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Book Review

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Abstract

As the argument goes: Over the last hundred years or so, Congress has steadily delegated away its law-making responsibility through broad grants of rule-making and discretionary authority to an unelected and unaccountable federal bureaucracy. And the US Court, in decisions such as *Chevron* and *Auer v Robbins*, has similarly relinquished any right it once asserted to oversee the interpretation and performance of that delegated authority. On this reading, the sprawling federal administrative apparatus, which touches on virtually every aspect of American life, exists in contravention of the proper division of powers under the Constitution and is, therefore, not legitimate. In *Law & Leviathan: Redeeming the Administrative State* ("Law & Leviathan"), Cass R. Sunstein and Adrian Vermeule set out to confront this (in their view, exaggerated) narrative and to inspire some conservative confidence in the administrative state.

Book Review

Law & Leviathan: Redeeming the Administrative State by Cass R. Sunstein and Adrian Vermeule¹

LUKE DEVINE²

AT A CASE CONFERENCE for *Chevron USA Inc v. Natural Resources Defense Council Inc*³—the landmark Supreme Court of the United States decision on the principle of judicial deference—Justice John Paul Stevens stated candidly, “[W]hen I am confused, I go with the agency.”⁴ Most observers, I think, will appreciate the humour and pragmatism in that statement: a generalist judge recognizing limits to his interpretive skills when faced with a highly specialized regulatory regime. But on a more cynical reading, Justice Stevens’s admission is emblematic of the wider, illegitimate abnegation of judicial and legislative power on which the modern American administrative state is founded.

As the argument goes: Over the last hundred years or so, Congress has steadily delegated away its law-making responsibility through broad grants of rule-making and discretionary authority to an unelected and unaccountable federal bureaucracy. And the US Court, in decisions such as *Chevron* and *Auer v Robbins*,⁵ has similarly relinquished any right it once asserted to oversee the interpretation and performance of that delegated authority. On this reading, the sprawling federal administrative apparatus, which touches on virtually every

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1. (Belknap Press of Harvard University Press, 2020) [Sunstein & Vermeule, *Law & Leviathan*].
 2. BA (McGill University), JD (Osgoode Hall Law School).
 3. 467 US 837 (1984) [*Chevron*].
 4. Sunstein & Vermeule, *Law & Leviathan*, *supra* note 1 at 113.
 5. 519 US 452 (1997).

aspect of American life, exists in contravention of the proper division of powers under the Constitution and is, therefore, not legitimate.

In *Law & Leviathan: Redeeming the Administrative State* (“*Law & Leviathan*”), Cass R. Sunstein and Adrian Vermeule set out to confront this (in their view, exaggerated) narrative and to inspire some conservative confidence in the administrative state. First, the authors identify three main detractors: originalists, libertarians, and democrats.⁶ Originalists tend to harp on how the administrative state defies how the Founding Fathers intended to divide and keep separate political power. Libertarians, meanwhile, focus on how agencies encroach on individual autonomy and private property. And finally, democrats source the illegitimacy of the administrative state to the “weak chain of accountability” from the electorate to appointed bureaucrats.⁷

Though each group contests the administrative state for varied reasons (some of which overlap), all three, the authors argue, converge on a common, albeit vague, concern over the deleterious effect of the administrative state on the *rule of law*.⁸ The authors employ the term “New Coke” to capture this loosely coordinated assault on the legitimacy of the administrative state under the rule of law banner. “New Coke” refers to the fact that detractors often speak of tyranny and absolutism when discussing the rise of the modern administrative state. Challengers have compared it to the untrammelled exercise of executive authority by the Stuart monarchs, and, in turn, have valorized the historical opponent of Stuart despotism: “[T]he common-law judge, symbolized by Edward Coke.”⁹

In attending to this concern, Sunstein and Vermeule argue that the seemingly rogue and unaccountable administrative state is, in fact, beholden to an intuitive but often unarticulated standard of behaviour: what they call “the internal morality of administrative law.”¹⁰ Drawing on Lon L. Fuller’s seminal work, *The Morality of Law*,¹¹ Sunstein and Vermeule tease out of the US Court’s jurisprudence a normative commitment to Fullerian “surrogate safeguards”—procedural principles that both empower and constrain the administrative state.¹² In doing so, the authors adopt a formalist, “thin” conception of the rule of law,

6. See Sunstein & Vermeule, *Law & Leviathan*, *supra* note 1 at 2.

7. *Ibid.*

8. *Ibid.*

9. *Ibid.* at 19.

10. *Ibid.* at 57.

11. (Yale University Press, 1964) [Fuller, *Morality of Law*].

12. *Law & Leviathan*, *supra* note 1 at 11.

which, as we shall see, arguably does not adequately respond to the essential concerns of each group of critics.¹³

Law & Leviathan is, overall, an enjoyable and interesting read. For the uninitiated, it makes for a very good primer on the fundamentals of US administrative law and judicial deference. Substantively, I argue that Sunstein and Vermeule's theory of the internal morality of law succeeds at (1) demonstrating that the US administrative state and the rule of law (or at least one conception of it) are capable of meaningful coexistence; and (2) providing an interpretive framework capable of both organizing and explaining US administrative law principles and jurisprudence. However, insofar as the book is purportedly addressed to those originalist, libertarian, and democrat detractors, it is not at all clear how their framework responds to most, if any, of their substantive concerns about the administrative state.

Sunstein and Vermeule are both law professors at Harvard Law School. While both have advocated for a robust administrative state with broad discretionary authority, they have done so with reference to different first principles and with different ends in mind. Sunstein is liberal, and his ideal administrative state employs cost-benefit analysis in service of welfarist principles and positive human consequences.¹⁴ Vermeule is conservative, and his ideal administrative state is broadly oriented in service of a politics of the "common good,"¹⁵ the content of which he has elsewhere argued should be informed by the tradition of the Catholic Church.¹⁶ This is not the first time Sunstein and Vermeule have teamed up to defend robust federal powers. In 2009, they co-authored an article in which they advocated, not without controversy, for covert government infiltration into real and online social networks responsible for disseminating false information.¹⁷

The internal morality that Sunstein and Vermeule think undergirds the administrative state essentially corresponds with Fuller's relatively thin (that is, formalist) definition of the rule of law. In Fuller's account, every rule fails to answer to the rule of law insofar as it is: ad hoc, unpublicised, retroactive, obscure, contradictory, impossible to obey, unstable, or not enforced by judges

13. *Ibid* at 12.

14. *Ibid* at 5.

15. *Ibid*.

16. See e.g. Adrian Vermeule, "A Christian Strategy," *First Things* (November 2017), online: <www.firstthings.com/article/2017/11/a-christian-strategy>; Adrian Vermeule, "The Ark of Tradition" (19 November 2017) (Book Review of *Roman Catholicism and Political Form* by Carl Schmitt), online: *The Russel Kirk Center* <kirkcenter.org/reviews/the-ark-of-tradition>.

17. See Cass R Sunstein & Adrian Vermeule, "Conspiracy Theories: Causes and Cures" (2009) 17 *J Political Philosophy* 202.

and administrators.¹⁸ The absence of these criteria, Sunstein and Vermeule point out, is in fact so essential to upholding the rule of law that, insofar as an administrative decision or rule exhibits one or more of these traits, it fails to be law at all.¹⁹ In order to illustrate the centrality of these instinctive, unarticulated moral norms, a significant portion of the book is devoted to demonstrating the implausibility of any theory of US administrative law that rests exclusively on “textualist positivism.”²⁰

Indeed, the authors go to great lengths to show that many cardinal procedural principles in American administrative law simply cannot be meaningfully traced to the Constitution (specifically, the Due Process Clause),²¹ the *Administrative Procedure Act*,²² or any other provision of enacted law. For example, the authors point out how, “remarkably,” the US Court has never been able to articulate the source of the *Arizona Grocery* principle, which requires agencies to follow their own regulations.²³ Such a principle, the authors suggest, is best understood as illustrative of Fuller’s eighth criterion, which necessitates a convergence between rules as announced and rules as administered.²⁴ Throughout the book, Sunstein and Vermeule repeat this process of (1) identifying a floating principle; (2) connecting it to a certain Fullerian duty; and then (3) filing it away as evidence of the “internal morality of administrative law.”²⁵

Admittedly, for readers who live in a country with a constitution that gestures lazily to the unwritten conventions of another country as the source for its most basic organizing principles, it is hard to appreciate the seriousness with which the authors broach this task.²⁶ Relatedly, while Sunstein and Vermeule state in the beginning that they hope the book offers insights that will be useful outside the American context and speak to foundational problems afflicting many nations,²⁷ I do not know if they succeed on this count. Any reader who anticipates a

18. See Fuller, *Morality of Law*, *supra* note 11 at 39.

19. *Law & Leviathan*, *supra* note 1 at 41.

20. *Ibid* at 9.

21. See US Const, amend V.

22. 5 USC §§ 551-59, 701-706 (1966).

23. Sunstein & Vermeule, *Law & Leviathan*, *supra* note 1 at 64.

24. *Ibid*.

25. See *e.g.* *ibid*.

26. See *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5. The preamble states, “Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom” (*ibid*).

27. *Law & Leviathan*, *supra* note 1 at 13.

comparative discussion based on that introductory remark will be disappointed. This is regrettable because Sunstein and Vermeule's argument for the internal morality of administrative law would surely have been bolstered by referencing non-American legal systems, which already openly exhibit their conclusion about the importance of unwritten principles and internal norms.

Consider, for example, that the common law rules of the Canadian Constitution cover many of the topics explicated in articles I through III of the US Constitution.²⁸ The absence of a single constitutive text has enabled Canadian judges and lawyers to readily accept, develop, and flexibly apply the somewhat ill-defined internal morality of law. Fuller himself noted this fact about the nature of unwritten constitutions:

In a country where the constitution is unwritten, it is necessary to ask whether a departure from established practice comports with the demands of decent and orderly government as a whole...With us, this is not so clear. Where doubtful procedures emerge, we tend to inquire into their legality, not into their effects. Instead of engaging in an effort to articulate the restraints that must be accepted to insure orderly, fair and decent government, American lawyers are likely to compete with one another in predicting what the Supreme Court will do.²⁹

Justice Rand's landmark decision in *Roncarelli v. Duplessis*, for instance, provides a perfect example of an intuitive commitment to upholding certain basic procedural principles to safeguard against clear administrative abuse.³⁰ Unfortunately, the authors acknowledge—but do not seriously consider—the parallels between their understanding of “surrogate safeguards” and the rules of natural justice as they have developed in other legal systems.

Still, Sunstein and Vermeule deserve credit for the explanatory power of their framework. Their internal morality theory is able to ground long-standing administrative principles which, in its absence, would have no firm (or at least no articulable) basis in US administrative law. In addition, as between unravelling administrative independence entirely (call it the Justice Thomas approach) and leaving the administrative status quo untouched (call it the Justice Kagan approach), Sunstein and Vermeule's idea of “surrogate safeguards” opens the door for a nuanced third approach. This approach recognizes the necessity of administrative expertise while ensuring that such authority is exercised within intelligible, reasonable, and accountable bounds.

28. See US Const, *supra* note 21, art I-III. Articles I-III set out the separation of powers between the legislature, the executive, and the judiciary.

29. Lon L Fuller, “American Legal Philosophy at Mid-Century” (1954) 6 J Leg Educ 457 at 464.

30. [1959] SCR 121 at 130-45, Rand J, concurring.

These points tie into one of the more obvious but creatively argued points in the book: that the administrative state is here to stay. The modern agency plays an indispensable role in achieving legislative ends and in delivering substantive outcomes that promote the common good.³¹ Those who cling to the “New Coke” aspiration that the judiciary will one day wrest discretionary power away from the administrative state are sorely misguided. Moreover, even if the US Court did indicate a desire to take such a step, it is not at all clear why it would be desirable. As the authors point out, much of the lofty rhetoric directed against the administrative state loses its vigour when forced to engage with “particular agencies...and particular practices.”³² It is one thing to bemoan the existence of the administrative state writ large, but quite another to maintain that righteous anger in the face of, say, the Nuclear Regulatory Commission.³³

However, one critical point does need to be made. While it may be true that, on some flexible interpretation of the classically amorphous term, democrats, originalists, and libertarians alike are concerned with protecting “the rule of law,” it seems unlikely that any of those groups have in mind the thin, formalist definition of the rule of law employed by Sunstein and Vermeule. Not surprisingly, Thomas Koenig argued that *Law & Leviathan* did not even attempt to address the central problem with the administrative state from the democratic perspective.³⁴ That problem is, in short, that “the chain of accountability from We The People” to federal bureaucrats is too tenuous.³⁵ As he wrote, “[T]he real battle over the growth of the administrative state is not over whether the rules are clear, but over *who makes the rules*.”³⁶ It is similarly unclear how any given libertarian will be comforted by Sunstein and Vermeule’s conclusion that administrative decision makers, when they intrude upon our personal and economic freedoms (as a libertarian understands them), must do so in accordance with certain procedural safeguards. This interesting book deserves to attract many serious readers—but it is unlikely to produce many converts.

31. See Sunstein & Vermeule, *Law & Leviathan*, *supra* note 1 at 143.

32. *Ibid* at 142.

33. *Ibid*.

34. “The Administrative State: Who Makes the Rules?” *National Review* (29 September 2020), online: <www.nationalreview.com/2020/09/administrative-state-unaccountable-bureaucrats-make-rules>.

35. Sunstein & Vermeule, *Law & Leviathan*, *supra* note 1 at 2.

36. Koenig, *supra* note 34 [emphasis in original].