION, *supra* note 10, at 75.

118 *Id.* at 15.

119 See Robert G. Natelson, *The Government as Fiduciary: A Practical Demonstration from the Reign of Trajan*, 35 U. RICH. L. REV. 191, 193 (2001); Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077 (2004); GARY LAWSON ET AL., *THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE* 68–70 (2010); Gary Lawson et al., *The Fiduciary Foundations of Federal Equal Protection*, 94 B.U. L. REV. 415 (2014); Gary Lawson & Guy I. Seidman, *By Any Other Name: Rational Basis Inquiry and the Federal Government’s Fiduciary Duty of Care*, Boston Univ. School of Law, Public Law Research Paper No. 16-29 (2016), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2822330](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2822330) (last visited December 27, 2016); GARY LAWSON & GUY I. SEIDMAN, *A GREAT POWER OF ATTORNEY: UNDERSTANDING THE FIDUCIARY CONSTITUTION* (forthcoming 2017).

120 See Robert G. Natelson, *Judicial Review of Special Interest Spending: The General Welfare Clause and the Fiduciary Law of the Founders*, 11 TEX. REV. L. & POL. 239, 255-62 (2007).

121 See generally L.S. Sealy, *Fiduciary Relationships*, 20 CAMBRIDGE L.J. 69 (1962); Ernest J. Weinrib, *The Fiduciary Obligation*, 25 U. TORONTO L.J. 1 (1975); Paul B. Miller, *A Theory of Fiduciary Liability*, 56 MCGILL L.J. 235 (2011).

122 See, e.g., THE FEDERALIST No. 14 (Madison), *supra* note 6, at 63 (in a republic, the people “assemble and administer [their government] by their representatives and agents”); THE FEDERALIST No. 46 (Madison), *supra* note 6, at 243 (“agents and trustees of the people”); THE FEDERALIST No. 57 (Madison), *supra* note 38, at 295 (“public trust”); THE FEDERALIST No. 59 (Hamilton), *supra* note 6, at 310 (“guardianship” and “trust”). For a detailed discussion of judges as fiduciaries, see Ethan J. Leib, David L. David, & Michael Serota, *A Fiduciary Theory of Judging*, 101 CAL. L. REV. 699 (2013).

123 See THE FEDERALIST No. 78 (Hamilton), *supra* note 6, 404 (explaining that “the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority . . . the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents”); LAW AND JUDICIAL DUTY, *supra* note 8, at 610 (finding that Founding-era judges “ordinarily assumed that they served the function of enforcing the constitution and protecting liberty by doing their duty—by deciding in accord with the law of the land”).

124 LAW’S ABNEGATION, *supra* note 10, at 116.

125 See, e.g., GABRIEL KOLKO, *RAILROADS AND REGULATION 1887-1916*, 34-44 (1965); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 2, 3 (1971); Fred McChesney, *Rent Extraction and Interest-Group Organization in a Coasean Model of Regulation*, 20 J. LEGAL STUD. 73 (1991); Andrew P. Morriss, Bruce Yandle & Andrew Dorchak, *Choosing How to Regulate*, 29 HARV. ENVTL. L. REV. 214 (2005).

126 463 U.S. 29.



recognition that agencies do not always seek legally legitimate goals.<sup>127</sup>

Now consider the thin rationality review that Vermeule believes to be the *dominant* form of arbitrary-and-capricious review at present and which he urges judges to explicitly embrace: “[A]gencies must act based on reasons, where the set of admissible reasons includes second-order reasons to act inaccurately, nonrationally, or arbitrarily.”<sup>128</sup> We can safely predict that agencies will seldom fail to offer such reasons, if they understand that this is all that they have to do before judges will uphold their actions. But how, if at all, can thin rationality review safeguard citizens against the risk that agencies will offer insincere, *pretextual* reasons to conceal their illegitimate ends?

Vermeule points to several methods of “flushing out” an agency’s real motives.<sup>129</sup> These include “mandating that the agency make decisions on a formal record; mandating that the agency respond specifically to comments even if there is no formal record; allowing cross-questioning of agency experts; and checking the fit between the agency’s findings and its conclusions.”<sup>130</sup> It is striking that Vermeule includes the last method, considering that he elsewhere states that judges should *not* “require agencies to be able to explain or convey their reasons, to the satisfaction of a panel of generalist judges.”<sup>131</sup> Judges “checking the fit” between findings and conclusions with any rigor would seem to be requiring agencies to do precisely that. If, on the other hand, by “checking the fit” Vermeule simply means requiring agencies to point to factual findings and to point to a legitimate reason for action without inquiring into the connection between findings and action, the problem of pretext remains.

Officials can also fall short of their legal duties *without* acting in bad faith, that is, without deliberately seeking legally illegitimate ends. Officials may err as a consequence of taking insufficient care in the pursuit of legally legitimate ends.<sup>132</sup> Some well-documented psychological biases that can distort judgment are particularly pronounced amongst experts—these include egocentrism and overconfidence.<sup>133</sup> The impact of such biases can

be diminished by the “expectation that one may be called upon to justify one’s beliefs, feelings, and actions to others” and will suffer negative consequences if one fails to do so.<sup>134</sup> Judicial review can offer a means of diminishing the impact of psychological biases and thus encouraging care by ensuring accountability, but it cannot do so if it solely requires officials to offer valid reasons for their actions. Officials who pursue legitimate ends but fail to take sufficient care will easily be able to offer valid reasons for their actions and thus escape negative consequences for them.

Finally, Vermeule marshals little evidence to justify his apparent confidence in agency high-mindedness and care. The closest he gets is his citation to other scholars’ findings that agencies often go above and beyond the courts’ interpretations of their procedural obligations under the APA.<sup>135</sup> This is interesting and encouraging, but—as Vermeule admits—insufficient to support any generalizations.<sup>136</sup> Vermeule also never considers whether agencies might act differently if judges were to explicitly and consistently embrace his deferential counsel. If we accept Vermeule’s marginalist terms, it is possible that an increased risk of abuse would be outweighed by the benefits that would be captured, but Vermeule does not sufficiently account for those potential costs in his calculations. Nor, for that matter, does he show that the costs he does acknowledge are or would be outweighed by the benefits of deference along the lines that he urges. Instead, readers are treated to summary assertions that the trade-offs are worth making. Again, if we accept his terms, perhaps they are—but he who asserts must prove, and Vermeule does not prove his marginalist case.<sup>137</sup>

### C. Correctable

Some of the most evocative language in Vermeule’s book is deployed in the service of his argument that legal resistance to administrative power will prove futile. Were the administrative state “abolished,” he predicts that it would “be created again, in a kind of eternal recurrence,” with the judiciary’s aid.<sup>138</sup> Vermeule reaches all the way back to the seventeenth century in support of this claim, invoking Sir Edward Coke’s “maxim” that, “in

127 For accounts of the influence of capture theory, see Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975); Thomas W. Merrill, *Capture Theory and the Courts: 1967- 1983*, 72 CHI. KENT L. REV. 1039 (1997).

128 LAW’S ABNEGATION, *supra* note 10, at 167.

129 *Id.* at 120.

130 *Id.* at 152.

131 *Id.* at 167.

132 Fiduciaries have a duty to take reasonable care as well as a duty to act with utmost good faith. See Lawson & Seidman, *supra* note 119, at \*25 (adducing evidence that “eighteenth-century fiduciaries generally, whether attorneys or corporate directors, had a duty of care as a baseline part of their obligations . . . akin to a standard of gross negligence” and contending that “[t]o the extent that the Constitution is a fiduciary instrument, of any plausible kind to which it can be analogized, federal actors must exercise their discretion at least in accordance with this standard”).

133 See Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 496-9 (2002) (internal citation omitted).

134 *Id.* at 508-22.

135 *Id.* at 117 (citing RICHARD PIERCE, JR. ET AL., *ADMINISTRATIVE LAW AND PROCESS* 361 (2008)). But see David S. Tatel, *The Administrative Process and the Rule of Environmental Law*, 34 HARV. ENVTL. L. REV. 1, 2 (2010) (recounting that “in both Republican and Democratic administrations, I have too often seen agencies failing to display the kind of careful and lawyerly attention one would expect from those required to obey federal statutes and to follow principles of administrative law,” and observing that, “[i]n such cases, it looks for all the world like agencies choose their policy first and then later seek to defend its legality”).

136 LAW’S ABNEGATION, *supra* note 10, at 117 (noting that it is “very hard to generalize”).

137 See Michael S. Greve, *Adrian’s Abnegation*, LIBRARY OF LAW & LIBERTY (Dec. 19, 2016), <http://www.libertylawsite.org/book-review/adrians-abnegation/> (last visited December 27, 2016) (observing that “what we have here is an abject failure to think on the margin, by a scholar who purports to embrace that mode of thinking”).

138 LAW’S ABNEGATION, *supra* note 10, at 15.



thinking institutionally, but by focusing on the merits of particular cases.<sup>148</sup> In economic terms, this case-specific focus enabled judges to capitalize upon their comparative advantage, which did not lie in wholesale system design, but in retail evaluation of whether particular government actions were lawful.

What could persuade judges to focus their attention in this way? As Hamburger has shown, more than life tenure or undiminished salaries, a particular conception of judicial duty—and a commitment to fulfilling it—was understood to be essential.<sup>149</sup> That duty was symbolized by and assumed through an oath. The oath initially had religious significance; American judges who often found themselves isolated from their communities<sup>150</sup> in evaluating the lawfulness of legislative enactments steered themselves to fear not men but only God.<sup>151</sup> As they faced down hostile legislative majorities, judges could take comfort in the fact that they were emulating the divine lawgiver in seeking to arrive at an accurate understanding of the law and to impartially give effect to it.

Judges did not have the luxury of infinite time to spend on getting the right answer in any given case, and they inevitably found themselves interpreting and applying written instruments the text of which was insufficient to produce determinate answers to particular questions. Thus, they were forced to rely upon default rules of construction. The distinction between the linguistic meaning of a provision of a written instrument and that instrument's fundamental purpose or function—whether a contract or a constitution—was expressed through a Christian trope: the distinction between the “letter” and the “spirit.”<sup>152</sup> Where interpretation of the letter—the linguistic meaning of the text—did not yield a determinate answer, judges had recourse to the spirit—the original function or purpose of that text.<sup>153</sup>

All of this might seem rather remote from the concerns of contemporary judges. But even in a more secular age, the concept of judicial duty and its association with the oath holds the potential to shape how judges approach cases, and the distinction between the letter and the spirit can be of use in resolving them. In a compelling recent paper, Richard Re has detailed how the oath required of all government officials to

“support *this* Constitution”<sup>154</sup> can “give[] rise to personal moral obligations” even today.<sup>155</sup> Re explains that “[n]o hand—either dead or alive—forces individuals to run for office, take the oath, or lead others to think that they will take ‘the Constitution’ seriously.”<sup>156</sup> Once officials do make such a promise, however, they are legally entrusted with power that they would not otherwise possess—power over their fellow citizens, power to ensure that their fellow citizens are not subjected to unlawful exercises of power.<sup>157</sup> The oath thus “functions as a bridge between the document and the duty to obey it”—more specifically, it creates a morally binding promise “to adopt an interpretive theory tethered to the Constitution’s text and history.”<sup>158</sup>

The distinction between letter and spirit also captures an enduring truth. Written instruments are calculated to serve particular functions, and they would be without value if they did not do so. Having recourse to the function, or spirit, of the law where the letter fails—as it may—can equip judges to give effect to the law as best they can. Discerning the spirit of the law entails investigation into the context in which the law was enacted, with an eye to identifying the function or functions that particular provisions would have reasonably be understood to serve. Judges may not, however, disregard the letter in search of the spirit—to do so would violate the duty of good faith that is imposed upon them qua fiduciaries.<sup>159</sup>

#### 1. Following the Letter: Independent Judgment

What then is a judge who is conscious of and faithful to his or her duty to give effect to the law—both letter and spirit—to do in cases involving administrative power? At least two of the doctrines of deference that Vermeule celebrates are prohibited by the letter of the law—that is, by its text.

*Chevron* deference and *Auer* deference require judges to defer to agencies’ “reasonable” interpretations of statutes or regulations, respectively, upon finding that the relevant language is “ambiguous.” To the extent that judges accord such interpretive deference, they cannot be said to exercise independent judgment, which entails an independent effort to ascertain the meaning of the law and give effect to it.<sup>160</sup> Because the duty of independent

148 See *id.* at 112 (“[J]udges ordinarily assumed that they served the function of enforcing the constitution and protecting liberty by doing their duty—by deciding in accord with the law of the land.”).

149 See *id.* at 577 (“The ideals of law and judicial duty . . . were presuppositions *about* law rather than doctrines *of* law, and Americans could therefore usually take these ideals for granted in thinking about their constitutions and judges.”).

150 The principal threats to individual liberty during the Founding Era came from “legislatures which were probably as equally and fairly representative of the people as any legislatures in history.” See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* 404 (2d ed. 1998).

151 See LAW AND JUDICIAL DUTY, *supra* note 8, at 106-12.

152 *Id.* at 52-56.

153 See generally Robert G. Natelson, *The Founders’ Hermeneutic: The Real Original Understanding of Original Intent*, 68 OHIO ST. L.J. 1239 (2007) (collecting cases and concluding that reliance upon the spirit “reflected the norm in Anglo-American jurisprudence”).

154 U.S. CONST. art. VI, cl. 3 (emphasis added).

155 Richard M. Re, *Promising the Constitution*, 110 Nw. U. L. Rev. 299 (2016).

156 *Id.* at 308.

157 See JOSEPH RAZ, *THE AUTHORITY OF LAW* 239 (2d ed. 2009) (explaining that “an oath may impose a moral obligation to obey (e.g. when voluntarily undertaken prior to assuming an office of state which one is under no compulsion or great pressure to assume)”; STEVE SHEPPARD, *I DO SOLEMNLY SWEAR: THE MORAL OBLIGATIONS OF LEGAL OFFICIALS* 107 (2009) (discussing how “[t]he oath represents an assurance that invites reliance upon those subject to the official’s authority”).

158 Re, *supra* note 155, at 323-24.

159 For a comprehensive presentation of the framework for construction sketched here, see Randy E. Barnett & Evan Bernick, *The Letter and the Spirit: A Theory of Good-Faith Constitutional Construction* (forthcoming).

160 See *Chevron Bias*, *supra* note 95, at 1209 (“A judge’s central office or duty, and therefore his power and very identity under Article III, is to exercise his own independent judgment in cases in accord with the law. He

judgment is imposed upon them by Article III's authorization of "[t]he judicial power," judges violate Article III in declining to discharge it.<sup>161</sup>

Any argument that judges are merely deferring to the law when they defer to agency interpretations of statutes and regulations is vulnerable to two fatal objections.<sup>162</sup> First and most fundamentally, Congress has no power to dictate how judges exercise their constitutionally delegated power—and independent judgment lies at the core of "[t]he judicial power."<sup>163</sup> Second, the notion that Congress generally intends for courts to defer to agencies is—as Vermeule has pointed out elsewhere—"rankly fictional."<sup>164</sup> As Aditya Bamzai has shown in an important constitutional and statutory critique of *Chevron* deference, the relevant text of the APA, enriched by the context in which it was adopted, is best understood as instructing judges to engage in independent review—consistent with the Hughesian synthesis.<sup>165</sup> The most one can say on behalf of the view that judges are deferring to the law when they accord *Chevron* and *Auer* deference is that is that *Chevron* and *Auer are the law*—but that just sends us back to the initial question about whether *Chevron* and *Auer* were correctly decided.

In addition, due process of law entails—among other things—*impartial* adjudication, free from bias towards either party.<sup>166</sup> Both *Chevron* and *Auer* deference require judges in

cases involving assertions of administrative power to favor the legal position held by the most powerful of parties—the government. That the bias is systematic and the product of adherence to a perceived legal principle rather than dependent upon the proclivities of individual judges only makes it more troubling because it makes it more certain to influence judges' deliberations.<sup>167</sup> According to *Chevron* and *Auer* deference thus entails violating the Fifth Amendment.

## 2. Following the Spirit: Judicial Engagement

Although the Supreme Court has maintained that arbitrary-and-capricious review of agency actions is more rigorous than the modern "rational-basis test," which serves as the default standard of review in constitutional cases, the Court has done little to ground that understanding in the letter or the spirit of the APA.<sup>168</sup> The APA does not sketch the contours of hard-look review or even suggest such a framework—nor, for that matter, does it sketch or suggest a different framework. Any approach to arbitrary-and-capricious review is necessarily a matter of construction rather than interpretation. Accordingly, judges must seek out the spirit of Section 706(2)(A); this in turn requires study of the publicly available context in which the APA was enacted into law.

The story of the APA's enactment is one of hard-fought compromise.<sup>169</sup> That compromise was forged between New Deal Democrats with undiluted faith in technocratic administration on the one hand, and Republicans and conservative Democrats who had become increasingly concerned with what Dean Roscoe Pound described as "administrative absolutism"<sup>170</sup> on the other.<sup>171</sup> The former sought the ratification of the New Deal vision of government-by-experts; the latter called for extensive constraints on executive power.<sup>172</sup>

Neither side got everything that it wanted. The APA provides for *some* separation of rulemaking, prosecution, and adjudication, *some* means through which regulated industries can challenge administrative decisions, and *some* judicial review. But it accepts what Vermeule's frequent co-author Cass Sunstein has described as the "enduring legacy of the [New Deal] period": "[the] insulated administrator, immersed in a particular area of

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cannot defer to executive or other administrative judgments about what the law is.").

161 See LAW AND JUDICIAL DUTY, *supra* note 8, at 612-620. Hamburger notes that "[w]hen . . . the U.S. Constitution mentioned the law of the land and the judges, it did not need to spell out the nature of legal obligation or the office and duty of judges," as "ideals of law and judicial duty were so deeply ingrained that they could simply be taken for granted." *Id.* at 618. Proposals for a federal council of revision ultimately failed to win the day at the 1787 Constitutional Convention because of concerns that judges would fail to exercise independent judgment if called upon to evaluate legislation which they had a hand in shaping. Thus, Nathaniel Gorham—speaking for what would ultimately be the winning side of the debate—affirmed that "[j]udges ought to carry into the exposition of the laws no prepossessions with regard to them." See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 79 (Max Farrand ed., rev. ed. 1937).

162 Perhaps the most influential formulation of this argument can be found in Henry P. Monaghan, "Marbury" and the Administrative State, 83 COLUM. L. REV. 1 (1983).

163 See Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 CONST. COMMENT. 191, 214 (2001) (explaining that because the judiciary possesses "independent judicial power to ascertain, interpret, and apply the relevant law," it follows that "Congress cannot tell courts how to reason any more than it can tell courts how to decide").

164 'No,' *supra* note 9, at 1556. See also Antonin Scalia, *Judicial Deference to Administrative Interpretation of Law*, 1989 DUKE L.J. 511, 517 ("In the vast majority of cases I expect that Congress . . . didn't think about the matter at all.").

165 Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. \_\_\_\_, \*53-62 (forthcoming 2017), available at <https://ssrn.com/abstract=2649445> (last visited December 27, 2016).

166 See Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 479 (1986) (finding that impartial adjudication "was considered a crucial element of procedural justice by the common law, by those that

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established the law of the colonies, and . . . by the Framers of the United States Constitution").

167 See *Chevron Bias*, *supra* note 95, at 1211 (arguing that "institutionally declared and thus systematic precommitment in favor of the government" is "more remarkable and worrisome").

168 See *State Farm*, 463 U.S. at 43 n.9.

169 For a lucid history, see generally DANIEL R. ERNST, *TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900-1940* (2014).

170 See Report of the Special Committee on Administrative Law, 63 ANN. REP. A.B.A. 331, 342-45 (1938).

171 Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447, 452 (1986).

172 *Id.* at 453.

expertise, equipped with broad discretion, and expected to carry out a set of traditionally separated functions.”<sup>173</sup>

If we understand the function of the APA generally and Section 706(2)(A) in particular as a means of ensuring that the administrative state can capture the goods that it was created to provide while safeguarding citizens against the abuse of agency discretion, the hard-look review showcased in *State Farm* is well-tailored to accomplish it. As defined and deployed in *State Farm*, hard-look review is a form of judicial engagement that can equip judges to discharge their constitutional duties.<sup>174</sup>

*State Farm* involved a 1982 decision by President Ronald Reagan’s National Highway Traffic Safety Administration (NHTSA) to revoke regulations issued by his predecessor’s administration.<sup>175</sup> Those regulations would have required vehicles produced after a certain date to include either airbags or automatic seat belts. The NHTSA determined that manufacturers would voluntarily include seat belts rather than airbags and that the regulation would not sufficiently increase seatbelt usage to justify its costs, given that “so many individuals will detach the mechanism.”<sup>176</sup> Deploying a framework with both procedural and substantive dimensions,<sup>177</sup> the Court determined that the agency had erred in failing to consider viable alternatives and in making a policy choice that was unreasonable in light of the evidence in the record. The Court pointed out that the NHTSA’s claim that “detachable automatic seat belts cannot be predicted to yield a substantial increase in usage” flew in the face of “empirical evidence on the record, consisting of surveys of drivers of automobiles equipped with passive belts, [which] reveal[ed] more than a doubling of the usage rate experienced with manual belts.”<sup>178</sup> It also criticized the agency for failing to consider requiring the installation of airbags, even though the

agency had “acknowledged the lifesaving potential of the airbag” and despite the fact that airbags cannot be detached.<sup>179</sup>

The hard-look review showcased in *State Farm* is comparable to the rationality review that served as the default standard of constitutional review prior to the Supreme Court’s decision in *Williamson v. Lee Optical*,<sup>180</sup> and which we find today in cases in which the Court applies “rational basis with bite”; while deferential, it is not toothless.<sup>181</sup> It requires an actual, rather than a hypothetical, fit between evidence and action.<sup>182</sup> It requires judges to review the record to determine whether the agency considered the evidence before it in light of contextually relevant factors *prior to making a decision*.<sup>183</sup> And while litigants ultimately bear the burden of rebutting a presumption that the agency is acting lawfully, that presumption *is* rebuttable.<sup>184</sup>

Implementing the *State Farm* model of arbitrary-and-capricious review more consistently would, of course, be costly. Time, information, and other resources are scarce, both for judges and for agency officials, and Vermeule is right that “[d]ollars and lives may be lost” if agencies cannot act quickly in certain contexts.<sup>185</sup> And yet there is ample reason to believe that the benefits of hard-look review outweigh the costs. As Sunstein observed several decades ago, “[t]he requirement of detailed explanation has been a powerful impediment to arbitrary or improperly motivated agency decisions,” it and addresses lingering concerns about the “uneasy constitutional position of the administrative agency” by ensuring that agencies will be

173 Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421 (1987).

174 See *supra* note 90. See CLARK M. NEILY III, TERMS OF ENGAGEMENT: HOW OUR COURTS SHOULD ENFORCE THE CONSTITUTION’S PROMISE OF LIMITED GOVERNMENT 35 (2013) (defining judicial engagement as “a genuine search for truth by a neutral adjudicator on the basis of reliable evidence” and explaining that “[a] properly engaged judge . . . seeks to determine the government’s true ends” by “consider[ing] the relationship between the government’s stated objective and the means chosen to pursue it”).

175 The facts and ultimate outcome of *State Farm* serve to illustrate that there is nothing inherently deregulatory about hard-look review. Indeed, hard-look review was chiefly developed by the United States Court of Appeals for the District of Columbia Circuit, which at the time may have been as *pro*-regulation as any appellate court in the nation’s history. For an illuminating discussion of the D.C. Circuit’s behavior during the 1960s and 1970s, see Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345 (1978).

176 *State Farm*, 463 U.S. at 47.

177 See Cass R. Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 SUP. CT. REV. 177, 210.

178 *State Farm*, 463 U.S. at 53.

179 *Id.* at 47.

180 348 U.S. 483 (1955). See Randy E. Barnett, *Judicial Engagement Through the Lens of Lee Optical*, 19 GEO. MASON L. REV. 845 (2012) (comparing the lower court decision in *Lee Optical* with the Supreme Court’s decision a year later in order to illuminate the difference between the then-prevailing approach to rationality review and the modern rational-basis test).

181 The term “rational basis with bite” was coined in Gail R. Pettinga, *Rational Basis With Bite: Intermediate Scrutiny By Any Other Name*, 62 IND. L.J. 779 (1987). Notable examples of rational-basis-with-bite include *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Department of Agric. v. Moreno*, 413 U.S. 528 (1973); *Metropolitan Life Ins. Co. v. Ward*, 105 S. Ct. 1676 (1985); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985); *Romer v. Evans*, 517 U.S. 620 (1996); *United States v. Windsor*, 133 S. Ct. 2675 (2013).

182 Compare *State Farm*, 463 U.S. 29 with *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993) (stating that “a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification”).

183 Compare *State Farm*, 463 U.S. 29 with *Beach Communications*, 508 U.S. at 315 (stating that “because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature”).

184 Taken literally, the presumption of constitutionality articulated in *Lee Optical* and *Beach Communications* would be impossible to rebut. See TIMOTHY SANDEFUR, THE RIGHT TO EARN A LIVING 129 (2013) (“Disproving an arbitrary claim is a hopeless task because an arbitrary assertion can simply be reinforced by other arbitrary assertions.”).

185 LAW’S ABNEGATION, *supra* note 10, at 185.

held accountable for their decisions.<sup>186</sup> It provides a framework for ensuring that agency officials comply with the same fiduciary duties that the Constitution imposes on all government actors. It thereby promotes the actual and perceived legitimacy of administrative power, as the APA was designed to do.

Vermeule's concern that demanding a "rational connection between the facts found and the choice made" demands too much of agencies that must act under conditions of uncertainty is valid. Yet it may be possible to address that concern without doing away with hard-look review entirely. The "rationally arbitrary" decisions that Vermeule regards as critical to the functioning of the administrative state are not arbitrary in the sense of being the product of mere will. They are reality-based, context-sensitive decisions, grounded in the (limited) information available to the decision-makers.<sup>187</sup> Nothing prevents agencies from explaining in detail why they decided as they did, as well as why any other decision would have been more, less, or equally rational. Judges should be aware that they could be misled concerning uncertainty, but if they are convinced that there is uncertainty and that the agency has outlined legally legitimate second-order reasons for its decision, judges could allow the agency to proceed.

#### *B. Legislative and Executive Duty: The Need for Constitutional Engagement*

On Vermeule's account, judges arrived at deference because there were and are good legal reasons for them to defer. Were judges to become convinced that there are *better* legal reasons to engage, it stands to reason that the arc of administrative jurisprudence could bend away from judicial deference and toward judicial engagement.

Yet such a change requires that officials in the other branches discharge their own constitutional duties. If Congress continues to enact statutes granting vast and unspecified powers to agencies and agencies continue to argue that they are entitled to deference when their actions are challenged, the judiciary will continue to face enormous pressure to defer. The pressure upon judges to defer will be diminished considerably if the other branches act consistently with their own constitutional duties, neither enacting statutes that purport to subdelegate legislative power nor asking for deference when their actions are challenged in court.

Because the judiciary has acquiesced in broad delegation and itself forged the abovementioned doctrines, relieving this pressure will require legislators and executive officials to articulate and act upon alternative visions of constitutional and statutory meaning. Independent constitutional deliberation by members of branches that are associated with "will" and "force" rather than "merely judgment" may sound quaint and unrealistic, but examples of such deliberation can be found throughout American

history.<sup>188</sup> While the judiciary's status as a separate branch of government that neither formulates nor executes policy and its relative insulation from extralegal pressures gives it certain institutional advantages in evaluating the legality (if not the wisdom) of particular actions,<sup>189</sup> nonjudicial actors can and do deliberate independently about the meaning of our law and the principles that undergird it.<sup>190</sup>

Indeed, legislators and executive branch officials are obliged by their oaths to independently interpret the Constitution and construct rules for implementing it in the statutes they enact and execute. Like judges, legislators and executive officials are elevated to public office only through processes authorized by the Constitution and only after taking an oath of fidelity to "this Constitution."<sup>191</sup> Congress is empowered to enact measures that are "necessary and proper"<sup>192</sup> for carrying delegated powers into execution, and to "lay and collect Taxes, Duties, Imposts, and Excises" in order to "provide for the . . . general Welfare"<sup>193</sup>; the President is required to "take Care that the Laws be faithfully executed."<sup>194</sup> All of this language, writes Natelson, sounds in fiduciary law and discloses a "purpose . . . to erect a government in which public officials would be bound by fiduciary duties."<sup>195</sup> Thus, like judges, legislators and executive branch officials are public fiduciaries with corresponding duties, including the duty to follow the letter and the spirit of their constitutional instructions.<sup>196</sup>

#### IV. CONCLUSION

*Law's Abnegation* is the work of a legal scholar of the first rank at the height of his considerable powers. If Vermeule's central thesis is ultimately unconvincing, the problem may lie less with the advocate than with his cause. Broad judicial deference to administrative power may well be the product of serious investigation into extant legal materials and careful reflection upon them in a world very different from that which the Framers knew.

186 See Sunstein, *supra* note 173, at 471. See also Cass R. Sunstein, *In Defense of the Hard Look: Judicial Activism and Administrative Law*, 7 HARV. J.L. & PUB. POL'Y 51, 53 (1984) (defending hard-look review on the grounds that it "operates as a means of determining whether agencies have disregarded the values chartered in regulatory statutes").

187 See ARISTOTLE, NICOMACHEAN ETHICS, 1.3, at 4 (Terence Erwin trans., 1985) ("[T]he educated person seeks exactness in each area to the extent that the nature of the subject allows.").

188 THE FEDERALIST No. 78 (Hamilton), *supra* note 6, at 402. For a detailed breakdown of several notable examples of constitutional construction by nonjudicial actors, see generally KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (2001).

189 See Jonathan R. Siegel, *Judicial Interpretation in the Cost-Benefit Crucible*, 92 MINN. L. REV. 387, 419-33 (2007).

190 See Keith E. Whittington et al., "The Constitution and Congressional Committees, 1971-2000," in THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE (Richard Bauman & Tsvi Kahana eds., 2006) (documenting myriad hearings devoted to constitutional issues—but finding that the percentage of hearings raising significant constitutional issues has declined throughout Congress over the last thirty years).

191 U.S. CONST. art. VI, cl. 3.

192 U.S. CONST. art. I, §8, cl. 18.

193 U.S. CONST. art I, §1, cl. 1.

194 U.S. CONST. art II, §3.

195 THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE, *supra* note 119, at 53.

196 *Id.* at 57.

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But even if Vermeule has advanced the best possible argument for deference, reclaiming territory long since abandoned by the courts to administrative power is neither absurd nor unwise. To those who would take up that task, *Law's Abnegation* is not only a challenge, but a potential source of inspiration. Decades' worth of abnegation will not easily be corrected, but our judicial lions have this consolation—that the letter and the spirit of “the Supreme Law of the Land” is on their side.

