Is Administrative Law Unlawful? NO!

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Adrian Vermeule, '*No' (Review of Philip Hamburger,* Is Administrative Law Unlawful?*)*, **Texas L.Rev.** (forthcoming), available at SSRN.

Last year, the University of Chicago Press published "Is Administrative Law Unlawful?" by Philip Hamburger, the Maurice and Hilda Friedman Professor of Law at the Columbia University School of Law. A book by a named professor at a top-ten school published by a respected academic publisher with a provocative title would seem to be a must-read book for adlaw aficionados. His conclusion is that administrative law is unlawful, root and branch, because it is unlawful for administrative agencies to issue any rule or order that binds private parties. This is more than provocative; it is radical. Radically wrong. So wrong, one might wonder how it came to be published, and in any case so wrong that no one would take it seriously. Not so fast. In March, Justice Thomas cited it extensively in his concurrence in Department of Transportation v. Ass'n of American Railroads, 2015 WL 998536 (2015) to support his conclusion that the Passenger Rail Investment and Improvement Act of 2008 is an unconstitutional delegation of legislative authority, concluding:

> We have too long abrogated our duty to enforce the separation of powers required by our Constitution. We have overseen and sanctioned the growth of an administrative system that concentrates the power to make laws and the power to enforce them in the hands of a vast and unaccountable administrative apparatus that finds no comfortable home in our constitutional structure.

In his review of the book, Adrian Vermeule, the John H. Watson Professor of Law at Harvard Law School, steps up to be the Dr. Van Helsing to drive the stake through the heart of this vampire. He minces no words:

> The book makes crippling mistakes about the administrative law of the United States; it misunderstands what that body of law actually holds and how it actually works. As a result the legal critique, launched by five-hundred-odd pages of text, falls well wide of the target.

And that's just the beginning.

As an initial matter, Vermeule notes that despite the title Hamburger does not in the book's 600+ pages clearly define what he means by "law" or "lawful." Hamburger does not mean that agencies are violating their statutory mandates, nor even that the statutes authorizing agency rulemaking and adjudication are unconstitutional under any reading of any Supreme Court decision. Indeed, it's not clear Hamburger means "law" in any legal sense. He writes:

> "[T]he legal critique of administrative law focuses on the flat question of unconstitutionality, and . . . this is not enough. Such an approach reduces administrative law to a question of law divorced from the underlying historical experience and thus separated from empirical evidence about the dangers [sic].

So what does he mean by "unlawful." Vermeule concludes with good reason that Hamburger is referring to what Hamburger perceives to have been the stance of English common-law courts during the reign of the Stuarts in the 1600s regarding the struggle between the king and parliament. The bulk of the book involves a detailed history of this

period and of the use and abuse of the so-called royal "prerogative." The royal prerogative was the king's claimed ability to make law in certain circumstances, and the victory of parliamentary supremacy by the 18th century essentially condemned the royal prerogative. It is Hamburger's argument that the modern administrative state has recreated the discredited "prerogative" and placed it in the President's hands. This, given English history, makes administrative law unlawful.

Vermeule does not attempt to rebut Hamburger's historical narrative, although he suggests that it may not be as clear as Hamburger suggests. What he does demonstrate, however, is that Hamburger never effectively connects this historical narrative to the founding fathers but rather assumes that the English background was somehow implicitly included in our Constitution. And more importantly he demonstrates that Hamburger totally fails to understand modern administrative law, not a subject he teaches or does research in, and therefore completely misses the distinctions between the royal prerogative and modern agency action. In the English struggle over the royal prerogative, the common-law courts according to Hamburger determined that the king could not make law that bound subjects; this legislative power was reserved to parliament. From this Hamburger deduces that agencies cannot make rules that bind private persons, because then they would be exercising legislative authority, and they cannot issue orders that bind private persons, because that would be exercising judicial authority. Thus, administrative law is unlawful.

Vermeule explains, however, that agencies do not claim to exercise any "prerogative," that is, inherent power to make law, as was the case of the king during the reign of the Stuarts. Indeed, it is hornbook administrative law that agencies do not possess any inherent power; they only have the power granted to them by statute. Hamburger would reply that Congress cannot grant agencies the power to bind private persons, because to do so would be the subdelegation of legislative authority to agencies or placement of judicial authority in agencies, both of which, he would say, are prohibited by the Constitution. According to English law at the time, *delegatus non potest delegare* – the delegate cannot delegate. Because the Constitution delegated the lawmaking and judicial powers to the Congress and Judiciary respectively, those powers cannot be exercised by anyone else. Executive power, at least domestically, Hamburger argues, is limited to going to a court to enforce the law or giving orders to its own employees (or to non-subjects); it has no power to exercise coercive authority over subjects.

Vermeule is willing for the sake of argument to acccept Hamburger's description of "what the deep principles of Anglo-American constitutional history actually are (assuming arguendo that such principles exist." Instead he attacks the disconnect between those principles and modern administrative law as it exists. He focuses on three topics: delegation, taxation, and separation of powers. As to delegation (or subdelegation as Hamburger characterizes it), Vermeule repeats the black letter law that Congress indeed cannot delegate legislative power, but it can make laws for agencies to execute that may require interpretation or the exercise of discretion, so long as there are "intelligible principles" to guide that interpretation or discretion. Now one may argue that the Court has failed to police adequately those intelligible principles, but Vermeule's point is that Hamburger would not allow *any* exercise of discretion or interpretation. Where Hamburger would read any such ability out of the executive power, Vermeule argues that it is the nature of the "executive power" to be able to fill in the details of legislation. It is not just an argument from necessity but that "to execute a law inevitably entails giving it additional specification, in the course of applying it to real problems and cases." Moreover, one might add, and so it has always been and will always be. Thus, agencies are not exercising any subdelegated legislative power; they are exercising executive power.

As for taxation, while Hamburger reserves a special place for the evils of delegating the power to tax, Vermeule points out once again that Congress does not delegate the power to tax to agencies, but it does occasionally authorize an agency to set the level of a tax imposed by Congress on the basis of standards contained in the statute. Vermeule cites to Skinner v. Mid-America Pipeline, 490 U.S. 212 (1988), in which a unanimous Court "examined the text and structure of Article I, and the history of legislation from '[Congress'] earliest days to the present,' and found no reason to treat taxation differently" from any other congressional authorization to agencies. That case cannot be found in Hamburger's book.

Hamburger explains the value of the separation of powers in terms of sequencing and specialization. He writes that it

"forc[es] the government to work through specialized institutions with specialized powers . . . forcing it to work in a sequence of legislative, executive and judicial power." The problem with the administrative state is that:

> Rather than follow the Constitution's orderly stages of decisionmaking, an agency can blend these specialized elements together — as when it legislates through formal adjudication [sic], or secures compliance with its adjudicatory demands by threatening severe inspections or regulation.

Vermeule counters this by noting that:

> The institutionally specialized process of lawmaking that Hamburger likes, with its sequence of legislative, executive and judicial action, is itself the source of the combined functions that Hamburger abhors. Agencies exercise combined functions when, and only when, an institutionally specialized decision, an exercise of lawmaking through sequenced and separated powers, has concluded that they should, and enacted a statute to that effect.

More importantly, however, Vermeule points out that while agencies to some extent do combine these functions, they do so under particular constraints precisely intended to guard against the evils that otherwise might flow from a combination of functions. And it is these constraints that Hamburger almost entirely overlooks, relying on simplistic overstatements. In short, Hamburger never really addresses administrative law as it actually operates.

Vermeule suggests that Hamburger's book might be viewed simply as "interestingly wrong, in an unbalanced sort of way, . . . interesting, if only because it is so hagridden by anxiety about administrative law." Unfortunately, however, Vermeule concludes that the book is "merely disheartening." Or worse,

> No, the Federal Trade Commission isn't much like the Star Chamber, after all. It's irresponsible to go about making or necessarily-implying such lurid comparisons, which tend to feed the tyrannophobia that bubbles unhealthily around the margins of popular culture, and that surfaces in disturbing forms on extremist blogs, in the darker corners of the Internet.

It's especially irresponsible to go around saying that the administrative state is "unlawful," whatever that may mean, without understanding what administrative law says, and seemingly with little idea about what exactly is being attacked — little idea about the intellectual architecture that underpins administrative law, and that many generations of the legal profession have labored to build up.

Indeed, Hamburger seems to fall back on *ad hominem* arguments, saying that American administrative law abandoned the constitutionalism of English common law in favor of French and German legal theory, leading to the "Prussification" of our society, whatever that means. But how is that? English law today essentially has no separation of powers between the executive and legislature, something completely antithetical to American constitutionalism, whereas, for example, continental systems generally reject the American concept of adjudication by administrative agencies in favor of specialized courts. In short, each developed "democratic" nation has its own form of government, but they all have in common a bureaucracy that has the power to make law pursuant statutory authorization with judicial review of such laws to safeguard liberty.

So, Hamburger's book is bad scholarship. Most bad scholarship ends up in the circular file and quickly forgotten, but regrettably that is not the likely result for Hamburger's book. Because it plays into the hands of those who tear down the administrative state for their own ideological or selfish reasons, it will be praised and cited as the new wisdom. As Vermeule says:

> The effect of such books, if accepted, is to quietly delegitimate the administrative state, to tear out its intellectual struts and props while leaving the building itself teetering in place — a dangerous game. The indirect and long-run effect of Hamburger's thesis on the intellectual culture of the legal profession, and perhaps even of the broader public, might be pernicious and worth opposing, even if there are no direct and short-run effects.

Vermeule's analytical rebuttal of Hamburger's thesis is convincing, but it is not the stake in the heart of the beast. This is not because of any fault by Vermeule, but because the appeal of Hamburger's thesis ultimately is not analytical, but emotional. Those who cite it most loudly are unlikely to have plowed through its 600 pages of dense history and hysterical rants. They will cite it because they want to believe that the administrative state is somehow un-American. Trying to rebut that belief is like trying to convince climate-change deniers. It may be impossible, but it must be attempted. Vermeule has given us an admirable first start.

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