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BOOK REVIEW

# *Law and Leviathan: Redeeming the Administrative State*

**CASS R. SUNSTEIN | ADRIAN VERMEULE**

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The administrative state continues to incite ardent academic and judicial opinion. A long-standing debate centres around the executive powers enjoyed and exercised by unelected government bureaucracies, most commonly exemplified by the executive, legislative, and judicial competences of administrative agencies. The structure of government in the modern administrative state extends far beyond a simple conception of three separate branches of government: executive, legislature, and judiciary. It is the apparent violations of the intended roles and competences of each branch that fuel concerns about the administrative state, especially in the United States (US). While the role of 'big government' and the nature of modern governing practices is a global concern, debate about the (in)congruence between the administrative state and the US Constitution is particularly mature and entrenched.

*Law and Leviathan: Redeeming the Administrative State* responds to critics of the administrative state who claim that it is variously unconstitutional, unaccountable, and illegitimate. The book frames the contemporary US debate about administrative law as one of staunch disagreement between its critics and supporters. Cass Sunstein and Adrian Vermeule identify a shared concern among critics about the illegitimacy of the modern administrative state and its effect on the separation of powers, democracy, and the rule of law. These critics find particularly problematic the capacity of federal administrative agencies to exercise powers that are reserved for the executive, legislature, and judiciary in the Constitution. On the contrary, supporters defend the administrative state's political and legal legitimacy, seeing it as 'essential for promoting the common good in contemporary society' (p. 3). They regard agencies as performing important functions to protect against various forms of exploitation and harm in areas such as health, labour, economy, and the environment.

Sunstein and Vermeule do not claim to settle these first-order conflicts about the nature and content of administrative law. Instead, they focus on redeeming the legitimacy of the administrative state by providing a framework for evaluating its procedural propriety. The intention is to bridge fundamental disagreements between supporters and critics of the administrative state. This project begins with the principles that constitute the internal morality of administrative law and culminates in the central argument that the development of administrative law in the US

should be read and understood as abiding by the principles of the rule of law. In the words of its authors, the book's aim is

> to understand and address the concerns of critics from the inside, offering a structure that can transcend the current debates and provide a unifying framework for accommodating a variety of first-order views, with an eye to promoting the common good and helping to identify a path forward amid intense disagreements on fundamental issues. (p. 6)

Chapter 1 examines and confronts the legal claims and constitutional theory presented by critics of the administrative state. The authors offer an impressive summary of the literature from a range of originalist and libertarian legal scholars[1] and the tendencies among judges to support associated reinterpretations of administrative law. The reader is provided with an overview of criticisms that the administrative state betrays constitutional commitments to political accountability and private liberty, and fails to exercise sufficient checks on executive power. In response, Sunstein and Vermeule offer a 'more sober view of American public law' (p. 22) by returning to the texts and motivating concerns behind the Administrative Procedure Act (APA), which stipulates the competences and procedures that govern federal administrative agencies' regulatory functions, and the Constitution. While the authors do not provide a 'full reconstruction' of the original meaning of the Constitution (p. 22), their aim is to highlight the insecure historical and doctrinal foundations of the originalist and libertarian critiques of the administrative state.

This sober response presents two related arguments. First, in spite of claims about returning to the original text, Sunstein and Vermeule understand the motivations of critics to be grounded in contemporary as opposed to historical fears – primarily, fears about administrative agencies exercising discretionary powers and the absence of adequate political accountability. Second, originalist claims about the Constitution's commitment to limiting the exercise of executive power present a partial reading of the original text and its aims. Returning to the writings of Madison and Hamilton, the authors set out the founding fathers' various motivations, including the need for strong national government and concerns about abuses of power by the legislative, judicial, *and* executive branches. These competing concerns indicate the 'full universe of risks' that must be balanced in the Constitution and recognized by public lawyers (p. 30). Therefore, the APA and the Constitution should be read as the attempt to accommodate a strong executive complete with delegated powers for administrative agencies with concerns about private liberty, democracy, and accountability. As Sunstein and Vermeule put it, 'the Constitution and the administrative state attempt to channel and constrain, rather than eliminate or minimize, executive discretion' (p. 24).

While the authors present a nuanced conception of public law, they concede that there is ample scope for administrative law reform and accept that their arguments are unlikely to appease staunch critics of the administrative state. In order to break this deadlock, Chapter 2 sets out a framework that aims to achieve a compromise and 'common language' for evaluating the legality of administrative law (p. 6). This 'second best approach' (p. 10) does not propose the ideal scenario for either the supporter or the critic of the administrative state but instead a mechanism for allaying fears about the rule of law while allowing sufficient delegation of powers to ensure that agencies are capable of performing their intended functions.

[1] See for example G. Lawson, 'The Rise of the Administrative State' (1994) 107 *Harvard Law Rev*. 1231; P. Hamburger, 'Chevron Bias' (2016) 84 *George Washington Law Rev*. 1187; R. A. Epstein, *How Progressives Rewrote the Constitution* (2006).

Sunstein and Vermeule's framework of procedural principles is drawn from Lon Fuller's internal morality of law. For Fuller, law's internal morality provides a set of procedures for the creation and maintenance of law. Fuller sets out eight principles that rules must be: general, publicly available, prospective, sufficiently clear, non-contradictory, possible to fulfil, relatively constant through time, and congruent with official action.[2] The principles of internal morality constitute the requirements and aspirations of the rule of law. Accordingly, the authors repurpose these principles as a framework capable of adjudicating conflicts about 'the scope, aims, and powers of the administrative state' (p. 10).

A key move here is to identify a concern for legality and the principles of the rule of law as a common denominator among criticisms of the administrative state. Drawing on a 'thin' conception of the rule of law, the authors detail the ways in which grants of discretionary power and other key pillars of administrative law are subject to rules about rule making and rigorous judicial scrutiny directed at protecting fundamental constitutional values.

With the evaluative framework established, each remaining chapter analyses the congruence between the principles of internal morality and current administrative law. Chapter 3 highlights judicial concerns for the principles of consistency and reliance. Chapter 4 identifies the limitations of internal morality for comprehending administrative law and holding it to account. This method involves detailed analysis of majority and dissenting judgments in key administrative law cases. These include Auer deference (to agency interpretations of their own rules),[3] Chevron deference (to agency interpretation of statutes),[4] and the non-delegation doctrine concerning the transfer and exercise of legislative power. In addition, the authors draw on an extensive range of case law and judicial opinion to demonstrate the intrinsic role of these principles at different judicial levels. This method provides the foundation for the bold but evidence-based claim that the administrative state has developed in accordance with principles of the rule of law. Moreover, taking the rule of law as a common desirable standard, the authors contend that the internal morality of administrative law can defuse high-intensity conflicts and concerns about 'arbitrary commands' or grants of 'unstructured discretion' to agencies (p. 43).

In spite of its support for the guiding effect of internal morality on legal officials, *Law and Leviathan* is not an uncritical celebration or defence of the administrative state. For instance, in Chapter 4, the authors acknowledge three explicit limitations of their framework. First, the appeal to the internal morality of law can mean the absence of sufficient grounding for decisions in sources of positive law. This raises particular challenges in administrative law due to the Vermont Yankee decision to limit the scope of procedural requirements to those found in the APA.[5] However, the authors insist on a more expansive role for Fullerian principles, identifying them as a fundamental part of law and key in 'reasoned administrative lawmaking' (p. 97). Second, there may be 'trade-offs' between the principles of legality and the provision of the common good (p. 97). Following Fuller, a violation of the principles of internal morality may be justified in delivering certain ends. The aspirational nature of internal morality means that its principles do not impose concrete duties. In practice, the judiciary will have to decide whether government has managed to balance sufficient respect for internal morality with the achievement of policy goals. Third, judges may lack the required expertise and time to adequately review agency decision making, opening

[2] L. Fuller, *The Morality of Law* (1969) 39.

[3] *Auer* v. *Robbins*, 519 U.S. 452 (1997).

[4] *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984).

[5] *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council Inc.*, 435 U.S. 519 (1978).

up the possibility for judicial errors and insufficient checks on agencies that expediate policies at the expense of law's internal morality.

Chapter 5 turns to the Roberts Court and identifies its reliance upon the principles of internal morality in its treatment of administrative law. The authors set out why the Court has rejected the more radical proposals of originalists and libertarians, instead favouring an approach that implements 'Fullerian principles as a set of safeguards for the values underlying the rule of law' (p. 118). Drawing on Sunstein's early work,[6] the authors argue that the Court has taken a 'surrogate safeguards' approach to administrative law whereby 'agencies enjoy expansive authority, but … that authority is shaped and constrained by the morality of administrative law' (p. 138). This approach has, according to the authors, enabled the Court to avoid the complexity of substantive policy making while protecting against procedural improprieties and upholding the rule of law.

The central project of *Law and Leviathan* remains true to Fuller's conception of the eight principles of legality as underpinning law's intrinsic commitment to achieving moral ends. The central purpose of law, for Fuller, is the 'enterprise of subjecting human conduct to the governance of rules'.[7] Importantly, law is something more than a set of mere commands or projection of authority. Drawing on the work of the sociologist Georg Simmel, Fuller understood government as having a moral obligation to realize conditions of reciprocity between government and citizens. Reciprocity is key to internal morality because it envisions a bargain between citizen and government, whereby subjecting human conduct to the rule of law both protects against abuses of power and enables the conditions of rational social coordination. While the authors do not draw explicitly on Fuller's understanding of reciprocity, it is implicit in their thesis that the internal morality of administrative law 'channels and constrains' the exercise of executive discretion. This thesis rejects readings of administrative law as facilitating abuses of executive power and insists that legal officials have, for the most part, sought to provide a framework for organizing the competing risks and rewards of administrative agencies in the coordination of contemporary society. The value of Sunstein and Vermeule's analysis lies in the revival of Fuller's understanding of law's fundamental purpose and the role played by rule of law principles in the development of administrative law.

The authors hope that the book will reach an international audience who share similar concerns with the challenges of contemporary administrative law. While the case law and relevant legal issues are unpacked for the non-specialist, the scope and impact of the arguments are more likely to pack a punch (and provoke a response) among their primary audience: public lawyers in the US, both academic and practising. The authors' analysis has international scope in its recommendation of applying a Fullerian analysis to evaluate the extent to which the regulation of administrative law is 'channelled and constrained' by principles of the rule of law.

Following Sunstein and Vermeule, rule of law principles provide an essential framework for adjudicating and managing competences in the administrative state – a framework that reduces the complexities of modern law and evaluates its legality and legitimacy on procedural grounds. This achieves the authors' aim of narrowing the frame for evaluating administrative law to issues of procedural propriety. In addition to inevitable criticisms from their primary interlocutors, the enduring challenge for this framework will be its capacity to sufficiently respond to impropriety and provide conditions that protect and enable the common good. While it is beyond the scope and aims of *Law and Leviathan*, the book's central thesis raises equally important issues about

[6] C. R. Sunstein, 'Interest Groups in American Public Law' (1985) 38 *Stanford Law Rev.* 29.

[7] Fuller, op. cit., n. 2, p. 106.

the extent to which a commitment to procedural propriety is capable of evaluating the administrative state's contribution to the common good. Whether this leads to well-worn debates about procedural and substantive approaches to the rule of law or critical analysis of the ideological commitments of modern government,[8] the administrative state will continue to pose fundamental challenges to democracy and the principles of 'good' government.

The authors make repeated reference to the capacity for administrative agencies to deliver the common good and general welfare. However, in the text, what these terms mean and what they require in practice are assumed. Given the influence of Fullerian reasoning about the common good as provided by and limited to law's fundamental purpose of facilitating social coordination, this assumption is easily explained. However, it also signals a key weakness of the framework's capacity to redeem the administrative state from broader criticism – for example, questions about the common good and shared interest that insist upon more forthright commitments to the substantive nature of constitutional values.

The generality, clarity, and non-retroactivity of law may provide the foundation for a just legal system but we might aspire beyond Fuller for something like dignity and solidarity. For instance, agencies whose policies fail to adequately respond to the demands of workers or provide sufficient social security may satisfy the principles of legality but pose a substantive threat to the common good. The authors do not confront this challenge; they are engaged in the task of 'redeeming' the administrative state from critics who demand limited government. As such, there is less concern for critics who accept the role of complex administrative government but call into question the turn to governance, the rise of market logics, the absence of democratic mechanisms, and the capacity for judicial commitment to 'due process' to play any meaningful role in defending fundamental values. In this sense, the exercise of redeeming the administrative state is contingent on both which pathologies we are willing to vindicate and which values we insist on recovering and protecting.

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[8] See for example A. Supiot, *Governance by Numbers: The Making of a Legal Model of Allegiance* (2017).