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Early Prerogative and Administrative Power: A Response to Paul Craig

*Philip Hamburger**

INTRODUCTION

What does English experience imply about American constitutional law? My book, *Is Administrative Law Unlawful?*, argues that federal administrative power generally is unconstitutional.¹ In supporting this conclusion, the book observes that eighteenth-century Americans adopted their constitutions not only with their eyes on the future, but also looking over their shoulder at the past – especially the English past. This much should not be controversial. There remain, however, all sorts of questions about how to understand the English history and its relevance for early Americans.

In opposition to my claims about American law, Paul Craig lobs three critiques from across the pond.² His two main arguments concern the English history of prerogative and administrative power – though in addition, he makes a conceptual point about the distinction between legislative and judicial power. It will be seen that Craig’s account repeatedly misunderstands the history and even the conceptual framework.

Nonetheless, his article usefully draws attention to some important issues. This is therefore a good occasion not simply to respond, but more broadly to explore three important questions about early prerogative and administrative power. First, how can one distinguish absolute prerogative power and administrative power in seventeenth- and eighteenth-century England? Second, how did the English resolve the tensions between their inherited types of administrative power and their constitutional principles? Third, how did Americans resolve the tensions between their inherited types of administrative power and their constitutional principles?

The initial question matters because my argument against administrative power assumes a link between administrative power and the absolute prerogative – in that both were types of extralegal power. The other questions

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1. PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* 1 (2014) [hereinafter HAMBURGER, UNLAWFUL]. This Article modernizes the spelling and capitalization of all quotations.

2. Paul Craig, *The Legitimacy of US Administrative Law and the Foundations of English Administrative Law: Setting the Historical Record Straight* 2–4 (Univ. of Oxford Legal Research Series, Paper No. 44, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2802784 [hereinafter Craig’s First Critique].

are significant because my argument assumes that the English and Americans could develop constitutional ideals against extralegal power even while retaining some local administrative instances of it. This Article is an opportunity to elaborate these points.

Organization. – This Article is organized around Craig’s three criticisms. (I) In challenging my thesis that federal administrative power revives a version of prerogative power, he argues that these types of power are crucially different because the prerogative was independent of statute. But his statute-free vision of prerogative power is grossly incorrect, and it therefore cannot distinguish prerogative and administrative power. His argument also is unresponsive. My thesis is that administrative power revives the extralegal character of the absolute prerogative – in other words, that both sorts of power have bound subjects through extralegal edicts – and this extralegal power remains a problem regardless of statutory authorization and limits.

(II) Against my thesis that the English constitution developed in response to extralegal power, Craig points to the existence of seventeenth- and eighteenth-century English “administrative” power. My book also points to this power. Craig, however, relies on its mere existence to suggest that the English constitution did not repudiate extralegal power. This is utterly mistaken. The English constitution clearly included general ideals against extralegal power, even though (as my book observes) the English did not apply them systematically – especially not to localized administrative power. And although the English thus had to live with conflicts between constitutional ideals and localized practices, Americans in the U.S. Constitution largely avoided such tensions.

(III) Against my argument about extralegal power, Craig notes that the distinction between legislative and judicial power can break down at the edges. His observation is not unreasonable. But it is irrelevant, as my argument about extralegal power does not depend on this distinction.

Craig’s critiques are thus simply mistaken, and in their place, very different conclusions emerge. In both England and America, many constitutional principles developed in response to the danger of extralegal power, as exemplified by the absolute prerogative. Although the English did not directly apply these principles to their inherited and mostly localized administrative power, Americans in the U.S. Constitution pursued their constitutional principles more systematically.

Broader Significance. – All of this is important because the English history is a foundation for understanding American constitutions, not least the U.S. Constitution. In much contemporary American scholarship, it is said that administrative power is a modern development, which was unknown to early Americans, and therefore could not have been barred by American constitutions.³ Early Americans, however, were very interested in the English

3. See, e.g., James Landis, *The Development of the Administrative Commission: An Address Before the Swarthmore Club of Philadelphia, February 27, 1937*, in *ADMINISTRATIVE LAW: CASES AND COMMENTS* 1, 2–3 (Walter Gellhorn ed., 1947).

experience with the absolute prerogative. The English Crown had used its absolute prerogative to bind subjects extralegally. By this I do not mean that the Crown acted unlawfully or without legal authorization. Rather, the point is that, with its absolute prerogative, the Crown imposed legal obligation not merely through the acts of the legislature and the courts, but through other edicts.⁴ Being aware of this threat and the English constitutional responses to it, Americans drafted their constitutions to prevent the recurrence of extralegal power, and they did this most systematically in the U.S. Constitution.

Of course, just because part of the royal prerogative bound subjects extralegally does not mean that all prerogative power was condemned as unconstitutional. Many parts of the prerogative, such as the appointment of officers and the pardoning of offenders, did not impose legal obligation and thus tended to be considered, on both sides of the Atlantic, relatively unproblematic aspects of executive power.⁵ The extralegal aspects of the prerogative, however, could be distinguished from executive power and provoked profound constitutional objections.

Not merely a matter of “originalism” or any other mode of interpretation, the point is that extralegal power was one of the central dangers that the U.S. Constitution was designed to defeat. Extralegal power, most notorious from the English absolute prerogative, was a key target of the Constitution, and until one recognizes this, one cannot understand the Constitution. More broadly, once one recognizes this history, one can begin to reconsider what administrative power really is. Rather than a uniquely modern approach to modern circumstances, administrative power is merely the most recent manifestation of the recurring danger of extralegal power – the danger that government will be tempted to evade ruling through the law and instead rule through other mechanisms.

Postscript. – Last but not least, this Article ends with a Postscript. Craig already has responded to this Article, and the Postscript observes how he thereby digs himself in even deeper.

4. For more on what I mean by “extralegal,” see *infra* Part I.B. See generally HAMBURGER, UNLAWFUL, *supra* note 1, at 21–24. For a qualification, see *id.* at 84–85.

5. In saying that the nonbinding elements of prerogative power tended to be considered part of executive power and generally were thought constitutional, this Article recognizes that American constitutions could fully or partly relocate these previously royal powers from the executive to the legislature. The Virginia Constitution partly shifted the pardon power to the legislature. VA. CONST. art. V, § 12 (West, Westlaw through 2016 Regular Session). The U.S. Constitution relocated the power to grant letters of marque and reprisal to Congress. U.S. CONST. art. I, § 8, cl. 11. And tellingly, when the U.S. Constitution made treaties part of the supreme law of land and thus potentially binding, it required Senate ratification. *Id.* art. II, § 2; *id.* art. VI.

I. PREROGATIVE POWER

In response to my book's argument that administrative power revives prerogative power, Craig repeatedly says that my argument "elides" prerogative and administrative power, and that this "elision" does "not represent the legal or constitutional reality in the seventeenth century or thereafter."⁶ Of course, as Craig understands, my book does not confuse the two types of power, but rather argues that the extralegal character of the absolute prerogative has been revived by contemporary administrative power.⁷ His claim of elision therefore argues that the two types of power were crucially different, and he supports this with an astonishing claim about prerogative power.⁸ He says that prerogative was "a species of executive power that exists independent of statute" and that its "existence and extent" were determined by the courts, in contrast to administrative power, which was authorized and limited by statute.⁹

To be sure, some of the prerogative existed independent of statute, and this independent aspect of the prerogative has been much romanticized. Much of the prerogative, however, depended on statutory authorization, and much of it was limited by statute. Accordingly, Craig's generalization that the prerogative was unauthorized and unlimited by statute is nonsense, and it cannot distinguish prerogative and administrative power.

6. Craig's First Critique, *supra* note 2, at 3, 13.

7. HAMBURGER, UNLAWFUL, *supra* note 1, at 5–6. Note that the word "absolute" could have other meanings. For example, it could suggest "unlimited discretion up to the limits of law." *Id.* at 25, n.b. But that is another matter.

8. Craig's First Critique, *supra* note 2, at 13.

9. *Id.* In explaining his distinction between prerogative and administrative power, Craig writes:

There were two kinds of constraint on rulemaking in England. The first constraint concerned the prerogative, which is a species of executive power that exists independent of statute, such as the power to conclude a treaty. The scope of a particular prerogative power could however be contestable. Thus, while the monarch might have a prerogative to regulate certain aspects of trade, its ambit could be unclear. . . . The existence and extent of prerogative power were thus determined by the courts. . . .

The second constraint concerned statute. The Parliament that became sovereign in the seventeenth century enacted various specific statutes empowering the administration to make rules, as will be seen below. It might have enacted a general statute concerning rulemaking, containing procedural provisions for the making of such rules, although it did not do so.

Id. See also *id.* at 29 ("[T]he courts placed limits on the exercise of prerogative adjudication."); *id.* at 29–30 ("[A]lmost all administration was based on statute, not the prerogative.").

A. Prerogative Independent of Statute?

Craig's claim of a statute-free prerogative is simply wrong as a matter of history. Of course, the king seemed to hold some of his prerogatives independently of any statute. But was this generally true?

The monarch pursued his prerogative most systematically in his prerogative courts, notably the Star Chamber and the High Commission, both of which acted at least partly on statutory authority. The Star Chamber's jurisdiction to try offenders extended only to misdemeanors, and a portion of this jurisdiction was authorized by the 1487 statute entitled: An Act Giving the Court of Starchamber Authority to Punish Divers Misdemeanors.¹⁰ As for the High Commission, it rested on authorization in the 1559 Act of Uniformity.¹¹ It therefore is simply incorrect to generalize that the king's prerogative was "independent" in the sense that it was unauthorized by statute.

Statutes, moreover, limited much of the king's prerogative power. Most basically, the statutes authorizing the king's leading prerogative tribunals had limiting implications. The proper interpretation of the Act of Uniformity was therefore a source of continuing controversy for the High Commission.¹² More narrowly, although the pardon power was not authorized by statute, it

10. An Act Giving the Court of Starchamber Authority to Punish Divers Misdemeanors 1487, 3 Hen. 7, c. 1 (Eng.). For historians of the late fifteenth century, there is a question as to what the 1487 statute really accomplished, for the Star Chamber "probably had already been recognized as a court, and . . . the 1487 statute merely authorized it to address a narrow range of offenders." HAMBURGER, UNLAWFUL, *supra* note 1, at 135. One way or another, Parliament evidently thought that at least part of the Star Chamber's authority rested on statute.

11. An Acte for the Uniformitie of Common Prayoure and Dyvyne Service in the Churche, and the Administration of the Sacramentes 1559, 1 Eliz., c. 2 (Eng.).

12. My book explains:

The High Commission's ecclesiastical jurisdiction had a statutory foundation in Queen Elizabeth's Act of Uniformity, adopted by Parliament in 1559. This statute authorized the court to impose otherworldly punishments on the public and even to deprive wayward ministers of their livings, but the court was not content with this. Taking a strained interpretation of the Act of Uniformity, it claimed a power to impose temporal punishments (including fines and imprisonment) on temporal persons, thus going beyond its narrowly ecclesiastical jurisdiction. Although some members of Parliament complained, Parliament itself largely acquiesced in this extension of prerogative authority – not unlike Congress's acquiescence in contemporary extensions of administrative authority.

The awkwardness for both the Star Chamber and the High Commission was the growing recognition that the Crown was using these courts to adjudicate outside the judicial power of the regular courts. Once this was widely understood, the claim of legislative authorization or acquiescence would not save the prerogative courts from eventually being condemned as extralegal instruments of extralegal power.

HAMBURGER, UNLAWFUL, *supra* note 1, at 135–36.

repeatedly was limited by statute, and this remained a reality notwithstanding that, until the end of the seventeenth century, kings evaded these statutes with the dispensing power.¹³

Some combinations of authorization and limits were especially dramatic. The 1539 Act of Proclamations, for example, not only authorized King Henry VIII to issue proclamations, but also limited this prerogative.¹⁴ It provided that, under no understanding of the Act, should “any of the king’s liege people” (that is, any of his subjects) “have any of his or their inheritances, lawful possessions, offices, liberties, privileges, franchises, goods, or chattels taken from them.”¹⁵ It also provided that none of them “by virtue of the said act” should “suffer any pains of death, other than shall be hereafter in this act declared.”¹⁶ Nor, it added, “by any proclamation to be made by virtue of this act” were “any acts, [or] common laws standing at this present time in strength and force” to be “infringed, broken or subverted.”¹⁷

Statutory limitations became even more vigorous in the next century – as evident from the 1624 Statute of Monopolies, the 1628 Petition of Right, the 1641 abolition of the Star Chamber and the High Commission, the 1679 Habeas Corpus Act, the 1689 Declaration of Rights, and the 1701 Act of Settlement.¹⁸ If anything became clear in the seventeenth century, it was that Parliament, rather than the Crown, had absolute power and that the king’s prerogative was thus entirely subject to law, including statute.

Of course – as already noted and as will be elaborated in Part I.C – the king enjoyed some prerogatives independently of statute. But Craig’s suggestion that, in the seventeenth and eighteenth centuries, a lack of statutory

13. William F. Duker, *The President’s Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 480–97 (1977).

14. An Act that Proclamations Made by the King Shall be Obeyed 1539, 31 Hen. 8, c. 8 (Eng.). For the meaning of these provisos, see HAMBURGER, UNLAWFUL, *supra* note 1, at 37–38. (Commas have been added for clarity to the quotations from this statute.)

15. An Act that Proclamations Made by the King Shall be Obeyed 1539, 31 Hen. 8, c. 8 (Eng.).

16. *Id.*

17. *Id.*

18. An Act concerning Monopolies and Dispensations with Penal Laws, and the Forfeitures thereof 1624, 21 Jac., c. 3, §§ 1–2 (Eng.); The Petition Exhibited to His Majestie by the Lordes Spirituall and Temporall and Commons in this present Parliament assembled concerning divers Rightes and Liberties of the Subjectes: with the Kinges Majesties Royall Aunswere thereunto in full Parliament 1628, 3 Car., c. 1, § 10 (Eng.); An Act for the Regulating of the Privy Council and for Taking Away the Court Commonly called the Star Chamber 1641, 16 Car., c. 10 (Eng.); An Act for the Better Secureing the Liberty of the Subject and for Prevention of Imprisonments Beyond the Seas 1679, 31 Car. II, c. 2, § 1 (Eng.); An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown 1689, 1 W. & M., Sess. 2, c. 2, §§ 1, 2 (Eng.); An Act for the Further Limitation of the Crown and Better Securing the Rights and Liberties of the Subject, 12 & 13 Will. III, c. 2 (Eng.).

authorization and limits generally distinguished prerogative power from administrative power is grossly mistaken.

B. Unresponsive

His account of prerogative power is not only historically wrong, it is also intellectually unresponsive. In claiming that prerogative power was independent of statute – that is, both unauthorized and unlimited by it – Craig thinks he is distinguishing this power from administrative power. But if (as seen above) much prerogative power was authorized and limited by statute, and if almost all administrative power is authorized and limited by statute, then the difference is not very clear – at least not from Craig’s argument about independence from statute. And, regardless, none of his argument responds to the problem that more clearly connects the binding absolute prerogative and administrative power, namely the attempt to bind subjects through extralegal edicts.

Craig tries to avoid recognizing the extralegal character of prerogative power by suggesting that when my book speaks of “extralegal power,” it must mean unauthorized power.¹⁹ In fact, my book carefully rejects any such meaning and instead uses “extralegal power” to mean power exercised not merely through law, but through other mechanisms – that is, not merely through legislative and judicial acts, but through other sorts of edicts, such as those of commissions. Craig even quotes one such explanation:

But quite apart from the question of legal authorization, there remains the underlying problem of extralegal power – the problem of power imposed not through the law, but through other sorts of commands. On this basis, when this book speaks of administrative law as a power outside the law – or as an extralegal, irregular, or extraordinary power – it is observing that administrative law purports to bind subjects not through the law, but through other sorts of directives.²⁰

But even when quoting this, Craig still clings to *his* understanding of “extralegal” to mean unauthorized: “He [Hamburger] appears to accept that much administrative adjudication has a firm base in statute, and thus is legally authorized. He nonetheless insists that it is still extralegal.”²¹ Not able to admit that my meaning is not what he wants to attribute to me, he concludes that “[t]his phrase is used in a plethora of ways throughout the work.”²² Actually, this is untrue, and he does not and cannot support it.²³ Such dogmatic insistence in attributing to me a view I expressly disclaim is beyond strange,

19. Craig’s First Critique, *supra* note 2, at 31.

20. *Id.* (quoting HAMBURGER, UNLAWFUL, *supra* note 1, at 23).

21. *Id.*

22. *Id.*

23. Indeed, he offers no proof of this, other than the above-quoted passage in which I explain that extralegal does not mean unauthorized. *Id.*

and his pretending that my argument is not there does not make it go away. He is not irrational, however, in refusing to recognize the extralegal character of prerogative power, for he thereby preserves his ability to distinguish prerogative from administrative power on the mistaken assumption that the former was unauthorized and unlimited by statute.²⁴

When Craig misinterprets my “extralegal” to mean sometimes unauthorized, he is confusing prerogative authority with prerogative paths of power. Both came at least notionally through the king and thus were called “prerogative”; but this is not to say they were the same. The king’s prerogative authority could sometimes be exercised in the courts, as in cases of habeas corpus, but his prerogative avenues of power came through his prerogative courts – notably the Star Chamber and the High Commission – whose edicts were extralegal means of imposing legal obligation.²⁵ There thus were at least two dangerous traits of prerogative power: that some of it had an authority independent of statutes and thus unlimited by them, and that much of it was imposed not merely through the law and its courts, but through other mechanisms.

When this pair of dangers is recognized, Craig’s argument about the one becomes less obviously responsive to my argument about the other. Even if he were correct that prerogative power generally was unauthorized and unlimited by statute, and even if he were correct that administrative power is entirely authorized and limited by statute, would this really resolve the danger arising from the prerogative’s extralegal pathways? The English did not think so, for they developed their constitutional ideals in response to both dangers in the prerogative. Nor did early Americans think so, for in the U.S. Constitution, they even more systematically addressed both dangers. My book discusses both but focuses on extralegal power, as that is the problem that was most pervasive in prerogative power and remains pervasive in administrative power.²⁶ Accordingly, if an account of prerogative power is to

24. As if all of this were not enough, Craig also assumes that when I speak of the extralegal acts of *agencies*, I am speaking of extralegal acts of legislatures. *Id.* at 60 (“Legislation that Hamburger would classify as embodying ‘extralegal adjudication’ or ‘extralegal rulemaking’ was not thus regarded by the courts.”). My book carefully does not confuse the extralegal character of administrative acts with any such conclusion about the statutes that authorize them.

25. For the king’s prerogative in habeas, see Philip Hamburger, *Beyond Protection*, 109 COLUM. L. REV. 1823, 1906–07 (2009).

26. My book’s Introduction explains:

Absolute power (as already suggested) traditionally had multiple components – three of which will matter here. Most basically, it was the power exercised outside the law. In addition, it tended to be exercised above the law. And where, as usual, it combined the otherwise separate legislative, judicial, and executive powers, it was consolidated.

In contrast, a fourth version of absolute power is much less significant for understanding administrative law – this being the conception of absolute power as unlimited. Extra- and supralegal power often escaped the limits of law,

be responsive, it must be more than historically accurate; it also must address the dangers of, and constitutional obstacles to, extralegal power.

C. *Why So Many Errors?*

How did Craig come to be so confused about all of this – about both the history and the responsiveness of his argument? Why so many errors?

Craig seems to be misled in part by his tendency to think about prerogative power in terms of the king's personal authority. In his words, prerogative power was power exercised "by the King for himself."²⁷ This is a romantic thought, and it sometimes was even true (for example, as to pardons). But in most instances, a monarch exercised his prerogative power through prerogative commissions and other bodies, where administrators acted for him. Although the power of such bodies was justified in terms of the king's personal prerogative, the real question – as today – was about *their* power. Not even James I, therefore, thought he personally exercised all of the prerogative. As he explained, he depended on the members of his prerogative tribunals, who were "his shadows and ministers."²⁸ It undoubtedly is good entertainment, whether in Shakespearian plays or Hollywood movies, to imagine that kings always acted personally in their prerogative power, but it is bad history.

In fact, the prerogative power was often very bureaucratic, just as contemporary administrative power is often very personal. Notwithstanding that the Crown's propagandists spoke of the king's personal power, the Star Chamber bureaucratically commissioned expert reports, collected data, and on this basis, issued regulations in its decrees. Nowadays, admirers of the administrative state speak of its bureaucratic expertise and neutrality, but it is under the watchful control of ORIA, the White House, and the President. Evidently, the prerogative already was moving toward the bureaucratic, and the administrative now is moving toward the personal. It thus is a profound mistake to take the personal theory of prerogative power so far as to assume that this power was fundamentally different from administrative power.

Craig also seems to be misled by the arguments of Crown lawyers. Such men, in their more conceptual arguments, distinguished between the king's absolute and his ordinary prerogative – one of their goals being to claim that the former sort, being based in the king's independent authority, and exercised extralegally (through means other than ordinary law), was un-

and absolute power therefore could be viewed as unlimited power. Administrative law, however, is not entirely unlimited. Although it suffers from many problems, it is absolute mostly in the first three ways mentioned here, and this is serious enough.

HAMBURGER, UNLAWFUL, *supra* note 1, at 25.

27. Craig's First Critique, *supra* note 2, at 59.

28. HAMBURGER, UNLAWFUL, *supra* note 1, at 53.

limited by law.²⁹ Craig seems to focus so much on their most extreme conclusions about the absolute prerogative as to believe that prerogative power generally was not authorized or limited by statute. But not even Crown lawyers thought that, for they acknowledged that a large part of the king's prerogative – the ordinary prerogative – was exercised through ordinary law and was limited by statute.³⁰

In failing to notice the distinction between the absolute and ordinary prerogative, Craig also assumes that the prerogative, as a whole, was subject to the decisions of the courts.³¹ But one of the primary purposes of Crown lawyers in distinguishing between the two types of prerogative was to keep absolute power out of the courts. As put by James I, the absolute prerogative was “not lawful to be disputed,” and some of the judges agreed.³²

Even worse, Craig seems to take Crown lawyers at their word when they exuberantly claimed that the absolute prerogative was unlimited by law, including statute. Even in their theory of absolute power, however, they backtracked, for they acknowledged that this power could be limited by law – specifically by statute – when the king, in his absolute power, chose to submit to law. In the words of the early seventeenth-century Attorney General for Ireland, Sir John Davies, “by the positive law the king himself was pleased to limit and stint his absolute power, and to tie himself to the ordinary rules of law, in common and ordinary cases.”³³ This was a necessary caution, for (as noted in Part I.A) much of the king's supposedly absolute power really was limited by statute and sometimes even derived from it.

The larger problem is that Craig seems to be stuck in a conventional vision of absolutism, in which absolute power is unauthorized and unlimited by law and thus fundamentally distinct from administrative power. This vision prevailed in parts of the Continent, and it remains powerful in the contemporary historical imagination. Craig seems to adopt a peculiar version of this perspective, in which prerogative power was not authorized or delimited by statute – thus distinguishing it from administrative power.³⁴

But Craig's vision of a statute-free prerogative is a perverse description of prerogative power in England, where Parliament had long been the king's

29. *Id.* at 285–86 (quoting FRANCIS BACON, *THE ELEMENTS OF THE COMMON LAWS OF ENGLAND* 38 (1992)). For the difference between absolute and ordinary power, see FRANCIS OAKLEY, *OMNIPOTENCE, COVENANT, & ORDER: AN EXCURSION IN THE HISTORY OF IDEAS FROM ABELARD TO LEIBNIZ* 109–16 (1984).

30. OAKLEY, *supra* note 29, at 115–16.

31. He writes: “The existence and extent of prerogative power were thus determined by the courts.” Craig's First Critique, *supra* note 2, at 13. *See also id.* at 29 (“[T]he courts placed limits on the exercise of prerogative adjudication.”).

32. OAKLEY, *supra* note 29, at 115.

33. *Id.* at 109 (quoting SIR JOHN DAVIES, *THE QUESTION CONCERNING IMPOSITIONS, TONNAGE, POUNDAGE* 30–32 (1656)); *see also id.* at 109–12 (Oakley's analysis and his comment that “[t]he rhetoric of their overeager propagandists to the contrary . . . popes, emperors, and kings were not God”).

34. Craig's First Critique, *supra* note 2, at 13.

high court with final and thus absolute power, where the king continually was struggling against statutory limits on his prerogative, and where even absolute power often had to be couched in law, not least in statutory authority and limits.³⁵ All of this was evident even prior to the English Revolution of the 1640s. And after the abolition of the Star Chamber and the High Commission in 1641, the statutory limits on prerogative power were the corner stone of English government.³⁶ If anything was resolved by Parliament's seventeenth-century triumph over the Crown, it was that the royal prerogative was subject to statute.

D. Extralegal

The abolition of the Star Chamber makes abundantly clear that the problem with this central prerogative tribunal was not that its power was "independent" of statute, but that it acted abusively and extralegally. Craig, however, seems determined to rewrite the history of prerogative power – even to the point of giving an imaginary account of the reasons for the abolition of the Star Chamber.

In putting an end to the Star Chamber's abuses, Parliament in 1641 saw no need for an extralegal or extraordinary mode of justice. As put by Parliament, "all matters" that had been decided in Star Chamber could "have their proper remedy and redress . . . by the common law of the land and in the ordinary course of justice."³⁷ But Craig has no patience with Parliament's reasons for abolishing the Star Chamber and invents his own – recasting the seventeenth-century objections to prerogative power in terms that leave room for contemporary administrative power. To be precise, he says that the Star Chamber was abolished because of its "general subject matter authority" without regular judicial review, and he thereby suggests that Parliament was carving out space for what Craig associates with administrative power, name-

35. PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* 242–47 (2008) (regarding Parliament's absolute power, and quoting, for example, CHRISTOPHER ST. GERMAN, *A TREATISE CONCERNING THE DIVISION BETWEEN THE SPIRITUALTIE AND TEMPORALTIE* 24 (1532) ("[T]he Parliament hath an absolute power . . .")).

36. An Act for the Regulating of the Privy Council and for Taking Away the Court Commonly called the Star Chamber 1641, 16 Car., c. 10 (Eng.); An Act for the Repeal of a Branch of a Statute Primo Elizabeth Concerning Commissioners for Causes Ecclesiastical 1641, 16 Car., c. 11 (Eng.).

37. An Act for the Regulating of the Privy Council and for Taking Away the Court Commonly called the Star Chamber 1641, 16 Car., c. 10 (Eng.); HAMBURGER, *UNLAWFUL*, *supra* note 1, at 138. Of course, Parliament did not live up to its ideals. For the significance of the word "ordinary," in contrast to "absolute," see OAKLEY, *supra* note 29, at 43, 63 (regarding the difference between exercising power regularly, through ordained law, and irregularly, outside such law); WILLIAM J. COURTENAY, *CAPACITY AND VOLITION: A HISTORY OF THE DISTINCTION OF ABSOLUTE AND ORDAINED POWER* 87 (Pierluigi Lubrina ed., 1990) (on the earlier history of such language).

ly, agencies that carry out a “specific statutory task” subject to “judicial review”:

[A] statute concerning adjudication would be regarded as constitutionally problematic if it established a judicial organ with general subject matter authority that was separate from the regular courts, which was subject to no review or appeal by any other regular judicial organ, and which was under the control of the executive, in the sense of serving its will. This is in effect what the Star Chamber became in the seventeenth century, hence its abolition.³⁸

This decidedly was *not* Parliament’s reason for abolishing the Star Chamber, as is clear from Parliament’s own words. But Craig knows better. If he were true to the seventeenth-century sources, he would have acknowledged that a central problem with binding prerogative power was that it almost always involved edicts that did not come through the ordinary course of lawmaking and adjudication. He then might have understood why prerogative power is so important for understanding administrative power. Instead, as he does so often, Craig simply rewrites history in contemporary terms.³⁹

And this brings the question of prerogative to its primary contemporary significance. Although Craig seems determined not to admit as much, my book argues that a characteristic feature of both absolute prerogative power and of administrative power is that they bind extralegally – in the sense that they impose legal obligation not merely through law, but through other sorts

38. Craig’s First Critique, *supra* note 2, at 30–31. In laying out his paradigms of administrative power, Craig writes about the “specific task” or the “specific statutory task” of an administrative agency. *Id.* at 15. For his vision of judicial review of administrative power, see *id.* at 6, 10–11.

39. Another example of Craig’s rewriting of old law to match contemporary administrative doctrine can be seen in his treatment of the 1539 Act of Proclamations. Without any sixteenth-century quotations, he describes this as a statute “whereby Parliament gave an open-ended substantive regulatory power to the executive, which was not subjectmatter specific, to make rules without further recourse to Parliament, which rules would then be given the force of an Act of Parliament.” *Id.* at 14. In thus suggesting that what “was especially constitutionally problematic was the grant of a general statutory authority,” he washes away any possible constitutional implications for “subjectmatter specific” administrative rules. *Id.* at 13–14.

Similarly, he restates the 1610 *Case of Proclamations* in a way that legitimizes specialized prerogative lawmaking, saying it is “clear constitutional authority for the proposition that the prerogative that enabled the Crown to regulate some aspects of trade did not extend so as to accord it a generalized regulatory power to make rules concerning trade broadly conceived.” *Id.* at 13. In fact, Coke stated that the king “by the laws of this realm cannot by his proclamation create anything to be an offense which not an offense before against the laws of this realm.” HAMBURGER, UNLAWFUL, *supra* note 1, at 47. As for how the *Case of Proclamations* was understood by a prominent eighteenth-century legal source, see *infra* Part II.B and accompanying text on Matthew Bacon.

of edicts. This was true of the High Commission, and it remains true of the Environmental Protection Agency. This extralegal power certainly is not the only problem with prerogative monarchy and the administrative state. But it is the enduring problem that runs through both the old absolute prerogative power and contemporary administrative power, and it is a problem regardless of statutory authorization and limits.

To sum up, much prerogative power had statutory authorization and limits, and such things are therefore a poor foundation for distinguishing between prerogative and administrative power. Moreover, even if prerogative power were entirely of the high-flown sort imagined by Hollywood and Craig, its alleged independence from statute would be unresponsive to the danger of extralegal power – the danger that government can create legal obligation through edicts that are not those of the legislature and the courts. This was a consistent problem with prerogative power, and it has been revived by administrative power.

II. ADMINISTRATIVE POWER

Professor Craig correctly observes that in seventeenth- and eighteenth-century England, there were local and other instances of what nowadays would be called “administrative power.”⁴⁰ Of course, it did not traditionally have this name, but Craig uses the label “administrative power” to suggest that such power, not prerogative power, was the antecedent of contemporary administrative power. And he repeatedly observes that Parliament authorized such power and the courts did not condemn it. How, then, he asks, could English constitutional experience and ideas have been the basis for an American rejection of administrative power?⁴¹

The answer, in brief, is that English prerogative power provoked the development of English constitutional ideals that condemned extralegal power. In England, these ideals were deployed mostly against centralized prerogative power rather than localized versions of extralegal power.⁴² And in any case, because of Parliament’s absolute power, Parliament did not have to follow these ideals, and the courts had to follow Parliament. On the other side of the Atlantic, however, especially in the federal Constitution, Americans pursued the ideals against extralegal power much more systematically.

40. Craig’s First Critique, *supra* note 2, at 19–27, 38–57.

41. *Id.* at 4–5 (“[W]hatsoever US courts and commentators choose to make of Philip Hamburger’s thesis in the modern day they should not believe that it represents the legal and constitutional realities from England that American colonists, or the framers of the American constitution, would have been familiar with.”).

42. For my understanding of “localized” to mean local and otherwise non-centralized, see *infra* Part II.B.

A. Evidence of English Administrative Power

The starting point must be the evidence. Both my book and Craig's article observe the existence in seventeenth- and eighteenth-century England of what nowadays would be called administrative power. There thus is at least some agreement between us.

Craig recites more than a half-dozen different types of administrative power in seventeenth- and eighteenth-century England. He discusses local governance (overseen by justices of the peace and their sessions).⁴³ He explores commissions of sewers (or drainage), bankruptcy commissions, and the excise commissioners.⁴⁴ He also observes the administrative regulation of cattle distemper, occupational self-regulation (citing that by Thames watermen and the Norwich worsted traders), and the regulation by enclosure commissions and turnpike trustees.⁴⁵ If my book ignored all of this, it must be pathetically weak in its history and dead wrong in its claims about the English constitution.

But of course my book discusses most of these traditional types of Anglo-American administrative power – the majority of them, excluding only the occupational, enclosure, and turnpike regulation.⁴⁶ And my book adds important examples that Craig omits, including general warrants, writs of assistance (authorizing customs searches), and the Privy Council's adjustment of duties on American goods.⁴⁷ In other words, he and I discuss largely the same examples of seventeenth- and eighteenth-century English administrative power, and even where we do not, we are more or less on par in listing sorts that the other omits. Neither of us aims to enumerate all English administrative regulation – the point being merely to illustrate it.

Of course, Craig's account of administrative power may seem more bulky than mine, but not always for reasons that are relevant. Craig recites *nineteenth-century* English administrative evidence, such as guardians of the poor, commissioners of tithes, commissioners of railways, and factory inspectors – as if such things were evidence of *eighteenth-century* English law!⁴⁸ He even relies on *nineteenth-century* English administrative legislation, ap-

43. Craig's First Critique, *supra* note 2, at 10, 59.

44. *Id.* at 10, 18, 21–23, 29 (sewers); *id.* at 10, 35, 39–45 (bankruptcy); *id.* at 10, 26–27, 36, 45–51 (excise).

45. *Id.* at 20 (cattle distemper); *id.* at 20–21 (occupational); *id.* at 51–54 (enclosure); *id.* at 55–57 (turnpikes). Incidentally, Craig overstates the administrative character of turnpike trustees, but there is no need to pursue the point here.

46. HAMBURGER, UNLAWFUL, *supra* note 1, at 100–03, 151–54 (justices of the peace); *id.* at 100, 103 (licensing of alehouses); *id.* at 98–99, 205–06, 220 (sewers); *id.* at 178, 220 (bankruptcy); *id.* at 206–08, 220 (excise).

47. *Id.* at 183–86 (general warrants); *id.* at 186–90 (writs of assistance); *id.* at 383 (Privy Council duties).

48. Craig's First Critique, *supra* note 2, at 10 (guardians of the poor); *id.* at 10 (commissioners of railways); *id.* at 10, 14 (commissioners of tithes); *id.* at 10, 37 (factory inspectors).

parently on the theory that it merely “consolidated” past English practice.⁴⁹ For example, he extensively expounds the 1801 and 1845 Inclosure Acts, the 1821 Turnpike Roads Act, the 1827 Excise Management Act, the 1833 Sewers Act, and the 1834 and 1847 Poor Laws.⁵⁰ All of this is puzzling when used as evidence of eighteenth-century English law, let alone the formation of the 1789 U.S. Constitution. Topping it off, Craig sweepingly generalizes from what apparently are word counts in case reports covering the period 1220 to 1867.⁵¹ And *he* complains that my inquiry stretches “over 300 hundred years”!⁵² At least my evidence does not post-date the period I am studying.⁵³

At the same time that Craig bulks up his evidence, he disparages my recognition of administrative power in England by assuming that my arguments about the English constitutional rejection of extralegal power are claims that there was not much regulation in seventeenth- and eighteenth-century England:

Adam Smith’s free market ideas were two centuries away, and there was statutory regulation of diverse matters, including trades such as leather, alcohol, iron and cloth; wages; bankruptcy; poverty, unemployment and vagrancy; land use; and morality. . . . The later advent of free market principles led to some diminution in trade regulation, but there was also increased regulation in areas such as factories, health and the like, which is the backdrop to continuing historical debates as to whether the nineteenth century really ever was an era of laissez-faire.⁵⁴

He thereby gives the impression that my book argues for a libertarian past. This is exactly what my book does not argue, for it expressly avoids confusing the extent of regulation with the use of extralegal power to impose it.⁵⁵ My scholarship obviously makes no claim about a libertarian past, and it is wrong to suggest as much.

But leave aside Craig’s irrelevant bulking up of his evidence and his mistaken suggestion that I am claiming a bygone libertarianism; both of us recognize the existence of administrative power in seventeenth- and eight-

49. *See id.* at 26, 39, 47, 49, 51, 53.

50. *Id.* at 51–54 (inclosure); *id.* at 56 (turnpikes); *id.* at 26, 47–49 (excise); *id.* at 23 (sewers); *id.* at 24–25 (poor).

51. *Id.* at 36 (“Between 1220 and 1867 there were 6,637 separate citations to certiorari, 5,563 to prohibition and 7,111 to mandamus.”).

52. *Id.* at 40.

53. *Id.* at 4.

54. *Id.* at 9. *See also id.* at 58.

55. HAMBURGER, UNLAWFUL, *supra* note 1, at 2 (“In challenging the off-road driving, this book does not dispute the direction of substantive policy. For example, when this book objects to off-road exercises of binding power, it does not ordinarily question the policies thereby pursued by the government.”).

eenth-century England. And this is not a surprise, for such power is well known.

So the real difference between Craig and me is not so much in the empirical evidence as in our conclusions about what it shows. The key question – and he is right to ask it – is whether the evidence of administrative power in England calls into doubt my central argument that Americans could draw on an English constitutional tradition that rejected extralegal power. But what do the instances of administrative power show about English constitutional ideas?

B. Two Interpretations

Craig interprets the existence of English administrative power as proof that the English did not reject what I call extralegal power. On this basis, he questions whether the U.S. Constitution rejected such power. As presented by him, the evidence of English administrative power seems an irrefutable problem for my constitutional arguments about England and probably also America.

But what if the argument against administrative power is not as simplistic as he assumes? The primary point about the English is not that they obliterated all extralegal power, but rather that they explored constitutional ideals that generally rejected such power. Such ideals barred at least centralized extralegal power – although there were exceptions (evident from general warrants, Privy Council duties on American goods, and the powers of excise commissioners and their officers).

As generally stated, these ideals also might seem to collide with localized extralegal power (by which I mean local and other non-centralized extralegal power). As will be explained below, such ideals led lawyers such as Coke to frame at least local administrative power in relatively law-like ways.⁵⁶ On the whole, however, local and other non-royal administrative power persisted in practice unimpeded by high constitutional ideals. One reason was the tendency to conceptualize much localized administrative power as a matter of determinations rather than of lawmaking or judicial power. Although lawyers tended to strain the determination theory beyond what was plausible, they thereby minimized the potential for conflict with constitutional ideas. More fundamentally, it should be kept in mind that the immediate problem in the seventeenth century was the king's extralegal power, not localized extralegal power. Accordingly, notwithstanding that general constitutional ideas had been employed to defeat the king's extralegal power, there was little interest in using such ideals to eradicate the localized versions.

My book therefore concludes that the English did not apply the constitutional ideals against extralegal power as systematically as did Americans in

56. *See infra* Part II.E.

the U.S. Constitution.⁵⁷ Put another way, whereas Craig views the existence of localized administrative power in England as proof that there was no English constitutional rejection of extralegal power, I view such instances of administrative power as limitations and exceptions – as instances in which the English turned a blind eye to their constitutional ideals that barred extralegal power.

None of this should be a surprise. The central political event of the seventeenth century was the English Revolution of the 1640s and the intellectual revolution that came with it, including constitutional ideals about limiting power. These ideals included, as elaborated in my book, ideals of rule through and under law and ideals about limiting both royal and Parliamentary (or executive and legislative) power. Partly in response to the ideal of rule through law, the English abolished the Star Chamber and other royal mechanisms for binding subjects extralegally. The English, however, dealt only with the problem in front of them. They therefore did not address Parliament's absolute power – indeed, they affirmed Parliament's absolute power by using it as a counterweight to the king's absolute power. Nor did they reject localized administrative power. Many of their constitutional principles were general, but they did not apply them systematically. Thus, many English instances of administrative power survived and developed as exceptions or limits to more general constitutional ideals that rejected extralegal power.

Of course, there were conflicting views of the English constitution and its ideals. The dominant constitutional theory, that of Parliamentary supremacy, could justify Parliament in authorizing extralegal power – a binding power imposed not merely through acts of Parliament and the courts, but through other edicts. But even many of the Englishmen who accepted Parliament's supremacy also expected Parliament to live up to other constitutional ideals – for example, about juries – that had evolved in response to extralegal prerogative power.

A more limiting theory of the constitution came from some of the most prominent legal sources available in America. Matthew Bacon's *New Abridgment of the Law*, for example, observed that “it seems clearly agreed, that the king cannot by his proclamation change any part of the common law, statutes, or customs of the realm; nor can he by his proclamation create any offence which was not an offence before.”⁵⁸ In thus expounding the *Case of Proclamations*, the *Abridgment* explained the underlying reason: “these

57. HAMBURGER, UNLAWFUL, *supra* note 1, at 12 (“This antiprerogative stance developed initially in the English constitution, and it was pursued most systematically in the U.S. Constitution.”); *id.* at 189 (“The response of Americans to the writs of assistance thus reveals how systematically the U.S. Constitution barred any return to administrative orders and warrants.”).

58. 8 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW 80 (Sir Henry Gwyllim & Charles Edward Dodd eds., 1876).

things cannot be done without a legislative power, of which in our constitution the king is but a part.”⁵⁹

Taking such ideas further, English radical Whigs recalled the broad constitutional ideals of the past century and envisioned a more complete constitutional rejection of extralegal power than prevailed among most of their contemporaries. They worried, on the one hand, about the revival of royal prerogative power and, on the other, about suggestions that Parliament was absolute. The Swiss theorist DeLolme popularized some of their ideas when he wrote: “The basis of the English constitution, the capital principle on which all others depend, is that the legislative power belongs to Parliament alone; that is to say, the power of establishing laws, and of abrogating, changing, or explaining them.”⁶⁰ In this way, although radical Whigs and sympathizers such as DeLolme had little to say about localized administrative power, they

59. HAMBURGER, *UNLAWFUL*, *supra* note 1, at 43 (quoting BACON, *supra* note 58, at 80). Incidentally, my book explains:

Of course, it may be supposed that the Revolution of 1688 established legislative supremacy, and that Parliament therefore could delegate its legislative power, but there were different interpretations of the Revolution. Some commentators understood it to have simply shifted power from the Crown to Parliament, thereby giving the latter absolute power, in the sense of supralegal and unlimited power. But others understood the Revolution to have restored the English constitution, including limits on Parliament. Moreover, even many of those who accepted a sort of absolute power in the legislature assumed that this high power could constitutionally reside only in Parliament. Thus, notwithstanding divergent constitutional theories, there was a substantial body of opinion that Parliament could not transfer its lawmaking power. On this basis, as has been seen, David Hume concluded that, when Parliament “gave to the king’s proclamation the same force as to a statute enacted by parliament,” it “made by one act a total subversion of the English constitution.”

Id. at 49. Elsewhere, my book repeats:

From one perspective, the absolute power of the Crown had been defeated by the absolute power of Parliament, thus leaving Parliament with a supralegal power above the law. From another perspective, however, Parliament had prevailed not so much on claims of absolute power as on claims of law, and being subject to law, it was limited by law. In this understanding, although Parliament was the high court, and thus was beyond any appeal to the other courts, it nonetheless was bound to adhere to the law, including the constitution made by the people. In this vision of the constitution, which would become that of radical Whigs and of Americans, only the people, not Parliament, could transfer Parliament’s legislative power, including its power of taxation.

Id. at 62 (citations omitted).

60. *Id.* at 49. Contrary to what Craig suggests, Craig’s First Critique, *supra* note 2, at 28, it was DeLolme, not me, who “expressed the whig understanding that, after the abolition of the Star Chamber, the Crown was confined to its ‘true constitutional office,’ which included executing the law, but not adjudicating it.” HAMBURGER, *UNLAWFUL*, *supra* note 1, at 141.

kept alive the constitutional ideals that could have disruptive implications for such power.

When Americans rejected Parliament and its supremacy, and when they established constitutional limits on all government power, they naturally recalled seventeenth-century English experience and the ideals that had come out of that crucible. And their guides in turning to that history and its intellectual product were legal sources such as Bacon's *Abridgment*, the radical Whigs, and writers like DeLolme.

Of course, none of this was determinative of what Americans would do, but Americans inherited some ideals that cut generally against extralegal power, and they tended to apply their versions of them far more systematically than the English. As will be discussed below, Americans retained much localized administrative power in the states, and even under the U.S. Constitution, there were some complicated questions at the margins.⁶¹ On the whole, however, in the U.S. Constitution, Americans systematically barred extralegal power, including much of the localized administrative power that the English retained.

English administrative power of the seventeenth and eighteenth centuries thus does not disprove the existence of constitutional ideals opposed to extralegal power. On the contrary, the survival of English administrative power shows how systematically Americans pursued such ideals in the U.S. Constitution.

C. Austinian Methodology

How does Craig go so wrong? How does he conclude that English administrative power means that the English did not have a constitutional heritage that condemned extralegal power – a heritage that Americans could have drawn on? One answer is his reliance on positivist or Austinian assumptions to understand the history of law. John Austin was the most notorious proponent of legal positivism, but he did not use it to butcher history.⁶²

Craig's most basic Austinian error is his use of positive measures of law to understand constitutional ideals. He repeatedly focuses on what Parliament or the courts permitted or barred, as if ideas about the English constitution can be measured by looking simply at what Parliament and the courts did.⁶³ He undoubtedly is correct that Parliament authorized English adminis-

61. See *infra* Part II.E.

62. For Austin's positivism, see JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (1834).

63. Craig's First Critique, *supra* note 2, at 34 (“[N]ot supported by the English jurisprudence.”); *id.* at 53 (“There is no hint that this regulatory model was regarded as extralegal or constitutionally illegitimate by Parliament.”); *id.* at 38 (“The grant of such power was not, however, regarded as constitutionally illegitimate by Parliament or the courts, nor was it perceived to be the exercise of extralegal authority”); *id.* at 50 (“There is, however, no indication that the ordinary courts felt that the administrative regime for excise collection was extralegal or constitutionally suspect.”); *id.* at 54

trative bodies and that neither Parliament nor the courts rejected most English instances of administrative power as unlawful. Accordingly, if Parliament and the courts were the end of the matter, he would have a point.

But this positivist measure of constitutional law is very odd when studying England. In a country with Parliamentary sovereignty and an unwritten or customary constitution, much constitutional law is apt to consist of ideals, not merely what statutes or the courts do. Nonetheless, Craig measures English constitutional law on administrative power by looking at what Parliament and the courts did.⁶⁴

Craig's second Austinian error is to assume the unity and consistency of law. He assumes that general English constitutional ideals and particular instances of English power corresponded so consistently that if there were particular instances of administrative power, it cannot be said that general constitutional ideals barred extralegal power – as if English law could be reduced to a single consistent thing, in which all particulars matched a uniform generality. He thus takes for granted that the instances of administrative power on the ground disprove the existence of general constitutional ideals that Americans could draw upon. But was there a single English vision of law, which was so consistently applied that one can measure the constitutional ideals merely by looking at particular instances of administrative power?

In short, even if Austinianism were good law, it is terrible history. With this simplistic view of law, and even worse guide to history, Craig goes so far in assuming positivism and consistency that he fails to discuss the possibility of broader ideas of the constitution. And, astonishingly, he evidently understands the narrowness of his approach, for he emphasizes that he is talking about English “constitutional realities,” thus very nearly conceding that he is omitting English constitutional ideals.⁶⁵

A better approach is to recognize layers of constitutional thought, including not only the decisions of Parliament and the courts, but also constitutional ideals. Even a single individual will at times have conflicting general conceptions and will often depart from them in his particular actions. These discordant tendencies are all the more evident when one is studying a nation.

(“There is equally no hint that the regime in this legislation was regarded as constitutionally illegitimate by the courts.”); *id.* at 60 (“Yet even this gives only a partial picture of how the administration was seen by the courts” and “the lack of fit between Hamburger’s analysis and what the courts were actually doing.”).

64. See generally Craig’s First Critique, *supra* note 2. Interestingly, as noted in my book, English positivism developed from Continental, especially Prussian, administrative ideas. The Continental model of administrative power was what spurred Jeremy Bentham’s interest in what became positivism, and Austin was not without his own German connections. See HAMBURGER, UNLAWFUL, *supra* note 1, at 445, 610–11 n.12. It therefore is rich that Craig relies on their thought to brush aside English constitutional ideals.

65. See, e.g., Craig’s First Critique, *supra* note 2, at 5 (noting “constitutional realities”).

One therefore cannot assume that the existence of administrative practices disproves the existence of contrary constitutional ideals.

In fact, English constitutional ideals went in divergent directions. It has been seen that one vision accepted as constitutional whatever Parliament did, thus reducing the constitution to Parliamentary supremacy, but even this often came with limiting ideals.⁶⁶ Another vision, which was espoused by some lawyers and taken further by radical Whigs, insisted that there were constitutional limits on what Parliament could lawfully do.⁶⁷ In this constitutional tradition, all legislative power was in the legislature, the judicial power was in the courts, and any other exercise of binding power was dangerously unlawful.⁶⁸

Even when Englishmen did not embrace the radical Whig vision of the constitution, they often could recognize that what Parliament allowed in local administrative power departed from what they conceived to be their constitutional rights. For example, Henry Homer introduced his 1766 guide for enclosure commissioners by observing:

The constitutional method established among us of deciding disputes about property, is by an appeal to twelve men. . . . The witnesses on both sides [of] the question are examined in a very solemn manner in open court, in the hearing of the most learned of the law, the Reverend the Judges. . . . This ceremony takes place when the matter in dispute is even of less value than five pounds. . . . How different is the method of settling the rights of proprietors upon enclosures! on which occasions the adjusting of property of forty or fifty thousand pounds value is left to the arbitration of a majority of five, often persons of mean education, without any guide to conduct them, and yet without any legal appeal against their decisions, even in cases of unjust judgment.⁶⁹

Indeed, enclosure determinations were problematic, and although Homer understood that no court would hold the determinations or the authorizing statutes void, he could observe the constitutional difficulty and seek to minimize it.

Put generally, in response to the prerogative, the English prominently developed at least some constitutional ideals that rejected extralegal power, and administrative power could be in tension with these ideals. Parliamentary supremacy offered another, more forgiving, set of constitutional ideals, but even under these ideals, administrative power could seem to violate constitutional rights. All of these contradictions, although not compatible with Austinianism, are what one would expect in England's legal system.

66. HAMBURGER, *UNLAWFUL*, *supra* note 1, at 62.

67. *Id.* at 73.

68. *See id.* at 21–24.

69. HENRY HOMER, *AN ESSAY ON THE NATURE AND METHOD OF ASCERTAINING THE SPECIFICK SHARES OF PROPRIETORS, UPON THE INCLOSURE OF COMMON FIELDS* v–vi (1766).

The key point is that, notwithstanding Craig's Austinianism, there were ideals of the English constitution that rejected extralegal power, and these ideals impressed many Americans. Indeed, American constitutions, especially the U.S. Constitution, pursued versions of such ideals more systematically than the English. On this, the evidence is abundantly clear, and the existence of English deviations takes nothing away from this conclusion.

D. Forgetting Three Revolutions

In imagining that the existence of administrative power in England somehow negates the existence of constitutional ideals that, at least in America, would bear down on administrative power, Craig goes beyond an Austinian approach to history; he also ignores some basic historical elephants. He ignores the key political revolution in each century of Anglo-American history that he discusses: the English Revolution, the American Revolution, and the German introduction of administrative power.

Revealingly, Craig has nothing – absolutely nothing – to say about the English Revolution of the 1640s and the associated constitutional ideals. Just how far Craig goes in trying to avoid recognizing the Revolution and the associated rejection of extralegal power, at least as to the absolute prerogative, has been seen in his account of the abolition of the Star Chamber (in Part I.D). Of course, if one airbrushes away the English Revolution and the constitutional ideals that pushed back against extralegal power, then it is easy to point to local and other non-centralized administrative power to repudiate the idea that the English developed ideas that cut against extralegal power. But if one includes the English Revolution in one's vision of history, one cannot avoid seeing the rejection of extralegal power.

When Craig gets to the eighteenth century, he ignores the absolute power of Parliament and how it was rejected in the American Revolution. He repeatedly observes that Parliament authorized administrative power and that the courts accepted this, but what he does not even mention is that Parliament was widely assumed to have what Blackstone knowingly called an “absolute despotic power.”⁷⁰ Nor does Craig have anything to say about the rejection of such power by many lawyers, by radical Whigs, and by Americans in the Revolution. In fact, a central point of the American Revolution was to reject Parliamentary absolutism. As Iredell recalled in North Carolina in 1786, Americans “were not ignorant of the theory of the necessity of the legislature being absolute in all cases, because it was the great ground of the British pretensions.”⁷¹ In this context, it is unremarkable that the English retained some extralegal power and that the U.S. Constitution more systematically rejected such power. In short, it needs to be understood that the English accepted

70. HAMBURGER, *UNLAWFUL*, *supra* note 1, at 74 (quoting 1 WILLIAM BLACKSTONE COMMENTARIES ON THE LAWS OF ENGLAND 160 (1765)).

71. *Id.* at 424 (quoting JAMES IREDELL, *To the Public, in LIFE AND CORRESPONDENCE OF JAMES IREDELL* 145, 146 (Griffith J. McRee ed., 1949)).

administrative power under a system of absolute Parliamentary power, and that this does not discount either the existence of countervailing constitutional ideas in England or the American pursuit of such ideas during and after the American Revolution.

Topping off his indifference to the English and American Revolutions, Craig ignores the transformative role of Continental absolutist ideas.⁷² Many of the seventeenth- and eighteenth-century administrative bodies that Craig treats as traditionally English (for example, commissions of sewers, bankruptcy, enclosures, and excise) followed civilian inquisitorial process rather than the common law's due process of law, and they thus can be viewed as early imports of extralegal power.⁷³ As Matthew Hale explained when discussing the due process required in courts of law, the civilian-style commissions proceeded by "other rule or trial than the common law."⁷⁴ This inquisitorial process was the traditional opposite of the due process of law, and the English therefore remained reluctant for a long time after the English Revolution to expand the spheres of English life that could be governed by it. Of course, as I have explained before, English "deviations from the due process of law were justified by acts of Parliament, which claimed a power not limited by constitutional rights or allocations of powers."⁷⁵ But in America, the due process and other constitutional problems with civilian-style commissions could not be so easily brushed aside.

It is serious enough that Craig fails to recognize the Continental derivation and character of much seventeenth- and eighteenth-century English administrative power; even more sobering, however, is his complete indifference to the nineteenth-century transformation of American governance on the basis of Continental, and especially German, administrative ideas.⁷⁶ At least until 1914, the founders of American administrative power tended to admit quite candidly that the Continental states had developed administrative power from the old absolute power and that it was necessary to study the administrative scholarship of the Prussians because they had perfected administrative power.⁷⁷ The Americans who took this path sometimes tried to justify what

72. For such ideas, see *id.* at 441–78.

73. *Id.* at 220.

74. *Id.*

75. *Id.*

76. This is not the place to explore the development of modern administrative power in England, but it is worth noting that, although Craig alludes to the English establishment of boards of health in 1848, he does not recognize that they candidly were based on the German model. Craig's First Critique, *supra* note 2, at 9; HAMBURGER, UNLAWFUL, *supra* note 1, at 454.

77. For example, as my book explains about Woodrow Wilson:

Wilson candidly admitted the mixed blessing of this "absolute" Prussian heritage. "We should not like to have had Prussia's history for the sake of having Prussia's administrative skill; and Prussia's particular system of administration would quite suffocate us. It is better to be untrained and free than to be servile and systematic." He hoped, however, for the best of both worlds:

they were doing by looking back to localized English administrative practices, but it is abundantly clear that the German ideas were central – that they inspired and were used to justify much of what became American administrative power.⁷⁸ Craig, however, does not seem to recognize that the development of twentieth-century federal administrative power came largely through Prussia.

Overall, Craig’s article lacks any recognition of the continuity of one of the most fundamental of legal problems. In a system of law, there is a persistent danger that rulers will be tempted to govern through other mechanisms, and this has led to a lasting tension between rule through the avenues of law (the acts of the legislature and the courts) and rule through other paths. This is why my book focuses not merely on prerogative or administrative power, but ultimately on extralegal power. The problem of extralegal power is enduring, and it is a profound mistake to ignore this reality.

Once one recognizes the continuing danger, one can look far beyond English history to see the risk for the United States. The point is not merely to understand the Constitution’s rejection of extralegal power, although this is important. Even more seriously, the goal is to recognize history as a form of experience, from which one can learn about recurring human dangers and the possible solutions. But one cannot do any of this if one refuses to acknowledge the elephants.

E. Centralized Prerogative v. Localized Administrative

Notwithstanding the failings of Craig’s approach to the history, his article draws attention (even if clumsily) to an interesting question about the place of localized and especially local administrative power in a system whose constitutional principles generally reject extralegal power. As already noted, although the English in the mid-seventeenth century rejected their central prerogative or administrative bodies – the Star Chamber and the High Commission – they continued to have a wide range of local and non-royal administrative bodies. What was the relationship between the rejection of the central prerogative tribunals and the retention and even expansion of other administrative bodies?

When the English developed constitutional principles in response to prerogative power, they did not resolve the question of localized administrative

“Still there is no denying that it would be better yet to be both free in spirit and proficient in practice. It is this even more reasonable preference which impels us to discover what there may be to hinder or delay us in naturalizing this much-to-be-desired science of administration.” He thereby brushed aside the conflict between administrative power and American liberty. Indeed, as will be seen shortly, he already was anticipating how there might be German-style solutions to the American constitutional objections.

HAMBURGER, UNLAWFUL, *supra* note 1, at 459.

78. *Id.* at 462–71.

power on a theoretical level. In most instances, however, they tempered localized administrative power to avoid its “absolute” character – here, meaning its arbitrary discretion – and in this way moved toward what would later be considered a *Rechtsstaat* approach.

The attempt to tame localized administrative power – to make it less inconsistent with the development of constitutional ideals – is not recognized by Craig, but it is essential for understanding the coexistence of this lowly power with the higher ideals. For example, Craig assumes that my account of determinations by commissions of sewers is to be taken literally – as if they were “merely determinations” and thus fully distinguishable from judicial decisions.⁷⁹ In fact, my book discusses how determinations could trespass on legislative and judicial power.⁸⁰ As to the latter, for example, the book explains that “these decisions could easily drift from mere determinations into extralegal adjudications, but the law went far in trying to prevent this” – mostly with doctrines that limited the discretion of those making determinations and that otherwise aimed to keep their determinations nonbinding.⁸¹ In summarizing this point, my book cautions that, whatever the realities, the work of commissions of sewers was “carefully structured in terms of determinations rather than binding adjudications. In reality, they probably exercised considerable judicial power, but it is telling that the law went so far in trying to treat their judicial power as a matter of mere determination.”⁸² This effort to reconcile localized administrative power with constitutional ideals is significant because it suggests that commissions of sewers and many other English instances of localized administrative power were understood to be in some tension with the higher ideals rather than evidence of them. These instances therefore “do not offer much legitimacy for the contemporary administrative exercise of judicial power.”⁸³

On the whole, local and other non-centralized administrative power in England remained an exception, which was tolerable for several reasons. First, doctrine usually tempered administrative discretion and otherwise limited the exercise of binding power; second, much of local administrative power was in the hands of justices of the peace, who could at least give judicial sanction to its judicial aspects; and third, it was local and in the hands of local elites, thus preventing it from becoming an instrument of centralized tyranny.

After the stillbirth of the 1849 Frankfurt Imperial Constitution, when German liberals lost their bid to establish a strong version of the *Rechtsstaat*, the Prussian jurist Rudolph von Gneist celebrated English administrative self-government, dominated by landowners and exercised through justices of the

79. Craig’s First Critique, *supra* note 2, at 29.

80. HAMBURGER, UNLAWFUL, *supra* note 1, at 98–99, 203–04.

81. *Id.* at 203–04. For the danger that their determinations could become a form of lawmaking, and the common response, see *id.* at 98–99.

82. *Id.* at 206.

83. *Id.*

peace, as a counterweight to the absolutist Prussian model.⁸⁴ Certainly, as compared to Prussian anti-constitutional absolutist doctrines, the English local model seemed a source of valuable ideals. Eighteenth-century Americans, however, began not with traditional Continental absolutism, but with a strong sense of constitutional ideals, drawn largely from the English rejection of the absolute prerogative. In America, therefore, localized administrative power was not a source of constitutional ideals but an awkward deviation from them.

This can be illustrated by determinations of legal duties. As already noted, determinations were apt to be stretched into binding legislative or judicial acts, and they therefore could easily collide with American constitutional principles. In explaining how they could drift into administrative legislation, my book explains:

The danger that the determination of duties would cross the line into an exercise of legislative will was especially a problem in local government. Although it could be swept under England's loose constitutional rug, it became painfully apparent in America, where the lines separating governmental powers were more sharply drawn.⁸⁵

To illustrate how Americans wrestled with this problem, the book recites how George Mason and his colleagues on the Alexandria County Court disagreed about a county levy. In Virginia, county courts served in an executive or administrative role when engaged in local governance, and in this role, they often imposed levies to maintain county buildings, on the theory that they were merely determining and giving notice of the duty to support county structures.

The potential for conflict between local determinations and constitutional principles can be illustrated by a dispute in Fairfax County, Virginia. A new courthouse had long been needed in Fairfax, but in 1789, under the leadership of George Mason, many justices of the Fairfax County Court refused to impose a levy for its construction. Although Mason had underlying political concerns, he and his allies on the court argued that “the power of levying by the [county] courts was destroyed by an express article in the bill of rights of this commonwealth” – perhaps the separation-of-powers provision, but more probably the one declaring that men “cannot be taxed or deprived of their property for public uses, without their own consent.” Either way, the objection was that the justices had to avoid a determination that drifted into the realm of legislative power. Traditionally, however, an assessment to replace a deteriorating courthouse had been accepted as

84. *Id.* at 472 (regarding the Imperial Constitution); MARTIN LOUGHLIN, LEGALITY AND LOCALITY: THE ROLE OF LAW IN CENTRAL-LOCAL GOVERNMENT RELATIONS 16–17 (1996).

85. HAMBURGER, UNLAWFUL, *supra* note 1, at 100.

a mere determination of a legal duty, and it therefore is not surprising that a majority of the court soon overruled Mason and his fellow protesters.

Their protest nonetheless is a reminder of the tension between American constitutional principles and the local determinations that easily could wander into legislative territory. These potentially wayward determinations had been drawn from England when America was under the English constitution, and they were retained in some states when Americans adopted their own constitutions. Accordingly, when taken too far, they could seem to be local departures or at least exceptions from American constitutional principles.⁸⁶

This illustrates that there were tensions between inherited administrative practices and American constitutional ideals.

The story also reveals how such administrative practices were treated as exceptions to the rule. Rather than proof that Americans accepted extralegal power, they were “inherited local exceptions from American constitutional principles.”⁸⁷

Most interestingly, the story is a reminder that the resolution of the tensions was different at different levels of government. Each state had its own constitution, and therefore it is difficult to generalize. But on the whole, just as Americans applied their constitutional ideals against administrative power more systematically than the English, so the Federal Constitution was more systematic than most state constitutions. Some state constitutions (such as that of Virginia) stated principles that precluded extralegal power, without usually being understood to bar at least some local administrative power (in counties and municipalities). And other state constitutions may have resolved the question differently. The Federal Constitution, however, repudiated all extralegal power, with only a few complications at the edges.

What were these complications? A few illustrations should suffice. Where Congress acted in place of the states, in the territories and the District

86. *Id.* at 100–01.

87. *Id.* at 101. My book observes:

Of course, at the state level, there were some historical anomalies, which survived from England. For example, commissioners of sewers persisted in some states and still enjoyed a judicial power to demand testimony. Along similar lines, . . . local justices of the peace continued in places to exercise something close to local legislative power in levying assessments for public works. It would be a mistake, however, to conclude too much from minor surviving instances of how local administrators could issue orders binding subjects in an exercise of judicial power. Like the anomalous persistence of minor legislative power in justices of the peace, the local administrative exercises of judicial power were inherited exceptions from prevailing constitutional principles rather than measures of these principles. They therefore are not revealing about federal constitutional law.

Id. at 222.

of Columbia, it felt free to authorize local licensing regulations and other administrative measures.⁸⁸ In addition, although Congress for a long time understood it could not authorize licensing as a means of executive regulation in domestic matters, it apparently felt it could allow such regulation in cross-border matters, notably as to Indian traders and steamboats.⁸⁹ In other areas, moreover, Congress soon changed its mind. For example, although it initially went out of its way to avoid giving administrative powers to excise commissioners, it took another position within a decade.⁹⁰

Thus, in both England and America, there was some tolerance for local and perhaps some other localized administrative power. But federalism allowed Americans in the U.S. Constitution to establish strong principles against extralegal power, without the sort of tension between constitutional principles and localized administrative practices that was evident in states such as Virginia. The U.S. Constitution, in other words, barred extralegal power more systematically than the states. And this was part of a more general layering of extralegal power, in which it was tolerated to some extent locally in the states, much less commonly at the state level, and hardly at all nationally.

F. Administrative Legitimization

This discussion must close by noting that Craig's article can be considered in the context of the long-standing attempts to legitimize administrative power by harking back to seventeenth- and eighteenth-century English "administrative" power.⁹¹ The effect of such efforts is to suggest continuity and constitutionality and to push aside concerns about the revival of extralegal power. There are, however, serious problems with placing much emphasis on traditional English administrative power for purposes of understanding contemporary administrative American power.

One problem is the very word "administrative." In emphasizing traditional English administrative power, and thereby dismissing the significance of the absolute prerogative, Craig's argument has immediate plausibility because he talks in terms of English "administrative power."⁹² If there really was something called "administrative power" in the seventeenth and eight-

88. *Id.* at 210.

89. *Id.* at 104–07 (cross-border licensing regulations, including those regarding Indian traders and steamboats). Beyond licensing regulations in cross-border matters, Congress apparently did not authorize executive licensing regulations before 1900, other than in congressionally controlled localities. *Id.* at 104, 107.

90. *Id.* at 209–10.

91. Craig's First Critique, *supra* note 2, at 58 ("Any reader of Philip Hamburger's book cannot but come away with the strong impression of the administrative state as something dangerous and alien, forever prone to the dangers of 'extralegal rule-making and adjudication', subverting thereby important values. This is a mistaken depiction of the modern administrative state . . .").

92. *See, e.g., id.* at 38.

eenth centuries, this clearly would seem to be the antecedent of contemporary administrative power. Case closed.

But the array of powers Craig discusses under the rubric of “administrative” was not a unitary thing in the seventeenth and eighteenth centuries. Some of it (for example, the excise) was centralized; some (for instance, bankruptcy) was dispersed among temporary commissions formed by private persons; and most was local, primarily in the hands of justices of the peace. Moreover, none of it was ordinarily called “administrative.”⁹³ This label is a later anachronism, which unifies diverse areas of law and makes them seem analogous to contemporary administrative power. Accordingly, when Craig speaks of English “administrative” power, he gives disparate practices a conceptual unity and a breadth of constitutional significance that cannot be assumed.

A second problem with the suggestion of historical administrative legitimacy is one of descent or genealogy. Although American government slowly drifted toward administrative power over the course of the nineteenth century, it accelerated its move in this direction, and even embraced centralized administrative power, only after Americans studied German absolutist theory.⁹⁴ Constitutional law had defeated the absolute prerogative in England and more completely in America, especially in the U.S. Constitution, but absolute power survived on the Continent, where it flourished.⁹⁵ The Prussians in the seventeenth and eighteenth centuries most systematically set out to convert the old monarchical power of the king into the bureaucratic power of the state, and in the nineteenth century, Prussian academics became the leading theorists of administrative power.⁹⁶ They made no secret of its absolutist heritage and its anti-constitutional character.⁹⁷ On the contrary, they boasted of this, and it therefore is all the more revealing that American progressives in the late nineteenth century flocked to Germany to study administrative law – even under the influence of men such as Heinrich von Treitschke (the ideal-

93. This is obvious enough to anyone even casually familiar with seventeenth- and eighteenth-century legal literature, whether printed or manuscript. And it can be confirmed with online searches. For example, in Gales’s Eighteenth Century Collections Online, on the Advanced Search page, a search of “justice” and “peace” in the title and “administrative” in the entire document reveals no justice of the peace manual with the word “administrative.” GALE’S EIGHTEENTH CENTURY COLLECTIONS ONLINE, <http://www.gale.com/primary-sources/eighteenth-century-collections-online/> (last visited Dec. 27, 2016). Similarly, on the same page, a search of “bankruptcy” or “bankrupt” or of “sewers” in the title, and “administrative” in the entire document, reveals no legal text on bankruptcy or commissions of sewers using the word “administrative.” *Id.*

94. HAMBURGER, UNLAWFUL, *supra* note 1, at 441–78.

95. *Id.*

96. *Id.* at 444–45.

97. *Id.* at 447–50.

ist of the *Machtstaat*).⁹⁸ The American advocates of administrative power, before 1914, clearly recognized its foundations in Continental absolutism as transmitted through German theory.⁹⁹ In short, American administrative power not only revived the absolute power of monarchs but actually was directly descended from it.

This Continental derivation of much American administrative power, moreover, is why it is called “administrative.” The Germans called it *Verwaltungsgesetz*, which is a mouthful for Americans, but the French, in replacing the monarch’s power with the state’s bureaucratic power, called it *administratif*, and this is what stuck.¹⁰⁰ It thus becomes evident that the name actually confirms the significance of prerogative power, not the traditional and mostly local power that Craig calls “administrative.”

The third and most serious problem with looking back to seventeenth- and eighteenth-century English “administrative power” is the difference in substance. The power to which Craig alludes was mostly local or at least localized, not centralized. It was mostly in the hands of local and mercantile elites rather than members of the knowledge class. Although it thus could have serious costs, not least for those outside the elites, it avoided the danger of placing much power in the hands of persons who, as a class, tended to idealize what could be accomplished through central government power and who tended to feel dependent on its wealth. And to all of this must be added a structural distinction. Because the power to which Craig recurs was mostly

98. *Id.* at 448. Treitschke’s classes were not directly on administrative law but covered its history and the underlying political theory. ANDREAS DORPALEN, HEINRICH VON TREITSCHKE 226–40 (1957). For American attendees, see *id.* at 240.

99. HAMBURGER, UNLAWFUL, *supra* note 1, at 450–53. Of course, after 1914, most academic defenders of administrative power ran away from its German foundations as fast as they could. James Landis, for example, brazenly declared that administrative agencies were “the product, not of dogma or of abstract theory, but of the gradual development of control by a democratic government” – even that they were an “indigenous” and “empirical growth,” which “always sprung from a concern over things rather than over doctrine.” Landis, *supra* note 3, at 2–3. Landis, however, surely knew better.

100. My book explains:

The systematized absolutism that developed in Prussia and German influenced lands first became recognized as “administrative” in France. Although under the Bourbons it was a matter of the royal pleasure, in the Republic and under Napoleon it was regularized and renamed *droit administratif*. Napoleon thereby (as noted by Dicey) “gave full expression” to the ancien régime’s “royal prerogative.” No longer confined by the customary constraints on the king’s personal authority, absolute power now flourished as an enlightened manifestation of uninhibited state power. Thus, what the earlier regime had done in legislative *ordonnances*, interpretative *déclarations*, and particularized *édits*, the new one did even more vigorously through administrative equivalents.

HAMBURGER, UNLAWFUL, *supra* note 1, at 445 (citations omitted).

local, or at least decentralized, and because in America it was largely under the oversight of the states (or Congress when acting in localities in place of the states), such power as it traditionally existed is a poor foundation for understanding the structural dangers of such power as it currently is exercised by the federal or other central governments.

For all of these reasons, when scholarship (such as Craig's) legitimizes current administrative power by harking back to the localized administrative power of the eighteenth century, there is reason for caution. Whatever the merits of such work, it cannot displace the need for understanding how prerogative power spurred fears of extralegal governance and how such fears shaped the U.S. Constitution.

Craig undoubtedly is correct in thinking that an argument rejecting administrative power under the U.S. Constitution must discuss seventeenth- and eighteenth-century English administrative powers. And that is what my book does. Our differences about traditional English administrative powers are therefore not so much in the evidence as in how to interpret it.

For purposes of accurate interpretation, one cannot rely on Austinian methodology to understand England's unwritten constitution, one cannot shut one's eyes to the revolutions of the seventeenth through nineteenth centuries, one cannot ignore the different approaches to localized and centralized extralegal power, and one cannot place much weight on a retrospective label such as "administrative power." When one avoids these and similar errors, one can better understand English constitutional ideals and how they appealed to Americans. And one thereby can understand the distinctively American results.

III. THE DIFFERENCE BETWEEN LEGISLATIVE AND JUDICIAL POWER

It would be gratifying to stop at this point. In addition to his historical confusion, however, Craig questions my argument against extralegal power by muddling up an important conceptual point. He suggests that my critique of extralegal power crucially depends on the distinction between legislative and judicial power. Well, not really.

What exactly is Craig's concern? He makes an elaborate argument that my notions of extralegal legislation and extralegal adjudication are "limit[ed]" or "qualified" by my definitions of legislative and judicial power, and that my thesis is therefore "crucially dependent" on the distinction between legislative and judicial power.¹⁰¹ He then observes that the definition of such

101. Craig's First Critique, *supra* note 2, at 17, 28. He says that Hamburger "seeks to limit the force of his argument concerning 'extralegal rulemaking' through definition of the term legislative." *Id.* at 3. He adds that "Hamburger's argument also contains, as in the context of rulemaking, a qualifying dimension, in which he limits the force of his principal argument concerning 'extralegal adjudication', through definition of the term judicial." *Id.* at 4.

powers can be in various ways “problematic,” and on this basis calls my thesis into question.¹⁰²

Certainly, the distinction between legislative and judicial power can be complicated, but this distinction is not very significant for my book, because its argument condemns all extralegal power, regardless of whether it is legislative or judicial.¹⁰³ Of course, the distinction matters for purposes of allocating power between the legislature and the judiciary, but it makes no substantial difference for condemning the extralegal power of executive or independent agencies.

How did Craig misunderstand this? My book has separate parts on “Extralegal Legislation” and “Extralegal Adjudication,” as this is a very practicable division of the material.¹⁰⁴ But the argument is not that extralegal lawmaking is unlawful in different ways than extralegal adjudication. Instead, the argument is that both are unlawful for the same reason: that they bind through edicts other than acts of the legislature or of the courts.¹⁰⁵

Thus, a binding administrative edict is unconstitutional regardless of whether it is legislative or judicial. The problem is simply that it is neither an act of the legislature or of a court. And my argument therefore is not “crucially dependent” on the distinction between legislative and judicial power.¹⁰⁶

102. *Id.* at 17, 19.

103. My book begins by explaining:

The executive often issues binding directives – whether rules, interpretations, adjudications, orders, or warrants. These executive edicts purport to bind not merely executive officers, but members of the public. To be precise, they purport to bind subjects, meaning the persons subject to the United States and its law. The executive’s edicts, moreover, purport to bind subjects not merely in the sense of reaching a settled decision about them, but in the deeper sense of legally obliging, constraining, or interfering with them. This executive power to issue edicts that bind, or confine, subjects has long been recognized as the central feature of “administrative law,” and it is what this book questions.

HAMBURGER, UNLAWFUL, *supra* note 1, at 2.

104. *Id.* at 31, 129.

105. *Id.* at 2.

106. Craig’s First Critique, *supra* note 2, at 17, 28.

Incidentally, Craig also gets confused about a less significant conceptual point. He says that I apply the distinction between binding and nonbinding acts to “distinguish legislative acts from statutes empowering the issuance of regulations to lesser executive officers, the assumption being that such regulations applied merely to such lesser officers and not to the rest of the public.” *Id.* at 12 (citing HAMBURGER, UNLAWFUL, *supra* note 1, at 85–86). In fact, my book makes no such assumption. On the contrary, my book expressly repudiates this and explains that it relies on the very opposite assumption: “Even as to executive officers, executive regulations or orders were not legally binding, but rather were, at most, mere conditions of employment.” HAMBURGER, UNLAWFUL, *supra* note 1, at 87.

CONCLUSION

In attempting to write from the shores of eighteenth-century England, Craig misstates both the history and its significance. Nonetheless, his critique valuably raises some important questions, and I am grateful to him for the opportunity to address them.

His Arguments. Craig's arguments are mistaken about the facts of prerogative power and about the English and American constitutional responses to both prerogative and administrative power. He thereby fails to understand why such things might matter for American constitutional law.

I. Prerogative. Against my thesis about the administrative revival of prerogative power, Craig claims that prerogative power was independent of statute and thus different from administrative power. Some prerogative power undoubtedly was independent of statutory authorization and limits, but (as by now should be clear) this is not to say that prerogative power generally was unauthorized and unlimited by statute. Craig's argument about statutory independence therefore does not distinguish prerogative and administrative power. Nor is it even responsive, for my thesis is that administrative power revives the extralegal character of the absolute prerogative. Thus, even if he were right, it would not refute the reality that extralegal power is what once pervaded absolute prerogative power, what now pervades administrative power, and what thus has been revived.

II. Administrative. Against my argument that the English constitution developed in response to extralegal power, Craig points to the existence of seventeenth- and eighteenth-century English administrative power. There certainly was much local and otherwise non-royal extralegal power in seventeenth- and eighteenth-century England – what in retrospect can be called “administrative” power – but it does not disprove that there was an English foundation for the American constitutional rejection of extralegal power. Under England's customary constitution, the law is not merely what Parliament and the courts do, and one therefore must also consider constitutional ideals. Of course, there was disagreement about the constitution, and the dominant ideals favored absolute Parliamentary power, but at the same time, Parliament was widely expected to conform to more limiting constitutional ideals, which had developed in response to extralegal prerogative power. Thus, notwithstanding the existence of administrative power in England, Americans had much to learn from the English constitution. That constitution was not, to be sure, what Austin would acknowledge as law, but nineteenth-century positivism is a poor guide for understanding eighteenth-century history.

III. Legislative v. Judicial. The distinction between legislative and judicial power is very important for understanding how to allocate power between the legislature and the courts. It is a mistake, however, to assume that one needs a refined understanding of this distinction for purposes of the constitutional objection to extralegal power. If all power to bind extralegally is

unconstitutional, one can argue against such power without worrying about whether, in any particular instance, it is legislative or judicial.

The Underlying Questions. Notwithstanding these problems with Craig's critique, it usefully draws attention to some critical questions about early administrative power.

How can one distinguish absolute prerogative power and administrative power in seventeenth- and eighteenth-century England? Not, evidently, by suggesting that the one was without the statutory authorization and limits characteristic of the other, for much prerogative power had statutory foundations and limits. Nor can one distinguish the two by considering the one personal and the other bureaucratic, for although this was true in high theory, it was not true in lower-level theory or in fact. Instead, the difference lies along different lines. The absolute prerogative power and traditional English administrative power both involved forms of extralegal power, but the one was centralized and the other localized.

How did the English resolve the tensions between their inherited types of administrative power and their constitutional principles? When the English struggled against the absolute prerogative – that is, against centralized extralegal power – they developed general constitutional ideals, which were in tension with not only the centralized extralegal power, but also the local and other non-royal versions of it. The English in the seventeenth and eighteenth centuries, however, employed these ideals mainly against the centralized extralegal power that worried them. Of course, the localized extralegal power could be abused, and the English in the seventeenth century developed doctrines that limited its conflict with their constitutional ideals, but the localized extralegal power did not pose a threat of centralized political tyranny and therefore did not provoke a direct constitutional response.

And how did Americans resolve the tensions between their inherited types of administrative power and their constitutional principles? Different states had different constitutions, and it therefore is difficult to go into detail about the state solutions. At least in some states, such as Virginia, there were tensions between inherited local administrative power and the state's constitutional generalities. In the U.S. Constitution, however, Americans barred almost all extralegal power, even if with some complicated questions at the margins.

Overall, Craig's errors notwithstanding, many English and American constitutional principles developed in response to the danger of extralegal power, as manifested in the absolute prerogative. Although the English did not use these principles against their inherited and mostly localized administrative power, Americans in the U.S. Constitution pursued their constitutional principles more systematically.

Postscript: Digging in

In response to this Article, *Early Prerogative and Administrative Power: A Response to Paul Craig*, Paul Craig has written again (in what I will call his “second critique”), and he thereby digs himself in even deeper.¹⁰⁷ He repeats many of his arguments without responding to the substance of mine. He denies that he made some of his own prior arguments. Most troubling, he pervasively misstates my arguments in ways that allow him to conclude that they make “no sense.”¹⁰⁸

All of this is regrettable, for it cuts short the possibility of a useful debate. This brief Postscript therefore does not bother to reiterate my inadequately answered arguments, or to answer each of his misstatements and other mistakes. Instead, it merely suggests the nature of his mode of argument.

I. EXTRALEGAL

The notion of extralegal power is ancient and not very complicated. And it is useful for understanding both prerogative and administrative power. Nonetheless, Craig persists in misconceiving and misstating what I mean by “extralegal.” This leads him far astray.

A. *Extralegal Is Not Necessarily Unlawful*

Much of Craig’s second critique runs into trouble by confusing “extralegal” with “unlawful.” It is not unreasonable for Craig, if he wishes, to think that “extralegal” means unlawful, but that is no excuse for attributing such a view to me.

For example, he writes: “Hamburger’s thesis rests on the argument that administrative law is extralegal, and hence illegitimate and unlawful.”¹⁰⁹ This sort of assumption runs through his entire second critique, and it is simply false.¹¹⁰

107. Paul Craig, *English Foundations of US Administrative Law: Four Central Errors* (Oct. 15, 2016) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2852835 [hereinafter Craig’s Second Critique].

108. *Id.* at 7, 9, 15–16.

109. *Id.* at 2.

110. In a few places, my book suggests that extralegal power is unlawful in a philosophical sense. See, e.g., HAMBURGER, UNLAWFUL, *supra* note 1, at 7. Most of my book, however, argues that administrative power is unlawful in the sense of being contrary to the U.S. Constitution and thus as a matter of positive law. Similarly, when Craig says that, in my argument, “extralegal” means or implies unlawful, he clearly is talking about this as a matter of positive law (hence, his emphasis on English statutes and cases). Accordingly, in this Postscript, when I explain that he is

My argument repeatedly distinguishes between what is extralegal and unlawful. For example, it observes that in the seventeenth century, many commentators viewed prerogative power as unlawful but not most localized administrative power.¹¹¹ Similarly, it notes that although the U.S. Constitution generally bars extralegal acts, this cannot be said of all state constitutions.¹¹² Even under the U.S. Constitution, I argue, there is room for local extralegal power where Congress is regulating localities such as territories and the District of Columbia. Clearly, therefore, my argument is not that extralegal means unlawful.

On the contrary, my point is that extralegal power is unconstitutional where a nation's constitution bars it. That is why so much of my argument is about how the U.S. Constitution generally forbids this sort of power.¹¹³

Craig, however, creates an easy target by repeatedly portraying my argument as one in which extralegal necessarily implies unlawful. He thereby accomplishes nothing but to set up forty pages of misplaced criticism.

B. *Extralegal Nonsensical?*

Another of Craig's misunderstandings concerns statutory authorization. In his initial critique, he persistently suggests that when I speak of "extralegal power," I somewhat ambiguously mean unauthorized power.¹¹⁴ My argument, however, consistently rejects any such meaning and, instead, uses "extralegal power" to mean power exercised not merely through law, but through other mechanisms. And my argument makes clear that, in this meaning, a rule or a decision can be extralegal, "quite apart from the question of legal authorization."¹¹⁵

Although Craig now grudgingly acknowledges that this is my position, he repeatedly seems incapable of making sense of it.¹¹⁶ For example, when discussing English administrative power, he writes:

There was clearly statutory authorization for the exercise of such power, so in what sense was this "power imposed not through the law, but through other sorts of commands"; in what sense should such power, or the exercise thereof, be regarded as falling "outside the law

conflating extralegal and unlawful, I also mean "unlawful" as a matter of positive law.

111. See *supra* Parts II.B & E.

112. See *id.* and accompanying citations.

113. See, e.g., HAMBURGER, UNLAWFUL, *supra* note 1, at 387 (Article I); *id.* at 396–97 (congressional delegation of judicial power); *id.* at 397–98 (judicial power and judicial delegation); *id.* at 427–29 (Necessary and Proper Clause); *id.* at 252–53 (privilege against self-incrimination); *id.* at 240–48 (jury rights); *id.* at 254–56 (due process of law).

114. See *supra* Part I.B and accompanying citations.

115. See *id.*

116. Craig's Second Critique, *supra* note 107, at 5.

or as an extralegal, irregular, or extraordinary power”; in what sense can it be correct to say that “administrative law purports to bind subjects not through the law, but through other sorts of directives”?¹¹⁷

Craig dismisses my argument by concluding that “such characterization makes no sense.”¹¹⁸

When attacking an argument, however, it is helpful to understand the ways in which it can make sense. Indeed, if an opposing argument seems nonsensical, this usually is a valuable warning that one should pause to consider whether one is missing something.

Nonetheless, Craig is emphatic: “There is no sense in which [administrative] power, or its exercise, is extralegal, irregular, or extraordinary; and there is no sense in which the decisions thus made should or could be regarded as directives that bind subjects other than through law.” Really?

His underlying confusion becomes apparent from his explanation that the things my argument calls “extralegal” have never been “so regarded by the courts.”¹¹⁹ This is revealing. On his mistaken assumption that I think “extralegal” necessarily means unlawful, he reasons that because administrative power has been upheld by courts, my view that it is extralegal makes “no sense.” It thus becomes apparent that, when he says there is “no sense in which [administrative] power . . . is extralegal, irregular, or extraordinary,” he is failing to consider the sense in which my work uses the terms. But Craig just cannot see that.

This is all the more remarkable because my definition of the term “extralegal” is far from idiosyncratic. As Craig recognizes, I use “irregular” or “extraordinary” as synonyms for “extralegal,” and there is much scholarship on the subject, using one term or another.¹²⁰ The medieval civilians employed the phrase *extra ius*, and as they understood, extralegal is not the same as unlawful – this being recognized, for example, by the fifteenth-century civilian Jason de Mayno when quoting Baldus about the power of the pope and the prince to do what is “*supra ius et contra ius, et extra ius.*”¹²¹ And these ideas had much significance in early modern England, as is well known from the work of Francis Oakley and other scholars.¹²²

Indeed, Richard Tuck recognizes not only the centrality of extralegal power in England but also its Continental and especially German foundations. When writing about Charles I’s attempt to raise an army, Tuck explains that

117. *Id.* at 6–7.

118. *Id.*

119. *Id.* at 9.

120. *Id.* at 5.

121. HAMBURGER, UNLAWFUL, *supra* note 1, at 516 (citing R. W. CARLYLE & A. J. CARLYLE, A HISTORY OF MEDÆVAL POLITICAL THEORY IN THE WEST 6, 83, 149, 460 (1903)).

122. *Id.* at 516 n.3 (citing OAKLEY, *supra* note 29, at 43, 63 (regarding the power to exercise will irregularly, outside ordained law, which came to be called “absolute” power)).

because “Parliament, like the German estates, was unwilling to provide new legal guidelines” on raising an army, “the king, like the German princes, had to plead *necessity*, and to claim that the extra-legal use of his prerogative was justified by virtue of his general duty to protect the realm.”¹²³ This extralegal aspect of the prerogative is what Craig initially denied. Unable to maintain that position, he now declares it nonsensical as to administrative power.

Why does the application of such ideas to administrative power lead Craig to emit a noncompute message? The answer (as already suggested) comes from his initial error in confusing extralegal with unlawful. When one mistakenly assumes that extralegal necessarily means unlawful, much can seem puzzling.

II. PREROGATIVE AND ADMINISTRATIVE

My argument is that the U.S. Constitution generally bars administrative power, and in this context, explains that administrative power revives the extralegal character of the prerogative power. Craig, however, does not accept what I argued or even what he argued. He misstates my arguments – sometimes giving them a breadth that they do not have, and sometimes simply ignoring that I made them. Topping it off, he denies that he said what he earlier clearly said and uses this to accuse me of misstating his views!

A. Overstates My Argument as to English Administrative Power

Craig repeatedly denounces me for arguing that English administrative power generally was and is unconstitutional. But that is not my argument, and Craig’s repeated suggestion to the contrary is deeply misleading.

To be sure, my argument describes seventeenth- and eighteenth-century English administrative power as extralegal. But as now should be abundantly clear, the point is not that English administrative power was or is unconstitutional. On the contrary, my argument is that some English constitutional principles were broad enough to be in tension with administrative power in England, but that such principles were not typically applied to administrative power. The tension was avoided partly with a strained conceptualization of administrative acts as mere determinations, partly with doctrines designed to tame administrative discretion, and more generally by treating such acts as limits or exceptions.¹²⁴ It therefore is simply false to suggest that, in my argument, English administrative power generally was or is unconstitutional.

And this should be unsurprising, for my goal is to understand American administrative power. The English argument is merely about the development of constitutional principles that would matter for Americans, not about the legal implications in England. In fact, my argument is not even generally

123. RICHARD TUCK, *PHILOSOPHY AND GOVERNMENT 1572-1651*, at 224 (1993).

124. *See supra* Part II.B.

about American administrative power but rather is restricted to the unconstitutionality of *federal* administrative power under the U.S. Constitution.

Nonetheless, Craig paints my argument with a broad brush, as if it concerns how administrative power, from the seventeenth century to the present, was not “regarded as lawful and constitutionally legitimate in English law.”¹²⁵ And on this gratuitous broadening of my argument, he declares it “wrong.”¹²⁶

As so often, he goes off on the wrong track because of his initial mistake in imposing his own meaning on “extralegal,” claiming that I thereby denote or imply what is unlawful. As seen above, however, that is not my meaning, and by disregarding what I mean, he creates an imaginary version of my argument that is so broad as to be untenable.

B. Still Ignores My Distinction Between Prerogative and Administrative

Craig repeats his claim that my argument “elides prerogative and administrative power.”¹²⁷ Of course, I don’t adopt his distinction, according to which prerogative was independent of statute and administrative power was not, for that is contrary to the evidence (as noted in Part I of *Early Prerogative and Administrative Power* and Part II.C of this Postscript). But I do distinguish prerogative and administrative power as different types of extralegal power – the one centralized, and the other localized.¹²⁸ Therefore, when he repeatedly suggests that I do not distinguish the two, he again is misstating my views.

C. His Less-Than-Candid Retreat from His Vision of Prerogative Independent of Statute

It will be recalled that Craig distinguishes prerogative and administrative power by claiming that whereas the former was “independent of statute,” the latter was authorized and limited by statute. In fact, however, as shown by Part I of my *Early Prerogative and Administrative Power*, his distinction is utterly mistaken, for the prerogative often was authorized and limited by statute. Now, rather than concede that he was in error when saying that the prerogative was independent of statute, Craig claims he never said what he seems to have said and accuses me of misstating his views. Really? Let’s unpack the question, so the reader can judge.

First, as to statutory authorization, he now protests that when saying the prerogative was “a species of executive power that exists independent of statute,” he did not mean it was unauthorized by statute but rather merely that the

125. Craig’s Second Critique, *supra* note 107, at 17.

126. *Id.*

127. *Id.*

128. See *supra* Part II.E and Conclusion.

prerogative was independent within its admitted boundaries – “What I said was that the prerogative entails a ground of lawful authority in English law that exists independently of statute, in the sense that the executive can lawfully act within the bounds of an admitted prerogative even though there is no legislative authority for the action.”¹²⁹ But of course this is not what he said. Indeed, he expressly said the opposite. When discussing the “relationship between the prerogative and statute,” he concluded that “almost all administration was based on statute, not the prerogative.”¹³⁰ Having said this about prerogative, why is he now saying he never said or even meant this?

Second, as to statutory limits, he now claims: “I did not say that the prerogative was unlimited by statute, nor did I intimate this in any way whatsoever.”¹³¹ In fact, Craig contrasted prerogative and administrative power in a way that clearly “intimated” prerogative was unlimited by statute:

There were two kinds of constraint on rulemaking in England. The first constraint concerned the prerogative, which is a species of executive power that exists independent of statute, such as the power to conclude a treaty. The scope of a particular prerogative power could however be contestable. Thus, while the monarch might have a prerogative to regulate certain aspects of trade, its ambit could be unclear. . . . The existence and extent of prerogative power were thus determined by the courts. . . .

The second constraint concerned statute. The Parliament that became sovereign in the seventeenth century enacted various specific statutes empowering the administration to make rules¹³²

A “constraint” presumably is a limit, and whereas one kind “concerned the prerogative, which is a species of executive power that exists independent of statute,” the other kind “concerned statute.” This sure sounds like a contrast between a power that is not “constrained” or limited by statute and one that is so constrained.

Perhaps I should thank Craig for his backhanded concession that prerogative and administrative power cannot be distinguished on his theory of a prerogative “independent of statute.” But a concession that denies what he

129. Craig’s Second Critique, *supra* note 107, at 13, 26.

130. Craig’s First Critique, *supra* note 2, at 29–30. Here is the full passage:

The initial difficulty is Hamburger’s repeated elision of prerogative adjudication and administrative adjudication, treating the two as synonymous. This is mistaken as a matter of positive law, and problematic from a broader normative perspective of constitutional theory concerning the relationship between the prerogative and statute. It is particularly important given that almost all administration was based on statute, not the prerogative.

Id.

131. Craig’s Second Critique, *supra* note 107, at 26.

132. Craig’s First Critique, *supra* note 2, at 13.

plainly said, and falsely accuses me of misstating his views, does not provoke a sense of gratitude.

III. LEGISLATIVE V. JUDICIAL

Craig sticks to his guns in claiming that my argument fails adequately to distinguish legislative and judicial power and that this is crucial to my argument. As noted in Part II, however, the distinction is not really relevant for purposes of my constitutional argument against federal administrative power.

He defends his critique by saying that it was “not directed at the divide between legislative and judicial acts,” but rather was “directed at the meaning that Hamburger ascribed to each of these terms.”¹³³ This, however, misses the point. Leaving aside the merits of my distinction between legislative and judicial acts, the problem with Craig’s objection is that the distinction does not matter for my constitutional argument.

My argument is that, under the U.S. Constitution, binding edicts, other than those of Congress or the courts, are generally unlawful. Accordingly, although the distinction between legislative and judicial power is useful for allocating authority among the branches, it is entirely unnecessary for recognizing the unlawfulness of an administrative act. For example, when an agency purports to create any legal obligation, it is acting unconstitutionally, and to reach this conclusion, one need not decide whether the agency’s act was legislative or judicial. Craig’s elaborate thoughts on the distinction are therefore entirely misplaced.

He, however, insists that the distinction is “crucial for Hamburger’s project.”¹³⁴ For example, he says that the definition of judicial power is “seminal” because it “signifies the boundary between what is lawful and unlawful.”¹³⁵ No, not in my argument.

IV. HIS POSTIVIST MODE OF ARGUMENT

Some English constitutional ideals cut against extralegal power, and Americans found these ideals relevant to their circumstances. But Craig, in his initial critique, dismisses all of this because of what he called the “constitutional realities” of statutes and court decisions. In viewing these “realities” as dispositive about the English constitution, he did not even acknowledge that Parliamentary sovereignty left the courts no choice but to accept what Parliament did; nor did he recognize that England’s unwritten constitution inevitably included many ideals that could not be given effect by the courts.

Now that I have reminded him of all of this, he protests that he recognized English constitutional ideals. Really? In Craig’s view, he was attentive to constitutional ideals because the actions of Parliament and the courts were

133. Craig’s Second Critique, *supra* note 107, at 29.

134. *Id.*

135. *Id.* at 3.

based on ideals.¹³⁶ Of course, earlier he said nothing of ideals, but instead emphasized the acts of Parliament and the courts as a trump card, on the ground that these were the “realities.”¹³⁷

Even now, he scarcely acknowledges the significance of constitutional ideals beyond Parliamentary sovereignty. My argument quotes lawyers, radical Whigs, and theoretical treatises on alternative visions of the English constitution, but Craig’s dismisses such on the basis of the sheer number of English statutes and cases that authorized or accepted administrative power.¹³⁸

Why does he consider such evidence so overwhelming as to make other evidence irrelevant? Because he assumes extralegal means unlawful: “I make no apology whatsoever for giving great weight to positivist sources,” as “the object” is to “test the veracity of Hamburger’s far-reaching thesis to the effect that administrative law should be regarded as unlawful.”¹³⁹ But my argument is that prerogative power provoked the development of English constitutional ideals against extralegal power, not that, in England, such ideals typically were applied to administrative power. Once again, he is paying a price for his radically mistaken assumption that extralegal means unlawful.¹⁴⁰

In short, Craig’s mistaken assumption that extralegal means unlawful leads him to rely heavily on what he admits are “positivist sources,” and he thereby sweepingly brushes aside as trivial most of the English constitutional ideals and traditions that cut against unlimited Parliamentary power.¹⁴¹ He thereby misunderstands English constitutional history, especially the constitutional ideals that appealed to so many Americans.

136. “Hamburger’s claim that I ignored constitutional ideals is quite wrong. He complains loudly that I ignored constitutional ideals when depicting the pattern of administration and how it was viewed, concentrating solely on positivist sources in terms of what the legislature and the courts did. There is considerable confusion here. . . . The reality was that the courts developed constitutional ideals that shaped this entire area of the law, and provided the principled architecture against which the administration operated.” *Id.* at 35.

137. In addition to rewriting his views, he also rewrites mine, saying that I treated statutes and cases as “value-free,” whereas, in fact, I merely pointed out the inadequacy of his emphasis on Parliamentary and judicial “realities.” *Id.* at 38.

138. Hamburger “ignores the thousands of cases in which the courts accepted the legality of administrative determinations, according them binding force subject to judicial review, with no hint whatsoever that the administration should be conceived of as extralegal in the manner for which Hamburger contends.” *Id.* at 40.

139. *Id.* at 34.

140. Incidentally, he also protests that he personally is not “not an Austinian positivist, nor indeed a Hartian positivist, nor is there anything whatsoever in the earlier article to sustain this.” *Id.* But my argument is about the nature of his argument, not him personally.

141. *Id.* at 34, 36.

V. AD HOMINEMS

Last but not least, it unfortunately is necessary to mention the tone of Craig's piece. The sense of contempt is palpable, and it is given force by repeated *ad hominem*s.

Craig comments on my "intellect," my "indignation," my "academic games," and my "blood pressure."¹⁴² Not content to disparage my mind and body, Craig goes on about my "lack of knowledge of, and interest in, what the courts were doing in this area of the law." He even condemns my laziness – as if the difference between us were not the relevance of different cases, but my sheer indolence: "He wants to do legal history, but does not invest the time or effort to read beyond a small group of legal cases in order to understand what was really going on."¹⁴³

Readers familiar with me and my scholarship can judge for themselves the merits of these statements. What matters here is that *ad hominem*s have no place in academic debate. They are distractions from the substantive questions and are downright silly coming from a scholar who repeatedly and dogmatically misstates my arguments.

VI. CODA

Craig's original critique is so distant from the historical evidence as to be puzzling. What would lead a serious scholar – indeed, an Oxford professor – to assert that the prerogative was independent of statute; to ignore the distinction between the absolute and ordinary prerogatives; to deny that the absolute prerogative was extralegal in the sense that it evaded acts of Parliament and the courts; to deny that the English constitution developed in large part in response to this sort of threat; to disregard English constitutional ideals by emphasizing positivist "realities"; to describe seventeenth- and eighteenth-century law on the basis of nineteenth-century statutes; to argue about such law from global word searches in a database covering the period 1220 to 1867; to assert the importance of early English "administrative" power without recognizing that the English did not then understand such power as unitary or even as "administrative"; to ignore Continental civilian and German influences; and so forth. What was he thinking?

His second critique is even more puzzling. Why would a serious scholar restate his arguments without responding to the substance of most of my criticisms? What would lead him to deny that he made his own prior arguments? And why would he repeatedly misstate my arguments – in ways that ensure they are "wrong" and make "no sense"?

If this is Craig's idea of intellectual debate, include me out.

142. *Id.* at 25–26, 29.

143. *Id.* at 34–35, 37.

