VOLUME XVII, NUMBER 3, SUMMER 2017

CLAREMONT
REVIEW OF BOOKS

A Journal of Political Thought and Statesmanship

Diversity and Its Discontents: Essay by William Voegeli

A Publication of the Claremont Institute

PRICE: $6.95

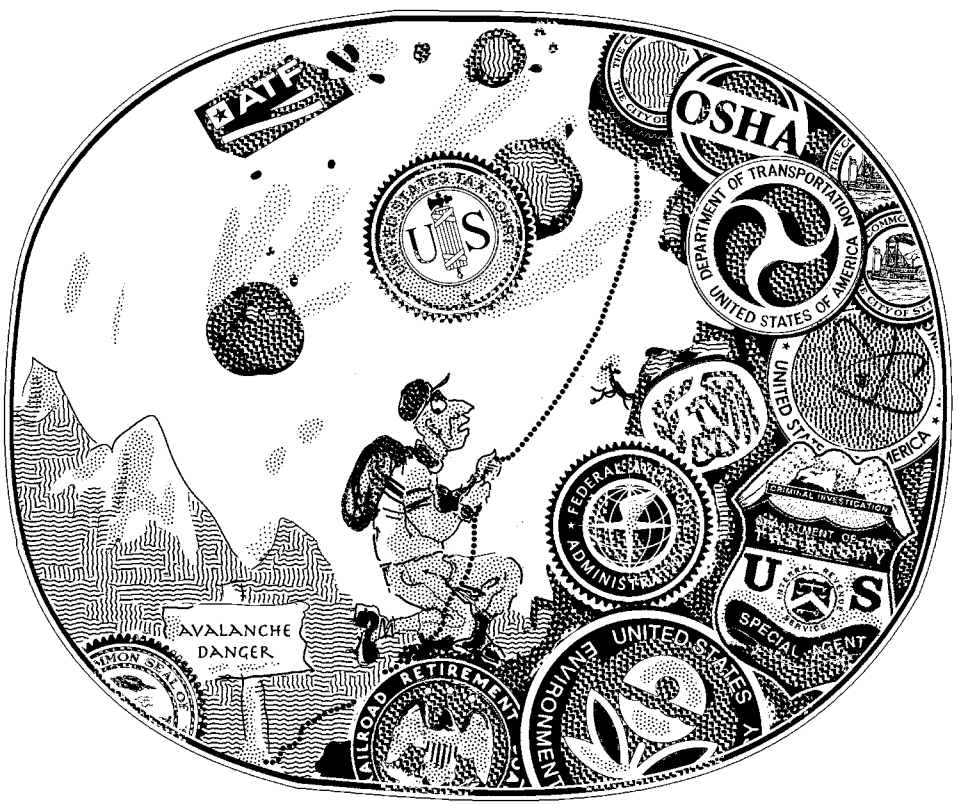
IN CANADA: $8.95

Book Review by Richard Epstein

Lawless Rules

Constitutional Morality and the Rise of Quasi-Law, by Bruce Frohnen and George W. Carey.
Harvard University Press, 304 pages, $45

Law's Abnegation: From Law's Empire to the Administrative State, by Adrian Vermeule.
Harvard University Press, 272 pages, $39.95



All too often, modern legal scholarship operates on a high plane of abstraction. In taking this path, too many legal scholars forfeit their comparative advantage: the study of specific cases and doctrines helps explain how a legal system does and should function. Two recent books make this same error, albeit in very different ways. The vice is more forgivable in Bruce Frohnen and George Carey's *Constitutional Morality and the Rise of Quasi-Law*. But there is no excuse for fleeing to such grand—indeed, useless—levels of abstraction in Adrian Vermeule's ominously titled *Law's Abnegation: From Law's Empire to the Administrative State*, a celebration of the administrative state's nearly limitless discretion.

Frohnen and Carey make it severely difficult to unpack their book's mysterious title. The Latin term "quasi" has a history in legal circles both honorable and confused, when it suggests that one thing is sort of like, but not quite like, another thing to which it is compared. Thus, rather than describing some subclass of contracts, the law of quasi-contract is a largely discarded title for the law of unjust enrichment, which is concerned with explaining when and why people have obligations to pay for benefits in cash, goods, or services that have been bestowed upon them, outside of their contractual obligations, but not as gifts.

For Frohnen, a professor of law at Ohio Northern University, and Carey, a professor of government at Georgetown until his death in 2013, the term quasi-law carries a different meaning: "directives with the force of law that lack crucial characteristics of genuine law." They stipulate further that they're *really* unhappy about the rules generated by the excessive delegation of discretionary power to officers of the administrative state, who do not promulgate laws "through prescribed means and provision of predictable rules." Our authors insist that these unwelcome constitutional shortcuts generate predictable unease about the nature and force of law, leading in turn to "confusion, tension, and animosity among those making and following law."

Frohnen and Carey blame our new constitutional ethos on the progressive thinkers who celebrated the administrative state and worked tirelessly to expand its powers. The book's claim that progressives support a model of political governance that combines democratic legitimacy and administrative expertise into a single whole—a system that necessarily slights the place of traditional forms of private property—cannot be doubted. Starting in the New Deal era, this result was achieved in part by reducing the protection of economic liberties often associated with the Supreme Court's 1905 *Lochner v. New York* decision, which struck down, as an interference with the liberty of contract, a New York State statute that limited bakers' workdays to a maximum of ten hours. The Court's argument assumed that the protec-

tion of common law rights provides a buffer against the state, one that can be breached only if the government shows some strong reason—most commonly grounded in questions of safety, health, or monopoly—to justify its limits on the freedom of ordinary individuals to lead their lives as they see fit.

Regrettably, rather than press this line of inquiry, Frohnen and Carey do their best to demolish its substantive underpinnings. In their view, any appeal to substantive due process was "arbitrarily" read into the Constitution, so that *Lochner* is denounced with the same enthusiasm as *Dred Scott v. Sandford* (1857) on the one side, and *Roe v. Wade* (1973) on the other. But *Lochner* is fundamentally dissimilar from these other two. To deny fundamental citizenship rights to freed black slaves, *Dred Scott* spoke explicitly of racial supremacy. *Roe v. Wade* dubiously declared that laws criminalizing abortion, which every state had adopted to protect the welfare of the unborn child, were unconstitutional. It is surely far more plausible to think that the constitutional protections of life, liberty, and property support the decision in *Lochner* to allow people to enter into ordinary contracts with their employers on mutually advantageous terms, free of the overreaching hand of the administrative state.

Nonetheless, Frohnen and Carey renounce any substantive component to their indictment of the modern progressive state, which makes it more difficult to understand where their exclusively proceduralist critique leads. The first and obvious difficulty is that the administrative state long antedates the rise of progressive government. Its mere existence cannot be regarded as inconsistent with the rule of law. How it acts matters. From the earliest times, governments have issued permits and licenses for people to drive cars, construct buildings, pay government pensions, collect taxes, and punish petty offenders. None of these activities draws the contempt of the common man. Indeed, the public would rise up as one if disbanding the administrative state let drunks hit innocent people, buildings topple, government debts go unpaid, taxes uncollected, and petty offenders unpunished.

Of course, there are common ways to identify the abusive exercise of these government powers. The permit system is undermined when public officials take bribes or neglect their duties. And there is much reason today to doubt the legitimacy of the common practice of exactions, under which a developer gets a building permit only on condition of funding a public art center or repairing the nearby train station. After all, the public is rightly uneasy whenever permits are used to shift the common costs of running community operations to latecomers who gain no special benefit from those improvements.

Once substance is put to one side, however, it is hard to figure out exactly the source of Frohnen and Carey's alarm. Early on in the book, they critique the notion of the rule of law as it's manifested in the work of philosopher H.L.A. Hart. But to what end? Hart defends the positivist thesis of the strong separation of law and morality, so that a bad law is nonetheless a law. Yet, as Frohnen and Carey note, Hart believes that "law in fact is intended to promote maximum protection of individual autonomy, including, as it does, a strong presumption against government action." But Frohnen and Carey never quite explain why that notion of individual autonomy does not support the Supreme Court's decision in *Lochner*, nor why common practices such as taxation can properly limit such autonomy.

Instead, their proceduralist attack can only offer some sensible cautionary notes about executive orders and signing statements, never explaining which are proper and which are not. Frohnen and Carey are also keenly unhappy with the demise of the non-delegation doctrine, but do not explain what it achieves or how it might be refurbished. In sum, the fundamental difficulty of their concern with the "quasi-law" is that they do not pay enough attention to the basic structure of constitutional law, which is a mix of institutional, substantive, and procedural protections, all of which contribute to the overall system. Instead they embrace the "thin" conception of the rule of law that eschews special protections for private property and freedom of contract. To be sure, the public is uneasy about the administrative state's caprices. But make no mistake, the substance-free account of the rule of law often imposes endless procedural delays on the judicial vindication of individual rights and leads to strong protection of the entitlement programs like Medicare, Medicaid, and Obamacare that leave Frohnen and Carey so uneasy.

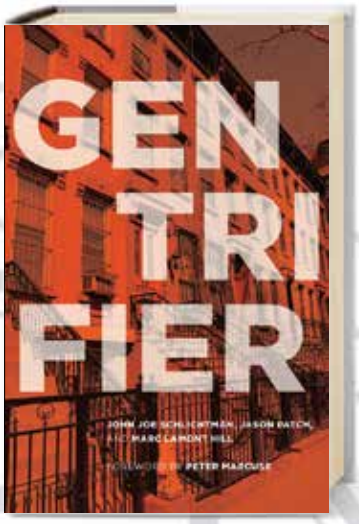
In one sense, Vermeule's book takes the opposite tack from Frohnen and Carey's. They lament the decline in the rule of law; he celebrates it. His subtitle, *From Law's Empire to the Administrative State*, is meant to convey his view that Ronald Dworkin's vision of benighted judges adopting the best moral rules in particular situations is something of a prefiguration of the modern administrative state, where judges are often marginal actors—rightly, in Vermeule's view. The opening salvo of *Law's Abnegation* employs a dangerous abstraction that disembodies all substantive discourse. "Law has voluntarily abandoned its imperial pretensions, for valid lawyerly reasons," all of which point to "a freely chosen deference to the administrative state," as if some collective wisdom has grown up to show the futility of courts standing in the path of an ever more expansive administrative state.

Vermeule, who teaches constitutional and administrative law at Harvard, thus casts a hostile eye toward those who think (on either normative or positive grounds) that courts should, or could, impose greater supervision over the activities of administrative agencies. It is difficult to pinpoint his views on such key issues as the proper balance between market and regulatory solutions. Vermeule has no overarching political theory, but only a deep desire to wash his hands of any normative and factual judgments about the administrative state. Indeed, at no point does he offer any political nor any public-choice account of how the administrative state operates, and where it can go astray. Nor, in grandly pronouncing the modern administrative state a success, does he ever ask about, let alone seek to estimate, the social losses that follow from the pro-cartel policies that the New Deal imposed on such key sectors as agriculture, aviation, communications, and labor markets. In his view, administrators should be allowed to make the tough choices on the proper interpretation and enforcement of those statutes they are called upon to enforce.

Moreover, for good "internal reasons," never identified, he concludes that the law, seemingly without human intervention, has been "working itself pure" in the name of "logical consistency" by ridding itself of the unwise pretension that it can engage in active oversight of administrative agencies. He does not even offer a claim of administrative expertise to justify this deference. It is a simple matter of inevitable political necessity. That Vermeule overstates the cult of deference in recent decisions dealing with telecommunications and financial regulation is almost an aside. His indifference to the administrative state's actual workings, however, is the most stunning aspect of his argument.

In putting forward his peculiar worldview, Vermeule regards himself as the custodian-in-chief of modern administrative law. He sets himself up against the rising group of critics—including, most notably, the new Supreme Court Justice Neil

New from **University of Toronto Press**

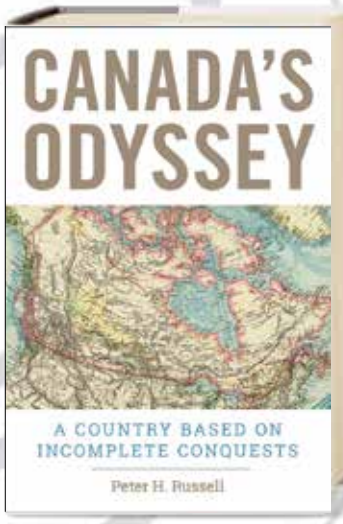


Gentrifier

by John Joe Schlichtman, Jason Patch, and Marc Lamont Hill

'This book helps us shelve what we thought we knew about gentrification, and gives us instead a brutally honest reckoning with the ills, conveniences and virtues of gentrification.'

Michael Eric Dyson, author of *'Tears We Cannot Stop: A Sermon to White America'*

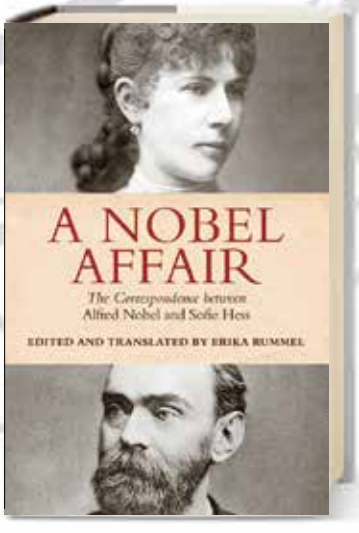


Canada's Odyssey

A Country Based on Incomplete Conquests

by Peter H. Russell

In *Canada's Odyssey,* renowned scholar Peter H. Russell provides an expansive, accessible account of Canadian history from the pre-Confederation period to the present day.

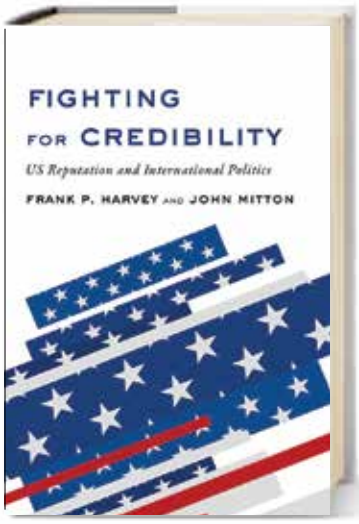


A Nobel Affair

The Correspondence between Alfred Nobel and Sofie Hess

edited and translated by Erika Rummel

Through the correspondence between Nobel and his Viennese mistress, Sofie Hess, this book shines a light on Alfred Nobel's private life and reveals a personality that differs significantly from his public image.

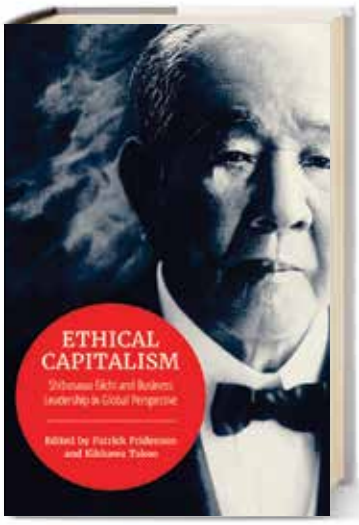


Fighting for Credibility

U.S. Reputation and International Politics

by Frank P. Harvey and John Mitton

Do reputations for credibility matter in international politics? In this book, Frank Harvey and John Mitton successfully bring reputation back to the table of foreign diplomacy.

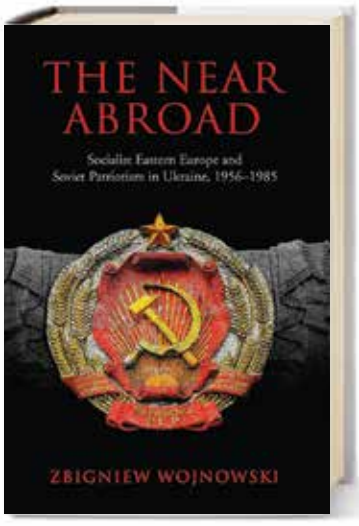


Ethical Capitalism

Shibusawa Eiichi and Business Leadership in Global Perspective

edited by Patrick Fridenson and Kikkawa Takeo

Ethical Capitalism tackles the thought, work, and legacy of Shibusawa Eiichi, today known as the "father of Japanese capitalism".



The Near Abroad

Socialist Eastern Europe and Soviet Patriotism in Ukraine, 1956-1985

by Zbigniew Wojnowski

In *The Near Abroad,* Zbigniew Wojnowski traces how Soviet Ukrainian identities developed in dialogue and confrontation with the USSR's neighbours in Eastern Europe.

utppublishing.com

UNIVERSITY OF TORONTO PRESS
Advancing Knowledge

Gorsuch—who contend that judicial deference on questions of law itself represents a serious dereliction of judges' role of declaring what the law is. Section 706 of the Administrative Procedure Act (APA) states in so many words, all of which Vermeule ignores, that "the reviewing court shall decide all relevant questions of law," which suggests that the lower arbitrary and capricious standards should apply chiefly to disputes over matters of fact. Thus, the APA seems to adopt the same division of responsibility between triers of fact and appellate judges as ordinary civil trials.

Vermeule rejects the APA's view in his extended critique of Justice Charles Evans Hughes's 1932 decision in *Crowell v. Benson*. This case concerned a congressional plan to decide workers' compensation claims (under the federal admiralty and maritime jurisdiction) for accidents arising in the course of employment on the navigable waters of the United States. The federal statute had copied the states' reliance on specialized tribunals to administer their workmen's compensation laws, widely regarded as one of the great innovations in industrial relations in the years just before World War I. It was easy for states to set up these special bodies because nothing in the federal constitutional order prevented them from organizing the business of adjudication and dispute resolution as they saw fit. Hughes was no stranger to these debates because he served as governor of New York from 1907 to 1910, just before the New York workers' compensation law had been struck down in *Ives v. South Buffalo Railway* in 1911.

Justice Hughes's constitutional challenge was how to fit the federal scheme into the rigid framework of Article III, which does pose limits on conferring judicial power on commissioners who did not have the protection of lifetime tenure. He found a workable accommodation by making two key moves. First, he gave the Article III courts jurisdiction to determine if the case falls within the inferior tribunal's jurisdiction, to make sure that "Congress cannot reach beyond the constitutional limits which are inherent in the admiralty and maritime jurisdiction." He further noted that on matters of law, the commissioners' decisions were reviewable by an Article III court, even if the findings of commissioners on matters of fact were "final" if supported by the evidence. In upholding the statute, Hughes was able to shoehorn a modern administrative statute into a rigid constitutional structure that predated the rise of the modern administrative state.

To Vermeule, *Crowell* represents the last gasp of a failed constitutional order, even though it continues to govern these admiralty cases today. In his view, the fragile compromise of letting only some questions be decided administratively was swept away by the New Deal, which vested broad powers in the federal government under the Commerce Clause. The New Deal also, after some hesitation, swept away the last vestiges of the non-delegation doctrine, so that Congress could vest courts with vast discretion on matters that fall within their reach. From these developments came the rise of deference, first in modest form in *Skidmore v. Swift & Co.* (1944), and then more grandly in *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.* (1984), after which deference to agency determinations was required unless the "precise" question was unambiguously answered by statute. Sometime later, *Auer v. Robbins* (1997) added to the mix the further proposition that courts should defer to agencies in the determination of their own rules. Finally, in *City of Arlington v. FCC* (2013), the Supreme Court extended *Chevron* deference to the FCC's determination of its own jurisdiction.

It is, however, odd in the extreme to describe these case law developments as an aban-

donment or repudiation of *Crowell*. None of these four cases discusses or even cites *Crowell*. The reason is that modern administrative law operates in a fundamentally different context. *Crowell* was an effort to allow for the routine administration of workmen's compensation claims inside the federal judicial system. These disputes never gave rise to grand rule-making pronouncements. Instead, in an incremental, common-law way, the deputy commissioner was supposed to build a body of precedent in individual cases by exercising sound discretion.

By contrast, the modern administrative law cases usually involve rule-making functions in a once-and-for-all fashion, working in uncharted territory on novel statutes that are laced with deep interpretive difficulties. *Skidmore*, for example, involved the interpretation of overtime regulations under the Fair Labor Standards Act (FLSA). *Chevron* required determining the scope of a "stationary source" as applied to multiple smokestacks at a single plant: if the group of smokestacks were treated as one source, emissions could switch between them without the need for the operator to obtain a further permit, but if the sources were indeed separate, new permits were needed to shift the output from smokestack to smokestack. *Auer* involved the question of whether police sergeants and lieutenants were exempt from overtime regulations "as bona fide executive, administrative, or professional" employees. *Arlington* asked whether the FCC had power to impose time limitations on local governments charged with reviewing applications by telecommunications carriers to erect and use towers and antennas.

In dealing with these interpretive issues, Vermeule plays both ends against the middle. He notes that the courts retain ultimate jurisdiction against the misconstruction of statutory or regulatory language, but in the next breath celebrates the fact that the occasions for intervention are few and far between. Given his penchant to do law at the highest level of abstraction, he never gives the statutory or regulatory text under review close attention. Yet the soundness of any interpretive doctrine depends on how it deals with concrete cases.

Both the smokestack regulation in *Chevron* and the time limitations in *City of Arlington* seem reasonable. In many other cases, however, that sunny conclusion seems well nigh impossible. Consider *Auer*: it takes about ten seconds of research to realize that police sergeants and lieutenants are not ordinary employees entitled to overtime protections. The standard police handbooks describe at length their various administrative oversight responsibilities, which make it abundantly clear that only ordinary patrol officers fall under that definition. The "interpretation" of the regulations in *Auer* is a travesty of the English language, driven by an aggressive administrator, committed to a strong pro-labor agenda. The ability of politically charged officials in one administration to expand the protection of overtime laws through interpretation has vast financial and social consequences on how state and local governments organize their work forces—a vital issue in any dual system of government.

More recently, the Court upheld a sharp and indefensible reversal of policy in *Perez v. Mortgage Bankers* (2015) that was every bit as dubious in finding that mortgage brokers were entitled to the overtime protection of the FLSA. As Frohnen and Carey recognized, it is a real affront to the rule of law to allow fast and loose readings of ordinary language to mangle a statute and its subordinate regulations. Ignoring the outcomes in concrete cases is the kiss of death for any serious study of administrative law. Judges must understand how these institutions are put together and why.

No wonder many thoughtful commentators think the entire system of *Chevron* deference is in deep disarray. It posits different levels of deference for different types of administrative actions; yet the categories are so pliable that it is hard to know from one case to the next whether the deference will be followed, ignored, or just plain misinterpreted. The current law allows one administration to disregard the interpretation of its predecessor for no reason at all, creating the risk of serious flip-flops between administrations on matters of immense importance, which makes for great difficulty in long-term planning in the private sector.

Much of this is totally unnecessary. Judges routinely interpret statutes when no administrative agency is involved. They should do so here.

Adrian Vermeule's abstract, formless defense of the modern administrative state should prove utterly unpersuasive to the careful reader. Bruce Frohnen and George Carey have much better instincts about what is wrong with the state of administrative and constitutional law, so it is a pity that they did not flesh out a much-needed account of how the overall system should operate. Absent such strong theory, the failure of judges to fulfill their constitutional obligations will become an even greater menace in the future.

Richard Epstein is the Laurence A. Tisch Professor of Law at New York University School of Law, the Peter and Kirstin Bedford Senior Fellow at the Hoover Institution, and the James Parker Hall Distinguished Service Professor of Law Emeritus and a senior lecturer at the University of Chicago.