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## Law & Leviathan: The Best Defense?

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# Law & Leviathan: The Best Defense?, by Ronald M. Levin

[Yalejreg.com/nc/law-leviathan-redeeming-the-administrative-state-part-01/](http://yalejreg.com/nc/law-leviathan-redeeming-the-administrative-state-part-01/)

*\*This is the first post in a series on Cass Sunstein and Adrian Vermeule's new book Law and Leviathan: Redeeming the Administrative State. For other posts in this series, click [here](#).*

In their recent book Law & Leviathan, Cass Sunstein and Adrian Vermeule unveil a novel and provocative approach to legitimating the modern administrative state. Their starting point is a set of procedural principles that the legal philosopher Lon Fuller described as fundamental premises of the law's "internal morality." Sunstein and Vermeule assert that these principles can be adapted to the context of judicial review of agency actions in order to define "the morality of administrative law." For example, an agency should adopt rules that are knowable and understandable; the agency should comply with its own rules; changes in rules should not defeat reliance interests; and the rules that agencies adopt must be congruent with the rules they actually apply. Sunstein and Vermeule maintain that if these Fuller-derived principles are interpreted robustly, they can provide a set of aspirational ideals that ought to appeal to both supporters and critics of the administrative state.

Much of the book is devoted to arguing that administrative law cases have often been driven by Fuller-like moral intuitions – even where positive-law texts, like the Constitution or the Administrative Procedure Act (APA), provided little if any explicit support for these holdings. For example, Supreme Court cases such as Georgetown University Hospital and Encino Motorcars have overturned agency decisions that frustrated reasonable reliance interests, thus displaying a Fuller-like distaste for retroactive lawmaking. Fuller's principles are also reflected in the Accardi doctrine, according to which an agency must comply with its own regulations. In addition, according to Sunstein and Vermeule, Allentown Mack v. NLRB exemplifies Fuller's insistence that a government decision must display "congruence between the rules as announced and their actual administration." (Later in the book, the authors also suggest that the "pretext" rationale in DOC v. New York, the Court's recent census case, can be understood in similar terms.) These precedents, together with other Fullerian cases discussed in Law & Leviathan, do seem to provide at least modest support for the authors' thesis that administrative law rests on a moral core.

However, the authors also have larger ambitions in mind. They contrast these "morality of administrative law" principles with the more one-sided critiques urged by a group of scholars and judges who advocate broad curtailment of administrative power, such as by reviving the long-dormant nondelegation doctrine and limiting judicial deference to agency interpretations of law. The book calls the positions urged by the latter group "The New Coke," because some of their members compare their assault on executive prerogatives to Sir Edward Coke's opposition to the despotic Stuart kings long ago. Sunstein and Vermeule hope that Fullerian principles can provide "surrogate safeguards" that the Supreme Court can use to

“redeem” the administrative state, obviating any need to endorse the much stronger medicine that the New Coke supporters advocate. They recognize that such lines of argument won’t satisfy the strongest devotees of the New Coke, but they suggest that compromise positions based on such surrogate safeguards might win significant support on and off the Court.

According to Sunstein and Vermeule, the Court made effective use of this strategy in a few high-profile cases decided during the 2018 term. In *Gundy v. United States*, the Court was asked to revitalize the nondelegation doctrine in order to invalidate part of a sex-offender law. The authors say that, in rejecting this plea, the Court used purposive statutory construction to read the relevant legislation as containing more limitations than it initially seemed to have. Similarly, in *Kisor v. Wilkie*, the Court refused to abandon *Auer* deference—i.e., its longstanding doctrine of according substantial deference to agencies’ interpretations of their own regulations. In reaching that decision, however, the Court specified a number of preconditions for *Auer* deference, thus cabining the scope of the doctrine without jettisoning it altogether.

I am sympathetic to the authors’ objective, but I am far from confident that a “surrogate safeguards” strategy, standing alone, can do the work that their optimistic vision contemplates. Can relatively moderate lawyers and justices be persuaded, with any consistency, that adherence to Fullerian principles is sufficient to answer current concerns about bureaucratic abuses? Or will they think that the authors’ alternative to the New Coke is merely weak tea?

I suspect that this strategy will be incomplete unless it is regularly paired with searching critiques of the doctrines that New Coke proponents seek to institute instead. In other words, supporters of the administrative state should take to heart the adage that the best defense is a strong offence.

To be sure, Justice Kagan’s opinion in *Kisor* did not neglect the “offense” level of the debate. Although her argument upholding *Auer* deference was written for only a plurality, her analysis will stand as a powerful explication of some of the policies that underlie the courts’ practice of deference, and also a refutation of many of the arguments that New Coke advocates have invoked to challenge it. In presenting this analysis, she relied squarely on an [article](#) by Sunstein and Vermeule. Elsewhere, Sunstein has recently continued to engage with the New Coke, [rebutting](#) the claim by some of its supporters that *Chevron* is inconsistent with the APA (a claim that I have also [disputed](#) in my own scholarship).

In *Gundy*, Kagan’s opinion for the Court was more restrained. Although one can reasonably infer that her narrow interpretation of the sex-offender law was driven in part by a desire to defuse nondelegation objections, the opinion did not openly acknowledge that purpose. Sunstein and Vermeule do take up the “offense” by submitting that the historical roots of the nondelegation doctrine are shaky and that, in any event, courts can usually look to the text

and context of an apparently open-ended statute in order to find the “intelligible principle” required by current doctrine. Those points are well taken, but the authors could also have gone further. They could have directly challenged the unwieldy alternative approach to nondelegation offered by Justice Gorsuch in dissent. Under that view, agencies would not be able to use delegated authority to make important policy decisions; they should, in most contexts, be limited to “finding facts” and “filling up details.” Yet, if those terms were to be applied according to their natural meaning, the resulting curtailment of the administrative state would likely be unlivable. On the other hand, if those terms were to be applied flexibly, they would appear to hold no clear advantage over the now-prevailing “intelligible principle” test.

I am not suggesting that the “offense” and “defense” components of rhetorical support for administrative institutions should come into play separately from each other, like the two halves of an inning in a baseball game. They clearly should operate concurrently. The critiques can highlight flaws in New Coke positions, and Fullerian principles or other surrogate safeguards can serve as the basis for moderate alternatives that hopefully would assuage some of the same concerns.

A final question that one could raise about the authors’ surrogate safeguards strategy is whether it will continue over time to be relevant to the inclinations of a Supreme Court that is itself in transition. The book was evidently completed in mid-2020. At that time, Chief Justice Roberts was riding high as the Court’s “swing justice.” One could have read the book as largely an appeal to Roberts, who has, at least sometimes, seemed especially receptive to rationales that would help to preserve the Court’s legitimacy by preventing it from lurching very far to the right at any one time. Since then, however, Justice Ginsburg has been replaced by Justice Barrett. That shift invites speculation as to whether the current Court is now so dominated by ideological conservatives that *Law & Leviathan’s* plea for moderate compromise solutions to administrative law issues may fall on too many deaf ears.

However, any such apprehension would rest on assumptions about Justice Barrett that are, at best, unverified. Unlike Justice Gorsuch and Justice Kavanaugh, Barrett has arrived at the Court without a public track record of having actively promoted “New Coke” theories. Indeed, when she was a judge on the Seventh Circuit, her few opinions applying *Chevron* or *Auer* were straightforward. In two of them, she voted to defer under *Chevron* to the agency’s interpretation. In a third, she found the Attorney General’s reading of a regulation insupportable under *Auer*—yet the result was to *expand* the powers of immigration judges. None of these opinions expressed underlying discontent with these deference doctrines or with the administrative state more generally. Moreover, in an article that she wrote as a professor, Barrett discussed the “intelligible principle” test for nondelegation without expressing any qualms about its legitimacy in an administrative context. Thus, any supposition that the strategy underlying *Law & Leviathan* has outlived its usefulness seems premature, to say the least.

Anyway, amid the continuing uncertainty about the future of administrative law, it is gratifying to see that Sunstein and Vermeule are continuing to speak out as leading voices in this ongoing debate.

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