Counter-Reformation

Redeeming the Administrative State

By G. Tracy Mehan III

THE heretics, recently inside the cathedral of the administrative state, were just barely excommunicated in the 2020 election. The Trump administration did not cotton to social, economic, or environmental regulation that it deemed inimical to its plans to revive the economy. To the outrage of some, the president issued executive orders to repeal two regulations for every new one promulgated and mandating, in effect, a regulatory budget for the federal Leviathan, something Congress has not legislated given its historic aversion to facing trade-offs.

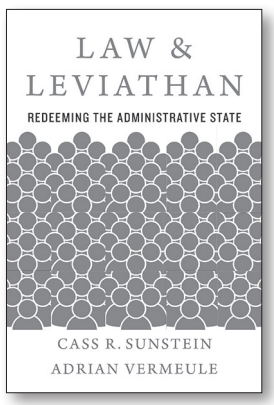
Conservatives, and libertarians such as those at the Competitive Enterprise Institute, rail against the "Ten Thousand Commandments" and the "hidden tax" of America's regulatory state. CEI argues that the aggregate cost of federal regulation is more than $1.9 trillion annually, the cost to each U.S. household exceeding $14,000 annually on average. This is 18 percent of the average pre-tax household budget, second only to housing.

While the Trump administration accounted for fewer pages in the Federal Register than Obama's, it still averaged 66,490 pager per year versus 80,420, according to CEI.

A more ominous development for defenders of the administrative state, several justices on the Supreme Court are harboring heretical thoughts and writing openly about restricting deference to regulatory agencies, even policing congressional delegation of regulatory authority they deem overbroad.

A counter-reformation has emerged from defenders of administrative law and cost-benefit analysis, the latter having fallen out of favor among some on the political Right.

In *Law & Leviathan: Redeeming the Administrative State*, Harvard Law professors Cass R. Sunstein and Adrian Vermeule seek to reassure legal and judicial critics of federal agencies and regulation who "converge, above all, on one major concern: *that the administrative state threatens the rule of law*." They concur with many of the usual defenses of administrative law and agencies, such as the validity of congressional authorizations and market failures. Nevertheless, "neither of us believes that the status quo is perfect; we might favor quite significant reforms, while not always agreeing on the forms they should take."



Law & Leviathan: Redeeming the Administrative State. By Cass R. Sunstein and Adrian Vermeule. The Belknap Press; $25.95; 188 pages.

Reviving Rationality: Saving Cost-Benefit Analysis for the Sake of the Environment and Our Health. By Michael A. Livermore and Richard L. Revesz. Oxford University Press; $34.95; 293 pages.

Sunstein and Vermeule offer the critics of Leviathan "a structure that can 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." They share the optimism of Justice Robert Jackson regarding the success of the Administrative Procedure Act, who, writing for the Supreme Court in *Wong Yang Sung v. McGrath* in 1950, stated that this statute, after "a long period of study and strife," "settles long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest."

Moreover, "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."

Sunstein and Vermeule describe the development of a body of judge-made law, without clear constitutional or statutory grounding, which has evolved over the years, yielding principles which they deem "the internal morality of administrative law." For example, agencies must follow their own rules; courts should disfavor retroactive rulemaking absent clear congressional intent. Courts and judges have posited "surrogate safeguards" to secure the rule of law for those subject to regulation without undermining the basic legitimacy of administrative law.

In the authors' view, this is exactly the approach the Roberts Court has pursued as it has declined to overturn either *Auer* or *Chevron* deference and come no where close to reviving the non-delegation doctrine despite musings by some justices. They have made some doctrinal adjustments, leaving underlying principles intact.

Sunstein is a liberal but also a strong proponent of cost-benefit analysis as befitting a former director of OMB's Office of Information and Regulatory Affairs in the Obama years. He even tried to say something nice about the Trump administration's "silly" executive orders on regulatory reform, which he thought could be re-worked into useful form. He is also a promoter of the "nudge" theory of social policy,

a more light-handed approach to welfare.

Vermeule, an expert in administrative law, is a convert, an ultra-montane Catholic and an Integralist (a proponent of papal authority) who, at a 2018 conference at Notre Dame, opined, "We mustn't confuse accommodation [with America's liberal regime] for something to celebrate."

In a slightly discordant note, Sunstein and Vermeule label originalist, textualist, and historical critics of administrative law, the very people with whom they seek common ground, as practitioners of the "New Coke," an ironic reference to the famous common law judge, Edward Coke, who opposed Stuart despotism in England.

The authors concede the sources are "murky" for these legal safeguards, or body of federal, judge-made law, discounting even the Due Process Clause as one. They seek to make a case of "judicial intuitions" as the origin of a new kind of law grounded in, or at least consonant with, the teaching of the famous Harvard Law professor Lon Fuller, who criticized legal positivism and argued for a form of natural law theory focused on procedural rules. By the way, the authors studiously avoid the term "natural law," but it is obvious to anyone familiar with that school of thought, that that is what is being described here.

In Fuller's most famous work, *The Morality of Law* (1964), he outlined eight ways the law may fail or run afoul the rule or morality of law, what Sunstein and Vermeule call the "Fullerian intuition." As summarized by the authors, these include the failure to make rules in the first place, failure of transparency, abuse of retroactivity, failure to make understandable rules, requiring people to do things they lack the power to do, frequent changes in rules, and a mismatch between rules as announced and as administered.

"In our view, the morality of administrative law is something to celebrate," conclude professors Sunstein and Vermeule — hoping the New Cokers will come around to accepting a second-best solution to their concerns.

Certainly, absent the development of this Fullerian case law, things would be much worse for regulated parties

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Professors Michael Livermore and Richard Revesz celebrate cost-benefit analysis in *Reviving Rationality: Saving Cost-Benefit Analysis for the Sake of the Environment and Our Health,* hoping to gain lost ground with Republicans and populists, as well as "Republican elites," whom they used to consider supporters of the practice. They are reacting to what they consider the apostasy of the more populist Trump administration. This book complements their 2008 book, *Retaking Rationality: How Cost-Benefit Analysis Can Better Protect the Environment and Our Health,* in which they sought "to intervene in what we believed was a stale debate between conservatives and progressives over the use of cost-benefit analysis in government decisionmaking." Indeed, "the progressive opposition to cost-benefit analysis was ineffective and counterproductive."

Livermore, he of the University of Virginia Law School, and Revesz of New York University School of Law, both recognized experts in the field, have come to bury Trump and not to praise him. The book focuses mostly on health and climate issues. Waters of the United States, for instance, does not appear in the index. Co-benefits, indirect benefits, social cost of carbon, domestic-only benefits, and many other issues are discussed in counterpoint to the positions of the previous administration.

Toqueville never read the Federal Register

No doubt Fullerian morality and cost-benefit analysis have greatly improved regulatory policy and law in the United States over the decades. But is that the end of the story? Jonathan Adler, another legal scholar, often asks, What are the opportunity costs of regulation? Try this thought experiment: Can we, for instance, afford an infinite or unlimited number of cost-beneficial rules? A prior judgment, a prudential judgment, legislative or executive, must be made before undertaking to regulate even before applying corrective practices such as cost-benefit analysis or judicial intuition. Often lost in this discussion, although no fault, certainly, of the proponents of the "New Coke," is the liberty interest of the citizenry.

In his classic study *Democracy in America*, Alexis de Tocqueville described "What Kind of Despotism Democratic Nations Have To Fear." There he provided the prescient warning against overweening regulation: "Thus, after taking each individual by turns in its powerful hands and kneading him as it likes, the sovereign extends its arms over society as a whole; it covers its surface with a network of small, complicated, painstaking, uniform rules through which the most original minds and the most vigorous souls cannot clear a way to surpass the crowd; it does not break wills, but it softens them, bends them, and directs them; it rarely forces one to act, but it constantly opposes itself to one's acting; it does not destroy, it prevents things from being born; it does not tyrannize, it hinders, compromises, enervates, extinguishes, dazes, and finally reduces each nation to being nothing more than a herd of timid and industrious animals of which the government is the shepherd." And Tocqueville never read the Federal Register.

Donald Trump, love him or hate him, did not lose re-election because of his regulatory reform or rollback program (choose your own term). It may be one of the reasons why the election was so close. Supporters of reasonable regulation should keep that in mind going forward if the legitimacy of the administrative state is to be restored.

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