

Bureaucracy With Bumper Guards: Better Than It Rules?

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A Review of:

Law & Leviathan: Redeeming the Administrative State, by Cass Sunstein & Adrian Vermeule, <https://www.hup.harvard.edu/catalog.php?isbn=9780674247536>

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Other Views:

- Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002), available at https://chicagounbound.uchicago.edu/journal_articles/1732/.
- Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000), available at <https://chicagounbound.uchicago.edu/uclev/vol67/iss2/1/>.
- Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of Auer*, 84 U. CHI. L. REV. 297 (2017), available at <https://chicagounbound.uchicago.edu/uclev/vol84/iss1/14/>.
- Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187 (2016), available at <https://www.gwlr.org/chevron-bias/> (arguing that deference violates Article III).

I. BEAUTY, BEAST, BUREAUCRACY: MUSIC TO WHOSE EAR?

Mark Twain popularized the quip by Bill Nye (not *that* Bill Nye!) that Wagner's music is really much better than it sounds. Cass Sunstein and Adrian Vermeule, two of America's most notable professors of constitutional and administrative law, have produced a book whose central argument is that the modern administrative state is really much better than it rules.¹

Unlike Twain and Nye's, Sunstein and Vermeule's is a serious argument, presented seriously. Their book offers a subtle, sophisticated, and in many ways soft presentation of reasons to put aside qualms about the administrative state.

For readers who wait interminably at the DMV or on the phone trying to connect with one of the agencies that rule our lives or who struggle to understand the complex morass of rules and regulations that control virtually every corner of our businesses, this may be a hard sell. So, too, for readers who have been thinking about the fit between our present administrative state and the constitutional structure that should govern it or who recognize that structure as the yardstick against which to measure the administrative state as it faces increasingly frequent legal challenges.

Sunstein and Vermeule don't avoid the headwinds faced by the administrative state. In fact, they start with a litany of complaints about the administrative state. And they make clear from the outset that their mission is not to refute them, but to reduce them—to pour oil on these troubled waters. (Okay, the metaphors are mixed, but the message should be clear.)

As fits both authors' style, *Law and Leviathan* isn't designed to bludgeon skeptical readers into submission, but instead to seduce them. The book isn't a straightforward explication of Sunstein and Vermeule's thesis. Instead, it's a blend of exploration, intrigue, and argument, presented through a series of overlapping discourses that mix anecdote, reflection, legal analysis, and jurisprudence, wrapped around a core of ideas associated with Lon Fuller's famous work, *The Morality of Law*. Fuller pushed back against the notion that law at its core is about keeping within the rules that constitute government and empower governing; instead, he argued that certain precepts about the character of rules, rulemaking, and rule enforcement matter critically to what should be regarded as properly within the framework of *law*. Most famously, Fuller articulated a set of concerns about law through which to judge legal systems—his eight ways legal systems can fail. For Fuller, avoiding these pitfalls defines the moral core of law.

Sunstein and Vermeule endeavor to persuade readers that the most important aspects of law and of a well-functioning, developed economy and society—and the broader organs of government that go with that—are best understood through reflecting on Fuller's concerns. In their telling, thinking about

¹ CASS SUNSTEIN & ADRIAN VERMEULE, *LAW & LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE* (2020).

these concerns and the ways courts and the administrative state have addressed them should give readers confidence that the most pressing problems of discretionary power are under control. Ultimately, the message is that, looked at in this manner, the administrative state not only isn't your nemesis, it's your friend. (Think of it as the administrative law version of "How to Train Your Dragon"—it's directed at making something scary into the kind of thing you'd be alright having at home.)

II. FULLER MORALITY: LAW'S (AND LEVIATHAN'S) CORE

Law and Leviathan's "Fullerian" core—its key to taming the administrative state—is evident throughout. The authors pay continuous homage to lessons drawn from Fuller's book on *The Morality of Law*,² building their discussions around Fuller's list of ways that law and legal systems can fail. Sunstein and Vermeule—with ample reason—see this list as the prototype for concerns all of us should have about law and legal systems. And they see it as the best explanation of what *law* is, especially what the law and practice of the American *administrative state* are.

Fuller's central argument, in opposition to positivists such as H.L.A. Hart,³ is that law isn't simply whatever a legally constituted authority says or what people recognize as a binding command. Instead, *law* must meet requisites of an inner morality that reflects essential ingredients of the rule of law. For example, to count as *law*, legal requirements must inhere in rules, must be accessible to those who are to be bound by law, must not be changed so often (or so unpredictably) as to be difficult to know, and must not demand things that cannot reasonably be expected.

All of these are reasonable requirements for law. All are reasonable demands to make of whatever government entity is authorized to *make* law. It is reasonable as well to demand that no government entity *enforcing* or *implementing* the law should act in ways that contravene these essential elements of what, for Fuller, counts as *law*. Whether Fuller or Hart had the better argument on how to *define* law, Fuller certainly was right that each element he identified with the morality of law *should be required* of a well-functioning legal system.

III. SURROGATE SAFEGUARDS: STORIES OF LAW'S STAND-INS

The rub, however, is that a good deal turns on the judgments that must be made in applying Sunstein and Vermeule's translation of Fuller to *legal* decisions respecting the administrative state. The terms emphasized in the paragraph above matter. *Making* law isn't the same as *enforcing* or *implementing* the law, even if some discretion inevitably inheres in enforcement or implementation. What *defines* legal rules is not the same question as asking what ideally *should* be required of the law (a point reprised later in this review). The same distinction recurs repeatedly in law. For instance, in *Marbury v. Madison's* famous phrase, the judge's job

is "to say what the law is"⁴—and judges frequently remind us that this task is not the same as saying what it *should* be.⁵ For Sunstein and Vermeule, that distinction is intentionally blurred.

The crux of *Law and Leviathan's* explicit message is that what we have today in the American legal canon and the practical implementation of the administrative state represents a workable, laudable set of "*surrogate safeguards*" against the dangers of excessive administrative discretion—dangers that are fodder for many critics of the administrative state. That message is repeated through a series of nuanced discussions of specific cases and doctrines. Those discussions occupy the bulk of this not-bulky book.

Sunstein and Vermeule discuss, among other things, presidential control over the bureaucracy, procedural protections in administrative adjudications, process choices in policy formation, and limitations on judicial understanding of complex trade-offs that must be made in administering laws respecting allocation of economic resources. None of these discussions is tendentious or unreasonable. Quite the opposite. The authors not only write well; they also display understanding of the weak points in their inclinations and repeatedly disclaim overly strong assertions in discussing cases.

The doctrines and settings addressed touch on a formidable sweep of cases that will be known to administrative law mavens: *Vermont Yankee*,⁶ *Whitman v. American Trucking Associations*,⁷ *Costle*,⁸ *Portland Audubon*,⁹ *Bowen v. Georgetown University Hospital*,¹⁰ *Accardi*,¹¹ *Brand X*,¹² *Auer*,¹³ *Kisor*,¹⁴ *Chevron*,¹⁵ *City of Arlington*,¹⁶ *Fox Television Stations*,¹⁷ *Smiley v. Citibank*,¹⁸

4 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the Judicial Department to say what the law is.").

5 See, e.g., ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (Amy Gutmann ed. 1997); Brett M. Kavanaugh, *The Judge as Umpire: Ten Principles*, 65 CATH. U. L. REV. 683 (2016).

6 *Vermont Yankee Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519 (1978).

7 531 U.S. 457 (2001).

8 *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981).

9 *Portland Audubon Soc'y v. Endangered Species*, 984 F.2d 1534 (9th Cir. 1993).

10 488 U.S. 204 (1988).

11 *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

12 *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

13 *Auer v. Robbins*, 519 U.S. 452, 462 (1997).

14 *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).

15 *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

16 *City of Arlington v. FCC*, 569 U.S. 290 (2013).

17 *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009).

18 *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735 (1996).

2 LON L. FULLER, *THE MORALITY OF LAW* (1964; rev. ed. 1969).

3 See H.L.A. HART, *THE CONCEPT OF LAW* (1961). Compare Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958), with H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

Encino Motorcars,¹⁹ Gundy,²⁰ and Department of Commerce,²¹ among others. Each discussion provides an interesting capsule of significant issues of administrative law, and each provides a thoughtful connection of doctrine to practice.

Notably, almost all of these discussions include a recognition by the authors that the outcomes they favor—reached in judicial decisions they applaud—are not truly explainable by virtue of the text of legal frameworks that come closest to embodying the core judgments that Sunstein and Vermeule approve. Most often, these potentially-supporting legal frameworks are the Constitution’s due process clauses or the Administrative Procedure Act (APA), and, as the authors acknowledge, neither of them quite serves to command the additional administrative procedures or judicial requirements that many of their favored decisions demand.

IV. BETTER THAN TEXT?

The textual weakness of the decisions Sunstein and Vermeule approve, however, is not for them the important point in these discussions. What matters isn’t text. Instead, it’s the internal morality—in Fuller’s sense—of decisions, the fit between decisions and outcomes that the authors think strike the right balance between facilitating desirable government activity and constraining excessive discretion. Because that is the authors’ priority, at each turn—even while nodding to concerns about the administrative state—the book subtly tilts the argument in a direction that at least one set of critics of the current administrative state and legal doctrines supporting it will reject.

The message of *Law and Leviathan* is that acceptance of our present set of surrogate safeguards—protections against too much discretionary power in the hands of the president, administrators, or judges—is better than demanding safeguards found in the text of the Constitution or the laws as written. On Sunstein and Vermeule’s telling, reliance on surrogate safeguards is particularly better than demanding safeguards that conform to the original meaning of authoritative legal texts. Textualism and originalism—at least of the sort that produce criticisms of the administrative state—are the real beasts to be slain in this book.

To be fair, in part this may reflect the authors’ judgment that much of what textualists and originalists demand is simply too difficult to obtain. For a very long time, courts’ decisions have demonstrated scant willingness to impose the sort of limitations on delegation or deference that textualist-originalist writers argue are the best readings of the Constitution or the APA. For example, adherents to textualism and originalism argue that the Constitution limits how much legislative authority Congress may delegate to the executive branch, but arguably that ship sailed with the *Hampton* case in 1928,²² and the Supreme Court has been reluctant to insist on real constraints on delegation for at least the last fifty years. For deference issues, especially under the

APA (and similar statutes),²³ the picture is more complicated, with pronouncements from the Supreme Court that range from acceptance of broad deference to agency decisions (even on matters of law) to far less deferential positions.

Given their reading of the current state of Supreme Court doctrine on both of these topics, Sunstein and Vermeule place their bets against acceptance of textualist-originalist challenges. The position they stake out is that, assuming these challenges are doomed to failure, the nation is better off sticking with the surrogate safeguards that have been adopted, letting agencies develop rules that limit their discretion, and counting on doctrines that make agencies accountable for sticking with their rules. That is, if the Court won’t bar agencies from exercising authority under a broad legislative delegation, the Court shouldn’t limit constraints on the agencies to those found in the APA, strictly read.

The key case for this argument is *Vermont Yankee*.²⁴ *Vermont Yankee* directed courts not to require agencies to adopt procedures beyond those that are specified in the law, which Sunstein and Vermeule accept is consistent with a plausible, textualist reading of the APA. But, at the same time, they regard it as a bad decision because it prevented (or at least slowed or diverted) courts from developing additional safeguards against excessive discretionary administrative authority.

V. WHERE’S THE LAW?: ELIDING LAW ON PURPOSE

The argument against decisions such as *Vermont Yankee*—predicated on the assumption that extratextual surrogate safeguards are better than no substantial safeguards at all—is a sensible, practical argument for a second-best set of court decisions, something that the authors announce as one of their goals for *Law and Leviathan*. It faces two difficulties, however, that do not fully get their due in the book.

First, the argument requires some grounding in *law*. After all, courts are not supposed to be free-form deciders on what is best for society. They are supposed to determine what the law is when called on to resolve legal disputes. That was *Marbury*’s declaration, repeated frequently by judges and scholars alike.

While Sunstein and Vermeule argue that Fuller’s concerns over law’s inner morality are keys to what can *count* as law, they acknowledge that morality standing alone cannot *be* law. Morality of the sort they champion can be necessary to law, but it cannot be sufficient. Recognizing this point, although not really focusing attention on it, *Law and Leviathan* does not argue that morality should stand alone. Instead, the book urges that constructions consistent with the inner morality of law can be fashioned with reference to the relevant law’s *purpose*. The message is that law, not morality, must govern, but that law governs through its *purpose* more than its *text*, and its purpose should be implemented consistent with a Fullerian understanding of the inner morality of law.

19 Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117 (2016).

20 Gundy v. United States, 139 S. Ct. 2116 (2019).

21 Dep’t of Commerce v. New York, 139 S. Ct. 2551 (2019).

22 J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394 (1928).

23 *Chevron* actually was not decided under the APA, but instead under a provision of the Clean Air Act that repeated—almost verbatim—the relevant scope-of-review language from APA section 706.

24 *Vermont Yankee*, 435 U.S. 519.

This raises the *second* difficulty, which can be summed up in two related questions: How is the law's purpose divined? And how is its application in a specific context determined?

Consider the authors' view of the APA, which governs many of administrative law's process issues. A central assertion of the book is that the APA's purpose was to create a *modus vivendi* between proponents of strong administrative governance structures and proponents of constraint on administrative discretion. That purpose, articulated not in the APA but in Justice Robert Jackson's opinion for the Court in *Wong Yang Sung v. McGrath*,²⁵ is what Sunstein and Vermeule suggest as the touchstone for judicial decisions on administrative process. But however thoughtful Jackson's description of the APA as a whole may be, it doesn't suggest obvious means to find the relevant purpose and to translate it into a suitable legal rule. *Wong Yang Sung* is an example of the difficulty.

Wong Yang Sung was a challenge to rules permitting immigration officers to investigate immigration issues in some cases and to adjudicate disputes in others. Jackson admitted that the APA did not by its terms generally forbid such commingling of duties. The APA's rules for formal adjudication *do* provide for separating adjudicators from functions that might present a conflict with independent adjudication. Jackson acknowledged that this provision applied only to adjudications "required by statute to be determined on the record after opportunity for an agency hearing."²⁶ He also noted that the immigration statute at issue in *Wong Yang Sung* contained no such requirement. Nor did the statute elsewhere command a separation of functions that would prohibit immigration officers from investigating some alleged violations of the immigration law and adjudicating others. In short, the text of the statute at issue did not support a required separation of functions in the setting presented in *Wong Yang Sung*, and the APA's text did not support it in the absence of a statutory command particularized to that setting. If judges are supposed to adhere to statutory text, that should have been game, set, and match.

Jackson, however, put aside text in favor of legislative history; and he put aside legislative history of the standard sort in favor of a wider set of materials not directly part of Congress's creation of law. The materials cited are reports of a variety of governmental and bar committees that worked on or suggested or commented on reforms to administrative procedure over the decade preceding the law's passage, not the usual makings of legislative history. Comments that Jackson mined from these reports expressed enough concern over commingling of functions for him to declare that eliminating commingling of functions was a purpose of the APA. He was able to discern such a purpose behind the APA even though its only mention of separating functions is its requirement that on-the-record adjudications "required by statute" use a formal adjudicative process including this feature—which points back to the textual barrier to imposing that requirement in *Wong Yang Sung*.

After locating this unstated separation-of-functions purpose behind APA adjudication, Jackson then put the onus on the government to explain why an immigration hearing should be "exempt" from requirements that didn't by the words of any relevant statute apply to that hearing. Jackson found the requirement for a hearing—which is not to say a formal, on-the-record hearing—supplied by a prior decision under a prior law in a different setting stating that the Due Process Clause of the Fifth Amendment required *some* sort of hearing. In other words, a constitutional requirement that arguably created a hearing requirement different from what would mandate the separation of functions essential to *Wong Yang Sung's* result and a statute that by its terms did not apply were stitched together to fit the deeper, unarticulated purpose the Justices found in materials that were not part of the actual legislative process for adopting the APA. These legal acrobatics are impressive. Molding such creativity into a Supreme Court decision is testament to Jackson's willingness to follow his own sense of right and wrong as well as his ability to weave his way around the impediments law placed in his way—impediments that would have stymied lesser legal athletes. Yet, much as these moves must have impressed Sunstein and Vermeule, they are not a stellar model of operating under the rule of law, which requires that judges implement the commands of law written by those to whom law-making power is constitutionally given.²⁷

Sunstein and Vermeule do not go into the details of *Wong Yang Sung* and are not defending its particular application of the principles they find central to good administrative law. Yet they make clear their view that the essence of good administrative law is conformity to the inner morality of law embraced by Fuller and Jackson. The startling creativity of Jackson's approach—especially its sharp divorce from the text of the laws that supposedly governed the case—should be striking to lawyers accustomed (in no small part, thanks to Justice Antonin Scalia) to reading texts and relying on them instead of tossing them overboard in favor of principles not found in the law though favored by judges and academic commentators. *Law and Leviathan's* warm embrace of Jackson and the approach his opinion in *Wong Yang Sung* represents should be similarly striking.

The details of *Wong Yang Sung* provide an important insight into *Law and Leviathan*. Sunstein and Vermeule are not simply providing a way of constraining administrative discretion that may be deployed when other means are unavailing. They are endorsing a form of *judicial* discretion that is used to support the administrative state even more than it is used to control it. Consider questions respecting delegation and deference, discussed in the next two sections.

25 339 U.S. 33, 40–45 (1950).

26 5 U.S.C. §554(d) (2018) (emphasis added) (cited by Jackson in *Wong Yang Sung*, 339 U.S. at 48, 50).

27 For explanation of the basic requirements of the rule of law, see, e.g., RONALD A. CASS, *THE RULE OF LAW IN AMERICA* 2–19 (2001); F. A. HAYEK, *THE ROAD TO SERFDOM* 80–81 (1994); Michael Oakshott, *The Rule of Law*, in *ON HISTORY AND OTHER ESSAYS* 1 (1983); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179–80 (1989).

VI. DELEGATION: IS THE CONSTITUTION AT HOME ON FREE-RANGE?

A critical issue for the administrative state is how courts decide whether authority given to administrators amounts to a constitutionally impermissible delegation of legislative power. To answer that question, Sunstein and Vermeule propose looking beyond the Constitution's text to its deeper purpose; and they suggest that the Constitution's purpose was to *facilitate*, more than to constrain, national government. In their words, it is important to appreciate that "members of the Founding Generation wanted a strong national government, not a weak one."²⁸ This purpose, then, informs judgments about the national government, including Sunstein and Vermeule's emphatic declaration that strict limits on delegation must be rejected because they would gravely impair that purpose.

The statement quoted above about what members of the Founding generation wanted may be true as written. Plainly, some members of the Founding generation undeniably wanted a strong national government. But the statement's phrasing is seriously misleading if taken to suggest that all or most of the Founding generation cared more about empowering the national government than constraining it. The Constitution did strengthen national government as compared to the Articles of Confederation, but the Founding generation's writings and speeches are replete with concerns about too-strong government. Virtually all the argument during the ratification debates focused on whether the new Constitution confined national power enough.²⁹ More important, the Constitution is overwhelmingly devoted to framing a very seriously constrained national government.

Lawmaking is the centerpiece of the Constitution and the activity that is most constrained, both in the construction of *who* makes the law and in the specifics of *how* law is made. Even a quick look at the Constitution's text shows how much space is devoted to these subjects. Both the document and the understanding of it expressed at the time emphasize the Framers concern with lawmaking and how to constrain it.

First, the Constitution requires that laws be made by Congress. That is Article I, section 1's first clause. It is where the Constitution's functional work begins.

Second, the lawmaking power is not vested in a single body selected at a single time in a single manner. Instead, laws can only be enacted by a combination of officials selected at different times, for different lengths of service, in different ways, representing different sizes and types of constituencies. This undoubtedly complicates lawmaking and frustrates many lawmaking efforts. That was exactly the goal of the Framers, who feared lawmaking by a body too easily persuaded by a transient, if widespread, sentiment or by a faction that intensely pushed for a law serving its own interest.³⁰ Just for good measure, every law needs to be passed by both houses of Congress in the same session and

presented to the president to sign or veto. In the case of a veto, a law could only be passed by a supermajority of both houses acting to override the veto.

The *who* and *how* of lawmaking were central concerns of the Framers, clearly spelled out in the Constitution, and clearly designed to slow down and complicate the lawmaking process in ways that served to check the national lawmaking power, sacrificing effectiveness to ensure protections against infringements on liberty. Of course, compared to the Articles of Confederation, the Constitution represented a decided step toward more effective national authority. After all, the Articles were styled as a confederation of states (rather than a united republic); they required consent of more than two-thirds of the states to enact a law; and they authorized only a narrow ambit of authority for national governance. But to view strengthening national government as the purpose of the document as a whole—such that disputes are always resolved in favor of more national power—would take substantial liberties with its history as well as its text.

Law and Leviathan's authors, viewing matters through their purposive lens, take a decidedly different view of the Constitution's meaning than I have expressed here. Sunstein and Vermeule see the Constitution as providing authority for Congress to turn over to administrators *any* scope of authority it chooses, viewing that act itself as exhausting the legislative power.³¹ This view makes *any* act of administrators, by definition, an exercise of the executive power.

The authors rely as well on a version of the history of delegations from Congress to administrators that is seriously contested. The book paints arguments against broad delegations of governing authority as recent inventions, but the historical works cited by Sunstein and Vermeule constitute the more recent, revisionist accounts. These accounts support what might be termed a doctrine of "free-range delegation," but many serious scholars sharply disagree with the historical and analytical claims that provide the underpinnings for Sunstein and Vermeule's approach.³²

The summary discussion here is not intended to rebut the book's contentions about delegation (or nondelegation) doctrine.

28 SUNSTEIN & VERMEULE, *supra* note 1, at 23.

29 See generally THE FEDERALIST; THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES (Ralph Ketcham ed., 1986).

30 The famous exposition of this point is THE FEDERALIST No. 10 (James Madison). See also *id.* Nos. 47–51 (Madison).

31 This argument is spelled out in Eric Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002). Narrower arguments based on practical difficulties of enforcement are presented in Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 326–28 (2000).

32 See, e.g., Larry Alexander & Saikrishna Prakash, *Delegation Really Running Riot*, 93 VA. L. REV. 1035 (2007); Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J.L. & PUB. POL'Y 147 (2016) (*Delegation Reconsidered*); Douglas H. Ginsburg & Steven Menashi, *Our Illiberal Administrative Law*, 10 N.Y.U. J.L. & LIBERTY 475, 478–91 (2016); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327 (2002); Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2165–81 (2004); Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463 (2015); David Schoenbrod, *Separation of Powers and the Powers That Be: The Constitutional Purposes of the Delegation Doctrine*, 36 AM. U. L. REV. 355 (1987); David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223 (1985); Ilan Wurman, *As-Applied Nondelegation*, 96 TEX.

Rather, the relevant point is that on this issue the argument presented in the book is heavily weighted on the side of the current, expansive administrative state. The authors' position that a nondelegation doctrine is less helpful than a "second-best" set of surrogate safeguards may be valid as a practical matter (though I am doubtful on that score), but it is difficult to take at face value given its tension with their "first-order" position opposing any legal restraints on delegation.³³

VII. DEFERENCE: WHO DECIDES? AND WHY?

Similarly, on questions respecting the appropriate scope of deference to administrative interpretations of statutes and agency regulations, Sunstein and Vermeule support broader authority for the administrative state. They also support judicial frameworks that are relatively short on legal grounding and long on discretion for courts and agencies alike.

The most famous deference decision is *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*³⁴ It has spawned a cottage industry of both legal application and academic commentary.³⁵ Much of the case law and commentary reveals divisions in the way the *Chevron* decision is interpreted. Some judges and scholars have read the decision as commanding judicial deference to administrative interpretations of statutes whenever the judge finds no absolutely precise and definite meaning to the relevant statute.³⁶ Deference in accordance with this view treats administrators effectively as substitute judges for the set of cases involving provisions with no clear determinate meaning.

A second group, including Justice Scalia, has read *Chevron* as leaving largely undisturbed prior law that understood that courts *interpret* law and agencies *implement* it, although

broadening the default rule on agencies' discretionary authority over implementation.³⁷ This group sees *Chevron* directing courts to interpret the law in traditional ways. When there is a natural, best reading to a statutory provision, courts should give the law that meaning. But when an agency administers a complex regulatory statute and the terms framing that agency's authority are ambiguous in some respect, the courts generally should understand the law as permitting the agency to make policy decisions implementing the law that do not conflict with the courts' view of the law's bounds around agency authority. In other words, the court determines the *meaning* of the law, and the agency decides how best to *implement* it when the meaning is "do anything reasonable to accomplish this goal within this sphere of authority." Read this way, *Chevron* is consistent with a conceptual division between *interpretation* and *implementation*. It also is consistent with the text of the APA (and the Clean Air Act, which was actually the law at issue in *Chevron*), with case-law predating the APA, and with the most natural reading of the Constitution's vesting clauses.

Sunstein and Vermeule focus much of their discussion on rebutting attacks on *Chevron*. They quite sensibly treat *Chevron*'s rule of deference as concerning delegation of authority. While they characterize *Chevron* as dealing with *interpretive* authority, they recognize that the framework that has grown up around *Chevron* is consistent with disparate visions of what it commands. *Law and Leviathan*, after reviewing some of the major disputes, cases, and lines of demarcation under the *Chevron* banner, characterizes the decision and the cases applying it this way: "*Chevron* continues to serve as a kind of governing regime, a broad and open-ended mini-constitution for judicial deference, one that tolerates and incorporates a diversity of approaches in a *modus vivendi*."³⁸

In general, Sunstein and Vermeule's treatment of *Chevron* is thoughtful, measured, and even consistent with approaches taken by critics of the administrative state. Yet their emphasis differs from that of approaches anchored in specific textual commands and constitutional structure. The important point for this book is not the cases' fit with specific legal texts, but the flexibility the *Chevron* framework leaves for judges and administrators. It lets judges work out when it is better to defer and when it is better to override administrative decisions that are framed in terms that either assert interpretive conclusions or announce policy decisions in language that parallels such determinations. And to the extent administrators are given discretion to implement the law, they have what for Sunstein and Vermeule is a salutary tractability to apply the law according to their own judgments.

L. REV. 975 (2018); Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. (forthcoming 2021). For works that more broadly contest the sort of approaches underlying the conception of a broadly empowered national government, and especially a government operating through discretionary administrative authority, see generally RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004); PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014).

33 In addition to their argument about delegation in Chapter 3, Sunstein and Vermeule explain their "first-order" narrative on delegation in Chapter 5. See SUNSTEIN & VERMEULE, *supra* note 1, at 121–22.

34 467 U.S. 837.

35 For helpful overviews of the arguments and positions regarding deference, see, e.g., Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779 (2010); Peter L. Strauss, "Deference" Is Too Confusing--Let's Call Them "Chevron Space" and "Skidmore Weight," 112 COLUM. L. REV. 1143 (2012); Christopher J. Walker, *Attacking Auer and Chevron Deference: A Literature Review*, 16 GEO. J.L. & PUB. POL'Y 103 (2018).

36 See, e.g., *Babbitt v. Sweet Home Chapter of Cmities. for a Great Oregon*, 515 U.S. 687 (1995); E. Donald Elliott, *Chevron Matters: How the Chevron Doctrine Redefined the Roles of Congress, Courts and Agencies in Environmental Law*, 16 VILL. ENVTL. L.J. 1 (2005); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989); Richard J. Pierce, Jr., *Chevron and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301 (1988).

37 See, e.g., *Brand X*, 545 U.S. at 1016–19 (Scalia, J., dissenting); *Smiley*, 517 U.S. 735; Ronald A. Cass, *Vive la Deference? Rethinking the Balance Between Administrative and Judicial Discretion*, 83 GEO. WASH. L. REV. 1294 (2015) (*Rethinking*); Gary Lawson & Stephen Kam, *Making Law Our of Nothing at All: The Origins of the Chevron Doctrine*, 65 ADMIN. L. REV. 1, 2 (2013); Thomas W. Merrill, *Justice Stevens and the Chevron Puzzle*, 106 NW. U. L. REV. 551 (2012); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511. See also RONALD A. CASS, COLIN S. DIVER, JACK M. BEERMANN, & JODY FREEMAN, *ADMINISTRATIVE LAW: CASES AND MATERIALS* 187–244 (8th ed. 2020).

38 SUNSTEIN & VERMEULE, at 137–38.

Law and Leviathan's key message on deference is that the Supreme Court should not substitute a less generous, more court-centric rule of statutory interpretation for *Chevron's* general acceptance of agencies' discretion to work out ways to implement statutes they administer.

The book's treatment of *Auer* deference—deference to agencies' interpretations of their own ambiguous rules—also supports giving leeway to the agencies, subject to a few safeguards of the sort Fuller and Jackson would likely approve. The safeguards, which have been incorporated into a new "*Chevronized*" version of *Auer* after the Court's decision in *Kisor v. Wilkie*,³⁹ are intended to prevent too rapid or unpredictable changes in rules' meaning, to make sure that the elaborations of rules' meanings are reasoned and attended to by appropriate agency personnel, and to limit deference to apply only to interpretations that utilize the agency's expertise.

The authors discuss and disagree with virtually all of the criticisms of *Auer*. They rightly note that many of the criticisms prove too much, notably the assertion that letting an agency interpret its own rule mixes adjudicative and legislative or administrative types of authority in violation of due process or of the vesting clauses that separate powers among the branches of government.⁴⁰ They also rightly point out that it is both plausible and (within certain bounds not spelled out in their discussion) constitutionally permissible for Congress to grant an agency discretion to make rules *and* to interpret those rules.

Their view of *Auer*, however, as with their treatment of delegation, is faulty because it provides an essentially open field. Just as, in their view, Congress can grant administrators any scope of authority so long as it does this by law, so, too, it can require courts to defer to administrators' judgments without limitation. This position may be correct in a general sense—after all, Congress could deprive the courts of jurisdiction over the challenges to administrative determinations on any terms.⁴¹ At some point, however, deference becomes tantamount to conferring a power on administrators that exceeds constitutional limits.⁴²

Sunstein and Vermeule's *Auer* deference argument fails as well because it lacks a requirement of an actual textual delegation of authority; for them, it's enough that it makes sense to read the delegation of authority as giving an agency discretion over how to interpret its own rules. The authors do not note one of the key differences between *Auer* and *Chevron* deference.

Chevron turns on what authority is reasonable to infer from an ambiguous statutory provision, asking when courts can deem that the ambiguity confers additional discretionary power on agencies. Obviously, Congress can choose to confer some degree of discretionary power on agencies. But can *Auer* sensibly ask whether the *agency's* ambiguity confers deference on the agency itself? That is the import of—and the problem with—the rule embraced in *Auer*.⁴³

What *Law and Leviathan* proposes is acceptance not of the rule announced in *Auer* (or its ancestor, *Seminole Rock*)⁴⁴ but of a revised rule that lets courts pour into statutes whatever delegations and commitments of discretionary authority make sense to the judges. The book's linkage of both *Chevron* and *Auer* deference to legislative delegations of authority makes constitutional sense. But the delegation in Sunstein and Vermeule's construct doesn't have to be real. It doesn't have to have been expressed in a statute or in the Constitution or even reasonably inferred from them. Delegation, for these purposes, only needs to provide a plausible framework for letting agencies operate—subject only to rules courts create to assign discretion where they think it fits, and procedures courts fashion to provide the freedom or the constraint they deem appropriate. The book's treatment of deference thus ultimately founders on the same ground as its treatment of delegation: it yields too much power to the least accountable actors in our constitutional system.

VIII. OF VESTING INTERESTS: TAKING DIVIDED GOVERNMENT SERIOUSLY

Framing legal doctrines to set bounds around administrative actions requires giving practical effect to the Constitution's separation of powers among the branches, captured most clearly in the three vesting clauses of Articles I, II, and III. From the beginning, James Madison, John Marshall, and others recognized that the boundaries between the powers assigned to the three branches are not capable of being drawn with absolute precision,⁴⁵ but they recognized as well that maintaining distinctions among these powers and keeping them separate is critical to the Constitution's design.⁴⁶

In line with these lessons, Justice Scalia's dissent in *Mistretta v. United States* notes both sides of the constitutional argument.

39 139 S. Ct. 2400.

40 For contrasting arguments on this issue, see, e.g., John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996). See also Paul J. Larkin, Jr. & Elizabeth H. Slattery, *The World After Seminole Rock and Auer*, 42 HARV. J. L. & PUB. POL'Y 625 (2019) (addressing *Auer/Seminole Rock* deference's conflicts with due process and related requirements of fair and impartial decision-making by biasing both agency interpretation and judicial review).

41 See, e.g., *Dep't of Commerce*, 139 S. Ct. at 2603 (Alito, J., concurring in part and dissenting in part); *Webster v. Doe*, 486 U.S. 592, 600 (1988); *id.* at 608–10 (Scalia, J., dissenting); *Heckler v. Chaney*, 470 U.S. 821, 837–38 (1985).

42 See, e.g., Ronald A. Cass, *Auer Deference: Doubling Down on Delegation's Defects*, 87 FORDHAM L. REV. 531, 536 (2018) (*Auer Deference*).

43 See, e.g., Ronald A. Cass, *Deference to Agency Rule Interpretations: Problems of Expanding Constitutionally Questionable Authority in the Administrative State*, 19 FEDERALIST SOC'Y REV. 54 (2018), available at <https://fedsoc.org/commentary/publications/deference-to-agency-rule-interpretations-problems-of-expanding-constitutionally-questionable-authority-in-the-administrative-state>.

44 *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

45 See, e.g., *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42–43, 46 (1825); THE FEDERALIST No. 37, at 228 (James Madison) (Clinton Rossiter ed., 1961).

46 See, e.g., THE FEDERALIST No. 47, at 301–03 (James Madison) (Clinton Rossiter ed., 1961); THE FEDERALIST Nos. 48 & 51 (James Madison). For more recent appreciation of this understanding, see, e.g., *Gundy*, 139 S. Ct. at 2138–40 (Gorsuch, J., dissenting); *Dep't of Transp. v. Ass'n of Am. R.R.*, 575 U.S. 43, 57–66 (2015) (Alito, J., concurring); *id.* at 66–91 (Thomas, J., concurring in the judgment); *Stern v. Marshall*, 564 U.S. 462 (2011); *Clinton v. New York*, 524 U.S. 417 (1998); *Loving v. United States*, 517 U.S. 748, 757–58 (1996); *Northern Pipeline*

First, he recognizes the difficulty of devising a formula to limit precisely how much discretion lawmakers can allocate to agencies before those agencies' administrative actions become lawmaking.⁴⁷ But then he also identifies a key distinction. His opinion draws a sharp line between different *kinds* of rulemaking: (i) application of articulated policy to particular factual circumstances and prescription of rules for future application by the same authority and (ii) prescription of rules pure and simple. The former could be an exercise of executive power (the province of the president and administrative agencies) or, when done in the context of cases that come within Article III's bounds, judicial power (the province of the courts). But, Scalia declares, where the rulemaking power stands alone, as in *Mistretta*, its exercise is a legislative function.⁴⁸ What Congress had done in that case in effect created "a sort of junior-varsity Congress."⁴⁹ A dozen years later, writing for the Court in *American Trucking*, Scalia expressly ties the permissible ambit of administrative discretion to the importance of the authority granted by law, noting that more important commitments of authority require more statutory direction.⁵⁰ This, essentially, reprises the test articulated by Chief Justice Marshall 176 years earlier.⁵¹

Quite a few scholars have proposed understanding constitutional separation of powers (and doctrines respecting delegation and deference that can serve related functions) in a conceptual framework that divides government actions into a few basic categories.⁵² The Supreme Court has followed a similar approach in deciding whether issues are within the judicial function assigned to Article III courts or whether a particular legislative or executive action constitutes lawmaking

that must go through the constitutionally prescribed process.⁵³ For deference issues, this approach separates questions into those dealing with *interpretation of law* and those dealing with matters of *administrative discretion*. Courts have authority over interpretation of law, including saying what scope of authority administrators enjoy under the law. That is essentially *Chevron's* Step One and its "traditional tools" direction. Agencies either have unreviewable discretion (when a matter is clearly committed to agency discretion by law), or they have discretion that is subject to review for reasonableness (*Chevron's* Step Two). This approach makes *Chevron* fit the constitutional scheme and also fit the APA (and related statutes), and it avoids complications from potential conflicts between agencies' and courts' interpretations of law.⁵⁴

Sunstein and Vermeule, however, resist a conceptual-categorical division between making *law* and making *policy decisions* in the course of enforcing or implementing law (the closest analogue to lawmaking in the administrator's legitimate domain), even where that distinction is generally in line with their interpretation of the law, as with *Chevron*. They base their resistance primarily on the difficulty of making the conceptual division required. That's a reasonable basis for rejecting some conceptual divisions, but it is a fairly weak argument here. The argument is especially unconvincing given that Sunstein and Vermeule's surrogate-safeguards/inner-morality approach calls for judgments that are at least as difficult to make and considerably more difficult to ground in anything solid as a matter of law.

Their related argument is that the conceptual approach has been tried and failed, as courts have rejected or abandoned it. The argument treats judges as neutral, dispositive arbiters of best approaches. That's a fair assumption in many circumstances, but it's at odds with much of the argumentation in the book. Further, courts have not in fact broadly rejected the conceptual division offered in the contexts relevant here. Sunstein and Vermeule's assertion rests on judicial reluctance to follow the division between "jurisdictional" or "fundamental" facts and ordinary facts, famously set forth in *Crowell v. Benson*,⁵⁵ not the distinction between interpreting law and exercising discretion in policy or enforcement.

The more likely reason for the authors' reluctance to embrace the conceptual division described above is that it doesn't fit their view that the Constitution's vesting clauses are mere definitional conveniences. On Sunstein and Vermeule's reading of the Constitution, whatever Congress does is, by definition, an exercise of legislative power. Nothing conceptual is needed. So, too, they see whatever courts do, by definition, as an exercise of

Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982); Alexander & Prakash, *supra* note 32; Clark Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of Chevron's Step Two*, 2 ADMIN. L.J. 255, 262–63, 266–67 (1988); Cass, *Delegation Reconsidered*, *supra* note 32; Ronald A. Cass, *Is Chevron's Game Worth the Candle? Burning Interpretation at Both Ends*, in LIBERTY'S NEMESIS: THE UNCHECKED EXPANSION OF THE STATE 57 (Dean Reuter & John Yoo eds., 2016) (*Worth the Candle?*); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 131, 189–211 (1998); Farina, *supra* note 36, at 472–73; Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under Chevron*, 6 ADMIN. L.J. AM. U. 187, 187–90 (1992); Lawson, *supra* note 32, at 341–42; Manning, *supra* note 40.

47 *Mistretta v. United States*, 488 U.S. 361, 415–16 (1989) (Scalia, J., dissenting).

48 *Id.* at 417–22 (Scalia, J., dissenting).

49 *Id.* at 427 (Scalia, J., dissenting).

50 *Whitman*, 531 U.S. at 475.

51 *See, e.g.*, Wayman, 23 U.S. (10 Wheat.) at 41–43.

52 *See, e.g.*, Alexander & Prakash, *supra* note 32; Byse, *supra* note 46; Cass, *Delegation Reconsidered*, *supra* note 32; Cass, *Worth the Candle?*, *supra* note 46; Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1679–1726 (2012); Herz, *supra* note 46; Lawson, *supra* note 32, at 341–42; Jeffrey Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852, 882–95 (2020). *See also* HAMBURGER, *supra* note 32.

53 *See, e.g.*, *Clinton*, 524 U.S. 417; *Loving*, 517 U.S. 748; *INS v. Chadha*, 462 U.S. 919 (1983); *Northern Pipeline*, 458 U.S. 50.

54 This approach, in various linguistic formulations, has been advanced in many of the discussions of *Chevron*. *See, e.g.*, Byse, *supra* note 46; Cass, *Auer Deference*, *supra* note 42; Cass, *Rethinking*, *supra* note 37, at 1314; Duffy, *supra* note 46, at 189–211; Herz, *supra* note 46; Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1257–58 (1997); Pierce, *supra* note 36, at 310–12; Pojanowski, *supra* note 52, at 858–59, 884–94, 900–02; Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 284 (1986).

55 285 U.S. 22, 55–57 (1932).

judicial power. On this view, anything that administrators do is executive power. And on this view, there is no delegation issue. Nor can there be a constitutional question of excessive deference.

This reductive view of the vesting clauses and the divisions of power that follow them requires justification. It does not obviously make sense to read the Constitution's principal provisions as a set of nearly tautological definitions. Explanation for the book's dismissal of conceptual-categorical approaches—and for the authors' embrace of definitional approaches to constitutional questions—demands something more.

While it is fair enough for Sunstein and Vermeule to emphasize the difficulty of making distinctions between conceptually imprecise categories such as lawmaking and implementation or legal interpretation and implementation, their preference for a different approach here seems rooted in other grounds. Two alternatives are plausible. One plausible basis is their rejection of textualism and originalism as methods of interpretation. Sunstein and Vermeule make plain that they prefer looking to purpose instead of text. The reasons for that are complex, and giving the arguments (these authors' arguments and those put forward in related academic debates) their due would take more space than is reasonable for a book review. It is, however, a plausible reading. The other plausible reason for rejecting the conceptual option is that it seems more likely to threaten the current form of the administrative state. That, too, seems a fair reading of the book. Either way, the rationales offered in the book, on this and other scores, will be more congenial to readers who are not dissatisfied with the size and shape of today's administrative state.

IX. CONCLUSION

Ultimately, this is a book that should be read by everyone interested in the law, theory, and practice of the administrative state. It is thoughtful, interesting, well-presented, and, despite its relative brevity (for many academics, a 145-page work is mere throat-clearing!), it is also quite capacious, covering a substantial part of the administrative law landscape. The book provides enough meat in sprightly enough fashion to become a talked-about, written-about, and resorted-to reference. Moreover, without being doctrinaire, it will please great parts of the academic, pundit, and policy community with its defenses of much that is essential to maintaining a large and powerful administrative state. None of this should surprise anyone familiar with Cass Sunstein and Adrian Vermeule or the very large and well-respected bodies of work they have produced.

Readers who come to *Law and Leviathan* without a background in these works or the debates they intersect also can find this a quite readable volume. But they should understand that the point of much of the book is not so much to examine or critique the administrative state as to explain ways to preserve it. This will involve placing limits on the administrative state in some instances, but that doesn't have to be done through hard limits on the bureaucracy, much less on congressional delegation of authority to it. The book's message is that soft limits are better, more flexible, more pragmatic, and have generally been formed by and are implemented by people who can be trusted to stop bad things and facilitate good things. Arguments to the

contrary are derided under the label of "New Coke"—ostensibly a reference to 17th century jurist and scholar Sir Edward Coke, but also no doubt a pun on the notoriously failed 1980s effort of the Coca-Cola company to change its flagship product to something sweeter.

The major argument throughout draws an unspoken parallel to the historic success of classic Coke. Sunstein and Vermeule's overarching theme is that courts generally have used their discretion to strike the right balance between creating process constraints and enabling agencies to function effectively, and that agencies have done the same. The stress is on preventing law from getting in the way of properly shaped discretion. The volume starts with observations about the assault against the administrative state, ends with a return to that theme, and reprises the importance of celebrating the way that advertence to the inner morality of law can bridge the divide between enabling and constraining the administrative state. Notably, however, many of *Law and Leviathan's* most pointed arguments focus not on the *constraint* side but on the *enabling* side of the divide.

Sunstein and Vermeule's vision of the administrative state is a generally rosy one. It sees the state making water cleaner, air more breathable, working conditions less dangerous, indefensible discrimination less common, pharmaceuticals safer, and financial stumbles more bearable. Theirs is not a vision of too many rules, too many regulations, too much red tape, or too much interference with private enterprise, private initiative, and private lives. The project here, as the book's subtitle says, is "redeeming the administrative state."

Much of what Sunstein and Vermeule urge in this book is at odds with the more obvious ways of reining in excesses and constraining grants of authority that strain constitutionally articulated limits—obvious ways of adherence to text, to original meaning, and to holding each branch of government to the conceptually distinctive tasks the Constitution assigns. Yet *Law and Leviathan* also offers pointers on how law can be used to soften some of the less savory byproducts of a large state brimming with regulations and requirements. Anyone concerned about the administrative state should hope that this side of the book's discourses is taken seriously by judges and administrators alike. Almost certainly, the other side will be—with or without Wagner playing in the background.

