An Irrebuttable Presumption of Legitimacy? Vermeule on the Administrative State

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If law is the self-critique of practical reason,[1] then modern American administrative law is the self-critique of law. Admittedly, this seeming conditional is far from self-explanatory. On the contrary, most should find it rather perplexing. While the condition signifies a larger and unfinished project, the consequence summarizes, heedlessly perhaps, the core of what *Adrian Vermeule* takes to be the genius of American administrative law. He has undertaken to reconstruct its significance in a series of publications that have culminated in a book called *Law's Abnegation*.[2] Since the ending of the story disclosed in this work must have appeared a tad too bleak, *Vermeule* may have decided to add, aided and abetted by *Cass Sunstein*,

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1 See, more recently, A Somek, 'Das Recht als Kritik der praktischen Vernunft' (2022) 108 *Archiv für Rechts- und Sozialphilosophie* 5-19.

2 A Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State* (Harvard University Press, 2016).

another slim volume that recasts the mindset of American administrative law from a slightly different angle, namely, *Lon Fuller's* "internal morality of law".[3] And yet, as if it had been necessary to complement this perspective from a constitutional point of view, *Vermeule* recently published another book that puts administrative law into a far broader perspective.[4]It is in this book that the *Thomist* conception of *determination* within a hierarchy of norms takes center stage.[5]

I. Legality and Rationality

There can be no doubt that "legitimacy" qua acceptability or *de facto* acceptance of one's rulers[6] or their policies is at the heart of *Vermeule's* agenda. This explains also why there is a tacit affinity to *Max Weber's* work. It is manifest, however, only to the extent to which *Vermeule* is suspicious of the irrational effects that legitimation "by means of legality" might engender.

According to *Weber*, the conviction that if requisite legal procedures have been observed the resulting arrangement is acceptable is one of several types of legitimate rule.[7] As an offspring of "legal rule", which is intimately tied up with modern bureaucracy, *Weber* calls this form of legitimacy the "belief in legality" (*Legalitätsglaube*).[8] This seemingly rather unsophisticated notion captures straightforwardly the fact that we are disposed to endorse as "right" what has been brought about in the legally ordained way. The important point is that we do not specify what it is exactly that we mean by "right". Is the matter *merely* legally accurate according to standards of positive law, or is it also morally correct? Interestingly, it does not even occur to us that we could ask this further question. What we mean by "right" oscillates, therefore, between "It accords with positive law" and "It is the way it ought to be".

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3 C Sunstein/A Vermeule, *Law and Leviathan: Redeeming the Administrative State* (Harvard University Press, 2020); See L Fuller, *The Morality of Law* (Yale University Press, 1969).

4 A Vermeule, *Common Good Constitutionalism: Recovering the Classical Legal Tradition* (Polity, 2022).

5 *Ibid*, 9-10, 45-46; See J Finnis, *Natural Law and Natural Rights* (Clarendon Press, 1980) 284-289; J Finnis, '*Philosophy of Law:* Collected Essays IV' (Oxford University Press, 2011) 301-302.

6 See M Weber, *Economy and Society* (Harvard University Press, 2019) 115.

7 *Ibid*, 341-343, 347.

8 See M Weber, *Wirtschaft und Gesellschaft: Grundriss der verstehenden Soziologie*, 5th ed (Mohr, 1976) 19.

The existence of our "belief in legality" explains why even the most formal ideas concerning the rule of law have so much traction. It also gives rise to an important additional attitude, namely, the faith that we ordinarily rest on judicial review. For if what has been determined following relevant procedures is legitimate, ascertaining this legitimacy invariably seems to require some form of judicial oversight. After all, it is to judges to whom we usually entrust the task of reviewing a whole variety of legal processes. There is, hence, a transitive relation leading from the belief in legality to the belief in judicial review.

Implicitly, *Vermeule* concedes this point, for his whole critical analysis presupposes the premise that we do in fact regard judicial review of any variety of state action, at least in principle, as a legitimating factor. There are exceptions to this principle, such as the "political questions doctrine",[9] but they do not alter the fact that judicial control and trust in legality ordinarily come in tandem.

Vermeule is suspicious that our obsession with legality eclipses the truly legitimating factor that ought to be relevant. That factor is rationality, indeed, in the sense envisaged by *Weber* qua purposive rationality (*Zweckrationalität*).[10] This type of rationality is supposed to underpin modern bureaucratic rule and also to be exercised by legal means. Since modern democracies are interwoven with law, matters are tricky. The mere *belief* in the legitimating force of legality may *either* conceal actual bureaucratic irrationality *or* – and this is the alternative that is of greater interest to *Vermeule* – erect irrational obstacles to purposive bureaucratic action owing to an inability, on the part of judges, to appreciate the full complexity of the subject matter.

It should be noted that from *Vermeule's* perspective – from which he does not, however, address matters in exactly these terms – the two independent legitimating factors are not on the same footing. While "belief in legality" – *prima facie*, at any rate – confers merely *de facto* legitimacy on happenings or states of affair (something is taken to be legitimate without submitting such taking to further scrutiny), the rationality of bureaucratic action is a conspicuously normative standard. Decisions, plans, policies or projects that are rational *ought* to be considered legitimate—prima facie, at any rate.

9 See Goldwater v. Carter, 444 U.S. 996 (1979), in which the Court asserted that some acts, such as the unilateral nullification of an international agreement, concern the conduct of foreign affairs and are, hence, essentially political. As a consequence, they are not subject to judicial review.

10 See M Weber, *Economy and Society* (Harvard University Press, 2019) 102-103.

II. Three Consequences of this Asymmetry

Three consequences follow from this asymmetry.

First, any account of legitimacy needs to examine whether and how the *de facto* legitimacy of the belief in legality threatens to eclipse or overlay the factors underpinning warranted acceptability. This explains why *Vermeule* has already attempted in his earlier work to identify the "limits of reason" that the advocates of judicial review usually ignore.[11] It is not by accident, therefore, that rescuing the rationality of administrative action from the asphyxiating embrace of searching judicial solicitude has always been a major focus of his project.

Second, owing to the asymmetry in the relation between legality and rationality, the value of legality must be accounted for with an eye to how it contributes to rationality. Stated in *Kantian* terms, this means that legality is answerable to the court of reason. What is decisive here is that the rationality in question is not the full-blown reasonableness[12] of a constitutional system, but rather the rationality of administrative action.

To answer this question, *Vermeule* applies a marginalist calculus. What are the likely additional benefits to be reaped from an increase in legal control? What are the costs? The answer given by *Vermeule* is semantically playful and substantively shrewd.[13] The history of American administrative law teaches the lesson of "marginalization". The law realizes that it had better or best abdicate most of its authority. Hence, the application of the marginalist calculus yields the marginalization of law:

> "[…] [T]he implicit question is whether judicial review, at the margin, adds net value to the process of institutional decision-making that begins with agency decision-making. That marginalist logic, working itself pure, is the driving internal logic that pushes law toward ever-greater abnegation. Abnegation, from the internal point of view, gathers strength when lawyers and judges come to doubt whether law has very much to add to agency decision-making. In the extreme, they may even come to worry that law makes things worse, not better.

11 See A Vermeule, *Law and the Limits of Reason* (Oxford University Press, 2009).

12 See A Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State* (Harvard University Press, 2016) 13, 21, 212-213.

13 *Ibid*, 13, 21, 212-213.

> In economic terms, the marginal (technical sense) cost and benefits of additional layers of review have to be considered, and the shape of the resulting curves will determine exactly how marginal (in the colloquial sense) law will be in the administrative sense."[14]

Third, the adoption of judicial review is scarcely ever a question of either/or, but rather of investing judges with the power of a "more or less" searching inquiry. This is the core lesson to be learned from the evolution of the American administrative state.

The rise of the administrative state can be attributed, in general, to external and internal factors.[15]

Among the external factors, the complexity and exigency of problem-solving under conditions of greater social differentiation and acceleration figure prominently. In addition, if the sentiment is widely shared among members of society, so that they are affected by a growing number of risks or riveted with one spectacle of crisis after the other, the call for quick and flexible problem-solving will ever so often originate from – and resound favorably in – the public sphere. The quantitative growth of the administrative state is due to the prevalence of these factors.[16]

The internal factor, by contrast, concerns "law's voluntary abnegation".[17] It is manifest in a judicious retreat from a more searching inquiry of administrative decisions.

In what follows, I would like to summarize briefly the major strategies that, taken together, comprise this abnegation. Then, I would like to explain in which respect they amount to a self-critique of law from the perspective of reason or rationality. It is in this context that the distinction between first- and second-order reasons plays a major role, and we shall see how it can be articulated fully with an eye to the work of the late *Joseph Raz*. On this basis, we are going to explore the issue of delegation and *Vermeule's* account of the constitutionality of widespread practice. As we shall see, he

14 *Ibid*, 13, 210.

15 *Ibid*, 211.

16 *Vermeule* identifies three institutional developments. First, the ever-increasing delegation of matters by Congress to the executive and to independent agencies; second, increasing deference by courts; and third, the executive exploiting broad and vague delegations or vague constitutional powers in order to change policies without having to have statutory approval by Congress. He adds that the main response of constitutional law to these developments has been to "go get out of the way", *ibid*, 68.

17 *Ibid*, 211, 1, 34.

is offering a variation of the argument that appeals to the normative force of the factual. This is the chief strategy in his attempt to rebut claims that the modern administrative state is inconsistent with the US constitution (a claim that is advanced by a group of scholars and justices to whom *Sunstein* and *Vermeule* refer in a wholesale manner as "the new Coke").[18]

III. Unravelling the Original Compromise

According to *Vermeule*, the evolution of the modern administrative state is manifest in the creeping collapse of a settlement between rational administration and judicial control that was laid down in the *Crowell* case.[19] In fact, according to *Vermeule*, this case already made itself vulnerable to the marginal logic that would subsequently precipitate law's abnegation.[20]

At its core, the settlement posited that agency expertise was supposed to rein almost supreme over questions of facts, whereas courts should engage in *de novo* and independent review of the legal grounds of administrative actions.[21] A consequence of this settlement was that agencies would not have the power to determine, by interpretive means, their own jurisdiction or the facts supporting their jurisdictional claims.[22] This proscription affected not least the question of delegation, to which we are going to return below. The courts were also supposed to have a firm grip on procedural guarantees, not least because usually it is they who are watching over issues of due process.[23] Finally, courts were supposed to serve as sentinels of the rationality of administrative action, possibly in a manner even going beyond the standard of the rational-basis test relevant for legislation.[24]

18 C Sunstein/A Vermeule, *Law and Leviathan: Redeeming the Administrative State* (Harvard University Press, 2020) 19-37; For a highly informative and useful introduction to the controversies surrounding the American administrative state, see E Schmidt-Aßmann, *Das Verwaltungsrecht der Vereinigten Staaten von Amerika: Grundlagen und Grundzüge aus deutscher Sicht* (Nomos, 2021) 346-352.

19 Crowell v. Benson, 285 U.S. 22 (1932); A Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State* (Harvard University Press, 2016) 13, 24.

20 *Ibid*, 24, 34.

21 *Ibid*, 25-26.

22 *Ibid*, 26.

23 *Ibid*, 87.

24 *Ibid*, 131, 155, 157, 187.

The *State Farm*[25] case and what legal scholars made of it[26] stands for this contention.

Vermeule goes to great lengths to show that this settlement unraveled and that the courts had to cede ground on every part of the territory that they were supposed to control.[27]

First, a substantial surrender of the exclusive judicial power to expound the law is manifest in the evolution of the two most famous forms of judicial deference established in *Chevron*[28] and *Auer*.[29] To be sure, none of these forms of deference are unconditional. According to the *Chevron* analysis, the Court will only defer to agency interpretations of the authorizing statute if it is conceivable to attribute to Congress the intent that the Court do so ("step zero"), [30] if the language of the statute is ambiguous or otherwise not clear ("step one") and if the interpretation is reasonable ("step two").[31] Despite these conditions, the agencies enjoy wide discretion to construe statutory language in a manner they see fit,[32] not least because the Supreme Court usually imagines that any grant of rule-making or adjudicative au-

25 See Motor Vehicle Manufacturers Association v. State Farm, 463 U.S. 29 (1983). The holding of *State Farm* is ordinarily taken to be that the review of the reasons that connect the facts to policy choices ought to be more demanding than a mere rational-basis review. Courts are expected to take a "hard look" at the rationality of agency decisions or to ensure that at least the agencies themselves have taken a "hard look" at the relevant problems, A Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State* (Harvard University Press, 2016) 131. According to the Administrative Procedure Act (APA), the agencies must stay within the bounds of their statutorily delegated powers and have to supply "substantial evidence" or at least a reasoned evidentiary basis for their factual findings, offering reasons for their policy choices, *ibid*, 130. According to Vermeule, the Court exercises a far less stringent form of review. He dismisses "hard look review" as a misnomer, *ibid*, 131.

26 *Ibid*, 155.

27 *Ibid*, 216.

28 See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

29 See Auer v. Robbins, 519 U.S. 432 (1997) and Perez v. Mortgage Bankers Association, 125 S. Ct. 1999 (2015).

30 A Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State* (Harvard University Press, 2016) 169, 202.

31 The question whether an agency's interpretation is reasonable must be distinguished from the other question whether the agency's decisional process was "arbitrary and capricious", *ibid*, 110.

32 Vermeule conceives of interpretation in a Kelsenian vain: "In the hard cases that tend to provoke litigation and reach appellate courts, agencies will usually have some discretion to choose among policies that fall within the range of reasonable interpretations." *Ibid*, 30, 201.

thority to an agency comes with the implied grant to absorb vagueness and ambiguity.[33] What is more, the Court permits agencies' interpretations to shift with changing administrations.[34]

According to *Vermeule's* reconstruction, *Chevron* deference reflects the concern that a judicial determination of statutory meaning would detract from the value of the administrative state, "[…] because judges lack any comparative insight into public values (*Chevron's* 'political accountability' rationale) and because judges often do not understand the consequences of interpreting statutes one way or another (*Chevron's* expertise rationale)".[35] Similarly, *Auer* deference requiring courts to defer to agencies' interpretations of their own rules is pertinent only if the interpretation is not clearly incorrect.[36] Nevertheless, *Auer* provides agencies with an incentive to stretch out the regulatory process over time, for they can adjust the meaning they attribute to their own regulations from one situation to the next. Since American administrative law leaves to agencies the choice between adopting a regulation or developing policies and general precepts on a case-by-case basis,[37] this should not be regarded as an irregularity. It is just the case that the agency has more flexibility regarding the timing of its regulation[38] and changing its interpretations under a new administration.[39]

However, the flexibility thus granted is counterbalanced by considerations of predictability, fair warning and the relevance of legitimate expec-

33 C Sunstein/A Vermeule, *Law and Leviathan: Redeeming the Administrative State* (Harvard University Press, 2020) 75, 135.

34 *Ibid*, 78-79.

35 A Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State* (Harvard University Press, 2016) 212-213.

36 *Ibid*, 75; In addition, the interpretation must not be arbitrary and the earlier rule must "parrot" the statutory text, C Sunstein/A Vermeule, *Law and Leviathan: Redeeming the Administrative State* (Harvard University Press, 2020) 75.

37 C Sunstein/A Vermeule, *Law and Leviathan: Redeeming the Administrative State* (Harvard University Press, 2020) 45-46, 53-55, 101; A Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State* (Harvard University Press, 2016) 163; Chenery II is the relevant authority here. Securities and Exchange Commission v. Chenery Corporation, 332 U.S. 194 (1947).

38 A Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State* (Harvard University Press, 2016) 80-81, 84-85, rejecting the charge of "self-delegation".

39 C Sunstein/A Vermeule, *Law and Leviathan: Redeeming the Administrative State* (Harvard University Press, 2020) 79.

tations to which prior practice may have given rise.[40] An agency interpretation defeating reliance interests may be regarded as arbitrary and capricious.[41] *De facto* retroactivity may adversely affect reliance interests, but these interests must be put on the scale of balance and weighted against the benefits of flexibility and learning.[42] Hence, if for some reason *Auer* deference is inapplicable, the Court may still want to see "*Skidmore* deference" applied, which grants agency interpretations persuasive authority, if not even the power to control the issue.[43] Again, however, the major reason underpinning *Auer* deference is marginalist in the sense that it is skeptical that judicial constructions of the meaning of agency regulations add value to the administrative process given that agencies possess greater expertise and are subject to political accountability.[44]

Second, in *City of Arlington v. FCC*,[45] the Supreme Court determined that the *Chevron* framework should also be applied to agency interpretations of their own jurisdiction. It may at first glance appear revolting that agencies be granted authority to determine the scope of their own powers.[46] In this case, however, the Court, per *Justice Scalia*, rejected the exception that had been made originally for jurisdictional matters in the *Crowell* precedent. *Scalia* did so in terms that would have pleased *Hans Kelsen*. Any organic statute, *Scalia* states, sets out the condition under which the agency may and can exercise regulatory or adjudicatory authority. Since all these conditions are on an equal footing, it would not make any sense to single out a few of them and to call them "jurisdictional".[47] The *Chevron*

40 *Ibid,* 71-72, 85, 109, 130; See Kisor v. Wilkie, 139 S. Ct. 2400, 2417-18 (2019), cited in C Sunstein/A Vermeule, *Law and Leviathan: Redeeming the Administrative State* (Harvard University Press, 2020) 159;

41 A Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State* (Harvard University Press, 2016) 85; See Perez v. Mortgage Bankers Association 135 S. Ct. 1199 (2015).

42 *Ibid*, 82.

43 *Ibid*, 83-84; Understandably, Vermeule treats *Skidmore* deference with caution, for it suggests that there might be a best interpretation, *ibid*, 201.

44 C Sunstein/A Vermeule, *Law and Leviathan: Redeeming the Administrative State* (Harvard University Press, 2020) 79, 126.

45 City of Arlington v. FCC, 133 S. Ct. 1863 (2013).

46 A Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State* (Harvard University Press, 2016) 35.

47 *Ibid*, 36, 112.

deference rule, hence, also applies to cases in which agencies appear to stretch the scope of their jurisdiction.[48]

Third, in *Mathews v. Eldrige*,[49] the Court developed a balancing test for the determination of the process that is due.[50] While there is obviously no consistent practice in the case law, *Vermeule* argues strongly that – in light of agency and more recent court practice[51] the three elements comprising the balancing test[52] ought to be used as a rule of decision by the agency and as mere standard of review by the court[53]. This means that the court would defer to the procedural determinations by the agency and merely control whether they were made arbitrarily and capriciously.[54]

Already in this context, the marginalist principle that *Vermeule* claims to be the driving force of the overall development seems to animate judicial retreat or abnegation. When confronted with the decision-making bodies established by agencies, the question must be raised, again, what additional benefit might be obtained from adding more full-blown judicial review.[55] *Vermeule* believes that, owing to the lesser familiarity by judges with the subject matters regulated, the overall balance may turn out to be negative rather than positive. Of course, one may object that, if agencies simultaneously investigate and adjudicate issues, they are made into judges in their own cause. Vermeule attempts to refute this objection by pointing out that constitutions "frequently make institutions the final arbiters of their own composition, compensation or power"[56].

Fourth, the rational-basis test based on the due-process clause is cast in the context of administrative law in the format of the "arbitrary and capricious test". It was introduced by the APA. Despite the "hard-look" approach developed in *State Farm,* is must not amount to something more stringent than the ordinary due-process standard. According to *Vermeule*, in the large majority of cases, the arbitrary and capricious standard laid down in the APA has been whittled down to a most deferential means of

48 *Ibid*, 110.
49 Mathews v. Eldridge, 424 U.S. 319 (1976).
50 Summarized in A Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State* (Harvard University Press, 2016) 92.
51 *Ibid*, 88.
52 *Ibid*,92.
53 *Ibid*, 103, 121.
54 *Ibid*, 88, 89.
55 *Ibid,* 115.
56 *Ibid*, 121.

control. Yet, this may be the point that *Vermeule* seems to have greatest difficulty in defending, which explains why he spends so much time on *State Farm* and its progeny.[57] However, he advocates thin rationality review. It boils down to asking whether there is a reason for agency action, and almost any reason may pass as sufficient.

IV. Uncertainty and Rationally Arbitrary Decisions

The upshot of the critique of our belief in legality comes to the fore in his explanation of what grounds thin rationality review.

Here is the core of *Vermeule's* case against more searching judicial inquiry:

> "Procedurally, judges sometimes demand reasons that cannot be given. Under conditions of genuine uncertainty, reasons run out and a relentless demand for further reason-giving becomes pathological. There is a category of agency decisions is [read: "in", A.S.] which it is *rational to be arbitrary*, in the sense that no first-order reason can be given for agency choice within a certain domain, yet some choice or other is inescapable, legally mandatory, or both."[58]

The idea is straightforward. From the APA's as well as the due-process clause's perspective, it is quite clear that legal acts – regardless of whether they are general or individual – must avail of a rational basis. Nothing must be done for no reason. Within the pursuit of their objective, they must do what is good (or even best), all things considered. Interferences with life, liberty or property can only be justified if the supporting reasons can be put on the table.

Yet, there are cases, *Vermeule* suggests, in which there ought to be some action, but no reason can be given for choosing one over the other. If courts were to ask for reasons in favor of acting in one way rather than another, agencies would end up in a situation in which they can only lose. If an act were struck down because it had been chosen for no good reason, the same could happen for acts based on the reverse choice, for they could not be based on a reason either.[59]

57 *Ibid*, 131, 155, 159-167.
58 *Ibid*, 129.
59 *Ibid*, 140.

The situations that *Vermeule* has in mind here are those of genuine uncertainty and ignorance.[60] Both are different from facing up to risks because, in principle, a probability of occurrence can be attached to the events addressed as "risks". Risks are calculable, uncertain events are not.[61] In the case of uncertainty, the possible outcome is known; in the case of ignorance, both the outcomes and the probabilities are indeterminate.[62] Uncertainty, in addition, can be of a second order. It can be uncertain whether an agency is confronted with a calculable risk or with an uncertainty.

Against this backdrop, *Vermeule* distinguishes three forms of uncertainty.[63] *Brute* uncertainty obtains if the facts relevant to the decision cannot be ascertained at a reasonable cost.[64] Also in this case, the problem can be compounded by the existence of second-order uncertainty[65] as to whether the benefits of further investments in fact-finding would exceed its costs.[66] *Strategic* uncertainty concerns the fact that interdependent choices create multiple equilibria;[67] and *model* uncertainty points to uncertainty as regards the proper analytical framework for assessing certain choices.[68]

Even if owing to the influence of these factors the substance of the matter is not amenable to a rational choice, there may nonetheless be a good reason on the part of an agency to make a choice, for example for the reason of creating legal certainty.[69] *Vermeule* therefore distinguishes between two different levels of reasons that are of relevance here:

60 *Ibid*, 126.

61 *Ibid*, 126, 152, 179; *Vermeule* observes that cases of genuine uncertainty are rare and that agencies work in order to transform uncertainty into risks. At the same time, agencies are always at the frontier of uncertainty, *ibid*, 153.

62 *Ibid*, 126, 132, 170-171.

63 *Ibid*, 133.

64 *Ibid*, 135-136.

65 *Ibid*, 149.

66 *Ibid*, 146, 152, 179-180 on "satisficing" as the consequence; See *ibid,* p. 21; *Vermeule* concludes: "One must decide to stop the explorations on an intuitive basis, i.e., without actually investigating whether further exploration would have yielded better results.", *ibid*, 147.

67 *Ibid*, 137-139.

68 In these contexts, *Vermeule* also dismisses the idea that agencies may be under an obligation to make cautious or "worst-case" assumptions, *ibid*, 133. It is not clear that under uncertainty the maximin (best worst case) or the maximax strategy (best-case payoff) ought to be chosen, *ibid*, 142. In his view, neither law nor canons of rationality require that agencies choose safe or cautious strategies, *ibid*, 143.

69 *Ibid*, 140.

> "By a first-order reason, I mean a reason that justifies the choice relative to other choices within the agency's feasible set. A second-order reason is a reason to make *some choice or other* within the feasible set, even if no first-order reason can be given."[70]

Vermeule goes on to explain that in situations of uncertainty agencies might often have "perfectly valid second-order reasons" even where first-order reasons are unavailable.[71] And from this he concludes that the decisions are then "necessarily and unavoidably arbitrary" in a first-order sense.[72]

Agencies, however, are permitted to make "rationally arbitrary decisions".[73] In order to elaborate what he means by this, he draws a handsome distinction between arbitrariness from the perspective of decision theory, on the one hand, and arbitrariness from the legal point of view, on the other.[74] He argues that it can often be the case that what is arbitrary from the decision-theoretical perspective does not appear to be arbitrary from a legal point of view. This concerns, in particular, decisions made under genuine uncertainty in which first-order reasons are insufficient to warrant one course of action over another. At the same time, there may be second-order reasons for making a choice, possibly if only in order to remove legal uncertainty (this is actually the reason that Vermeule mentions frequently). It is in these cases that the judicial demand for first-order reasons becomes pathological.[75] *Vermeule* then continues by expanding the picture of imperfectly reasoned first-order decisions by pointing to such second-order reasons as exigency (a speed-accuracy trade-off),[76] the preference for a sufficiently satisfactory result over the costly and uncertain search for an optimum ("satisficing")[77] or settling on an expected mean with greater or lesser variance.[78]

Vermeule states his conclusion in bold terms, namely that "under a robust range of conditions, *rational agencies may have good reason to decide*

70 *Ibid*, 135.
71 *Ibid*, 135.
72 *Ibid*, 126, 129, 133, 135.
73 *Ibid*, 149-151; A Vermeule, *Common Good Constitutionalism: Recovering the Classical Legal Tradition* (Polity, 2022) 13, 46.
74 A Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State* (Harvard University Press, 2016) 137, 149.
75 *Ibid*, 140, 153.
76 *Ibid*, 185-186.
77 *Ibid*, 179-183.
78 *Ibid*, 184-185.

in a manner that is inaccurate, nonrational, or arbitrary."[79] (*Vermeule's* emphasis).[80] Unsurprisingly, his preferred version of this rationality review is designed to recognize the "nonideal"[81] limits of time, information and resources that provide agencies with reasons to behave irrationally from a first-order perspective, at least as long as there are second-order reasons for doing so:

> "Such reasons may, for example, justify acting when taking some action or other is necessary or desirable, even when no particular action is sufficiently justified (a rationally arbitrary decision); justify a policy under a decision rule that can predictably be expected to misfire producing arbitrary results in some sets of cases (the mean-variance trade-off and the speed-accuracy trade-off); or justify a policy that seems acceptable, but might well be worse than other possible policies in the feasible set, for all anyone knows (satisficing). In all these cases, agencies rightly depart from the simplistic framework under which rationality requires choosing the best option within the known feasible set."[82]

The irrationality of legality is manifest in the lack of regard for the difference between the two levels of reasons. Courts invalidate decisions for want of first-order reasons where the lack thereof actually gives rise to valid second-order reasons.[83] The legalistic concern with legality gives rise to irrationality, or, in *Vermeule's* own parlance, to unreasonableness.[84] The administrative state underachieves its objectives owing to a false calibration

79 *Ibid*, 156.

80 *Ibid*, 215: „[…] [A]gencies have to make decisions whose content is intrinsically unjustifiable, in the sense that rationality does not dictate the decision, nor the opposite. In that sense, agencies must make decisions that are arbitrary. It does not follow, however, that the decisions are 'arbitrary and capricious' in a legal sense."

81 *Ibid*, 187.

82 *Ibid*, 187-188.

83 *Ibid*, 188.

84 *Ibid*, 188-189: „[...] [I]t is possible to decide reasonably, even when rationality has exhausted its force. For many large decisions at the individual level – where to go to college, what profession to pursue, whom to marry – rational choice is impotent or apposite, yet it is still possible to approach the decision more or less reasonably. Many of the decisions that agencies face have exactly this quality; the stakes are high, the consequences of the alternatives are shrouded in uncertainty, and this decision is either a one-time event, or at least will not be frequently repeated, so that no strong process of learning through trial and error is possible." He adds that the "arbitrary and capricious" standard should be best understood as a prohibition on unreasoned agency action.

of judicial review. It ignores the necessity of rationally arbitrary, or at the very least questionable, decisions.

V. What are Second-Order Reasons?

Thus understood, *Vermeule's* project is animated by the spirit of the enlightenment. It engages in a self-critique[85] of the reasons of law. It challenges a misguided faith in the beneficial effects of judicial review and rejects overreaching and overambitious interferences with agency action.

Deep down, however, the work is about legitimate authority. It is no coincidence that *Vermeule's* arguments have a familiar ring to students of *Joseph Raz's* work.[86]

Authority is legitimate if one has reason to follow the directives issued by authority because doing so makes one comply better with the reasons that apply to oneself than if one responded to these reasons directly. This is, roughly speaking, the gist of the so-called "service conception" of authority. Indeed, the concept of authority is based on "deference", for it involves "surrendering" one's own judgment.[87]

A simple example may explain what *Raz's* point is. In a pandemic, we all have reason to protect our health and to make sure that we do not constitute a health risk for others by spreading the disease. We are better able to act on these reasons by observing the policies adopted by government than by determining our conduct ourselves. First, governments draw on internationally shared medical and epidemiological expertise and, second, governments are able to coordinate our conduct in a manner that promises to make us jointly do what we are morally required to do. The existence of authority gives us a second-order reason not to rely on our own individual assessment of the situation.

In the relation between agencies and reviewing courts, the second-order reasons identified by *Vermeule* confer authority on agencies. They give courts reason *not* to examine the soundness of the first-order reasons of

85 See I Kant, *Critique of Pure Reason,* 2nd ed (Palgrave Macmillan, 2007).

86 See for example, J Raz, *The Authority of Law: Essays in Law and Morality* (Oxford Clarendon Press, 1979).

87 See J Raz, *The Morality of Freedom* (Oxford Clarendon Press, 1986) 42.

agency action, even if these reasons may have been inconclusive.[88] They are also not decisive. Decisive are the second-order reasons. Whether or not these reasons are relevant and applicable is essential to the authority of agency decisions.

One must be inclined, therefore, to conclude that any review of agency action, despite deference to first-order reasons, had better take a "hard look" at second-order reasons.[89] Why should the reasons governing the second order not also be just as amenable to judicial scrutiny as the first-order reasons, provided they are of relevance?

VI. The Elusiveness of the Distinction

Vermeule, however, presents second-order reasons as though they had to be more or less immune from judicial solicitude. This is puzzling and must invite further questions concerning the nature of reasons of a different order.

We have long come to recognize that every action is held to aim at some good.[90] Regardless of whether what agents take to be good is in fact good, it is obvious that any agent, in order to count for one, must rationally be concerned with something that they consider to be worth their while. This explains why there can be *prima facie* no reason to assume that judicial review is categorically ruled out on the ground that whatever agencies do is entirely haphazard and no longer rational action. Nevertheless, this matches exactly with how *Vermeule* invites us to look at first-order reasons if they are arbitrary. Hence, whatever the agency does would be no longer rational action if we conceived of it *merely* in light of the effort to arrive at, say, the technically most satisfactory solution of an environmental-protection

88 See A Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State* (Harvard University Press, 2016) 167: "[…] [A]gencies must act on reasons, where the set of admissible reasons includes second-order reasons to act inaccurately, nonrationally, or arbitrarily."

89 *Ibid*, 167.

90 Aristotle, *Nicomachean Ethics* (University of Chicago Press, 2011) p. 1 (1094a). Contemporary analytic philosophy calls this "the guise of the good". See JD Velleman, *The Possibility of Practical Reason*, 2nd ed (Maize Books, 2015) 73-99; J Raz, *From Normativity to Responsibility* (Oxford University Press, 2011) 59-84.

problem or the choice of the morally most defensible standard for barring "indecent" broadcasting.[91]

The question that must arise, though, is whether judicial review should be equally deferential towards second-order reasons. The answer must be straightforward. If the courts bracketed second-order reasons in the same manner in which they disregard first-order reasons, the judiciary would effectively abdicate all authority. The agencies would be entirely free to do what they want to do. Judicial review would become superfluous. Since this would be contrary to the intents of the system of judicial review, the judiciary must submit second-order reasons to *some* scrutiny.

From the perspective of *Weber's* purposive rationality, second-order reasons are not different from first-order reasons. They are merely directed at different objectives than the primary objectives of administrative action, such as attaining a high level of safety or environmental protection. Rather, they concern the expediency or the cost of such action. Possibly, they are also of an entirely political nature if they originate, for example, from the government's desire to demonstrate that it is taking control. In relation to first-order reasons, they *may* operate as exclusionary reasons, if they suggest that it is legitimate to ignore first-order reasons altogether. But they do not necessarily perform this function. On the contrary, it is imaginable that agencies base their action on a combination of first-order and second-order reasons, which is indeed the case if the agency finds that it can attain an objective in a satisfactory manner even if it does not invest more resources to determine which course of action would actually be best. It does not exclude the pertinent first-order reasons or treat them with indifference; it merely decides to close the book on the further exploration of such reasons. This indicates that *Vermeule* has mischaracterized the relation between first- and second-order reasons by suggesting that the second-order reason steps in "if no first-order reason can be given"[92]. Indeed, more often than not it will be the case the that first-order and the so-called "second-order" reason are part of the same set, and agencies use "second-order" reasons in order to determine which first-order reason is good enough. Second-order reasons, then, do not serve as exclusionary reasons, for other *conceivable* first-order reasons are not categorically considered irrelevant.

91 A Vermeule, *Common Good Constitutionalism: Recovering the Classical Legal Tradition* (Polity, 2022) 152.

92 A Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State* (Harvard University Press, 2016) 135.

The distinction between first-order and second-order reasons collapses in these contexts, and it becomes unclear why the judiciary ought to abdicate all authority.

VII. Transitive Inconclusiveness

The answer that might be given to this question is that the judiciary ought to take its hands off all second-order reasons owing to a disabling transitive relation. Conceivably, first- and second-order reasons are so intrinsically interwoven with each other, and so inextricably combined, that deference towards first-order reasons invariably must translate into deference towards second-order reasons.

The inconclusiveness of first-order reasons is, indeed, often transitive in relation to reasons of the second order. This means, for example, that if it is unclear whether the agency is confronted with uncertainty rather than a risk, it is very likely to be equally unclear whether further cost-intensive research may reveal what the situation is really like. It is difficult to imagine, in particular, how a court is supposed to ascertain that an agency has erred about the unfeasibility of an inquiry in the existence of either uncertainty and risk and therefore failed to develop a strategy for managing an alleged *risk* when it acted on what it took to be *uncertainty*. Carrying out this type of review presupposes expertise that the judiciary usually does not possess. An agency may have had a resource-related reason not to explore the matter further and to take it for granted that this is a case of uncertainty concerning the existence of either uncertainty or risk. How should the court be able to review the agency's choice if the point of this choice is to have the agency deal with the lack of a guiding standard? The second-order reasons appear to be so composed that the unintelligibility of first-order reasons is preserved in them.

It is next to impossible to conceive how a court could assess the correctness of the second-order reason to engage in a particular mean-variance trade-off.[93] An agency may estimate that a policy could save roughly 2000 animals from contracting a contagious disease, but depending on further research the variance could lie between 200 or 1000 animals. There are good reasons to save as many animals as possible, but there are equally

93 *Ibid*, 184-185.

good reasons to economize on further research, in particular if its payoff is unknown, too. The second-order reasons grant the agency the authority to pick a solution with a wide variance. The accuracy of relying on that reason could only be reviewed by a court that had a standard available for balancing the unclear costs of further research against the likelihood of greater or lesser variance. Indeed, it is the very lack of such a standard that supposedly gives rise to second-order reasons in the first place. The second-order reason is subject only to a thin rationality review conceding that there is always "some reason" for agency action.[94] The one reason that is, however, definitely excluded is the pursuit of private rather than public purposes.[95] But will it ever be the case that for a justification of agency action nothing else will remain but the private gain of commissioners? This may be duly doubted.

The same observation can be made for the second-order reason of "satisficing",[96] which excludes a comparative policy evaluation. It occurs when an option is chosen that meets certain threshold conditions, regardless of whether there may be even better options hidden in the feasible set. There is a second-order reason to satisfice with something if the costs of information and research might be substantial. The problem is recursive, of course. It may be also uncertain what the costs of determining the size of the costs amount to. Suddenly, then, another second-order reason emerges, confirming the second-order reason for satisficing. The elusive second-order reason becomes self-validating.

Vermeule suggests that a "constrained optimizer" would "invest in gathering information just up to the point at which the (increasing) marginal costs of doing so equal the expected marginal benefits of information"[97]. While the satisficer stops as soon as the option is good enough, an optimizer moves forward unless there is reason to believe that the marginal benefit of information is not worth the cost. It is difficult to imagine how a court, which is not in the business of conducting or commissioning empirical research, could ever scrutinize a relevant assertion made by the agency. Courts cannot but give agencies the benefit of the doubt.

94 *Ibid*, 187.
95 A Vermeule, *Common Good Constitutionalism: Recovering the Classical Legal Tradition* (Polity, 2022) 150.
96 A Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State* (Harvard University Press, 2016) 180.
97 *Ibid*, 181.

It is to be expected, thus, that the second-order reasons potentially anchoring in thin rationality review are possibly just as, or even more, elusive than the indeterminate first-order reasons. Yet, the elusiveness of the second-order reasons explains, indeed, why we are interested in the judicial review of first-order reasons concerning the optimal policy choice in the first place.

VIII. Epiphanies of Sovereignty

Vermeule appears to believe that the reasons relevant at the second-order level are altogether different from the reasons governing the choice of the best policy. This is of great consequence for the plenitude of authority that agencies are supposed to possess.

Taking as an example, for the sake of simplicity, the adoption of a standard for "indecent broadcasting", there are two ways of approaching the issue. The first would actually examine the matter from a *Dworkinian* perspective and view agencies as well as courts as charged with the task of having to arrive at the most plausible conception of what is to be understood by "indecency".[98] The second would actually claim that the relevant political choice is the agency's to make. If the latter is the idea underpinning the hands-off approach advocated by *Vermeule*, then it is based upon a certain view of what is rationally reviewable by courts. And it appears that *Vermeule* is ready to exclude a whole variety of reasons from the domain of second-order reasons that it would be adequate for the judiciary to consider. Reasons that make a choice economical, for example, are of this kind, and *Vermeule* is ready to grant agencies much space to decide whether further research is feasible in order to explore whether choosing the best policy option might even be in the cards. I take it, therefore, that *Vermeule* envisages something amounting to another domain of "political questions" with which the judiciary is not supposed to meddle.

Upon closer examination, however, it turns out that the seemingly neat distinction needs to be viewed as merely one side of another distinction whose other side consists of the considerations relevant for shifting from the first-order to the second-order level in the first place. In order to avoid compounding the matter with another set of second-order reasons, one

98 See R Dworkin, *Taking Rights Seriously* (Harvard University Press, 1978).

could say that second-order reasons are applied self-reflectively, that is, on the basis of some idea when it is appropriate to base decision-making on them rather than on first-order reasons. Regardless of what type of a question this is, if we allow the agency to answer it itself, following *Vermeule*, we grant it jurisdiction to exempt itself from judicial scrutiny. Since the agency thus also determines its own jurisdiction, we catch a glimpse of sovereignty here, for sovereign is that body which determines its own jurisdiction.[99] The authority of the decision-making body cuts itself loose from the reasons to grant it such authority from the perspective of those who are subject to it.

The situation is not identical with, but nonetheless parallel to, the condition under which authority becomes authoritarian.[100] This is the case if the reasons for accepting authority no longer persuade the subordinates, who are nonetheless told that they would be persuaded if they possessed adequate insight. The defense for considering them obligated is that the elect bearers of authority are in the know. The subordinates are told that obedience is good for the obedient, even if they have no clue why. This situation is not identical with thin rationality, to be sure, for in the case of deference those wielding authority do not have any first-order reasons for acting one way or another either. Since the reviewability of second-order reasons remains, as we have seen in the previous sections, at least an open question, if it is not entirely foreclosed, those who decide have authority for no reason other than the complexity of determining whether they really deserve to possess it. Their authority is based on an *irrebuttable presumption of authority*. This is very much like the authority endorsed by professing authoritarians. It is not by accident, possibly, that *Vermeule* confronts us with claims, such as:

> "[…][P]ublic authority is both natural and legitimate – rather than intrinsically suspect, as one might infer from certain stands of the liberal tradition."[101]

The abdication of law makes room for *faith* in agency action.

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99 See D Grimm, *Souveränität: Herkunft und Zukunft eines Schlüsselbegriffs* (Berlin University Press, 2009).

100 See A Somek 'Delegation and Authority: Authoritarian Liberalism Today' (2015) 21 *European Law Journal* 340-360.

101 A Vermeule, *Common Good Constitutionalism: Recovering the Classical Legal Tradition* (Polity, 2022) 7.

IX. Delegation Awakens the Leviathan

The abdication of law is thus followed by the *Kantian* step to make room for faith.[102]

Faith is already anticipated in the way in which *Vermeule* addresses the issue of delegation. His views emerge in reply to the common charge that the administrative state acts in excess of the powers that have been delegated to it. This is the charge that *Vermeule* replies to in discussing the work of *Hamburger* and *Lawson*[103] who allege that administrative law unconstitutionally rests on subdelegating from Congress to agencies the legislative power that was originally delegated from the people to Congress.[104] This cannot be right: *delegata potestas non potest delegari*.

This critical view of the administrative state seems to be premised on the idea that delegation involves – putting the matter in the language of European Union law – a "conferral" or, cast in classical legal language, a *traditio*, a handover of legal power from one institution to another. Such a handover must in principle not happen; and if it happens, it must contain its own revocation. Such a revocation is manifest in the tight leash along which the delegate ("delegatee" – obviously used in contemporary legal English, even though a rather peculiar coinage in view of the availability of "delegate") is tied to the plans and intentions of the delegator. What the delegate may then permissibly do is to "fill in the details" (this is how *Justice Gorsuch* is not approaching the issue)[105]. The delegate is doing something on behalf of the delegator that the latter is too lazy to do or cannot do owing to a heavy load of other responsibilities.[106]

But one can conceive of delegation without a transfer. Possibly "commissioning", regardless of what it may mean precisely, provides the adequate concept for this understanding. The delegators assign certain tasks that they cannot accomplish themselves. It is essential that the tasks be carried out by *someone else*. The delegates can be given only a rough idea of what the delegators desire, for the simple reason that the delegators themselves only

102 See I Kant, *Critique of Pure Reason,* 2nd ed (Palgrave Macmillan, 2007).

103 A Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State* (Harvard University Press, 2016) 36-37.

104 *Ibid*, 51.

105 See C Sunstein/A Vermeule, *Law and Leviathan: Redeeming the Administrative State* (Harvard University Press, 2020) 120.

106 This reflects, arguably, a part of my relation to my assistants. They are doing things for me that I could possibly do even more quickly myself. However, I need to delegate matters in order to cope with the rest of my workload.

have a rough idea of what it is that they want. They need the delegates to flesh out their inchoate ideas.

American administrative law has long considered delegations appropriate so long as the delegating statute supplies an "intelligible principle" that guides the exercise of delegated discretion.[107] Since the 1950s, the Supreme Court permitted such principles to be highly general, such as "what is requisite for the protection of health and safety"[108]. This seemingly loose attitude towards constraints, however, seems to match the idea that delegation is akin to "commissioning". When Congress delegates a task to an agency, it *exercises*, but does not thereby *transfer,* legislative power.[109] The agencies, consequently, adopt executive, and not legislative, acts.[110]

What is possibly even more striking, however, is that according to *Vermeule's* view, the executive branch never exercises legislative power, but *always only* executive power, even if it were to transcend the bounds of delegation (by definition it could never validly exercise legislative power). It cannot do anything but exercise executive power. Remarkably, however, the power avails of splendid plenitude, for it contains within itself the three functions of the separation of powers:

> "When agencies create 'legislative rules', they are acting within the bounds of statutory grants of authority, adding specification to statutory policy choices – a core executive task. When they 'adjudicate', they are adding specification to the statutes by elaborating their application to particular factual circumstances – a core executive task. In either case, in the theory of American administrative law, agencies are not exercising legislative or judicial powers, and there simply is no fusion of powers going on in the first place."[111]

In a manner somewhat reminiscent of conceptual jurisprudence, *Vermeule* draws a line between "branches" and "functions". The powers remain se-

107 A Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State* (Harvard University Press, 2016) 51.

108 C Sunstein/A Vermeule, *Law and Leviathan: Redeeming the Administrative State* (Harvard University Press, 2020) 120.

109 *Ibid*, 122.

110 A Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State* (Harvard University Press, 2016) 51; This is the view explicitly adopted by the Court in the City of Arlington case, City of Arlington v. FCC, 133 S. Ct. 1863, 1873 n. 4 (2013), cited *ibid*, 52.

111 *Ibid*, 77.

parate even if the executive branch contains within itself legislative and adjudicative functions.[112]

From that angle, the act of delegation can be cast in a different light. Far from amounting to a conferral or a *traditio*, it *permits* the executive branch to exercise powers that it already has. In a sense, it *unleashes* the Leviathan that is initially cabined into constitutional bounds.

The fact that this branch is always and already legislative, executive and adjudicative does not, however, warrant the conclusion that within agencies the functions must be kept distinct in a manner that matches how the constitution has separated the three major branches. On the contrary, the administrative state does not have to replicate within itself the constitutional system of the separation of powers:

> "Law has decided to allow the combination of lawmaking, law-interpreting, and adjudicative functions in the same hands, where there are good reasons to do so – reasons evaluated by the classical constitutional institutions themselves, in the exercise of their constitutional powers. Law's abnegation is generated from within.
> […]
> Not every subordinate institution within the system must have the same internal structure as the Constitution itself."[113]

There is no problem if the prosecuting agency first legislates and then adjudicates a specific issue.[114] Agencies may permissibly wear three different hats vis-à-vis citizens. This makes good sense given that administrative law is supposed to serve as a countervailing force in relation to socially powerful private actors, such as corporations.[115] Even though there may be a risk of the abuse of agency power if an investigating commissioner can cast a vote in the adjudicating body, the risk of abuse needs to be balanced against the at least equally important risk that the administrative state could be disabled from executing its task to protect the interests of citizens.[116]

112 *Ibid*, 63.
113 *Ibid*, 86.
114 *Ibid*, 63.
115 C Sunstein/A Vermeule, *Law and Leviathan: Redeeming the Administrative State* (Harvard University Press, 2020) 30.
116 A Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State* (Harvard University Press, 2016) 64-65.

Vermeule concludes that there are good reasons to unchain, at least partly and cautiously, the unmitigated Leviathan (aka the "deep state").[117] He thereby cunningly reduces constitutional constraints to a level at which they become rather trivial:

> "[…] [A]gencies must act based on reasons."[118]

Law and Leviathan completes the task of downplaying the legal checks on the administrative state by reading the existing Court's jurisprudence as though it lent expression to the principles of *Fuller's* internal morality of law.[119] Indeed, the book positions itself shrewdly in the middle between political liberalism and the consummation of law's abdication. It appears like political liberalism, for it claims that most scholarship in administrative law could converge on their view, albeit based on different premises.[120] I am in no position to check whether this is indeed the case. At the same time, *Sunstein* and *Vermeule* point out repeatedly that *Fuller's* framework does a better job of explaining the guiding ethos of contemporary administrative law, as interpreted by the Supreme Court:

> "[…] [A]dministrative law has converged on the principles of law's morality as *surrogate safeguards*. These safeguards help protect many of the values and concerns articulated by critics about violations of the rule of law, excessive administrative discretion, arbitrariness, and the erosion of judicial power. The surrogate safeguards capture the workings of contemporary administrative law at its most appealing, and they also have critical power for the future."[121]

The principles of the morality of administrative law are intrinsic to law. Attempts to derive them from positive law are bound to remain somewhat bogus.

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117 One is reminded, of course, of Hobbes's idea of the "sleeping sovereign". See R Tuck, *The Sleeping Sovereign: The Invention of Modern Democracy* (Cambridge University Press, 2015).

118 A Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State* (Harvard University Press, 2016) 187.

119 C Sunstein/A Vermeule, *Law and Leviathan: Redeeming the Administrative State* (Harvard University Press, 2020) 8; They concede that it might be difficult to derive the principles from the text of the APA, *ibid*, 9, 95-103.

120 *Ibid,* 10.

121 C Sunstein/A Vermeule, *Law and Leviathan: Redeeming the Administrative State* (Harvard University Press, 2020) 9, 11-12.

X. The Constitution Interpreting the Constitution

There is an ultimate argument proffered by *Vermeule* in support of "law's abnegation". He himself, however, appears to struggle a bit with articulating it clearly.

The argument is made in reply to the objection that the concentration of powers in the administrative state is not faithful to the constitution's original design. The reply to this objection that we find most frequently articulated in *Law's Abnegation*[122] is not terribly convincing – at any rate, it is not at first glance. Repeatedly, *Vermeule* points out that the administrative state has historically emerged from the cooperative interaction between and among the three branches of government:

> "It is very odd for theorists to complain about combinations of functions in agencies, and to urge a return to separated functions, when the combination of functions was itself an arrangement created by the operation of classical institutions with separated powers. Whatever arguments support the separation of powers necessarily support the institutions that the separated powers, after due deliberation, decided to create."[123]

This not terribly convincing argument appears to proceed as follows: Assuming that the interaction among branches is conducive to reasonable deliberations, at least as long as the separation of powers is sustained, the institutions and legislative delegations constituting the administrative state are the descendants of the original constitutional design. In order to underscore this point, *Vermeule* adds that, even if the administrative state were all of a sudden eliminated, root and branch, it would invariably have to reappear.[124] This argument is functionalist in its orientation. It raises the question whether, assuming that the administrative state is a many-headed hydra devoid of a constitutional base, we would not have to bite the bullet and take it for granted that the original constitutional design has remained powerless in the face of the necessities arising in a complex society. That observation may be entirely correct from a sociological point of view, but

122 A Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State* (Harvard University Press, 2016) 54-55, 69, 72-73, 79, 86, 218.

123 *Ibid*, 84, 72-73; C Sunstein/A Vermeule, *Law and Leviathan: Redeeming the Administrative State* (Harvard University Press, 2020) 217-218.

124 A Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State* (Harvard University Press, 2016) 54.

it does nothing to assuage the objection concerning the lawfulness of the administrative state.

The major argument, by contrast, is not functionalist, but also far from clear. It is to be feared that, even if we attributed to it a clear meaning, it might, if presented in a certain way, still beg the question.

Vermeule's argument comes in two different versions. This first presents the creation of the administrative state as a constitutional abnegation of constitutional authority. Here is the gist of it:

> "[…] [The] institutions acting in their classically separated ways, together decided to create institutions that did not follow the pattern of the creating institutions themselves. They made creatures *not* in their own image. Thus the Constitution superseded itself from within, in a gigantic act of self-abnegation."[125]

For the argument to be normatively sound, it must view the operation of the separated powers acting jointly as invested with the legal power to alter the arrangement of functions that the constitution originally anticipated the institutions of the executive branch to exhibit. The constitution would make *itself* vulnerable to being altered in its operation.

There is, however, a slightly different, second version of the argument in *Vermeule's* text:

> "The classical Constitution of separated power, cooperating in joint lawmaking across all three branches, *itself* gave rise to the administrative state."[126]

There is no talk of constitutional self-abdication; rather, in this case, the question is which institution possesses the ultimate authority of constitutional interpretation. Could it be the Supreme Court invoking some mystical "original design" against the understandings developed by other branches of government, or is such authority invested in the three powers acting in concert? It is clear how *Vermeule* answers this question:

> "If political legitimacy is not to be found in this long-sustained and judicially-approved joint action of Congress and the President, the premier democratically elected and democratically legitimate bodies in our system, then legitimacy resides nowhere in that system […]."

125 *Ibid*, 42-43.
126 *Ibid*, 46.

Modifying the argument a bit, and pushing the emphasis on political legitimacy somewhat to the background, one could say that the credentials of an interpretation of the constitution could never be higher than those of an interpretation that taps judicial expertise, garners the support of a *de facto* popularly elected chief executive and has backing from the deliberations of the democratically elected legislature.

In its first version, the argument begs the question, for it suggests that whatever the three branches venture to bring about severally and jointly automatically bears the imprint of constitutional authority because none of them has exercised any resistance against the other. This view must take the original constitution to embrace a self-denying ("abnegating") ordinance according to which the three branches of government have unlimited power to amend the constitution, a view that is obviously not supported by the text of this constitution.

In its second version, the argument possesses far greater merit. Defending it in the terms proposed by *Vermeule*, however, would require reopening the debate over judicial supremacy, which is another can of worms.[127] I surmise, however, that the argument could possibly be salvaged if it were recast in slightly different form. Actually, one merely needs to consult *Vermeule's* earlier work on constitutional interpretation[128] to see how the modified argument might work.

The meaning that is ascribed to constitutional provisions is "systemic". This means that participants in the system arrive at interpretations by paying heed to how these are regarded by other political players. If one is surrounded by originalists, it would be pointless to appeal to the "living constitution". For strategic reasons, the argument that one would really like to make with an eye to "evolving" meanings has to be recast as a reference to some, possibly rather obscure, "true" original meaning. Likewise, even originalists must respect limits at which non-originalist would regard them as nuts.[129] Simply put, a constitutional argument is good for A if she has reason to believe that B would find it acceptable according to either A's or B's terms. Should B not accept it, A could possibly challenge B for having misunderstood or misapplied her own (or A's) principles.

127 See LD Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford University Press, 2004).

128 See A Vermeule, *The System of the Constitution* (Oxford University Press, 2011).

129 See A Scalia, 'Originalism: The Lesser Evil' (1989) 57 *Cincinnati Law Review* 849-865.

Meanings can be settled within a constitutional system only if the mutual anticipations of acceptability converge. This means, however, that meanings depend decisively on the interpretive views of those who are *relevant* to constitutional discourse. The constitution can mean only what the political players active within the framework of the constitution ascribe as its meaning to it.[130] The constitutionally relevant game of interpretation is constituted by the constitution itself. The constitutional system has no time for solitary constitutional constructions arrived at from outside the constitutional system. For appeals to external meanings to matter, they must be made from the inside. Thus, the system of the constitution itself gives rise to its interpretation. All strategies that appeal to purportedly stable or timeless constitutional meanings must be funneled into the constitutional system. Consequently, their relevance to the constitution becomes dependent on the political constellation of forces made possible by the constitution.

Possibly, the point becomes clearer when one considers the career of originalism. It took several judicial appointments, in addition to *Justice Scalia*, to elevate it to the level of a dominating interpretive doctrine. Whether or not originalism is *constitutionally* regarded as an acceptable method of interpretation depends on the composition of the court.

It is against this background that *Vermeule* can claim that the actual constitution has accepted the administrative state. It settles the issue.

XI. Determinatio

Vermeule's most recent book offers the key to unlocking the connection between deference and the specific contribution made by the delegate.

Above all, *Vermeule* explains, somewhat perplexingly, that deference is the favorite tool of the "classical lawyer" (which is *Vermeule's* slightly generic term for jurists hailing from the Thomist tradition). Substantively, it stands for a "rebuttable presumption of authority"[131]. We have seen that in the context of the highly complex issues addressed by the administrative state there is nothing left to rebut. The authority of agency action becomes

130 For a further elaboration of these points, see A Somek, 'Real Constitutional Law: A Revised Madisonian Perspective' in: C Bezemek/M Potacs/A Somek (eds.), *Vienna Lectures on Legal Philosophy,* vol. 2 (Hart Publishing, 2020) 161-183.

131 A Vermeule, *Common Good Constitutionalism: Recovering the Classical Legal Tradition* (Polity, 2022) 46.

irrebuttable. For that reason, as we have seen (see V. above), it is a strange sibling of authoritarian rule.

But *Vermeule* now also claims that deference flows from determination.[132] This is consistent with according primacy to reason. From within the *Thomistic* framework that he has now added to his theoretical edifice, the regulating or adjudicating authority is to be given precedence over judicial second-guessing of regulatory choices, at least so long as the authority has engaged in a good-faith effort to arrive at a reasonable determination of the "intelligible principle". Such a *determinatio* may legitimately reflect the influence of context-specific, path-dependent and local factors and cannot be uniform for all places.[133] Indeed, a *determinatio* would be wrong if it even attempted to pursue this aim, for according to *Thomist* principles the human law is a particularly *human* contribution made in the broader context of natural law, at any rate when we are talking about *determinatio* in the second form envisaged by *Aquinas*.

The story is straightforward.

In *Aquinas*' hierarchical view of the law, natural law (*ius naturale*) represents that part of the law governing God's creation (*lex aeterna*) that is amenable to human insight and that is to be further determined by human or positive laws (*lex humana sive positiva*). The relevant determinations can take on two different forms.[134]

First, they can amount to deductions. The example provided by *Aquinas* is that the prohibition of murder can be deduced from the harm principle. It is merely a further specification that draws out its meaning. The determinations of the first kind stay within the perimeter of natural law. They can be recorded in written laws, but this does not alter their nature, which is to belong to the realm of natural law.

Second, *determinatio* can also involve and require a decisively original contribution to be made by the law-giver if such a contribution is indispensable to realizing a general precept of natural law. This does not indicate that there is a defect of natural law that needs to be repaired by virtue of human intervention. Neither natural law nor positive law are in any respect deficient. It is just the case that the former requires the latter to be put into practice and the latter depends on the former so that it can serve the right aim. The example used by *Aquinas* to elucidate the idea is that of an

132 *Ibid*, 152.
133 *Ibid*, 45.
134 *Ibid*, 44-45.

architect being commissioned (see V. above) to build a house for his or her clients.[135] Of course, the architect has to fill in all kinds of blanks so that the project can be set on the tracks. But there is no deficiency on the part of the clients if they approach the architect with only a rough idea of what they want, just as there is nothing wrong with the architect drawing out rough ideas much more concretely, possibly by adding to the building one or another more or less arbitrary ornamental detail.

It is this *determinatio* in the second sense that is at stake in the context of delegation. *Vermeule* actually underscores that, whereas the legislature is ideally merely determining natural law, administrative agencies actually have to serve two "clients": the statutory framework and the principles of the morality of administrative law, which is to be considered part of natural law.[136]

In an almost moving eulogy for a long-gone period of American constitutional history, *Vermeule* exemplifies how the relation of *determinatio* and deference works. In the period after the civil war preceding the infamous *Lochner*[137] case, it was understood that state legislatures may, as an outgrowth of their police power, adopt legislation for the sake of protecting health, safety and morals (and more specific public purposes).[138] The Supreme Court merely examined whether the purpose pursued by legislation stayed within the remit of this power and whether the legislative means chosen to pursue them were rationally related to this purpose. This rationality test was quite deferential, for all that was required was to examine whether the legislature had reasonably found such a relation to exist.[139] The reviewing court thereby left sufficient leeway to the legislature to fulfil its function to serve the common good. This is deference's ultimate point.

135 *Ibid*.

136 *Ibid*, 151-153; Vermeule is entirely correct in pointing out that from a historical perspective natural law was not only considered to be a trump card in the event of positive law appearing to be particularly awful, *ibid*, 44. On the contrary, natural law was taken to be complementary to positive law, overlapping with its principles in large parts and providing a resource for amendment. See R Helmholz, *Natural Law in Courts: A History of Legal Theory in Practice* (Harvard University Press, 2015) 37, 46-53, 73-75.

137 See Lochner v. New York, 198 U.S. 45 (1905).

138 See A Vermeule, *Common Good Constitutionalism: Recovering the Classical Legal Tradition* (Polity, 2022) 62, 67.

139 *Ibid*, 65.

Vermeule speaks with great modesty about the scope of reasonableness:

> "In the nature of things there is no metric or algorithm for determining the boundaries of the reasonable, but a hallmark of maturity is the realisation that the absence of such a metric is hardly a decisive objection."[140]

Even if one or another arbitrary determination of the law is made, the regulating authority does not, as we have seen, leave the remit of reasonableness.[141]

XII. Political Theology

Vermeule has recently rediscovered and rejuvenated natural law theorizing, not only with reference to, and modest reverence for, Fuller in the context of administrative law,[142] but also at a more general level[143]. He claims that viewing law in the context of principles of natural justice has been integral to the "classical tradition in American law".[144] While his views have not remained uncontested,[145] what is commendable about his intervention is that he corrects the caricature into which natural law has been turned under the dominance of legal positivism.[146] Natural law, properly understood, is not merely the ultimate authority for answering questions of legal validity in a knock-down manner. Rather, it provides a structure of arguments that regards certain principles, such as *inclinationes naturales*,[147] relevant to answering normative questions without suggesting that it is easy or even

140 *Ibid*, 70.
141 *Ibid,* 46.
142 C Sunstein/A Vermeule, *Law and Leviathan: Redeeming the Administrative State* (Harvard University Press, 2020).
143 A Vermeule, *Common Good Constitutionalism: Recovering the Classical Legal Tradition* (Polity, 2022).
144 *Ibid*, 54-56.
145 See WH Pryor, 'Against Living Common Goodism' (2022) 23 *Federalist Society Review* 23-40.
146 For a very nuanced discussion that actually emphasizes that natural law, as it is imagined in the context of the modern controversy with legal positivism, presents natural law in truncated form, see B Bix, 'Natural Law Theory' in D Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory,* 2nd ed (Wiley-Blackwell, 2010) 211, 219.
147 Examples for such natural inclinations are the drive for self-preservation or the desire to procreate. See C Shields/R Pasnau, *The Philosophy of Aquinas, 2nd ed* (Oxford University Press, 2016) 275.

always possible to arrive at a single right answer.[148] One may even conclude, on the basis of a natural-law argument, that positive law is not correct, but one may nonetheless abstain from denying it legal validity, for example for the reason that doing so might upset order and public peace.[149]

There is nothing to be said, in principle, against rejuvenating natural-law theory. On the contrary, it is perfectly sound[150] so long as this suggests that the pursuit of legal arguments remains embedded in a structure of practical reasoning that recognizes the relevance of morally significant ideas.[151] One may even want to modify *Aquinas'* distinction between *lex naturalis* and *lex humana sive positiva* to suggest that when we reason within the structure of natural law we may at times find, as is often said, that reasonable people can disagree and that the choice inherent in adopting positive law is necessary in order to settle the issues that are bound to remain unsettled based on principles of natural justice alone.

Given that natural-law arguments have to be employed with circumspection and caution, even if one endorses a natural-law perspective, it is all the more surprising that *Vermeule* is quick at identifying mistaken Supreme Court decisions. Among his chief exhibits are Obergefell v. Hodges,[152] clearing the path for same-sex marriage, and Ashcroft v. Free Speech coalition, protecting on First Amendment grounds simulated child pornography enacted by adult actors.[153] It is sad that he thereby confirms a widespread prejudice about Roman Catholics,[154] namely that they are always obsessed

148 For an excellent account, see *ibid*, 282-283.

149 See B Bix, 'Natural Law Theory' in D Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory,* 2nd ed (Wiley-Blackwell, 2010) 214-215.

150 It is so, in particular, considering the enormous wrenching of concepts that legal positivists have engaged in to accommodate practical reasoning in law by developing an "inclusive" version of legal positivism. See R Dworkin, 'Thirty Years on' (2002) 115 *Harvard Law Review* 1655-1687 (reviewing J. Coleman's *The Practice of Principle*).

151 See the approving references to *Dworkin* A Vermeule, *Common Good Constitutionalism: Recovering the Classical Legal Tradition* (Polity, 2022) 144-145.

152 See Obergefell v. Hodges, 576 U.S. 644 (2015).

153 See Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002).

154 This is not the place to explore the impact that Vermeule's conversion to Catholicism has had on his thinking. It is, however, possibly more obvious in his contributions to blogs and online journals than in his most recent monograph. See, in particular, his contributions to https://iusetiustitium.com <02/2024> and his much-debated article 'Beyond Originalism' in *The Atlantic*, https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/ <02/2024>. For a critical voice, see James Chappel, 'Nudging Towards Theocracy: Adrian Vermeule's

with questions concerning sexuality.[155] One would have been really interested in reading *Vermeule's* views on Bush v. Gore,[156] which in 2000 effectively settled the Presidential election in favor of George W. Bush, or Citizens United v. FEC,[157] which opened the gate to massive corporate funding of electoral campaigns. Both decisions had an adverse impact on American democracy in comparison to which an issue like same-sex marriage, if it is at all still worth debating, pales in significance. Since *Vermeule* believes that there is never a real conflict between rights and the common good and that no right ever extends beyond the contribution that the pursuit of an individual interest can make to it,[158] his silence suggests that, in his view, stopping the ballot count and permitting the untrammeled influence of money on the electoral process are conducive to the common good.

That a political and constitutional theory which is taking its cue from *Aquinas* is not the natural ally of progressives should of course not come as a surprise. What is astounding, nonetheless, is the view of authority with which his most recent book concludes. *Vermeule* offers an approving summary of *some* of *Johannes Messner's* views of subsidiarity.[159] *Messner*, in his major tome on natural law, derives the principle of subsidiarity from the common good. If the common good is the most fundamental principle of the social order, and if the decentralization of authority, albeit subject to exceptions, is the best means to achieve it, then the principle of subsidiarity is a consequence of this basic norm.[160] The principle of subsidiarity,

War on Liberalism' in *Dissent*, https://www.dissentmagazine.org/article/nudging-towards-theocracy <02/2024>. See also Angelo Golia, 'A Road to Redemption? Reflections on *Law and Leviathan*' (2022), no. 4 MPIL Research Paper, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4041976# <02/2024>; rs, 'His ideas profoundly split US conservatives. He is just getting started' *Financial Times*, 14 October 2022, https://www.ft.com/content/5c615d7d-3b1a-47a2-86ab-34c7db363fe4 <02/2024>.

155 For a striking example, see RP George, 'What Sex Can Be: Self-Alienation, Illusion or One-Flesh Union' in RP George (ed.), *In Defense of Natural Law* (Oxford University Press, 1999) 161-183.

156 See Bush v. Gore, 531 U.S. 98 (2000).

157 See Citizens United v. Federal Election Commission, 558 U.S. 310 (2010).

158 A Vermeule, *Common Good Constitutionalism: Recovering the Classical Legal Tradition* (Polity, 2022) 24, 167.

159 I think it is fair to say that *Messner* was one of the most important proponents of *Thomist* natural-law theory in the second half of the twentieth century. See J Messner, *Das Naturrecht: Handbuch der Gesellschaftsethik, Staatsethik und Wirtschaftsethik*, 8th ed (Duncker & Humblot, 2018) 294-298.

160 *Ibid*, 295.

according to *Messner*, empowers those who are capable of contributing to the common good to do their bit, but it also limits the powers thus conferred on pursuing this objective. Subsidiarity is both enabling and constraining.[161] *Messner* adds that human flourishing, which is an integral part of the common good, requires that people enjoy their liberty to pursue their existential aims by their own lights. The common good would hence not be attained if people lacked autonomy and individual responsibility.[162] Since the principle of subsidiarity is designed to allocate responsibilities, in particular in the relation of the higher and the lower level of social organization, it is a principle of law. Competence on the ground of one's particular responsibility for the common good is the basis of rights.[163]

The subsidiarity principle is thus generative of a very broadly defined constitutional order, possibly of the legal order as a whole. What matters is that *Messner* begins with order, not with disorder, even though he must concede that in exceptional cases the central authority may have to intervene, if it becomes clear that the subordinate institutions or persons are incapable of delivering their contribution to the common good.[164]

Vermeule deconstructs subsidiarity by putting the supplementary principle first.[165] He turns *Messner's* focus on its head by putting *Messner's* discussion of the exceptional situation of disorder first.[166] The concept of subsidiarity, *Vermeule* explains, is derivative of the Latin *subsidium*, namely, the reserve army that is supposed to step in only if the regularly deployed troops are unable to cope with the situation.[167] The focus on the legal order that is generated by the subsidiarity principle disappears, for the order is seen to exist only for as long as the central authority is convinced of the usefulness of its existence. *Vermeule* thus reconceives order from the perspective of the exceptional situation, that is, the situation in which the chief authority believes to have reason to step in in order to protect the common weal. *Bruce P. Frohnen* sums up the consequence – quite pointedly, one must say – as follows:

161 *Ibid*, 295.
162 *Ibid*, 296.
163 *Ibid*, 298.
164 *Ibid*, 301.
165 In the sense envisaged by *Jacques Derrida*, See J Derrida, *Of Grammatology* (Johns Hopkins University Press, 1997) 141-165.
166 A Vermeule, *Common Good Constitutionalism: Recovering the Classical Legal Tradition* (Polity, 2022)157.
167 *Ibid*, 156.

> "This 'constitutionalism' is rooted in the demand that subjects show 'respect for the authority of rule and rulers'. Note, not respect for law, tradition, of even in this context, God, but for the powerful, their positions, and their dictates."[168]

All constitutional and other legal constraints are in place at the pleasure of the executive branch. We can conclude that *Vermeule's* thinking has not altered all too dramatically since the publication of *The Executive Unbound*.[169]

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168 BP Frohnen, 'Common Good Constitutionalism and the Problem of Administrative Absolutism' (2022) 27 *The Catholic Social Science Review* 81, 88.

169 EA Posner/A Vermeule, *The Executive Unbound: After the Madisonian Republic* (Oxford University Press, 2010).

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