Rezensionsaufsatz

A Road to Redemption? Reflections on *Law & Leviathan*

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I. The Administrative State as an Object of Contention

In US legal and political debates, the term 'administrative state' has come to indicate the phenomenon of executive branch administrative agencies exercising the power to create, adjudicate, and enforce their own rules.[1] Although the legitimacy of such phenomenon within the framework

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Cass R. Sunstein and Adrian Vermeule, Law and Leviathan: Redeeming the Administrative State. Cambridge, Ma.: The Belknap Press, 2020. ISBN 978-0-67424753-6 (hardback). 208 pp. $27.00 / £21.95 / €24.50.

[1] The phenomenon dates back to at least the nineteenth century and saw an exponential increase starting from the New Deal policies in the 1930s. The term 'administrative state' – in its current use – seems to have emerged with the book Dwight Waldo, *The Administrative State: A Study of the Political Theory of American Public Administration* (New York: Ronald Press Company 1948). For a historical outline, see Ronald Pestritto, 'The Birth of the Administrative State: Where It Came From and What It Means for Limited Government', The Heritage Foundation (2007), available at <https://www.heritage.org/political-process/report/the-birth-the-administrative-state-where-it-came-and-what-it-means-limited>; and Peter L. Strauss, How the Administrative State Got to This Challenging Place', Daedalus 150 (2021), 17-32. For an account of the shifting definitions over decades and the gap between scholarly and public understandings of the concept, see Alasdair Roberts, 'Should We Defend the Administrative State?', PAR 80 (2020), 391-401.

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of the United States (US) Constitution has never really ceased to be an object of academic disputes, only in the last few years has this problem made its way into broader political debates. This has emerged in a particularly virulent way starting with the Trump presidency. In a talk delivered in February 2017 at the Conservative Political Action Conference, Stephen Bannon – the conservative nationalist then chief strategist in the White House – promised that one of Trump's priorities was the 'deconstruction of the administrative state',[2] perceived as bloated, dysfunctional, and dangerous to liberty. However, one should be wary of equating the criticisms against the administrative state with those – mostly fomented by conservative movements – against its 'conspirationist' proxy, the (un)famous 'deep state'.

Following a trajectory similar to most (Western) constitutional systems, US administrative agencies have exponentially grown in power and scope during the twentieth century, especially at the federal level.[3] This expansion has often taken place with weak legal bases and, more generally, thin congressional or even presidential oversight. This situation has given rise to a highly heated debate, quite unique for its intensity.

The legitimacy of the 'administrative state' is contested by a broad and diverse array of critics. Such critics include (conservative) originalists, arguing that the Constitution would not allow the Congress or the President to delegate such broad regulatory, executive, and adjudicative powers;[4] libertarians, focussing on the allegedly excessive limitations to liberty and the dangers coming from the ever-expanding power of administrative agencies;[5] and democrats, focussing on issues of accountability, democratic control, and political legitimation.[6] On the opposite side, an equally broad array of supporters variably claim that the administrative state is deeply rooted in the

[2] See Ryan T. Beckwith, 'Read Steve Bannon and Reince Priebus' Joint Interview at CPAC', Time (2017), available at <https://time.com/4681094/reince-priebus-steve-bannon-cpac-interview-transcript/>.

[3] See Susan E. Dudley, 'Milestones in the Evolution of the Administrative State', Daedalus 150 (2021), 33-48.

[4] Gary Lawson, 'The Rise and Rise of the Administrative State', Harv. L. Rev. 107 (1994), 1231-1254; Philip Hamburger, 'Chevron Bias', Geo. Wash. L. Rev. 84 (2016), 1187-1251; Joseph Postell, *Bureaucracy in America* (Columbia, Mi: University of Missouri Press 2017); Steven G. Calabresi and Gary Lawson, 'The Depravity of the 1930s and the Modern Administrative State', Notre Dame L. Rev. 94 (2018), 821-866.

[5] Richard A. Epstein, *How Progressives Rewrote the Constitution* (Washington, D. C.: Cato Institute 2006).

[6] Theodore Lowi, *The End of Liberalism: The Second Republic of the United States* (New York: Norton 1979); David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation* (New Haven, Ct: Yale University Press 1995).

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history of the US constitution;[7] that it is, in fact, constitutionally legitimated and/or democratically accountable;[8] and that it is overall efficient and beneficial to the welfare of the people.[9]

II. *Law & Leviathan* as an Ecumenical Project

Against this background, with their book '*Law & Leviathan. Redeeming the Administrative State*', Cass Sunstein and Adrian Vermeule advance a proposal to settle 'long-continued and hard-fought contentions'[10] (pp. 1, 18, 42, 115) concerning the legitimacy of the administrative state. The book presents itself as a relatively light and all in all reasonable defence – a redemption – of the administrative state against its critics across the US legal-political spectrum. However, their book is more than that. It is an ambitious, even ecumenical project, as the authors explicitly claim (p. 90). Such ecumenism emerges in two ways.

Firstly, between the authors themselves, who hold different first-order views (pp. 5-6). Sunstein's 'libertarian paternalism'[11] – building on behavioural economics, cost-benefit analysis, and 'nudging'[12] – supports a broad discretion of administrative agencies, subject to welfarist principles. Vermeule, for his part, recently proposed a 'common good constitutionalism' which, de-

[7] See Jerry L. Mashaw, *Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law* (New Haven, Ct.: Yale University Press 2012); and more generally Mark Tushnet, 'Introduction: The Pasts & Futures of the Administrative State', Daedalus 150 (2021), 5-16 (6-8).

[8] Elena Kagan, 'Presidential Administration', Harv. L. Rev. 114 (2000), 2245-2385; Gillian E. Metzger, '1930 Redux: The Administrative State Under Siege' Harv. L. Rev. 131 (2017), 1-95.

[9] Stephen Breyer, *Regulation and Its Reform* (Cambridge, Mass.: Harvard University Press 1982); Matthew Adler, *Well-Being and Fair Distribution: Beyond Cost-Benefit Analysis* (Oxford: Oxford University Press 2011).

[10] The authors repeatedly refer to a passage of *Wong Yang Sung v. McGrath*, 339 U. S. 33 (1950), at 40-41, arguing that the 1946 Administrative Procedure Act (APA)
'[…] represents a long period of study and strife; it settles long continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest. It contains many compromises and generalities and, no doubt, some ambiguities. Experience may reveal defects. But it would be a disservice to our form of government and to the administrative process itself if the courts should fail, so far as the terms of the Act warrant, to give effect to its remedial purposes where the evils it was aimed at appear.'

[11] Richard H. Thaler and Cass R. Sunstein, 'Libertarian Paternalism', The American Economic Review 93 (2003), 175-179.

[12] See, among many works, Richard H. Thaler and Cass R. Sunstein, *Nudge* (New Haven, Ct.: Yale University Press 2008); Cass R. Sunstein, 'Nudging: A Very Short Guide', Journal of Consumer Policy 37 (2014), 583; Cass R. Sunstein, *The Cost-Benefit Revolution* (Cambridge, Ma.: MIT Press 2017).

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parting from libertarian conservatism and originalism, would promote 'human flourishing' and the 'common good'.[13] This notwithstanding, or precisely because of that, the authors aim to represent a 'living example' of the possibility to '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).

Secondly, the ecumenism emerges among the supporters and the critics of the administrative state. In Chapter 1, the authors describe the distinct positions of the critics recalled above (pp. 19-37), to which they collectively refer as 'The *New Coke*', a reference to the common-law judge *Coke* who opposed Stuart despotism (p. 22). They aim to offer a framework that 'can be embraced not only by ambivalent or uncertain observers attempting to make sense of fundamental questions, but also by the most enthusiastic supporters of the administrative state […] and by the most committed skeptics […]' (p. 6). The book's ecumenical, redemptive project – one might be tempted to call it 'The *New Pope*', had it not already been used for a television series – then offers a defence of the administrative state which would address and appease the concerns of the *New Coke*, partly shared by the authors themselves.

In negative terms, the authors argue that libertarian, originalist, and democratic critics 'focus too myopically and selectively on one set of risks, neglecting the full universe of risks' (p. 30). In particular, they recall the motivations underlying the enactment of the 1946 Administrative Procedure Act (APA) and, before then, of the Constitution itself (especially through references to Madison and Hamilton). Both instruments – the Constitution and the APA – constituted attempts to accommodate a strong executive holding delegated powers for administrative agencies with concerns about private liberty, democracy, and accountability (pp. 30-37). In other words, the structures of the administrative state constitute a delicate balance between conflicting needs: intervening on it would not *per se* avoid the risks feared by the *New Coke* and might actually increase them.

What is, however, in positive terms, the road to redemption indicated by the authors? They aim to establish a common framework 'within which disagreements can occur in a productive, structured way' (p. 6). Such framework would consist in a set of procedural principles 'with widespread appeal in many legal systems, […] often discussed under the heading of natural

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[13] See, among many works, Adrian Vermeule, 'Beyond Originalism', The Atlantic (2020), available at <https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/>; and more recently Adrian Vermeule, *Common Good Constitutionalism* (Cambridge: Polity 2022).

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justice, natural procedural justice, or some such formulation. In the US system, they are often said […] to be inherent in the notion of "due process of law", in "tradition", or in unspecified constitutional sources' (p. 8).

Starting from Chapter 2 (pp. 38 ff.), the authors build on Fuller's work and identify three macro-principles, which would constitute *the morality of administrative law*: 1) agencies must follow their own rules; 2) retroactive rulemaking is disfavoured and must be limited to prevent abuse; 3) and official agency declarations of law and policy must be congruent with the rules that agencies actually apply (p. 9).

Such principles would constitute minimum procedural constraints to administrative action, that is, surrogate, indirect safeguards (pp. 10-14, 116-141) based on a 'thin' conception of the rule of law (p. 12). Compared to their respective first-order views recalled above, this is the second-best approach (pp. 12, 17) which the authors propose to prevent the constitutional invalidation or aggressive substantive review of administrative agencies' powers, invoked by the most belligerent exponents of the *New Coke*. At the same time, such principles would help the administrative state to become fully efficacious through procedures that channel agency action (pp. 39-43, 144). The broader point made by the authors – worth stressing in a legal-political discourse where libertarian rhetoric has so much currency – is that (administrative) law is both limitative and constitutive of power and, consequently, of the very rights and freedoms that power itself realises and protects.

To substantiate their point in the central chapters of the book (pp. 38-115), the authors embark on an enjoyable *tour* on the (judicial) development of US administrative law in the past century. Chapter 3 highlights how courts safeguarded the principles of consistency and reliance, while Chapter 4 focusses on the limitations of internal morality for and holding administrative law to account. The authors especially analyse the nondelegation doctrine,[14] the *Chevron* deference,[15] and the *Auer* deference.[16] Overall, Sunstein and Vermeule argue that at least since the enactment of the APA and the decisions of the Supreme Court *Wong Yang Sung* (1950) and *Vermont Yankee* (1978), US

[14] Doctrine of US administrative law that Congress cannot delegate its legislative powers to other entities: see *Hampton v. United States*, 276 US 394 (1928); and *Schechter Poultry Corp. v. United States*, 295 US 495 (1935).

[15] Doctrine of judicial deference to administrative actions – first enounced in *Chevron U. S. A., Inc. v. Natural Resources Defense Council, Inc.*, 468 US 837 (1984) – whereby courts should defer to the agency's answer or interpretation of law, holding that such judicial deference is appropriate where the agency's answer was not unreasonable, so long as the Congress had not spoken directly to the precise issue at question.

[16] Doctrine of judicial deference to administrative actions *Auer v. Robbins*, 519 U. S. 452 (1997) requiring federal courts to yield to an agency's interpretation of an ambiguous regulation that the agency has promulgated.

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administrative law and practice has been built on principles of (administrative) morality, thus providing an appropriate justification for the growing expansion of the administrative state. In particular, they describe how delegation of power and other pillars of administrative law are subject to rules about rule making and judicial scrutiny directed at protecting constitutional values.

Chapter 5 (pp. 116-141) moves back to present-day debates. Sunstein and Vermeule individuate in the Roberts Court the institutional setting where the principles of internal morality of administrative law have finally coalesced. With the so-far successful opposition to the *New Coke* demands brought by newly appointed justice Gorsuch – they argue – the Supreme Court moved during its 2018-2019 term toward an approach that relies on principles of administrative law's internal morality 'strikingly consistent with our framework, and far less consistent with other possible frameworks' (p. 118). In its most recent decisions, the Court seems to have taken a 'surrogate safeguards' approach to administrative law, holding that 'agencies enjoy expansive authority, but […] that authority is shaped and constrained by the morality of administrative law' (p. 138). By these means, the Court would not intrude in the complexity of substantive policy making while still defending the (thin) rule of law.

Through this elaboration, the law has allegedly 'redeemed the legitimacy of the administrative state while recognizing the complaints of its critics' (p. 18). This is a crucial point: the legitimacy/lawfulness of the administrative state is at the same time *based on* and *strengthened by* its own 'internal' morality or – better – the consistent recourse to doctrines and principles ultimately with a 'moral' character. In other words, the authors argue that, while the 'natural' principles of administrative law morality have already been there since the *New Deal* era, somehow less evident, as a sort of underground river, they have now coalesced and emerged through a settled corpus of precedents and doctrines. Such corpus might constitute the long-awaited 'common house' and possibly even put the controversy over the legitimacy of the administrative state to an end. Sunstein and Vermeule (or the Roberts Court) only bring it to light.

Law & Leviathan is a useful source to learn about the current state of US public law discourse. The reader can find an interesting mapping of concerns and solutions advanced towards developments which – to different degrees and under various labels – have taken place in most Western constitutional systems, as well as within the institutional structures of global governance. Beyond that, however, the book shows several and significant limits, which can be grouped under three headings: self-referentiality, use of the concept of 'legitimacy', and instrumental redirection of Fuller's 'morality of law'.

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III. The Limits of the Project

1. Self-Referentiality

The first limit is its self-referentiality. I am not referring to the fact that some of the book's content is of limited relevance to non-US jurists.[17] After all, the authors aim to convince their domestic interlocutors about the legitimacy of the US administrative state. Rather, I refer to what Quinn Slobodian most recently indicated as 'the peculiarly American quality of ignoring the rest of the world while assuming that America was a working model for it'.[18] Indeed, Sunstein and Vermeule consciously 'touch on some of the largest issues facing contemporary democracies […] with the goal of speaking to fundamental problems in many nations' (p. 13). They also claim that the path they choose is promising 'for nations all over the world […] because it has the potential to authorize the legitimate functions of the contemporary administrative state, and thus to promote the common good and human welfare, while also helping to make real the values associated with the rule of law' (p. 18).

However, the authors did not seem to consider analyses, solutions, and criticisms advanced in other contexts for the very same issues. Sunstein and Vermeule are well aware that various 'procedural turns' in legal-political thought have recurringly been taken as a way to legitimise pervasive administrative action – and, more generally, authority – within Western, fragmented mass societies, characterised by (aspirations to) democratic legitimation, the need to protect rights, and to ensure the effective regulation in multiple social spheres. Without going too far back in time, in continental scholarship, one may think of Rudolf Wiethölter's works.[19] In US (international) legal thought, especially Benedict Kingsbury has contributed to the development of a concept of 'global' administrative law that comes close to their framework.[20] The authors are most certainly aware that especially critical and feminist scholarship has dissected these procedural solutions from various

[17] This is the only limit found by Conor Casey in his otherwise enthusiastic review: see M. L. R. 84 (2021), 1467-1472 (1472).

[18] Quinn Slobodian, *Globalists* (Cambridge, Ma.: Harvard University Press 2018), 9.

[19] See for example Rudolf Wiethölter, 'Proceduralization of the Category of Law', GLJ 12 (2011), 465-473 (originally published in 1986).

[20] See especially Benedict Kingsbury, 'The Concept of 'Law' in Global Administrative Law', *EJIL* 20 (2009), 23-57, particularly relevant for the use of Fuller's concept of 'inner morality of law' and the focus on procedural principles of public/administrative law. See more generally the seminal article by Benedict Kingsbury, Nico Krisch and Richard B. Stewart, 'The Emergence of Global Administrative Law', Law & Contemp. Probs. 68 (2005), 15-61.

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perspectives.[21] Yet even without going fully 'critical', one could take into consideration current debates about the causes of populist tendencies in constitutional systems[22] or the remarks to the 'global administrative law' project.[23] How desirable or avoidable the trend towards the proceduralisation in modern law and politics is, what flanks it exposes and how it *actually* enhances the legitimacy of public (and private) authorities – these are all questions that have been heavily debated for more than four decades now.

Law & Leviathan stays purposefully away from these 'big' debates. The authors claim somewhat dismissively that their aims are not at all jurisprudential (pp. 41-42). This – one may notice – is quite odd for a book titled *Law & Leviathan*. It is precisely this under-theorisation, however, that allows the authors to give a patina of novelty to otherwise unoriginal solutions: internal, minimum procedural constraints; efficacy as a source of (output) legitimacy; strategic use of open-ended provisions by Fuller-inspired judges.

2. The Concept of Legitimacy

The strategic under-theorisation is most apparent with the oscillating use of 'legitimacy', which I consider to be the second major limit of the book. Although the authors claim to typically refer to legal legitimacy, they admit-

[21] See, among many, Duncan Kennedy, 'Comment on Rudolf Wietholter's "Materialization and Proceduralization in Modern Law", and "Proceduralization of the Category of Law"', GLJ 12 (2011), 474-487 (originally published in 1986); Reeta Chowdhari Tremblay, 'Inclusive Administration and Development: Feminist Critiques of Bureaucracy' in: Keith M. Henderson and O. P. Dwivedi (eds), *Bureaucracy and the Alternatives in World Perspective* (London: Palgrave Macmillan 1999), 69-84; Tammy Findlay, *Femocratic Administration: Gender, Governance, and Democracy in Ontario* (Toronto: University of Toronto Press 2018); Alexis R. Kennedy, Sebawit G. Bishu, and Nuri Heckler, 'Feminism, Masculinity, and Active Representation: A Gender Analysis of Representative Bureaucracy', Administration & Society 52 (2020), 1101-1130.

[22] For a short introduction to an otherwise vast debate, see Paul Blokker, 'Populist Constitutionalism', Verfassungsblog (2017), available at <https://verfassungsblog.de/populist-constitutionalism/>. More generally, see Jack Hayward (ed.), *Elitism, Populism, and European Politics* (Oxford: Oxford University Press 1996); the Special Issue 'Public Law and Populism', GLJ 20 (2019), 125-290; Jonathan White, *Politics of Last Resort: Governing by Emergency in the European Union* (Oxford: Oxford University Press 2019), ch. 6; and Mark Tushnet and Bojan Bugarič, *Power to the People. Constitutionalism in the Age of Populism* (Oxford: Oxford University Press 2022).

[23] Notably the disentanglement between legitimation and rationalisation, that is, between lawmaking and jurisgenerative publics; tendencies to technocratic governance; a post-public notion of legitimacy, where the regulatory publics comprise informed but privileged players: see, among many, Ming-Sung Kuo, 'Taming Governance with Legality? Critical Reflections upon Global Administrative Law as Small-c Global Constitutionalism', N. Y. U. J. Int'l L. & Pol. 44 (2011), 55-102.

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tedly do not choose one single sense – legal, moral, sociological – assuring the reader that the context will make it clear (p. 148 n. 5). They seem to use such ambiguity to dodge potential (counter-)arguments exposing the weaknesses of their line of reasoning: the moral legitimacy of procedural principles would simultaneously emerge from and strengthen the concrete practice of US administrative law, making the administrative state lawful and ultimately enhancing its (sociological) legitimacy.

However, the critics of the administrative state are not concerned only with its conformity with the constitutional framework of any given system. More often than not, such critics are concerned about more or less unintended, more or less unnoticed authoritarian drifts, risks deeply rooted in the inner organisational structures of Western modernity – what has come to be known as the Weberian 'iron cage of future serfdom'.[24] The problem with the administrative state is not only whether it is lawful within its own system, be it a parliamentary democracy with no direct legitimation of the executive (e. g. Italy); a business corporation (e. g. Facebook/Meta);[25] or the fragmented global governance system gravitating around international organisations and transgovernmental networks.[26] Rather, the problem is also whether procedural principles only legitimise the action of (either public or private) actors, while simultaneously hiding and reinforcing their mechanisms of self-reproduction, deepening social manipulation and fragmentation, possibly paving the way to authoritarian drifts at both macro- and micro-levels.[27]

24 That is, the authoritarian tendencies intrinsic to Western modernity and rooted in processes involving fragmented meaning, instrumental calculation, bureaucratic organization, charismatic leadership: see Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (New York: Bedminster Press 1968 [1914-1920]), 212-254, 926-938.

25 I refer to the 'case law' of the Oversight Board, the independent private adjudicatory body recently established by Facebook/Meta to review content moderation decisions on its social media platforms, which has mostly adjudicated the takedowns based on procedural principles largely similar to those advanced by Sunstein and Vermeule.

26 For this problem in the context of international institutional law, see only Armin von Bogdandy et al. (eds), *The Exercise of Public Authority by International Institutions. Advancing International Institutional Law* (Heidelberg: Springer 2010); Andrew Guzman, 'International Organizations and the Frankenstein Problem', EJIL 24 (2013), 999-1025.

27 For an illuminating discussion in US socio-legal thought, see David Sciulli, *Theory of Societal Constitutionalism: Foundations of a Non-Marxist Critical Theory* (Cambridge: Cambridge University Press 1992), insisting on the inability of liberal constitutional theory to detect in conceptual terms authoritarian drifts within society, even when state structures remain liberal-democratic. Such authoritarian drifts – Sciulli argued – are an intrinsic rather than accidental feature of Western modernity, rooted in processes of fragmented meaning, instrumental calculation, bureaucratic organisation, charismatic leadership. Confronted with such processes, liberal constitutionalism's inherited concepts fail to address and may actually enable both purposefully and inadvertently arbitrary exercises of collective power by private enterprises within civil society.

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The authors explicitly analogise what they call the morality of administrative law to 'enduring legal and political frameworks such as the US Constitution, the Universal Declaration of Human Rights, and the Nicene Creed [*sic*!], all of which have allowed wide scope for contest and conflict within a common order' (p. 6). They seem to overlook what especially critical scholarship has long shown, that is, how the specific features or assumptions of these foundational texts have directly or indirectly served as justifications for violence, inequality, discrimination, socio-political marginalisation, often strengthening institutions and groups benefitting from such dynamics, be they the Church, the white land- and slave-owners, or the US in the global arena. Admittedly, the authors do not intend to include every position in their framework. But the problem of the modern administrative state lies precisely in what is left 'out there', in what is excluded *from* and *through* procedures, especially when the relevant agencies are unavoidably 'enmeshed with interest groups and congressional committees'.[28] Faced with these problems, it is crucial to ask how well equipped, (in)sufficient, or even counter-productive some mechanisms of the administrative state actually are. However, the authors certainly try to circumvent and even avoid addressing this pressing question.

On the contrary, the reader is left with the feeling that the authors' arguments remain somehow artificial and even justificatory, and that their analysis sometimes lacks the convincing and even captivating distance – however situated and partial – of 'cold' doctrinal work. Their goal always seems to pull the famous rabbit out of a hat to show how 'moral' – and therefore lawful[29] – the reality of US administrative state is. One might be tempted to ask: if US administrative law – its textual bases, its disparate judge-made doctrines – has already long been traversed by such principles of morality, then why the need to clarify, to somehow discover them *now*? Might it be that such internal morality is not really a property of (US) administrative law as such, but at best of some privileged subdomains?[30] In the end, Sunstein and Vermeule resort to a kind of interpretivism (p. 115),[31]

[28] Mark Tushnet, *Taking Back the Constitution. Activist Judges and the Next Age of American Law* (New Haven, Ct.: Yale University Press 2020), 163.

[29] See above, section II.

[30] Cf. Paul Gowder in his review: Law and Politics Book Review 31 (2021), 12-47 (15), contrasting the domains of administrative law concerned with economic regulation with those 'where executive power touches on the wellbeing of discrete individuals and particularly where the federal government directly wields its violent power […] those domains encompassed by the Departments of Homeland Security and Justice'.

[31] See only Nicos Stavropoulos, 'Legal Interpretivism', *The Stanford Encyclopedia of Philosophy* (Spring 2021 Edition), available at <https://plato.stanford.edu/archives/spr2021/entries/law-interpretivist/>. For similarities and differences between Dworkin's and Sunstein's approaches to interpretivism, see Tina Hunter, 'Interpretive Theories: Dworkin, Sunstein, and Ely', Bond LR 17 (2005), 78-101.

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which ties the enforcement and modification of legal rights and obligations to institutional practice, but – again – they do not address the criticisms against it.[32]

3. Redirection of Fuller's Morality of Law

The justificatory tone is even more surprising in the light of the third limit of the work. Sunstein and Vermeule consciously repurpose (p. 42) the morality of law – outlined by Fuller as a minimum threshold to individuate any set of rules as 'law' – and use it as a benchmark for the lawfulness of administrative acts and, ultimately, for the legitimacy of the administrative state. Even so, they claim that, when the procedural principles are not respected, '*in the real world of American administrative law* [emphasis added], the problem will usually be less a *failure* than an arguable *insufficiency*' (p. 98). Thus, the respect for such standards should be understood as an aspiration rather than a strict benchmark, especially when administrative agencies do not directly regulate private conduct (e. g. the handing out of radio frequencies). They claim that 'it is doubtful that the American administrative state, or any administrative state *in a mature democracy* [emphasis added], will look a lot like the government of the lawless, hapless Rex imagined by Fuller to set his standards for law's morality' (p. 89).

These passages are illuminating. What the authors are telling us is: these minimum principles are enough in a mature democracy, that is, everything modelled on what we have *here in the USA*. More generally, the authors seem to rely on the hard-to-defeat presupposition that Western political institutions and economic practices necessarily constitute a nonauthoritarian social order. But how exactly does a 'mature democracy' look like? Can we really assume, even for the sake of discussion, that the USA are a well-functioning democracy – whatever its meaning? This is another 'big' question left unaddressed, with which their project stands or falls. In a way, when the authors minimise the risks of authoritarianism, they have in mind an extreme and somehow caricatural version: the medieval tyrant – the bogeyman of *New Coke*'s libertarians – or regimes, based on some variation of the *Führerprinzip*. Building an argument against such a target (pp. 34-35) is quite handy but ignores both past and present examples of legalistic forms of authoritarian-

[32] For an overview spanning through three decades, see Stephen Guest, 'How to Criticize Ronald Dworkin's Theory of Law', Analysis 69 (2009), 352-364. For a critique from the more specific standpoint of US critical legal theory, see the classic Duncan Kennedy, *A Critique of Adjudication (fin de siècle)* (Cambridge, Ma.: Harvard University Press 1997), 37-38.

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ism, where administrative procedures consistently comply with the three macro-principles recalled above.[33]

From yet another perspective, when it comes to the identification of 'mature' democracies, it would be easy to point to the US history of systemic, targeted, and constitutionally sanctioned[34] voter suppression or to the more recent deployment and conduct of Special Weapons and Tactics (SWAT) forces against Portland protestors or the 2021 Capitol attack. One could more aptly recall Trump's selection of a climate change denier as chief of the Environmental Protection Agency in 2017.[35] To be sure, democracy's problems go well beyond the administrative state and 'wrong' picks happen all the time. But the authors do not address – do not even seem to 'see' – the next question: how does the concrete operation of the modern administrative state contribute to the social conditions for the erosion of democracy and, more generally, for discrimination, exclusion, and oppression in Western, 'mature' constitutional orders? Again, the authors deem the effects of the administrative state on democracy as largely positive (p. 143), but this question looms over current and future emergencies where 'big government' will be sorely needed. In such a scenario, public law scholarship cannot focus only on how to prevent authoritarianism, possibly seen as the only way to attain the 'common good'.[36] It also has to focus on how the (over)confidence in procedural principles contributes in the first place to making COVID-19 or climate change the disasters they have become.

More concretely, and taking a cue from current events: in assessing the legitimacy of the administrative state, public law scholars cannot focus only

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[33] Cf. Gowder (n. 30), 24. One might recall here the concept of 'Frankenstate' introduced by Kim Scheppele to indicate a state where perfectly legal and reasonable constitutional components are stitched together to create authoritarian outcomes, using as case studies especially Central and Eastern European countries: see Kim L. Scheppele, 'The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work', Governance 26 (2013), 559-562. See also Tushnet and Bugarič (n. 22), ch. 5.

[34] Just to refer to most recent case law, see *Merrill v. Milligan*, 596 __ (2022) (Nos 21A375 (21–1086) and 21A376 (21–1087)), decided on 7 February 2022, allowing the state of Alabama to implement a new congressional district plan that includes only one district with a majority of Black voters and heavily diluting the Black vote in the other districts.

[35] Sunstein and Vermeule briefly touch upon this point (pp. 78 ff.) but elegantly dodge the main question by focussing on whether this situation calls for a reconsideration of the *Chevron* deference. For some instructive readings, see Aziz Huq and Tom Ginsburg, 'How to Lose a Constitutional Democracy', UCLA L.Rev. 65 (2018), 78-169 (163-164); and Kathryn E. Kovacs, 'From Presidential Administration to Bureaucratic Dictatorship' Harv. L.Rev. 135 (2021), 104-132.

[36] For an enriching discussion, see Ross Mittiga, 'Political Legitimacy, Authoritarianism, and Climate Change' Am. Polit. Sci. Rev. (2021), online version available at <https://www.cambridge.org/core/journals/american-political-science-review/article/political-legitimacy-authoritarianism-and-climate-change/E7391723A7E02FA6D536AC168377D2DE>.

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on whether or not the US Occupational Safety and Health Administration (OSHA) may require COVID-19 vaccination (or a test-and-mask regimen) in large workplaces.[37] When it comes to divides rooted in social conflicts, the relative weakness of the performative role of interpretive communities in bringing out an alleged 'morality' of administrative law emerges fully. In such scenarios, public lawyers cannot be left only to wonder at why morality failed to show up, or to observe how courts 'erred'.[38] They also have to investigate how the structures and procedures of the administrative state – and, more generally, the political-economic entanglements gravitating around it – contribute to making vaccine and masks such divisive political issues. From a different perspective: non-authoritarian societal variations and consensus-based collective decision-making cannot depend (only) on correct and non-dispersed knowledge and its effective translation into concrete decisions through cost-benefit analysis performed by administrative agencies.[39] They *also* require active, strategic participation of diverse social groups through bottom-up dynamics[40] which involve struggle, conflict, and contestation over concrete policy options.[41]

The professed confidence of the authors in the *process* is not isolated. Still today, it is a refrain equally common among left-leaning Anglo-American intellectuals (such as Sunstein) and among many European readers of Habermas. In terms of policy, such confidence seems to be a characteristic of Obama-era policymakers[42] but also of many European policy- and law-

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[37] See *National Federation of Independent Business v. Department of Labor, Occupational Safety and Health Administration*, 595 U. S. __ (2022) (Nos 21A244 and 21A247), decided on 13 January 2022, where the Supreme Court granted the applications to stay the application of OSHA's rule, a centrepiece of Biden's push to get more people vaccinated amid a COVID-19 surge triggered by the Delta and Omicron variants.

[38] See Adrian Vermeule, 'Supreme Court Justices Have Forgotten What the Law Is For', New York Times (2022), available at <https://www.nytimes.com/2022/02/03/opinion/us-supreme-court-nomination.html>, commenting on *National Federation of Independent Business* (n. 37). On 30 June 2022, when the present piece was at the proof stage, the US Supreme Court decided the case *West Virginia v. Environmental Protection Agency* (597 U.S. ___ (2022)). In a 6-3 ruling, the Court ruled that the regulation of existing power plants in Section 7411(d) fell under the major questions doctrine – a variation of the nondelegation doctrine – and within that, Congress did not grant the EPA authority to regulate emissions from existing plants based on generation shifting mechanisms. Apparently, the inner morality of US administrative law – allegedly coalesced in the Roberts Court – again failed to show up.

[39] For this position, see Cass R. Sunstein, 'Some Costs & Benefits of Cost-Benefit Analysis', Daedalus 150 (2021), 208-219.

[40] Cf. Angela Pohlmann and others, 'It's not enough to be right! The climate crisis, power, and the climate movement', GAIA 30 (2021), 231-236.

[41] See, most recently, Tushnet (n. 28), 243 ff.

[42] See Daniel Bessner, 'The Barack Obama Memoir: Don't Trust the Process', Jacobin (2021), available at <https://jacobinmag.com/2021/02/dont-trust-the-process>.

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makers, too often convinced to solve problems of legitimacy only through 'better' procedures.

IV. At the End of the Road: Between 'Libertarian Paternalism' and 'Common Good Constitutionalism'

But what is the role of *Law & Leviathan* and of its defence of the administrative state, grounded on procedural principles of morality, within the broader intellectual frameworks of the authors? Where does the road to redemption *actually* lead? Before concluding, I would like to briefly explore the authors' first-order projects, showing how the reviewed book fits within the respective agendas.

Sunstein has emerged as the leading voice of 'libertarian paternalism', a form of welfarism inspired by behavioural economics and techniques of 'soft' social manipulation ('nudging') to obtain the sought regulatory goals.[43] He belongs to a strand of scholars insisting that the most critical issue of contemporary societies is the reduction of 'noise' and cognitive bias in (automated) decision-making.[44] Indeed, information analysis, Big Data, algorithmic regulation/administration pave the way for more and more personalised and ubiquitous forms of intervention and social control.[45] The latter, while not formally ruling out individual agency, de facto leave little room for bottom-up societal variations – be they emancipatory or not. Most importantly, such mode of governance contributes to shaping social subjectivities in new and potentially disturbing ways.[46]

Seen in the context of Sunstein's broader intellectual endeavours, then, the substantially unreserved apology of the administrative state of *Law & Leviathan*, based on its alleged morality, seems a way to anesthetise contestation and to reduce space for *effective* social participation and deliberation. In a way, Sunstein's project is a further step towards Weber's 'iron cage of future serfdom'.[47]

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43 Adrien Barton and Till Grüne-Yanoff, 'From Libertarian Paternalism to Nudging – and Beyond', Review of Philosophy and Psychology 6 (2015), 341-359.

44 See Daniel Kahneman, Olivier Sibony and Cass Sunstein, *Noise: A Flaw in Human Judgment* (New York: Little, Brown Spark 2021), defining 'noise' in human judgement as 'undesirable variability in judgments of the same problem'.

45 See Stuart Mills, 'Hyper Nudges and Big Data' (2019), available at <https://towardsdatascience.com/hyper-nudges-and-big-data-d15767b2ee0b>; Stuart Mills, 'The Future of Nudging Will Be Personal' (2021), available at <https://behavioralscientist.org/the-future-of-nudging-will-be-personal/>.

46 Cf. Fleur Johns, 'Governance by Data', Annual Review of Law and Social Science 17 (2021), 53-71 (58-64); Jenna Burrell and Marion Fourcade, 'The Society of Algorithms', Annual Review of Sociology 47 (2021), 213-237.

47 See above (n. 24).

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Vermeule, for his part, has shown not to be a fan of constraints to executive action[48] and he has taken increasingly stronger anti-positivistic stances.[49] Realistically, for him *Law & Leviathan* is a detour aimed to normalise an *explicit* and *direct* language of morality in legal reasoning. This move, in turn, paves the way to his 'common good constitutionalism' project, seemingly a reheated Schmittean soup where Catholic salt went out of hand.[50]

To be sure, no one would seriously contest that 'no law can operate without some implicit or explicit vision of the good to which law is ordered.'[51] But one of the achievements of modern law (and the *legal* formalism coming with it) as a technique to address social conflict lies in ruling out moral arguments as *directly* relevant in legal reasoning and adjudication.[52]

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48 See Adrian Vermeule, 'Our Schmittian Administrative Law', Harv. L. Rev. 122 (2009), 1095-1150; Eric A. Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (Oxford: Oxford University Press 2011); Adrian Vermeule, *Law's Abnegation. From Law's Empire to the Administrative State* (Cambridge, MA: Harvard University Press 2016).

49 See Vermeule, 'Beyond Originalism' (n. 13); Vermeule, Common Good (n. 13), 4. It is worth noting that Vermeule largely collapses positivism into (US) originalism: Vermeule, Common Good (n. 13), 29.

50 See *contra* Conor Casey, '"*Common-Good Constitutionalism*" and the New Battle over Constitutional Interpretation in the United States', Public Law 4 (2021), 765-787. How 'Schmittean' Vermeule's project actually is cannot be properly discussed here, but one cannot but notice that such project – ostensibly drawing from 'classical' and 'natural law' traditions – moves along the same lines as the authors of reactionary Catholicism (notably Donoso Cortés and De Maistre) who had a crucial influence on the foundations of Schmitt's thought: see Carl Schmitt, *Donoso Cortés in gesamteuropäischer Interpretation* (2nd edn, Berlin: Duncker & Humblot 2009); Carl Schmitt, *Roman Catholicism and Political Form* (Westport, Ct: Praeger 1996 [1923]). That the 'common good' project shares with Schmitt more than a 'negative' side – the critique of liberalism – emerges most apparently in another early work: Carl Schmitt, 'The Value of the State and the Significance of the Individual' in: Lars Vinx and Samuel Garrett Zeitlin (eds), *Carl Schmitt's Early Legal-Theoretical Writings* (Cambridge: Cambridge University Press 2021), 159-242. More generally, references to subsidiarity, 'human flourishing', and rights do not rule out reactionary or authoritarian ideologies, as shown by research on the role played in the European human rights movement by neomedieval social doctrines of conservative Catholics, some of which were implicated with the Vichy regime: see Marco Duranti, *The Conservative Human Rights Revolution. European Identity, Transnational Politics, and the Origins of the European Convention* (Oxford: Oxford University Press 2017).

51 Vermeule, Common Good (n. 13), 29.

52 Without referring to current disputes between so-called 'inclusive' and 'exclusive' versions of legal positivism – with relatively little echo outside the US – a point of reference in the Anglo-American tradition remains Neil MacCormick, *Legal Reasoning and Legal Theory* (Oxford: Clarendon Press 1978); and Neil MacCormick, *Institutions of Law* (Oxford: Oxford University Press 2007), 243-305. For the evolution in MacCormick's thought on the point, see Déirdre Dwyer, 'Beyond Kelsen and Hart? MacCormick's Institutions of Law', M. L. R. 71 (2008), 823-839; and Julie Dickson, 'Is Bad Law Still Law? Is Bad Law Really Law?' in: Maksymilian Del Mar and Zenon Bankowski (eds), *Law as Institutional Normative Order* (London: Routledge 2009), 161-183.

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For (modern) law to be law, it has to maintain some – however fictitious – distance from morality, by filtering, translating, and (mis)interpreting moral arguments through concepts, doctrines, and principles that are – have to be – *internal* to law and cannot be collapsed into any 'common good'.[53]

Vermeule often invokes the authority of Latin maxims and the 'classical legal tradition', claiming that his 'common good constitutionalism' 'draws upon an immemorial tradition that includes […] sources such as the *ius gentium* – the law of nations or the "general law" common to all civilized legal systems.'[54] But he certainly knows that even Alberico Gentili, one of the founders of modern *ius gentium* and well within the natural law tradition, resorted to the maxim 'silete theologi in munere alieno',[55] reclaiming the functional and professional autonomy of law – of the *iurisprudentia* – against the intrusions of theology.[56] Leaving aside Gentili's actual intentions,[57] that 'silete' somehow contributed to the secularisation of law, a crucial step in a process that made modern constitutionalism possible in the first place. Whatever one might think of the 'common good constitutionalism' project, it has an intrinsic and worrisome ambiguity, an ambiguity which might not be compatible with (modern) constitutionalism, not to mention modern democracy.

53 This is another point of contact with Schmitt, who in the 1930s came to conceive of law as a sieve for the purposes of (absolute) political homogeneity which, as such, does not retain any real functional autonomy towards politics. The 'sieve' is only an instrument in the hands of judges and administrative agencies, and law loses its own self-reproducing nature, structurally coupled but still at relative distance from politics: see Franz L. Neumann, *Behemoth: The Structure and Practice of National Socialism* (London: Victor Gollancz 1942), 368. For a recent analysis with references to the relevant works of Schmitt, see Mariano Croce and Marco Goldoni, *The Legacy of Pluralism. The Continental Jurisprudence of Santi Romano, Carl Schmitt, and Costantino Mortati* (Stanford: Stanford University Press 2020), 124-134.

54 Vermeule, Common Good (n. 13), 29. I leave aside the point concerning the use of civilisation as a benchmark for universality *today*, but see Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge: Cambridge University Press 2020).

55 Albericus Gentilis, *De iure belli libri III* (Hanoviae, excudebat Guilielmus Antonius 1598), Bk I, ch. XII, 92.

56 It is worth noting that, in defining 'common good constitutionalism', Vermeule also refers to the works of theologians: see Vermeule, Common Good (n. 13), 60, 201.

57 See most recently Rafael Domingo and Giovanni Minnucci, 'Alberico Gentili and the Secularization of the Law of Nations' in: Rafael Domingo and John Witte Jr (eds), *Christianity and Global Law* (London: Routledge 2020), 98-111 (104-106); Martti Koskenniemi, *To the Uttermost Parts of the Earth* (Cambridge: Cambridge University Press 2021), 212-279 (248-254); and Francesca Iurlaro, 'Disenchanting Gentili: Chapter 3: Italian Lessons. Ius Gentium and Reason of States', EJIL 32 (2021), 965-972.

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From the perspective of the 'common good constitutionalism' project, then, using the morality of administrative law to legitimise the way it operates does not even constitute a second-best, but a necessary intermediary step for a theocon[58] project. Indeed, the 'common good' is not opposed to process, quite the contrary: it becomes a way to justify certain procedural structures.[59] To give an example: Paul Gowder has described how, under existing immigration law, officers exercise complete arbitrariness over the legal status and removal of immigrants, pointing to the possibility that said officers 'might find that enough visitors from Africa have already entered the United States'.[60] But this is precisely the kind of scenario sought by Vermeule, who in 2019 made the argument that immigration rules should be changed to provide 'lexical priority to confirmed Catholics, all of whom will jump immediately to the head of the queue'.[61] Once the language of morality is normalised and *directly* incorporated as a legitimate form of legal reasoning, it is unavoidable to also pick *one* specific, substantive morality, and Vermeule already has one at hand.

To conclude, the most benevolent assessment of *Law & Leviathan* is that it is an ambitious work that does not rise to the level of complexity required by the issues it purports to address. From a less benevolent perspective, the book is a backwards-looking project serving the authors' respective agendas, seemingly catapulted from the late-absolutism era: for Vermeule, in the form of the reactionary Catholicism; for Sunstein, in the form of an enlightened paternalism 3.0 that might at best be seen as technocracy[62] with a human facade. One may be tempted to praise at least the defence of the (adminis-

58 The term has been introduced to indicate a synthesis of elements of US conservatism, conservative Christianity, and social conservatism, first appeared in the article Jacob Heilbrunn, 'Neocon v. Theocon', The New Republic (1996), available at <https://web.archive.org/web/20010914000605/http:/www.tnr.com/archive/1996/12/123096/heilbrunn123096.html>.

59 See Vermeule, Common Good (n. 13), 88 (n. 62): 'although some have supposed there is a tension or even inconsistency between […] focusing on the structural preconditions of justice and focusing on the legitimate ends of government […] I can see no such tension; the two formulations just address different and compatible aspects or phases of the same problem.'

60 Gowder (n. 30), 32.

61 See Adrian Vermeule, 'A Principle of Immigration Priority' (2019), available at <https://mirrorofjustice.blogs.com/mirrorofjustice/2019/07/a-principle-of-immigration-priority.html>.

62 I understand 'technocracy' as the control of society by scientists, technicians, or engineers or the exercise of political authority by virtue of technical competence and expertise in the application of knowledge. The problematisation of technocracy is a traditional focus of critical theory: among many works, see Jürgen Habermas, *Toward a Rational Society: Student Protest, Science, and Politics* (Boston: Beacon Press 1970), spec. 57 ff.; Jürgen Habermas, *The Lure of Technocracy* (Cambridge: Polity 2015).

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trative) state against the drifts of conservative libertarianism. But the fact that such defence comes in the form of a strategic and, all in all, quite weak eulogy paints a gloomy picture of the mainstream public law discourse in the US, where the margins for an authentically transformative, self-reflective, non-apologetic discussion over the structures of modern constitutionalism seem to become thinner and thinner.

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