*Cass R. Sunstein & Adrian Vermeule,* **Law & Leviathan: Redeeming the Administrative State**,Cambridge, Massachusetts, Harvard University Press, 2020, pp.208, hb, £20.95.

In their recent and timely monograph *Law and Leviathan: Redeeming the Administrative State* Cass Sunstein and Adrian Vermeule mount a spirited defence of the administrative state against those who advocate stripping its capacity and returning to a legislative-led separation of powers. Although their analysis is grounded in the United States, the authors write with the express goal of discussing the status of the administrative state in constitutional systems more broadly (13).

Chapter I begins by outlining some of the most common contemporary legal and normative critiques mounted against the administrative state in the United States. Sunstein and Vermeule colourfully dub the cluster of beliefs hostile to the legal and moral legitimacy of the administrative state - ‘*the New Coke’* – so named due to the admiration critics hold for the famed English jurist Edward Coke and his judicial resistance to the perceived executive despotism of the Stuarts. The authors outline how academic and judicial proponents of the ‘*New Coke’* position frequently portray the executive-led administrative state – and its capacious discretion – as the modern-day equivalent of Stuart absolutism unbounded by law (19-26).

*New Coke* critics argue that several core features of the administrative state – including broad delegation of rule-making authority, creation of independent agencies not under the plenary control of the president, and the *Chevron* and *Auer* line of case-law where Courts defer to reasonable administrative interpretations of ambiguous statutes and regulations, are all utterly inconsistent with the Constitution and separation of powers originally (and for them properly) understood (20-22, 24-26). To correct this unconstitutional situation, they advocate aggressively applying originalist interpretations of the Constitution to reinvigorate hard limits on the legislature’s ability to delegate statutory rule-making authority to administrative bodies and returning to an original understanding of judicial power that would banish *Chevron* and *Auer*. The authors note how several Justices on the current Supreme Court bench – most prominently Justices Thomas and Gorsuch - have expressed sympathy with these arguments (21).

*New Coke* critics buttress these legal arguments with several normative objections to the administrative state. One argument is that copious delegation of power by legislatures to the executive and administrative bodies is undemocratic; that law-making power belongs to the democratically elected legislature and, as a result, the most substantial political and moral issues of the day should be decided by them through the legislative process. Additionally, fear of arbitrary rule and despotism is at the heart of why ‘*New Coke’* critics wish to see a significant dismantling of the administrative state’s capacity (19-26). Capacious delegation and judicial deference to agency statutory interpretation are said to increase the risk of arbitrary abuse of power; expanding the circumstances in which the State can intervene in the lives and affairs of citizens and corporations, compared to where a legislature enacts general, clear, detailed rules and judges review statutory interpretation *de novo*. On this view, the administrative state is a development in deep tension with democracy and liberty, two core principles of contemporary constitutionalism.

These legal and normative arguments are robustly rejected by the authors. On the legal front, the authors suggest objections to the legality of the administrative state are based more on contemporary libertarian readings of text and structure rather than a faithful historical approach based on original public meaning. The authors argue that the view the administrative state is legally legitimate offers a more morally compelling reading of constitutional text and structure, a more plausible reading of history, and gives due weight to settled constitutional practice over many decades as expressed through countless judicial decisions, enactment of landmark statutes like the Administrative Procedure Act 1946, and the views of successive democratically elected officials (23-24, 32-37).

In respect of normative arguments against the administrative state, the authors trenchantly defend its democratic credentials and contribution to the common good. The authors highlight how the shift to a separation of powers dominated by a powerful presidency overseeing a potent administrative state emerged over a very extended period - not because of unilateral presidential aggrandisement - but through continuous cycles of democratic politics where citizens appointed officials who were content with the propriety of the growing authority of the presidency and bureaucracy. Moreover, they maintain the contemporary administrative apparatus remains highly democratically accountable through presidential and congressional oversight (2-4, 26, 142).

Sunstein and Vermeule acknowledge they have different first order views about what the general welfare or common good entails and how it should be pursued (5). This book is therefore in many ways a decidedly second order project, based upon an intellectual meeting of minds on the basic premise that the growth in the capacity of the administrative state is a welcome development, as without such institutional authority the State’s capacity to regulate socio-economic life and respond to policy issues for the general welfare - however concretely expressed - would be seriously dented. The authors also share the basic premise that *New Coke* critics work from a myopic view of what liberty or abuse of power entails, selectively emphasising ‘one set of risks, neglecting the full universe of risks’ (30) That is, focusing on State abuses of power while neglecting consideration of abuses that can come from being ‘hurt or subordinated’ by market or employment exploitation or the vagaries of ‘ill-health, poverty, or pollution’ (5).

For Sunstein and Vermeule, the expansion of the administrative state and its discretionary authority represents a reasonable set of judgments about how to best pursue the common good and general welfare - by expanding the institutional capacity of the State to address the above kind of abuses (30-37). The authors ask if people would truly be freer or better off absent the kind of regulatory activities typically entrusted to actors in the administrative state, including formulating and enforcing labour laws, food safety regulation, environmental protection, and public health measures? For proponents of the administrative state’s normative legitimacy, the answer is clearly ‘no’ – and in fact its potent capacity is necessary to achieving the *purpose* of constitutional government – which the authors take to be the general welfare and common good.

While the authors mount a robust legal and normative defence of the administrative state, this kind of all-things-considered defence of the administrative state is *not* the main point of their project, nor is taking the fight to their critics from first principles, something each author has done separately, sometimes in scathing terms (A. Vermeule, ‘No’: Review of Philip Hamburger, *Is Administrative Law Unlawful?* (2014) (2015) 93 *Texas Law Review* 1547).

Instead, the rest of the book takes the form of a proposed intellectual peace-treaty designed to be attractive to both serious critics and enthusiasts of the administrative state (6). The authors therefore take critiques of the administrative state very seriously and, although they do not agree with the *New Coke’s* legal or normative objections, they share a concern for what they view as the animating core of objections to the administrative state: concern about the rule of law and the risks of arbitrary decision making (2).

Chapter 2 outlines the terms of the intellectual truce the authors seek to offer to all sides in the conflict over the morality of the administrative state - a conceptual framework for channelling and constraining administrative action they argue can be a common starting point for ‘people of divergent convictions, with different first order views’ (6, 37). Sunstein and Vermeule argue common ground can be found by those both favourably and unfavourably disposed to the administrative state, through renewed attention and protection of what the authors call the ‘morality of administrative law’ (8-10). These are the legal and moral principles the authors argue help put the work of the administrative state in its best moral light, principles which both constrain its scope for arbitrariness while also improving its efficacy and perceived legitimacy (9).

The principles the authors rally behind track Lon Fuller’s internal morality of law (Lon Fuller, *The Morality of Law,* Yale University Press, 1969) and are said to be already deeply embedded in US administrative law. These principles famously include the requirement State actors make general rules and not act entirely via ad-hoc command; that rules are promulgated; not abusively retroactive; are accessible and clear; non-contradictory; do not require the impossible; and not changed too frequently. There must also be congruence between the law as posited and as applied (38-40). Bundled together, they amount to an aspirational conception of the ‘rule of law’ which, while described as ‘thin’ by the authors, nonetheless demonstrates a substantive Fullerian concern for arbitrariness and State capacity to interfere with the moral agency and freedom of citizens (12).

In Chapters 2, 3 and 4 Sunstein and Vermeule demonstrate how respect for such principles is discernible in administrative law doctrine, and that they give both coherence to a disparate range of case law and put it in its best moral light (38-40). These chapters outline how Courts have used these principles, which lack an obvious basis in the Constitution or statute, to channel and constrain administrative action. They chart how these principles have featured in cases where Courts have: voided statutes whose scope was excessively vague such that there was, in substance, a failure to make legal rules and obligations understandable (50-52); struck down agency action where administrators failed to apply in practice the same standards they articulate in principle (56); placed interpretive presumptions against the retroactive application of rules which effectively impose new burdens on past conduct (61-62); refused to extend deference to facially reasonable administration interpretations of their own statutes or regulations if those interpretations were adopted in an arbitrary or opportunistic way which upset economic or reliance interests without a reasonable explanation; (70-80) and refused to extend deference to facially rational policymaking where there was evidence of pretext and a lack of congruence between the action announced and its actual motivation (140-141).

Lacking a firm basis in posited law, the principles operate in a Dworkian sense as background principles of legal and political morality drawn upon by legal actors to make sense of consistent legal practice and put legal materials in their best moral light (39). Taken together, they are said to help to empower and constrain administrative action, in a manner which makes it more morally legitimate *and* more efficacious as law, as a distinct enterprise of ruling via a system of accessible, transparent, rules oriented to co-ordinating human action in a manner respectful of moral agency, as opposed to ruling by arbitrary ad-hoc command.

Vermeule and Sunstein argue such principles, when factored into bureaucratic decision-making and given bite via judicial review, can make a dramatic difference to both the efficacy and morality of administrative action. In contrast, any sizeable degree of disrespect for these in any direction can lead to ‘serious problems — from the standpoint of democratic accountability, liberty, and welfare’, which arise ‘if public officials have the discretion to do whatever they want, if citizens have to guess about what the law is, and if people are unable to plan their affairs’ (88-89). Total disrespect of these principles would lead to a complete failure to maintain a legal system at all – and would better resemble a regime based on arbitrary ad-hoc commands (143).

Chapter 5 offers a brisk tour of the contemporary US Supreme Court’s approach to hot-button administrative law issues like the scope of the delegation doctrine and judicial deference to agency interpretation. The authors are sceptical of claims that there is appetite, even amongst the more anti-administravist members of the Court, for a wholescale attack on these features of the administrative state. Rather, they argue cases such as *Gundy v. United States* 139 S. Ct. 2116 (2019) and *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019)highlight that the Court is currently engaged in a ‘redemptive enterprise’, which tries to ‘legitimate’ and not ‘curtail’ the basic features of the modern administrative state (such as widespread delegation and interpretive deference), by ‘eliciting and formalizing the internal principles and logic of laws morality’ (141) and requiring bureaucratic action be more rule-bound, transparent, and non-arbitrary. The Court offers ‘surrogate safeguards’ and ‘checks and limits that promote fidelity to the law’ when it comes to contested practices like broad delegation and interpretive deference and not ‘constitutional invalidation’ (144).

Although aware their arguments will not assuage everyone’s first order concerns over the legitimacy of the administrative state, Vermeule and Sunstein suggest robustly respecting these rule of law principles should go a long way to curbing the kind of bureaucratic excesses that worry many commentators and thus represent a normatively acceptable second-order compromise for even its most vociferous critics. It offers, they say, a reasonable conceptual framework which gives ‘wide scope for policy initiative while addressing the ultimate concerns about the rule of law that animate critics of the administrative state’ (141). It seems clear, for example, that Vermeule and Sunstein hope even judges sympathetic to arguments of the ‘*New Coke’* can reasonably endorse basic tenets of the administrative state - like capacious delegation or *Chevron* - by purging its most egregious perceived sins against the rule of law via baptism with the principles of law’s internal morality.

While a relatively short work, the book’s brevity does not sacrifice its nuance. The authors outline a clear objective in its opening pages – to articulate a conceptual framework for administrative action reasonable for both proponents and opponents of the administrative state to endorse – and proceed to defend it with considerable elegance and analytical rigour.

One (perhaps unavoidable) limitation of the book is that some of its content might be of limited relevance to non-US jurists. While the authors have the express goal of discussing the status of the administrative state in constitutional systems more broadly, their analysis is grounded in the legal practice of the United States. The limitation this choice of jurisdiction imposes stems from the fact it is probably fair to say that the United States’ long-running battles over the *legal* legitimacy of the administrative state will seem idiosyncratic, even downright odd, to foreign jurists where the issue has long been settled (or never seriously debated); meaning that the book’s discussion of the legality of the administrative state may be of limited interest to foreign public lawyers, as may its technical discussion of aspects of US administrative law doctrine.

That said, the book’s broader theoretical discussion of the place of the administrative state in contemporary legal systems, the internal morality of law, the common good - and how all these issues intersect - will be of immense relevance and value to public lawyers interested in these topics, regardless of their jurisdiction. *Law and Leviathan* should – and I think will - become required reading for both the strongest proponents and fiercest opponents of the now very prominent place of the administrative state in contemporary constitutional orders.

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