would push their authority any closer to the ideals it describes is an open question.

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Cass R. Sunstein and Adrian Vermeule: *Law and Leviathan: Redeeming the Administrative State*. (Cambridge, MA: Belknap Press of Harvard University Press, 2020. Pp. 188.)

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Cass Sunstein and Adrian Vermeule are two of the most prominent legal theorists in America today. They are also among the most influential defenders of the modern administrative state. In *Law and Leviathan* they join forces to address, and hopefully (in their view) to settle, the "low-grade cold war" over the legitimacy of the administrative state (1). Their argument on behalf of such a settlement is thoughtful and intriguing, and it should be taken seriously by both supporters and skeptics of the administrative state.

The authors' goal is to "understand and address the concerns of the critics" of the administrative state "from the inside" (6). While they do not agree with the administrative state's critics, they grant that their concerns "should be taken seriously and addressed" (15). Sunstein and Vermeule argue for a grand settlement in which the administrative state's critics might be willing to accept the "surrogate safeguards" of administrative law to be "tolerable as a non-ideal second best" outcome (11).

The authors advance a theory of the "morality of administrative law" that attempts to replicate or preserve constitutional checks and balances in the wake of the administrative state (8). (However, to be clear, they do not accept the skeptics' premise that those constitutional checks and balances have been eroded by the administrative state's arrival.) Administrative law's morality has two critical features. First, it tracks Lon Fuller's theory of the morality of law, attempting to implement that theory in the context of administrative law. Second, it is not based on explicit constitutional or statutory authority, but has instead been crafted by courts through "disparate judge-made doctrines . . . unified by a commitment to [law's] morality" (103).

The first chapter describes what they call the New Coke, which is "shorthand for a cluster of impulses stemming from a belief in the illegitimacy of the modern administrative state" (19). This New Coke invokes the heroic example of

common-law judge Edward Coke who resisted the despotism of the Stuart monarchs. Sunstein and Vermule reject the New Coke as inconsistent with the historical sources on which its proponents rely. New Coke, they argue, is "a living-constitutionalist movement, a product of thoroughly contemporary values and fears" rather than a faithful representation of the principles of Coke and the American Founders (20). "Even if the New Coke can claim a solid historical pedigree," they continue, it should be dismissed as an "ambitious effort at constitutional reform" that would be deeply disruptive of the modern state (21).

The chapter on the New Coke is useful in setting the stage for their alternative project, but the really interesting sections of the book are found in the chapters that follow, in which the authors' positive project is articulated. The surrogate safeguards they wish to create or strengthen through administrative law are valuable means of protecting liberty in the face of the modern administrative threat. These features demand, for example, that people are governed by rules rather than ad hoc decision-making, that people are aware of the rules they must follow, that these rules are understandable and predictable, and that they are not applied in ways that run contrary to how they are written and announced (40).

The core of the authors' argument is that the "understanding of the morality of administrative law" just described "helps to unify a disparate array of judge-made doctrines, and perhaps even the field as a whole." They respond to the criticisms of the contemporary administrative state and even put those criticisms "in their best light," thus pointing toward "a kind of macro-settlement" over the administrative state (42). If supporters can accept the limits placed on the administrative state through administrative law, and critics can find those limits acceptable as a second-best option, we can achieve the benefit of both energetic and restrained government, and surer protection of liberty.

In support of the argument, Sunstein and Vermeule traverse an array of particular administrative law decisions and doctrines that contribute to the morality of administrative law. The complexities of these decisions and doctrines cannot be captured by a brief review. A few, however, are worth mentioning as illustrations of the book's ingenuity. In some instances, they advocate strengthening administrative law's protections for individual liberty, a project which skeptics should also embrace.

First, Sunstein and Vermeule discuss the problem of vagueness: when an agency decides particular cases without following ascertainable standards previously announced in their own rules (51–53). They note that there is no clear rule of law that governs this area, but they suggest that both skeptics and supporters of the administrative state have an interest in promoting transparency in how agencies' rules are made and followed. They raise intriguing possibilities for limiting agencies' power to impose vague and undefined requirements on regulated parties.

Second, Sunstein and Vermule raise the problem of administrative agencies making policy through case-by-case adjudication rather than rulemaking. This practice seems to violate Fuller's insistence that officials govern

through rules rather than ad hoc decisions (53–55, 101–3). The Supreme Court has not mandated that agencies govern through general rules rather than ad hoc adjudication, but Sunstein and Vermule make the case for such a requirement. (Oddly, however, they eventually refuse to endorse such a step in order to preserve administrative discretion.)

In addition to these specifics, the authors note other areas of administrative law, such as the law governing administrative decisions with retroactive effect, where courts have crafted doctrines promoting the morality of administrative law.

Thus, they conclude, the morality of administrative law should be embraced in spite of its defects and the trade-offs it imposes on agencies and courts. Moreover, they argue, the Supreme Court is inevitably moving in this direction regardless of the objections of the administrative state's critics. New Coke has led to little doctrinal change in spite of its bluster. During the Supreme Court's 2018–2019 term, for instance, "the expectations" of the New Coke's adherents "were distinctly disappointed" (116). Rather than embracing their radical rejection of the administrative state, the Court "adopted principles of administrative law morality as surrogate safeguards, accommodating the legitimate demands of administrative policymaking with rule-of-law concerns" (119).

In sum, Sunstein and Vermeule acknowledge the rise of scholarly objections to the administrative state, but they respond that administrative law solves the dilemma posed by the administrative state. Instead of New Coke, they want to use the weaker protections of administrative law to restrain the administrative state in smaller and more incremental ways. They prefer Diet Coke to New Coke.

As one of the skeptics whose scholarship is engaged in the book, I applaud the authors for setting out a framework that would advance some of the principles of the rule of law. They admit that their framework would not address all of the skeptics' concerns about the administrative state. It would not settle the matter of the administrative state's legitimacy. But it would better protect individual liberty. *Law and Leviathan*, therefore, has something to offer both critics and supporters of the administrative state and is a valuable contribution to the ongoing debate over the constitutionality of the modern state.

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