VIRTUE AND THE ADMINISTRATIVE STATE

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ABSTRACT

Debates over the lawfulness and importance of the administrative state frequently stall out because participants operate from incommensurable premises. Its critics appeal to history and tradition, and its defenders to the need for a unified national response to contemporary crises. By contrast, this article offers a novel critique of the administrative state through the lens of the virtue-ethics tradition that sidesteps this impasse. The article argues that any account of the administrative state must take into account the core bureaucratic virtues—public-spiritedness and subject-matter competence—that individuals within the administrative state must exemplify in order to succeed in their roles, and yet, that stand in tension with the institutional design of the administrative state. Finally, it develops a critical—but not nihilistic—paradigm for future judicial engagement with the administrative state, on the model of recent Supreme Court decisions in this area.

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I. INTRODUCTION

The "administrative state" is, for the most part, a term freighted with negative connotations. The phrase evokes images of fusty bureaucrats in rooms piled high with unread paperwork, far removed from anything like the grassroots excitement of the democratic process. And at a higher level, the moniker implies that the ruling authority that exists is not, in fact, government "by the people" in any intelligible sense; to speak of an administrative state suggests, rather, that the decisions that shape the lives and freedoms of ordinary citizens are made by faceless forces untethered from any serious accountability framework.

It is this conception of the administrative state that continues to animate the conservative legal movement's longstanding critiques of the contemporary American federal bureaucracy. In the eyes of the administrative state's critics, the mushrooming of executive power—beginning with the presidency of Woodrow Wilson and continuing to the present day—has given rise to a functional "rule by agencies."[1] On this view, more and more legislative, executive, and judicial functions have been progressively outsourced to cadres of unelected government functionaries, which now oversee virtually all facets of civic life.[2] This dynamic, critics charge, cannot be credibly squared with the separation-of-powers scheme envisioned by the Constitution and by the American Founders—a claim that, in turn, suggests that the radical dismantling of familiar bureaucracies may be constitutionally required, assuming judges and Justices have the will to do it.[3]

To be sure, these criticisms of the administrative state have not gone unanswered. Both defenders and friendlier critics of the bureaucracy are keen to note the chaos that would result from a full-scale deconstruction of the federal bureaucratic apparatus.[4] What would the country look like if the Department of Education or Department of Transportation were declared unconstitutional in full? Could decades of federal involvement in public life simply be "unwound" with a single judicial decision? And that, of course, is saying nothing of the fact that thorough arguments can be made for the legal permissibility of the contemporary federal bureaucracy. Some who hold such views pejoratively describe critics of the administrative state as adherents of the "New Coke"

1. *See, e.g.*, JOHN MARINI, UNMASKING THE ADMINISTRATIVE STATE: THE CRISIS OF AMERICAN POLITICS IN THE TWENTY-FIRST CENTURY 48, 61–62 (2019).

2. *Id.* at 277.

3. *See, e.g.*, RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT 581 (2014).

4. *E.g.*, Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 7 (2017); J. Harvie Wilkinson III, *Assessing the Administrative State*, 32 J.L. & POL. 239, 257 (2017) ("I am skeptical of the wisdom of a radical restructuring engineered by the judiciary through constitutional interpretation—it would, in effect, amount to an effort by one democratically unaccountable institution to reform another. There is reason to be wary of such a struggle of the unaccountables.").

school of thought[5]—a reactionary intellectual project doomed to failure in the courts and even more pronounced failure in the public square.

Today, these two competing perspectives on administrative law are notably exemplified in the scholarly work of Philip Hamburger[6] (on the critical side) and that of Cass Sunstein and Adrian Vermeule[7] (on the affirmative/supportive side). Scholars on both sides of this divide have authored lengthy volumes and articles expounding their positions on administrative law and correspondingly attracted their own respective contingents of supporters.

As engaging as these arguments may be to read, though, the prospects for meaningful advancement of this debate are limited. That is because, at bottom, these two camps begin from very different ideas of what constitutes "legality" in the first place. The first stresses affinity to the Constitution and the particular common-law tradition from which it emerged. The second, by contrast, submits that "the path of the law"[8] cannot be arbitrarily arrested in 1789; law necessarily evolves over time to respond to emerging challenges, and those challenges are increasingly federal or global in scale.[9] Something like the administrative state may be, in a sense, the teleological destination of law as such.[10] Or, put another way: on the former view, legality is to be conceived in terms of strict adherence to the meaning of the founding text; on the latter view, legality must be understood by reference to the "thicker" backdrop of the general welfare or (in more classical terms) the common good. These two views are, to paraphrase Thomas Kuhn, incommensurable paradigms.[11] If any progress in this debate is to be made, it must somehow move beyond this particular dialectic.

Accordingly, this article takes an altogether different approach to the question of the administrative state, one that concentrates on the nature of the administrative state as not simply a monolithic leviathan, but a collective of individual subjects with minds and motives of their own. At the same time, the modern administrative state itself—like all institutions—does have distinctive characteristics that, over time, will inevitably influence the habits and behaviors of those individuals who participate within it. The interplay between these two forces—the agentic and the institutional—is essential to any assessment of whether the administrative state can in fact achieve its stated ends.

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5. *See* Cass R. Sunstein & Adrian Vermeule, *The New Coke: On the Plural Aims of Administrative Law*, 2015 SUP. CT. REV. 41 (2015).

6. *See, e.g.*, PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014).

7. *See, e.g.*, CASS R. SUNSTEIN & ADRIAN VERMEULE, LAW AND LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE (2020).

8. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 478 (1897).

9. *See, e.g.*, Nicholas Bagley, *I'm Still Worried: A Post on Law and Leviathan*, YALE J. ON REG. NOTICE & COMMENT (Apr. 15, 2021), https://www.yalejreg.com/nc/law-leviathan-redeeming-the-administrative-state-part-04 ("The risks posed by an increasingly complex and interdependent world—climate change chief among them, but also financial crises, industrial pollution, and new pandemics—are not ones that the government can fight with one hand tied behind its back.").

10. ADRIAN VERMEULE, LAW'S ABNEGATION: FROM LAW'S EMPIRE TO THE ADMINISTRATIVE STATE 218–29 (2016).

11. THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 150 (3d ed. 1996).

On the basis of that premise, this article proceeds to argue for the following central claim: the administrative state, in its present form, is unlikely to produce the types of moral agents who are capable of reliably pursuing and achieving the common good. This problem, it is contended, follows from the inner logic of the bureaucracy itself. Note that in so reasoning, this article accepts arguendo Sunstein and Vermeule's common good-based criterion for judging the success or failure of the administrative state; it thereby offers an argument against the nature of the contemporary administrative state that is not, in fact, incommensurable with the evaluative framework from which Sunstein and Vermeule operate. It is, in short, a critique of the administrative state on the argumentative terrain that perhaps its two foremost advocates have already staked out.

The argument proceeds in five stages. In Part II, this article offers a high-level evaluation of the current debate over the lawfulness of the administrative state and the limited possibilities for meaningful resolution of this debate under present conditions. In Part III, it outlines and defends the parameters within which the inner moral logic of life within the administrative state can be coherently explored, specifically through consideration of Alasdair MacIntyre's approach to virtue ethics and the centrality of practices to virtue formation in the lives of individual agents. In Part IV, it develops an account of two distinctive moral pathologies inherent in the structure of the modern administrative state—the elevation of private goods over the common good, and the progressive deterioration of expertise in the pursuit of the common good—through engagement with James Buchanan's work in the field of public choice economics, explored through a distinctly MacIntyrean lens in order to understand the moral impact of these dynamics on individual agents operating within the administrative state. In Part V, the article considers the implications of these problems for the overall effectiveness of the administrative state. In so doing, it evaluates how recent decisions by the U.S. Supreme Court implicitly recognize a discontinuity between the straightforward performance of administrative functions according to the "letter of the law" and the moral behavior of individual agents within the administrative state and are willing to find violations of law in cases where this discontinuity is deemed too extreme. Finally, in Part VI, the article turns to consider pragmatic directions by which opponents of the administrative state, as currently conceived, may pursue both constitutional legality and the attainment of the common good.

II. INCOMMENSURABLE IDEAS OF LAWFULNESS IN THE ADMINISTRATIVE LAW DEBATE

Opposition to the growth of government by political conservatives is certainly nothing new. Indeed, some have argued that distaste for centralized government *as such* may be constitutive of American-style conservatism.[12] And more specifically, criticism of President Franklin Delano Roosevelt's New Deal and its concomitant administrative apparatuses—and, before that, of Woodrow Wilson's willingness to adopt elements of governance by a German-style class of credentialed experts—has long been a fixture of American political debate.[13]

Within the conservative legal movement that emerged in organized form in the 1970s and 1980s, however, this underlying philosophical instinct has been clarified and sharpened to a particular argumentative point: rejection of the administrative state as both *unconstitutional* and *normatively undesirable*.[14] In this milieu, the administrative state is principally conceived as the complex of federal bureaucracies that is subject to the body of administrative law originally rooted in the Administrative Procedure Act, and subsequently developed in detail by judges.

A. The Administrative State as Enduring Specter

Charges of the administrative state's *unconstitutionality* are usually rooted, in some fashion, in arguments about the extent to which entities formally subordinated to the executive branch may wield the power to make binding rules of conduct and engage in binding adjudications.[15] The problems inherent in this centralization, critics of the administrative state further allege, have been exacerbated by a line of Supreme Court rulings—in particular, the decisions that gave rise to the *Chevron* deference doctrine, which counsels courts to generally defer to agency construction of statutes,[16] and the *Auer* deference doctrine,[17] which directs courts to generally defer to agencies' interpretations of their own regulations—that have gradually shifted more and more power to federal agencies. Correspondingly, arguments about the *normative undesirability* of the administrative state tend to fall along economic lines, in the form of efficiency-based claims about the burdensome effect of federal regulations on small business owners and everyday citizens alike.[18]

For the conservative legal movement as a whole, this consistent focus on the administrative state offers a number of sociological advantages. Notably,

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12. *See* Tanner Greer, *The Problem of the New Right*, SCHOLAR'S STAGE (Apr. 24, 2021), https://scholars-stage.org/the-problem-of-the-new-right/.

13. *See* MARINI, *supra* note 1, at 61–62, 127–29.

14. *See* KEN I. KERSCH, CONSERVATIVES AND THE CONSTITUTION: IMAGINING CONSTITUTIONAL RESTORATION IN THE HEYDAY OF AMERICAN LIBERALISM 150–51, 363 (2019).

15. *E.g.*, MARINI, *supra* note 1, at 76–77.

16. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 866 (1984).

17. Auer v. Robbins, 519 U.S. 452, 461 (1997).

18. *See, e.g.*, CLINT BOLICK, DAVID'S HAMMER: THE CASE FOR AN ACTIVIST JUDICIARY 12–17, 28–29 (2007).

for a number of years opposition to the administrative state provided the foundation for a version of fusionism between libertarian and socially conservative elements of the movement. Libertarians could denounce the administrative state's tendency to proliferate federal regulations infringing on personal liberties, while conservatives of a more traditional bent could work to rein in institutions staffed with political apparatchiks more likely to hold secular-progressive value commitments. While that alliance has become increasingly uneasy in recent years[19]—a shift catalyzed by ongoing controversies surrounding religious liberty and the ongoing advance of LGBT rights—discussions focused on the deconstruction or critique of the administrative state continue to be fixtures of movement gatherings.[20]

Those discussions, however, are often little more than preaching to an already-converted audience. In conservative legal movement spaces, the overwhelming majority of which take the (contested) interpretive principle of originalism to be foundational,[21] philosophical opposition to the administrative state is often taken for granted. Accordingly, there is often little effort within the movement to explicate the deeper sense in which the administrative state is alleged to violate the law. That is not to say, however, that such efforts do not exist.

B. The Hamburger-Vermeule Debate

Perhaps most prominently, Columbia University professor Philip Hamburger presented and examined this central question in his provocatively titled 2014 volume *Is Administrative Law Unlawful?*[22] (the author of this article recalls that Hamburger, when asked to autograph a friend's copy of the book some years ago, answered his own question with a decisive "Yes!" on the title page).

In reaching that conclusion, Hamburger's study undertakes an extended historical analysis of the nature of the English executive power—characterized as a form of monarchical or absolute power—that the American Founders allegedly repudiated. In Hamburger's account, "[a]dministrative power . . . brings back to life three basic elements of absolute power. It is

19. *See* Jesse Merriam, *Legal Conservatism After* Bostock, LAW & LIBERTY (June 29, 2020), https://lawliberty.org/legal-conservatism-after-bostock (characterizing the libertarian/conservative split as "a division that lies at the core of American constitutional law," between "the view that the original constitutional order was not substantially changed in 1868, leaving intact a robust role for local governance and voluntary associations" and "the view that the Fourteenth Amendment displaced the 1787 design, making individual rights, enforced by the federal judiciary, the centerpiece of our constitutional order").

20. *See, e.g.*, Eileen J. O'Connor, *NLC: The Administrative State and Its Discontents*, FEDERALIST SOC'Y (Nov. 13, 2017), https://fedsoc.org/commentary/fedsoc-blog/nlc-the-administrative-state-and-its-discontents (inputting the following text string into the Google search engine—site:fedsoc.org "administrative state"—discloses a vast number of similar events, panels, and writings).

21. KERSCH, *supra* note 14, at 378.

22. Hamburger, supra note 6, passim.

extralegal, supralegal, and consolidated."[23] That is to say, the administrative state possesses the power to make binding rules that do not receive direct congressional approbation or scrutiny, as well as engage in adjudicative processes that are only secondarily reviewable by courts; the power to command the deference of said courts once such review is undertaken; and the unified power to legislate, adjudicate, and enforce the law under the auspices of a single entity.[24] It was this precise configuration of authority, Hamburger argues, that characterized the Crown against whom the early American colonists revolted, and whose errors the Founders consciously strove to avoid.[25] On this view, modern administrative law—and the administrative state from whence it functionally derives—amounts at bottom to the reemergence of an ancient enemy of liberty under a novel guise. One might even say that for Hamburger, Paul Revere's legendary warning cry "the British are coming!" was rather metaphysically apt.

For Hamburger, the truth about America's recent authoritarian lurch is a stark one: in his words, "administrative law was never an open question. From its beginnings, it has violated the Constitution, and the problem therefore is not whether time can settle an uncertainty, but whether time can cure a continuing unlawful exercise of power."[26] The entire bureaucratic edifice that structures most Americans' dealings with the state was, in short, illicit from the beginning.

What is to be done, then? For starters, Americans must "fac[e] up to the ugly reality"[27] of the administrative state's fundamental unlawfulness. Judges, for their parts, must be willing to undertake an "incremental"[28] dismantling of the institutions that have reconstituted the nexus of absolute power against which the colonists revolted. In so doing, they "cannot afford to cling to their precedents,"[29] for at stake is "the very nature of Anglo-American constitutional law and society."[30]

Significantly, Hamburger's argument against the administrative state is not one that was solely intended to be read and received by members of the conservative legal movement, even if many of its admirers hail from that camp. While his case is undoubtedly an appeal to history, it is not, strictly speaking, an argument that is predicated on adherence to constitutional originalism. If his central claim is true—if the administrative state really is incompatible with the rule of law in a deep sense—then American public life really has gone astray in a fundamental fashion that should concern every citizen. Whether it *has* gone

23. HAMBURGER, *supra* note 6, at 7.
24. *Id.* at 21–25.
25. *Id.* at 32, 279–80.
26. *Id.* at 11.
27. *Id.* at 492.
28. *Id.* at 491.
29. *Id.*
30. *Id.* at 511.

astray, of course, is the precise point at issue. And unsurprisingly, Hamburger's expansive critique has been challenged at length.[31]

Some of these criticisms, naturally, prove more astute than others. In perhaps the most philosophically incisive rejoinder to Hamburger's claims, Harvard Law School professors Cass Sunstein and Adrian Vermeule, in their slender yet incisive 2020 book *Law and Leviathan: Redeeming the Administrative State*, develop a normative defense of the administrative state against fire-breathing adversaries such as Hamburger.[32] This defense centers on their argument that what they term "the morality of administrative law"[33] offers a suitable hedge against the manifold abuses of power that allegedly characterized the British sovereign and that Hamburger so viscerally opposes. This idea of the internal morality of law is drawn principally from the work of legal philosopher Lon Fuller, who argued against the legal positivist school that the internal dynamics of the legal process may be sufficient to ultimately ground the normativity of legal claims.[34]

Throughout *Law and Leviathan*, the principles of administrative law's internal morality are distilled into three fundamental maxims (though more could probably be developed): "agencies must follow their own rules; retroactive rulemaking is disfavored and must be limited to prevent abuse; and official agency declarations of law and policy must be congruent with the rules that agencies actually apply."[35] These tenets of the system amount, for Sunstein and Vermeule, "a set of principles with widespread appeal in many legal systems, so widespread that they are often discussed under the heading of natural justice, natural procedural justice, or some such formulation."[36] Like Hamburger, they seek to ground these tenets in history—though crucially, their grounding move is an appeal to the eternal or necessary, rather than (as for Hamburger) an appeal to the historical or contingent. "In the American system, [these principles] are often said—rather vaguely—to be inherent in the notion of 'due process of law,' in 'tradition,' or in unspecified constitutional sources."[37] This tradition, however, must—on Sunstein and Vermeule's account—be said to extend beyond the strictly Anglo-American orbit.

With these two positions now outlined, their radical incommensurability—the sense in which "the proponents of competing paradigms practice their trades in different worlds"[38]—becomes clear. Hamburger clearly takes the American Founding, and the philosophical commitments inherent in that founding, as the criterion against which the

31. *See, e.g.*, Jack M. Beermann, *The Never-Ending Assault on the Administrative State*, 93 NOTRE DAME L. REV. 1599, 1635–51 (2018).

32. SUNSTEIN & VERMEULE, *supra* note 7, *passim.*

33. SUNSTEIN & VERMEULE, *supra* note 7, at 8; *see also* Cass R. Sunstein & Adrian Vermeule, *The Morality of Administrative Law*, 131 HARV. L. REV. 1924 (2018).

34. LON L. FULLER, THE MORALITY OF LAW 204–06 (1964).

35. SUNSTEIN & VERMEULE, *supra* note 7, at 9.

36. *Id.* at 8.

37. *Id.*

38. KUHN, *supra* note 11, at 150.

lawfulness of the modern administrative state must be assessed. And it is foundational to his argument that one of those philosophical commitments was the repudiation of any particular political authority's claim to absolute power; hence, on Hamburger's view, the separation of powers that rests at the heart of the U.S. Constitution. To the extent, then, that the modern administrative state can be characterized as possessing the characteristics of absolute power that, philosophically speaking, are *prima facie* incompatible with the American project, the modern administrative state is unlawful. Boiled down to its essentials, Hamburger's case is a kind of argument from the American *ethos*, or the set of background commitments historically deemed inextricable from American public life.

By contrast, Sunstein and Vermeule proceed on the basis of an altogether different conception of lawfulness. On their view, following Fuller (and, arguably, a number of other thinkers in the broad natural-law tradition deriving from Roman civil law), the salient criterion of lawfulness is, in a sense, intrasystemic; it is not something "outside" the administrative state to which one might appeal, or against which the administrative state ought to be evaluated. Lawfulness, in short, follows from the essential nature and functionality of the administrative state when properly realized.[39] All told, this is a kind of argument from the nature of law itself, one that has little to do with contingent historical circumstances such as those surrounding the American Founding. Arguments about the desirability or undesirability of the administrative state, for Sunstein and Vermeule, ought not to be waged on the ground of whether the present regime is constitutional or not, but rather on the simpler terrain of whether it produces good or bad outcomes.[40]

C. Beyond Incommensurability?

The fundamental intractability of the debate between these two scholarly factions comes explicitly to the fore in Vermeule's highly critical 2015 review of Hamburger's book in the pages of the *Texas Law Review*,[41] and Hamburger's

39. For a classically liberal engagement with the central question posed by Sunstein and Vermeule—whether the modern administrative state, as presently constituted, satisfies a Fullerian conception of the internal morality of law—see RICHARD A. EPSTEIN, THE DUBIOUS MORALITY OF MODERN ADMINISTRATIVE LAW (2020). For an argument that Sunstein and Vermeule rely on too crabbed an account of administrative law's inner morality, see Aditya Bamzai, *What Can Philosophy Teach Us About Administrative Law?*, YALE J. ON REG. NOTICE & COMMENT (Apr. 21, 2021), https://www.yalejreg.com/nc/law-leviathan-redeeming-the-administrative-state-part-08.

40. SUNSTEIN & VERMEULE, *supra* note 7, at 5. *But see* Jennifer Mascott, *The Procedural Morality of Administrative Law—To the End of the Common Good?*, YALE J. ON REG. NOTICE & COMMENT (Apr. 19, 2021), https://www.yalejreg.com/nc/law-leviathan-redeeming-the-administrative-state-part-06 (averring that "[t]he internal morality of law cannot address the flawed problems of human nature that will lead any governmental actor, imbued with too much concentrated power, to eventually become corrupt and pursue ends at odds with the common good.").

41. Adrian Vermeule, *No*, 93 TEX. L. REV. 1547 (2015) (reviewing HAMBURGER, *supra* note 6).

subsequent reply.[42] For his part, Vermeule compares *Is Administrative Law Unlawful?* to "a child wrecking a sculpture by Jeff Koons," where "the child isn't in a position to understand *why* it might be detestable, and the act is purely destructive with no illuminating import."[43] On his reading, the "basic ambiguity" of Hamburger's argument "arises from the fact that Hamburger is impenetrably obscure about what he means by 'lawful' and 'unlawful.' Those terms are only loosely related to the ordinary lawyers' sense."[44] Indeed, Vermeule correctly recognizes that Hamburger's criterion of legality is, at bottom, "a historically grounded but entirely *substantive* and ironically extra-constitutional vision of the true Anglo-American constitutional order, emphatically with a small-c,"[45] which has little to do with "the intellectual architecture that underpins administrative law and that many generations of the legal profession have labored to build up."[46] While Vermeule perhaps overstates his case—Hamburger's appeal to the Anglo-American tradition functions principally as an appeal to fundamental background beliefs that must, in his view, necessarily inform faithful constitutional interpretation, following the principle that *all* textual interpretation necessarily depends for its meaning on extratextual referents—he is not wrong to compare Hamburger's argument to something of a "different genre" than his own work, and the work of other administrative law scholars willing to color inside different lines than Hamburger. Indeed, Hamburger himself acknowledges that his argument "presents a new conception of administrative power, its history, and its unconstitutionality"—a "new paradigm."[47] And where a clash of paradigms has emerged, intellectual progress necessarily stalls.[48]

Nevertheless, Vermeule lands a blow when he alleges that Hamburger's historically-rooted conception of lawfulness is "loosely related to the ordinary lawyers' sense"[49]—and, moreover, for that matter, Hamburger's view is loosely related to how most *everyday people* understand the law. The natural instinct of the untrained citizen is to understand "lawfulness" as something that bears an irreducible connection to reasoning about morality and values transcending the legal system as such: if something is perceived to be dangerous or harmful, citizens instinctively look to ban it. Consistent with that reflex, Sunstein and Vermeule are open about their view that justifying "promotion of the common good and human well-being, broadly understood, are the proper ends of government."[50] And so, to the extent that the administrative state produces good results, "such as the activity level of agencies, their expertise, and the benefits

42. Philip Hamburger, *Vermeule Unbound*, 94 TEX. L. REV. SEE ALSO 204 (2016).
43. Vermeule, *supra* note 41, at 1567.
44. *Id.* at 1548.
45. *Id.* at 1552.
46. *Id.* at 1566.
47. Hamburger, *supra* note 42, at 204.
48. KUHN, *supra* note 11, at 83.
49. Vermeule, *supra* note 41, at 1548.
50. SUNSTEIN & VERMEULE, *supra* note 7, at 5.

of a unitary policymaker,"[51] and the intrasystemic procedures governing its exercise of power—such as avoidance of retroactive applications of the law—are consistent with the common good, its actions will probably be intuitively accepted as lawful by most people.

By contrast, a criterion of legality that assesses present-day actions and policies against the product of a contingent historical moment—whether that "product" be understood as the act of the American Founding against British absolutism (*pace* Hamburger), or as the Constitution itself (*pace* originalism)—can and has been defended on explicitly normative grounds,[52] but this argument has less obvious public appeal. Indeed, the overwhelming majority of mainstream arguments against originalist interpretive methodologies highlight the allegedly immoral or undesirable consequences of a thoroughgoing return to the Founders' vision. Most lawyers, and most people in general, simply do not think in strictly originalist categories or subscribe to Hamburger's view that the Anglo-American tradition ought to circumscribe what administrative agencies can do today.[53] Accordingly, a successful critique of the administrative state, as presently conceived, must engage on different terrain than this.

In the Parts that follow, this article will do precisely that, engaging the administrative state directly on the normative ground of the "common good." Not explored in depth here, however, are efficiency-based arguments about the extent to which expansion of government regulatory authority may stymie ordinary business activity or burden entrepreneurs: these arguments must always rely on controversial judgments about the range of inputs and externalities that may rightly be included in any study. That, in turn, entails that economic debates over the administrative state will tend toward the same irresolvability as the aforementioned debate between legal thinkers committed to irreconcilable conceptions of "lawfulness."

Rather, the argument here proceeds from the necessary conditions of the American federal bureaucracy as such and considers whether the institutional dynamics of the status quo are capable of producing outcomes consistent with the common good over time. Such an argument must begin with an examination

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51. Vermeule, *supra* note 41, at 1565.

52. PETER AUGUSTINE LAWLER & RICHARD M. REINSCH II, A CONSTITUTION IN FULL: RECOVERING THE UNWRITTEN FOUNDATION OF AMERICAN LIBERTY (2019) (arguing for the relationship between American constitutionalism and the "unwritten" American ethos). *See, e.g.*, LEE J. STRANG, ORIGINALISM'S PROMISE: A NATURAL LAW ACCOUNT OF THE AMERICAN CONSTITUTION (2019) (offering a comprehensive normative argument for originalist methodology and the preferability of the U.S. Constitution on the basis of the "new natural law theory" pioneered by Germain Grisez and John Finnis).

53. *See, e.g.*, Kristen Bialik, *Growing Share of Americans Say Supreme Court Should Base Its Rulings on What Constitution Means Today*, PEW RSCH. CTR. (May 11, 2018), https://www.pewresearch.org/fact-tank/2018/05/11/growing-share-of-americans-say-supreme-court-should-base-its-rulings-on-what-constitution-means-today (noting that "[a] majority of Americans (55%) now say the U.S. Supreme Court should base its rulings on what the Constitution 'means in current times,' while 41% say rulings should be based on what it 'meant as originally written'"—representing "a shift in public opinion").

of the characteristics of those individuals who themselves constitute the administrative state; individuals who, at their best, seek to instantiate the virtues associated with their roles within that institution, and in so doing rightly uphold the law.

III. VIRTUE ETHICS AND THE RULE OF LAW

Early on in Lon Fuller's *The Morality of Law*, the legal philosopher recounts a lengthy parable about "Rex," an ill-fated monarch.[54] Though at the time of his accession to the throne, Rex is "filled with the zeal of a reformer" and determined not to repeat the systemic mistakes of his predecessors, Rex's attempts at transformation of his regime's legal order soon deteriorate.[55] First, Rex repeals all existing law and decides to make himself the sole judge in his realm.[56] When the unpredictability of this approach throws the realm into chaos, Rex comes up with a list of secret guidelines to guide his decision-making, but does not share these publicly, resulting in an outcry.[57] Rex then decides to issue case-by-case decisions along with published statements of reasons, but this unpredictability prevents any reliance interests from vesting.[58] An attempt at a published legal code turns out to be too opaque to be useful, an attempt at revision simply exposes contradictions in the code, a draconian set of penal laws sparks backlash, and all these rapid changes taken together destabilize the kingdom, particularly when Rex decides to start enforcing his own laws inconsistently.[59] Rex's tenure on the throne is, in short, an abject failure.

With the parable's lessons in view, Fuller proceeds to derive a number of crucial insights, all relevant to the elaboration of the intrasystemic "morality of law":

> [T]he attempt to create and maintain a system of legal rules may miscarry in at least eight ways . . . . The first and most obvious lies in a failure to achieve rules at all, so that every issue must be decided on an ad hoc basis. The other routes are: (2) a failure to publicize, or at least to make available to the affected party, the rules he is expected to observe; (3) the abuse of retroactive legislation . . . (4) a failure to make rules understandable; (5) the enactment of contradictory rules or (6) rules that require conduct beyond the powers of the affected party; (7) introducing such frequent changes in the rules that the subject cannot orient his action by them; and, finally, (8) a failure of congruence between the rules as announced and their actual administration.[60]

54. FULLER, *supra* note 34, at 33–38.
55. *Id.* at 33.
56. *Id.* at 34.
57. *Id.* at 34–35.
58. *Id.* at 35.
59. *Id.* at 35–37.
60. *Id.* at 38–39.

Three of these principles—the presence of rules, anti-retroactivity, and required congruence with the rules—form the backbone of what Sunstein and Vermeule identify as the internal "morality of administrative law" in *Law and Leviathan*.[61]

A. The Rule of Law, Step Zero

What is most interesting about Fuller's enumeration of principles, however, is what is omitted. Absent from this set of principles is any discussion of what might be called—with all due respect to the *Chevron* doctrine which it paraphrases—Rule of Law, Step Zero: *the question of the character of the individual who stands in the position of, at whatever level, "creat[ing] and maintain[ing] a system of legal rules" in the first place.*[62] If Rex had been taught to be a wiser and more virtuous man, might any of these disasters have come to pass? Fuller teases this element in the parable itself, remarking early on that "trained as a lonely prince, [Rex's] education had been very defective,"[63] but does not here draw the connection between this prior absence of moral formation and the "downstream" range of legal pathologies he identifies.

In posing this question, one grasps that Rex's manifold failures were not in any sense necessary or foreordained. For example, a monarch of better character might have glimpsed the usefulness of a parliamentary body that would be more responsive to the concerns of his citizenry, or—at the very least—known better than to abolish the established laws and customs of his land with the stroke of a pen, thereby casting the polity into confusion. But what exactly does it mean to say that Rex's failure stemmed, at least in part, from his education? What in Rex's nature, ideally, should have developed in the course of that process? Presumably, the answer has something to do with specific character qualities that would have better equipped him to fulfill his role as sovereign, particularly given the knowledge that, upon his accession to the throne, he would need to play a key role in shaping his realm's legal order. And it is that set of character dispositions—dispositions that emerge out of, and are cultivated across, a pattern of prior behavior—that constitutes the principal subject of study of the tradition of moral reasoning known as virtue ethics.

B. The Virtue-Ethics Tradition

The internal logic of virtue ethics begins from the straightforward observation that all intentional human activity is, at bottom, always goal-directed.[64] For instance, a surgeon makes incisions in his patients' flesh and sutures torn tissues together with the overarching goal of ensuring that the patients' health and flourishing are completely restored. Analogous examples from everyday life are legion.

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61. SUNSTEIN & VERMEULE, *supra* note 7, at 8.

62. FULLER, *supra* note 34**Error! Bookmark not defined.**, at 38 (emphasis added).

63. *Id.* at 34.

64. *See* ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 148 (3d ed. 2007).

When ordinary language employs morally freighted ascriptions such as "good" and "bad," an implicit awareness of the various roles (and associated responsibilities) that structure everyday life, *and the pursuit of its various goals*, is frequently present.[65] To continue the prior example, a surgeon who happens to fail over and over again, so that all of the patients he treats promptly die, is correctly described as a "bad surgeon," because he has consistently failed to achieve the goal that is inherent to his role as "surgeon"; in fact, given the ubiquity of his failures, one might rightly question whether he could even be intelligibly described as a "surgeon" at all. There is, in short, an intrinsic connection between language traditionally associated with moral judgment and the objective degree to which one measures up (or fails to measure up) to the goals associated with one's individual role.

In contending for the legitimacy of this use of moral language, virtue ethics rejects the premise (associated with David Hume and others) that an insuperable gulf exists between the objective "is" and the normative "ought."[66] On the virtue-ethics paradigm, if one inhabits the role of surgeon, one can be said to act "well" if one performs the definitional functions of a surgeon with excellence; by contrast, one can be said to act "badly" when their exemplification of those functions is deficient.[67] As Alasdair MacIntyre, perhaps the foremost contemporary exponent of this school of thought, explains, "we all approach our own circumstances as bearers of a particular social identity. . . . Hence what is good for me has to be the good for one who inhabits these roles."[68]

Intrinsic to every particular social role are particular "practices"—defined, for MacIntyre, as "coherent and complex form[s] of socially established cooperative human activity through which goods internal to th[ose] form[s] of activity are realized in the course of trying to achieve those standards of excellence which are appropriate to, and partially definitive of, th[ose] form[s] of activity," with the ultimate result being the broadening of the range of understanding and the capacities of human beings as a whole.[69] So, in the case of a surgeon, the relevant "practice" would be the field of modern medicine, which would entail in his case the capacity to perform advanced brain surgery, the ability to recognize when all pieces of a cancerous tumor have been removed, the aptitude to discern the implications of subtle fluctuations in an anesthetized patient's vital signs, and so on.

To carry the analysis one step further, genuine *success* as a surgeon engaged in that practice requires the exemplification of the relevant virtues—"acquired human qualit[ies] the possession and exercise of which tends to enable us to achieve those goods which are internal to practices and the lack of which effectively prevents us from achieving any such goods."[70] A surgeon

65. *Id.* at 33–34.
66. *Id.* at 55–59.
67. *Id.* at 59.
68. *Id.* at 220.
69. *Id.* at 187.
70. *Id.* at 191.

who does not exemplify the virtue of patience, for instance, will be reckless with his scalpel and likely pose a risk to his patients. Conversely, a surgeon who possesses the virtue of *caritas*, or charity, will demonstrate compassion for his patients, cultivating a mutual trust that will ideally contribute to the patient's speedy recovery. Over time, the disciplined pursuit of particular practices (and the goals intrinsic to them) ought to lead to the cultivation of the virtues associated with excellence in that practice.

Notably, as a framework for reasoning about moral questions, virtue ethics stands altogether outside the binary of utilitarianism and Kantian deontological ethics that dominates contemporary ethical theory. Virtue is not conceived as either a matter of cost-benefit advantage or the satisfaction of preexisting duties. Indeed, MacIntyre is keen to stress that "the exercise of the virtues requires . . . a capacity to judge and to do the right thing in the right place at the right time in the right way. The exercise of such judgment is not a routinizable application of rules."[71] Accordingly, a mere pattern of habituated compliance with the procedural rules of a particular institutional system cannot be said to involve, in any sense, the exercise of virtue. Virtue (or its absence) is in a certain sense prior to the encounter with any particular institutional constraints or norms at all.

With this overarching framework of moral analysis established, the question of Fuller's poorly educated Rex can be considered afresh. Specifically, at the root of Rex's failure as king is his lack of prior cultivation of the classical virtue of *prudentia*, or wisdom, a deficiency which in turn leaves him ill-equipped to engage in the *practice* of monarchical governance. This question of virtue can be called "Rule of Law, Step Zero," because it naturally impacts everything that follows. A king who possesses the virtue of *prudentia* will grasp that "the social presuppositions of the flourishing of the virtue of justice in a community are . . . twofold: that there are rational criteria of desert and that there is socially established agreement as to what those criteria are,"[72] and simply not pursue such ill-fated projects as abolishing all existing criteria of desert and imposing new (and irrational) ones apart from popular consensus.

The virtue-ethics tradition allows for the foregrounding of questions like this one—questions that are otherwise unaddressable within the terms of present debates surrounding the administrative state, lawfulness, and the common good, and yet questions that powerfully bear on the claims made by the administrative state's critics and defenders alike. And while much philosophical debate surrounding the virtue-ethics tradition hinges on fundamental questions central to the discipline—such as whether it is intelligible to speak of virtues associated with the role of "human being" as such, or whether (as the Christian tradition has contended) the goal-directedness of individual human actions tends to imply a final metaphysical "destination" that subsumes and encompasses all finite goals[73]—there is no need to engage those questions within the scope of this

71. *Id.* at 150.

72. *Id.* at 152.

73. *See* ALASDAIR MACINTYRE, ETHICS IN THE CONFLICTS OF MODERNITY: AN ESSAY ON DESIRE, PRACTICAL REASONING, AND NARRATIVE 315 (2016).

enquiry. All that is required is exploration of the virtues or qualities necessary to be a good bureaucrat within the administrative state—the specific "role" that is fundamentally at issue here.

C. The Bureaucratic Virtues

What are these virtues, then, that are necessarily associated with excellence in one's role as a bureaucrat in the federal administrative state?[74]

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74. To be sure, MacIntyre himself has harsh words for modern bureaucracies as such, although the general tenor of his critique takes a different form from the one outlined here. MacIntyre characterizes modern theories of bureaucracy as principally committed to the view (associated with Max Weber) that:

[T]he rationality of adjusting means to ends in the most economical and efficient way is the central task of the bureaucrat and that therefore the appropriate mode of justification of his activity by the bureaucrat lies in the appeal to his (or later her) ability to deploy a body of scientific and above all social scientific knowledge, organized in terms of and understood as comprising a set of universal law-like generalizations . . . .

MACINTYRE, *supra* note 64, at 86.

It is the historical contingency of such social-scientific knowledge that MacIntyre problematizes throughout *After Virtue*, while simultaneously stressing that such sciences are what "managerial expertise requires for its vindication." *Id.* at 88. For MacIntyre, "[t]he claim that the manager makes to effectiveness rests of course on the further claim to possess a stock of knowledge by means of which organizations and social structures can be molded." *Id.* at 77. Yet MacIntyre contends that no such "factual law-like generalizations" about social behavior are realistically possible. *See id.* at 77–89.

This argument is undoubtedly well taken, but it must be stressed that all forms of expertise relevant to the function of public administration are not, strictly speaking, the sort of "managerial expertise" that derives from the ostensibly predictive powers of the social sciences. Expertise may also simply refer to a broad-based understanding of the nature of the problem a particular institution is tasked with addressing at a given juncture. A Corps of Engineers bureaucrat tasked with preventing the imminent collapse of a levy, or an Environmental Protection Agency employee assigned to help manage the development of a sensitive wetland area, or a Department of Education worker rendering decisions about recommended curricular standards, can only wield power prudently to the extent he or she possesses a substantial degree of awareness of the "conditions on the ground." Practical reasoning is always conducted under some condition of uncertainty, but knowledge of context and circumstances is a crucial underpinning of that reasoning process.

The salient point here is that "expertise" is, at some level, a knowledge of the substantive questions necessary to ask of a particular situation, within a particular domain of knowledge, in order to obtain a better awareness of the context and circumstances that can inform a judgment. This would seem to be a different sort of "expertise" than the managerialism that MacIntyre has in mind, and it is a form of expertise that is germane to the question of whether or not the administrative state can achieve its own internal ends. *Cf.* Kathryn Balstad Brewer, *Management as a Practice: A Response to Alasdair MacIntyre*, 16 J. BUS. ETHICS 825, 832 (1997) (explaining, against MacIntyre's characterization of the manager as a "template for immorality," that "[t]hrough experience, [a virtuous manager] would draw upon an ever increasing understanding of what constitutes the good.").

In any event, no affirmative effort is made here to develop a normative justification of the modern administrative state as such, or the specific modes of reasoning that, on a Weberian account or at least on MacIntyre's reading of him, are allegedly peculiar to it. Rather, taking the modern administrative state as a "given" datum, this article aims to assess whether the practices intrinsic to

Naturally, there will be a wide range of specific virtues associated with individual roles within the administrative state. To wit, the virtues properly associated with one's performance of the role of a staffer at the Environmental Protection Agency (EPA), are, naturally, rather different from the virtues properly associated with one's performance of the role of a judge on the Board of Immigration Appeals. This follows from the fact that the nature of the practices associated with these roles is quite different; an EPA staffer and an immigration judge *do* very different things, operating as they do within dissimilar contexts and pursuant to field-specific canons of behavior.

But can anything be said about the virtues ideally exemplified by participants within the administrative state more broadly? Is it possible to identify any virtues associated with, specifically, the individual's role *as a bureaucrat*—as a constituent element, however minuscule, of the federal administrative state as a whole?

Two candidates naturally present themselves: the virtues of *public-spiritedness* and *subject-matter competence*. Each of these warrants a closer look.

First, the *virtue of public-spiritedness* is somewhat related to the virtue of justice in that "[t]o be just is to give each person what each deserves,"[75] and this obligation certainly does not cease when one passes from private life into public administration. "Justice" alone, however, does not exhaust the concept in this context; identification of public-spiritedness as a distinct virtue stems from the intuition that to inhabit a role in public administration is to always experience a unique set of cross-pressures as one undertakes to give individual entities their just deserts. Those cross-pressures may emerge from opposed political constituencies, rival managers, or private business or ideological interests. To be public-spirited, then, is to remain constant in one's genuine commitment to, or orientation toward, a common good that transcends all others, even in the face of pressures to direct one's gaze toward the welfare of "lower" interests. Put more succinctly, it is the disposition to eschew the pursuit of private advantage when placed into a position of public trust.

Second, the *virtue of subject-matter competence* is the aptitude to, within a particular analytical domain, synthesize reliable knowledge of facts and data drawn from the actual world with the goals and priorities of one's leadership, at a level of complexity materially greater than that which an ordinary person would be able to handle. Like public-spiritedness, the virtue of subject-matter competence bears a resemblance to a classical virtue—in this case, *prudentia*—but it is nevertheless distinct. As used here, subject-matter competence refers to the mastery of a specific, bounded body of knowledge and the capacity to apply that knowledge to new circumstances in the pursuit of a particular end.

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the institution lead to the exemplification of virtues consistent with the substantive ends that, ideally, the administrative state exists to achieve. Or, put differently, MacIntyre outlines a critique of public bureaucracy that is "external" to the institution; this Article develops an "internal" critique of said institution, given that Sunstein and Vermeule choose to defend the administrative state on that Fullerian ground.

75. MACINTYRE, *supra* note 64, at 152.

As previously suggested, the precise practices through which these virtues might be exemplified will, of course, inevitably vary from individual bureaucrat to individual bureaucrat on the basis of their *particular* social roles within the administrative state. These two virtues, however, offer a framework for grasping the manner in which individual members of the federal administrative state may be said to be *excellent* in the social roles of bureaucrats.

With the theoretical groundwork now fully laid, it is now time to turn to the question that rests at the heart of this article: whether the institutional design of the federal administrative state itself is consistent with the cultivation of the virtues that its members must exemplify in order to demonstrate excellence in the service of the common good.

IV. THE BUREAUCRATIC VIRTUES VERSUS THE ADMINISTRATIVE STATE

This article's central claim is a straightforward one: the nature of the administrative state, as presently designed, tends to subvert the core bureaucratic virtues of public-spiritedness and subject-matter competence in the lives of those bureaucrats who comprise it, meaning that the administrative state ultimately produces the very pathologies that call into question its ability to promote the common good. In this Part, this point will be demonstrated and defended through consideration of each of those two virtues, as pursued and instantiated (or not) within the federal administrative state.

A. Subverting the Virtue of Public-Spiritedness

How can the administrative state be said to undermine the virtue of public-spiritedness? From a certain perspective, this question is a simple nonstarter: to participate in the project of public administration is, ipso facto, to display the virtue of public-spiritedness. Recall, however, that public-spiritedness is not merely an adjectival descriptor of work within the federal bureaucracy, but a virtue—something that may be *exemplified* within the course of one's service in the bureaucracy, as a description of one's individual degree of success or failure in the pursuit of the goals internal to that service (namely, the promotion of the common good, as understood within the specific mandate of a particular bureaucratic entity). In theory, one can serve in a role of public administration while failing utterly to achieve those goals, and in so doing failing to exemplify the bureaucratic virtues, such as by taking bribes for services. Indeed, it is notable that, on the global scale, talk of the "rule of law" is virtually synonymous with anticorruption efforts and campaigns to root out self-dealing officials—a tendency consistent with this article's claim that individuals' exemplification of the bureaucratic virtues is, as previously noted, "Rule of Law, Step Zero" as it pertains to the administrative state.

In moving toward a more satisfying answer to the question of the relation between the administrative state and public-spiritedness, one must begin, following MacIntyre's lead, by first examining a prior question: what are the fundamental, even definitional, characteristics of the social role that is the *bureaucrat within the federal administrative state*?

Three descriptive characteristics in particular—characteristics that hold at every level of the administrative state, from frontline caseworker to Cabinet secretary alike—stand out. First, the bureaucrat serves in a subordinate position relative to some other entity vested with a correspondingly greater degree of executive authority. The caseworker is ultimately accountable to her supervisor, who enjoys a degree of greater proximity to the ultimate locus of executive power, the President. Agency heads, of course, enjoy greater proximity still, and wield correspondingly greater powers. Second, the bureaucrat exercises discretion over some matter that is relevant to the public trust. The caseworker has a measure of autonomy over the manner in which she engages the public and represents the state to its constituents; the manager or agency head may, within the scope of their designated authority, establish and execute on priorities for departmental or institutional action. Third, the bureaucrat receives compensation for her services from the public fisc, and it is

deemed an abuse of trust if she receives payment for her services from third-party entities subject to administrative authority.

Taken together, these characteristics entail that a bureaucrat must, at all times, be engaged in an ongoing process of exercising her discretion in a manner sufficient to justify to her superior both the scope of authority she enjoys within her role and the financial compensation she receives for her work. At this point, a crucial insight comes into view: within the federal administrative state, *there is no necessary correlation between the increase over time of the bureaucrat's compensation and authority and her exemplification of the virtue of public-spiritedness*. Indeed, in many cases quite the opposite may be true.

Consider, for instance, the following hypothetical: Daisy and Elizabeth are two bureaucrats within Agency A, overseeing departments engaged in similar work. Both are aware that, at the end of each year, they will be called upon to prepare reports for their mutual supervisor detailing their use of the budgetary resources allocated to them for the fiscal year. As the fiscal year draws to a close, however, both Daisy and Elizabeth become aware that each of their relative operations will come in under budget. Daisy, who is committed a priori to the virtue of public-spiritedness, faithfully reports her budget surplus; by contrast Elizabeth, in the waning months of the year, finds a way to claim full utilization of all resources by cutting corners in the competitive-bidding process for her department. She accordingly reports to her supervisor, misleadingly, that all budgetary resources were used. In the next fiscal year, Elizabeth is rewarded for her failure of virtue by receiving a correspondingly larger budget and is commended by her supervisor for putting all her allocated resources to work for the "public good." Elizabeth's power and influence within Agency A grow, while Daisy's professional trajectory stagnates.[76]

There exists, in short, a powerful asymmetry of incentives within the administrative state where the virtue of public-spiritedness is concerned. The administrative state presents clear material reasons for Daisy and Elizabeth to act in a manner that is antithetical to the virtue of public-spiritedness, a virtue that in turn reflects success in the pursuit of the goal—the common good—that is internal to the practice of agency work.

And what consequences will eventually obtain? Those bureaucrats most strongly committed to exemplifying the virtue of public-spiritedness as public workers will, over time, grow discouraged and depart for employment within institutions that do not present the same tension between private interest and the public good—institutions, that is, wherein excellence in one's role does not require demonstration of the bureaucratic virtue of public-spiritedness. And so over time, those who tend to occupy the higher rungs of the administrative state will be those who have consistently failed to exemplify the virtue of public-spiritedness. Over time, what develops is an institution that pays lip service to the common good, but whose constituent members consistently fail to exemplify the virtue directly associated with the actual attainment of that end.

76. *See* MACINTYRE, *supra* note 64, at 107 ("The most effective bureaucrat is the best actor.").

As is likely evident, the argument outlined above has its roots in the insights of public choice economics. James Buchanan, perhaps the foremost theorist of this school of thought, argued directly in *Politics Without Romance* that "the bureaucracy can manipulate the agenda for legislative action for the purpose of securing outcomes favorable to its own interests. The bureaucracy can play off one set of constituents against others, insuring that budgets rise much beyond plausible efficiency limits."[77]

For Buchanan, it was essential to understand this bureaucracy as a collection of individual moral agents "as they participate variously in the formation of public or collective choices, by which is meant choices from among mutually exclusive alternative constraints which, once selected, must apply to all members of the community."[78] And, since "the same individuals act in both [economic and political] relationships,"[79] one can safely infer that no bureaucrat is ever truly immunized from pressures toward self-dealing solely by virtue of their public-facing station:

> Once we begin to look at bureaucracy in this way we can, of course, predict that individual bureaucrats will seek to expand the size of their bureaus since, almost universally in modern Western societies, the salaries and perquisites of office are related directly to the sizes of budgets administered and controlled. The built-in motive force for expansion, the dynamics of modern governmental bureaucracy in the small and in the large, was apparent to all who cared to think.[80]

The overwhelming majority of scholarship on public choice economics has conventionally focused on its efficiency-based analyses of bureaucracy and public administration—that is, the relative deficiencies of government actors vis-à-vis private economic actors—and on attempts to empirically evaluate the theoretical conclusions of Buchanan and others. But Buchanan's arguments take on a radically different cast when transposed into a MacIntyrean key: self-interested, "utility-maximizing" conduct by bureaucrats is, on a virtue-ethics understanding, less a matter of inefficiency than of *failure in virtue*.[81]

Given the set of distorted behavioral incentives that the public-choice school brought to the analytical fore, one can realistically conclude that the

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77. 1 JAMES M. BUCHANAN, *Politics Without Romance: A Sketch of Positive Public Choice Theory and Its Normative Implications*, *in* THE COLLECTED WORKS OF JAMES M. BUCHANAN: THE LOGICAL FOUNDATIONS OF CONSTITUTIONAL LIBERTY 45, 57 (Liberty Fund ed., 1999).

78. 13 JAMES M. BUCHANAN, *Toward Analysis of Closed Behavioral Systems*, *in* THE COLLECTED WORKS OF JAMES M. BUCHANAN: POLITICS AS PUBLIC CHOICE 25, 29 (Liberty Fund ed., 1999).

79. *Id.* at 26.

80. 13 JAMES M. BUCHANAN, *From Private Preferences to Public Philosophy: The Development of Public Choice*, *in* THE COLLECTED WORKS OF JAMES M. BUCHANAN: POLITICS AS PUBLIC CHOICE 39, 48 (Liberty Fund ed., 1999).

81. From a theological standpoint, one might describe the phenomena Buchanan describes with the classical phrase *incurvatus in se*—"curving in on oneself" and prioritizing one's private gain over the public good. That phrase, for St. Augustine and for Martin Luther after him, captured the nature of sin. *See* MATT JENSON, THE GRAVITY OF SIN: AUGUSTINE, LUTHER, AND BARTH ON *HOMO INCURVATUS IN SE* 4–5 (2006).

administrative state *does not tend to form those sorts of people* who possess the virtue of public-spiritedness that is integral to the accomplishment of the agency's mission. The administrative state, in short, undermines one of the very bureaucratic virtues integral to its own success.

Defenders of the administrative state may press a number of potential counterarguments against the position outlined here. Such criticisms may include the following:

> 1. The governing presumption of public choice economics that all human beings behave as utility-maximizing *homo economicus* is fatally flawed. Human beings take actions for any number of reasons, including altruistic ones, that are not reducible to the craven pursuit of private interest.[82]
>
> 2. The civic-minded culture of the administrative state may itself be a spur toward individuals' exemplification of the virtue of public-spiritedness, over against material incentives toward overt and covert self-dealing.
>
> 3. The dark vision offered by public choice economics offers a justification, whether intentional or unintentional, for the systematic dismantling of institutions designed to serve the public good and the resultant entrenchment of powerful private interests.[83]
>
> 4. Even granting that *many* actors within the administrative state, particularly at the higher echelons, will consistently fail to exemplify the virtue of public-spiritedness, there is nothing in the nature of the administrative state that necessitates that a *particular* individual of uncommon character will fail to exemplify that virtue.

Each of these will be addressed in turn. First, as previously noted, since it is the same individuals who engage in both commerce (in their roles as private citizens) and public administration (in their roles as bureaucrats), the argumentative burden is upon those who would posit a major divergence in motivations to explain the nature of that divergence. As Buchanan contended from the earliest days of public choice economics, such a claim rests upon the assumption that an individual "shift[s] his psychological and moral gears when he moves from the realm of organised market activity to that of organised political activity and *vice-versa*."[84] But this assumption holds only "if there can be demonstrated to be something in the nature of market organisation, as such, that brings out the selfish motives in man, and something in the political organisation, as such, which, in turn, suppresses these motives and brings out the more 'noble' ones[.]"[85]

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82. *See, e.g.*, SAMUEL BOWLES, THE MORAL ECONOMY: WHY GOOD INCENTIVES ARE NO SUBSTITUTE FOR GOOD CITIZENS 39–41 (2016).

83. *See, e.g.*, NANCY MACLEAN, DEMOCRACY IN CHAINS: THE DEEP HISTORY OF THE RADICAL RIGHT'S STEALTH PLAN FOR AMERICA 227 (2017).

84. 1 JAMES M. BUCHANAN, *Politics, Policy, and the Pigovian Margins*, *in* THE COLLECTED WORKS OF JAMES M. BUCHANAN: THE LOGICAL FOUNDATIONS OF CONSTITUTIONAL LIBERTY 60, 68 (Liberty Fund ed., 1999).

85. *Id.* at 68–69.

Second, while it is not strictly impossible to envision that more or less civic-minded institutional cultures may exist within different branches of the administrative state, and thus that the phenomenon of virtue-undermining described above may be present to a *greater or lesser degree* within in particular work cultures, this does not itself remove the fact that these incentives are still present, because they emerge out of the inherent characteristics of the social role of *bureaucrat.* There is no possibility of circumventing this dynamic altogether. And in any event, there is substantial reason to doubt the behavior-shifting powers of mere changes in "culture" when juxtaposed against the possibility of expanded compensation and responsibilities. Most famously, the widespread failure of Stakhanovite motivational strategies in the Soviet Union as a means of catalyzing production strongly suggests that appeals to one's sense of national pride or patriotic duty cannot realistically compete with the allure of more tangible gains.[86]

Third, to tar arguments rooted in public-choice economics as always perversely antidemocratic is to miss the point of this altogether. The argument over public-spiritedness developed here emerges out of concern for precisely those democratic commitments emphasized by public choice theory's foes, such as the faithful use of public resources in order to promote the common good. So too, as a large number of scholars have noted, it is highly questionable whether this particular charge actually lies as a matter of history.[87]

Fourth, even if some particularly righteous persons may resist structural pressures to abandon public-spiritedness, the overarching problem still remains. For one thing, even the most noble-minded individual, to the extent she possesses the characteristics of the social role of "bureaucrat," continually faces the temptations away from public-spiritedness that have been outlined here.[88] Her resolve may weaken over time, particularly as she repeatedly witnesses the success of others less committed to exemplifying the bureaucratic virtues. And more generally, given that human beings by nature tend to respond to incentives—particularly material ones—the bare possibility that some isolated few will be altogether immune to such pressures does not substantially compromise the argument outlined here.[89]

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86. *See* Vladimir Shlapentokh, *The Stakhanovite Movement: Changing Perceptions over Fifty Years*, 23 J. CONTEMP. HIST. 259, 269–70 (1988) ("The economic effects of the movement were often negative. . . . By all accounts . . . the majority of movement participants saw involvement as a means to improving their chances of promotion and material rewards.").

87. *See, e.g.*, Michael C. Munger, *On the Origins and Goals of Public Choice: Constitutional Conspiracy?*, 22 INDEP. REV. 359 (2018).

88. *See* James A.H.S. Hine, *The Shadow of MacIntyre's Manager in the Kingdom of Conscience Constrained*, 16 BUS. ETHICS: EUR. REV. 358, 367 (2007) (finding that empirically, "senior managers do not withdraw from moral issues, but that their moral autonomy is restricted by a combination of reasonable self-interest, involving responsibility for others such as families, a powerful shareholder discourse (with legal and normative underpinnings), and an overriding requirement to engage with the realities of bureaucratic organisation within a morally pluralistic milieu.").

89. For more on the theme of bureaucratic self-dealing and the possibility of countermeasures, see David Epstein & Sharyn O'Halloran, *Administrative Procedures,*

B. Subverting the Virtue of Subject-Matter Competence

Both critics and defenders of the modern administrative state are often keen to note its rapid expansion over the course of recent decades. Today's federal bureaucracy is a vast profusion of departments and agencies, all promulgating an ever-greater number of rules and regulations designed to structure commercial activities and American life as a whole. In the eyes of its mainstream critics, this growth tends to signify a kind of prima facie argument against the administrative state's legal permissibility. The Constitution, after all, did not specifically countenance an ever-more-dominant fourth branch of government largely shielded from direct democratic accountability.[90]

But for its defenders, this rhizomatic growth is a feature and not a bug. In an age of ever-increasing scientific and technological complexity, it stands to reason that federal regulatory and enforcement authorities would expand significantly to meet the needs of the day.[91] And that is saying nothing of transnational challenges such as climate change and the reemergence of traditional great-power competition, which necessitate unified governmental action on a large scale.

For the intrinsic goals of any particular subunit of the administrative state to be achieved, its constituent bureaucrats must individually exemplify the virtue of subject-matter competence—which, as explained above, is a matter of proficiency in a particular domain of knowledge coupled with the capability to operationalize that knowledge in service of a higher-order goal. The central problem here emerges from the straightforward fact that the size and scale of the contemporary administrative state entails that *those who seek to flourish within any of its subunits or agencies must increasingly develop an aptitude for*

Information, and Agency Discretion, 38 AM. J. POL. SCI. 697, 697–702 (1994); *see also* David Delfs Erbo Anderson, *Does Meritocracy Lead to Bureaucratic Quality? Revisiting the Experience of Prussia and Imperial and Weimar Germany*, 42 SOC. SCI. HIST. 245, 250 (2018) (explaining that "bureaucrats are strategic and self-interested agents. Despite their employment as servants in an ultimately politically controlled hierarchy, they may engage in slack generation, shirking, or sabotage to serve organizational, or even their own personal, interests"). Furthermore, substantial empirical evidence in support of this phenomenon has been collected in the decades since public choice theory first emerged. *See, e.g.*, André Blais & Stéphane Dion, *Are Bureaucrats Budget Maximizers? The Niskanen Model and Its Critics*, 22 Polity 655, 656–63 (1990) (adducing examples); see generally WILLIAM A. NISKANEN JR., BUREAUCRACY & REPRESENTATIVE GOVERNMENT (1971) (developing the theory of bureaucratic behavior stress-tested by the studies reviewed in Blais and Dion's meta-analysis). *But see* Julie Dolan, *The Budget-Minimizing Bureaucrat? Empirical Evidence from the Senior Executive Service*, 62 PUB. ADMIN. REV. 42, 47 (2002) (presenting some findings to the contrary).

90. *Cf.* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994).

91. *See, e.g.*, Metzger, *supra* note 4, at 7 ("[T]he administrative state today is constitutionally obligatory, given the broad delegations of authority to the executive branch that represent the central reality of contemporary national government. Those delegations are necessary given the economic, social, scientific, and technological realities of our day."); *see also* ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM 135 (2022) ("Under contemporary conditions of extreme economic and social complexity, bureaucracy properly and intelligently deployed is an engine of unsurpassed power for promoting the common good.").

navigating an ever-growing number of institutional processes that have no intrinsic value, where "value" is conceived in terms of the end for which the agency exists in the first place.

All bureaucrats—and indeed, all human beings—must make decisions and allocate their personal time and energies under conditions of finitude: time spent mastering internal functional processes that have no intrinsic value is time *not* spent developing mastery of the disciplinary field for which an individual was hired in the first place, mastery which would allow her to exemplify the core bureaucratic virtue of subject-matter competence. From the perspective of the administrative state's *raison d'être*—the promotion of the common good—time spent maximizing one's knowledge of intrasystemic steps that must be taken in order to achieve a particular result within the agency is far less valuable than maximizing one's knowledge of the problem one's agency is tasked with addressing. As system-wide complexity increases, and more and more individual resources are devoted to understanding and navigating the interstices of the bureaucratic apparatus one inhabits, the individual bureaucrat enjoys fewer and fewer opportunities to cultivate subject-matter competence and grows further and further removed from the real-world problems the agency exists to address.

At this point, a major theoretical objection rears its head. From a certain perspective, the expansion of the size of a bureaucracy does not really compromise the virtue of subject-matter competence; rather, it simply entails that the domain of the relevant subject matter presumed by this virtue has expanded. Mastery of internal procedural knowledge, that is, is a way through which the virtue of subject-matter competence may be exemplified.

On its face, this argument is compelling. No doubt there is indeed a sense in which a degree of internal procedural knowledge can be said to be highly relevant to the achievement of the common good; a Department of Justice attorney who does not realize that his brief requires the approval of the Solicitor General prior to court filing is likely to throw his agency into a tailspin. Some elaboration of the initial claim is thus required here.

The aspects of bureaucratic knowledge that pertain exclusively to institutional processes are non-unique to individuals who must exemplify the virtue of subject-matter competence *in the sense that is relevant to an agency's specific end*. Consider the following example. A contract mail carrier that provides services to the Department of Justice may develop extensive institutional knowledge of who reports to whom, internal procedural norms, and so on. For instance, over time he may observe a pattern of mail being relayed from subordinate attorneys to the Solicitor General, such that he comes to understand that such communication is a routine aspect of the internal document-management process. However, it is obvious that the Department of Justice could not achieve its goals—indeed, could not *function* in any intelligible sense—if it were to simply fire all its attorneys and bureaucrats and hire contract mail carriers in their place. The mail carrier's knowledge of surface-level institutional processes, such as the necessary reporting chain for legal filings, is not knowledge of *why* those processes are necessary in the first place—why, for instance, it is essential that individual line attorneys not take positions on behalf of the Department of Justice absent deliberation by their

superiors. The type of knowledge the mail carrier lacks, an irreducible residuum of domain-specific expertise that is directly relevant to the reason for which the agency exists in the first place, is the knowledge possessed by the individual who exemplifies the virtue of subject-matter competence.

So much, then, for the charge that mere procedural knowledge is knowledge relevant to bureaucratic virtue. But what sort of thing, positively speaking, *is* this "knowledge of no intrinsic value" that inheres in one's work within an expanding bureaucracy, and that the virtue of subject-matter competence may rationally be defined to exclude? This knowledge will subsequently be described as "system-navigation knowledge."[92]

At bottom, this term "system-navigation knowledge" describes the category of information that makes former bureaucrats such valuable employees of lobbying firms and other private interest groups—knowledge of the internal hierarchy of agency decisionmakers, the range of resources consulted and steps taken before important decisions are made, the stakeholders that loom largest within senior officials' decision-making calculus, and so on. The more the agency grows, as it controls larger budgets and exercises greater power, the larger the body of system-navigation knowledge that necessarily emerges. It follows from this that former members of the bureaucracy who possess a mastery of this system-navigation knowledge will, over time, become more and more valuable to those third parties who, quite naturally, are not committed to the common good writ large but rather their own interests.

One can see here a two-pronged problem, where the bureaucratic virtues are concerned: not only does the growth of the bureaucracy tend, as previously explained, to undermine the virtue of subject-matter competence, but a major downstream effect of the development of a discrete body of system-navigation knowledge is the further slow subversion of the bureaucratic virtue of public-spiritedness. To the first prong: the larger the agency, the more its bureaucrats are characterized by their system-navigation knowledge as opposed to their subject-matter competence, thereby subverting that virtue. To the second: as it grows, the administrative state naturally produces the very individual actors who will be most effective at manipulating it toward private ends, a far cry from public-spiritedness in the service of the common good.

In sum, where the fundamental bureaucratic virtues associated with the achievement of the common good are concerned, it has been shown in this Part that paradoxically, the inner logic of the federal administrative state tends to

92. For an extended empirical analysis of the tension between bureaucracy and expertise across multiple national contexts, see generally Edward C. Page, *Bureaucrats and Expertise: Elucidating a Problematic Relationship in Three Tableaux and Six Jurisdictions*, 52 SOCIOLOGIE DU TRAVAIL 255 (2010). Page points out that bureaucratic expertise—his definition of which largely maps onto this Article's conception of subject-matter expertise—is largely uncorrelated with actual policymaking influence. *Id.* at 258–59, 270–71. To the extent bureaucrats possess such influence, Page finds that that influence is a function of their status *as* (apparently) eminent members of the bureaucracy, rather than on the content of their subject-matter expertise as such. *Id.* at 270–71.

undermine those very virtues.[93] The next Part puts theory into practice by considering two recent Supreme Court decisions involving the administrative

93. As previously suggested, the foregoing account of the relationship between virtue and the administrative state has a number of implications that range well beyond questions of the functionality of the bureaucracy or its relationship to the courts that review its actions. Specifically, this account gestures in the direction of more fundamental philosophical and theological questions, one of which in particular is worth examining at length here. In addition to his extensive and acclaimed work in the field of administrative law, Vermeule himself is a proponent of "Catholic integralism," a premodern approach to political thought that is committed, generally speaking, to some version of the following three claims: (1) "political rule must order man to his final goal," over against the "liberal separation of politics from concern with the end of human life"; (2) human beings are ruled by both "a temporal power and a spiritual power," since they have "both a temporal and an eternal end"; and (3) "since man's temporal end is subordinated to his eternal end, the temporal power must be subordinated to the spiritual power." Edmund Waldstein, *Integralism in Three Sentences*, JOSIAS (Oct. 17, 2016), https://thejosias.com/2016/10/17/integralism-in-three-sentences/. While the language may be arcane, the outcome is fairly straightforward: such a program amounts to a thoroughgoing rejection of liberal values such as pluralism and autonomy in favor of a political regime placed ultimately under the unitary authority of the Roman Catholic Church, one that is committed to enforcing its doctrines in some sense through the vehicle of human law. Vermeule elaborated his own understanding of this philosophy in a controversial *Atlantic* article in 2020. *See* Adrian Vermeule, *Beyond Originalism*, ATLANTIC (Mar. 31, 2020), https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037 (proposing that "common-good constitutionalism will favor a powerful presidency ruling over a powerful bureaucracy, the latter acting through principles of administrative law's inner morality with a view to promoting solidarity and subsidiarity. The bureaucracy will be seen not as an enemy, but as the strong hand of legitimate rule.").

As a philosophy, modern-day integralism (in the broadest sense) is not monolithic: many Catholics who reject the premises of Enlightenment liberalism offer political theories that diverge sharply from Vermeule's. *See, e.g.*, D.C. SCHINDLER, THE POLITICS OF THE REAL: THE CHURCH BETWEEN LIBERALISM AND INTEGRALISM (2021); *see also* JOHN MILBANK & ADRIAN PABST, THE POLITICS OF VIRTUE: POST-LIBERALISM AND THE HUMAN FUTURE (2016) (undertaking an Anglo-Catholic exploration of these same themes). The genuine novelty of Vermeule's own interpretation of integralism is its willingness to synthesize postliberal moral and metaphysical critiques of modernity with the legal mechanisms provided by the contemporary administrative state.

Key details of this synthesis have emerged throughout Vermeule's public writings in recent years. On Vermeule's view, young integralists ought to "hold posts as elite administrators" in order to "occupy the commanding heights of the administrative state," where, "in the setting of the administrative state, these agents may have a great deal of discretion to further human dignity and the common good, defined entirely in substantive rather than procedural-technical terms." Adrian Vermeule, *Integration from Within*, 2 AM. AFFS J. (2018) (reviewing PATRICK J. DENEEN, WHY LIBERALISM FAILED (2018)), https://americanaffairsjournal.org/2018/02/integration-from-within. This process may continue until such time as "[t]he vast bureaucracy created by liberalism in pursuit of a mirage of depoliticized governance may, by the invisible hand of Providence, be turned to new ends, becoming the great instrument with which to restore a substantive politics of the good." *Id.* (footnote omitted). In the course of that process, "the adviser may in the end turn the tables on her political foes." Adrian Vermeule, *A Christian Strategy*, FIRST THINGS (Nov. 2017), https://www.firstthings.com/article/2017/11/a-christian-strategy. Once holding the reins of power, these "advisers" could engage in a variety of policy manipulations and other interventions designed to promote public virtue. *Cf.* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2d ed. 2009).

state, analysis of which discloses the need for an account of the administrative state that takes seriously the role of the bureaucratic virtues described here.

This proposed strategy raises a critical question that virtually all of Vermeule's many critics have so far failed to engage: theologically speaking, is the administrative state a proper vehicle for the reconstitution of society and its reorientation toward Catholic ends?

Answering that question requires a brief philosophical excursus. In the tradition of virtue ethics that forms the linchpin of classical Catholic moral reasoning, growth in virtue occurs through the actualization of the natural capacities possessed by a finite being: the person who cultivates the virtue of courage by acting bravely will, over time, come to develop a disposition and capability to act bravely when presented with difficulties. This process of development is theologically significant. Traditionally, Christian metaphysical thought has conceived of God in his essence as *actus purus*, or pure actuality—the fullness of Being, from which all finite existents ultimately emerge. *See, e.g.*, THOMAS AQUINAS, SUMMA THEOLOGICA 29–31 (Fathers of the Eng. Dominican Province trans., 1911); THOMAS AQUINAS, SUMMA THEOLOGICA 214–216 (Fathers of the Eng. Dominican Province trans., 1912). Accordingly, the theological account of progress in virtue is, in the metaphysical sense, an account of progress toward God himself—the original actualizing agent of all realities that have no ground of being in themselves, and the ever-sustaining cause of their being. As an individual grows "into" God's infinite actuality by cultivating their capabilities (that is, growing in virtue), they become "who they were meant to be" in the very deepest way. Sin, on this account, is essentially the failure to exemplify virtue, through a self-oriented act of turning away from God's actualizing light.

Given these premises, the argument from virtue ethics developed in this article substantially problematizes Vermeule's integralist vision from a theological standpoint. If there is a fundamental incompatibility between growth in virtue and the expansion of the administrative state, then the administrative state may not be the final culmination of social order, but rather a kind of political antichrist. That thesis, however, requires some elaboration of what might be described, from the perspective of the bureaucracy itself, as the internal and external effects of the administrative state on the manifestation of virtue (theologically understood).

First, if indeed the administrative state tends to undermine the capacity of its bureaucrats to exemplify the bureaucratic virtues, then the institutional structure of the administrative state tends to contribute to their moral corruption over time. The higher a bureaucrat rises, the less they tend to cultivate or exemplify virtue, and so the further they tend to drift from their eschatological destiny. On this view the administrative state, in short, is a system that leads its bureaucrats toward sin—a far cry from the virtuous regime imagined by Vermeule.

And this problem necessarily has spillover effects for the public at large. If the judgment of actors within the administration state tends naturally to be clouded by their failure to exemplify the bureaucratic virtues—a failure bound up closely with institutional design—then why should anyone assume that over time, a cadre of individuals who enter the bureaucracy as committed integralists will be able to consistently and faithfully operationalize that idealistic vision, when it comes time to make public-facing decisions? The pathologies outlined in this article would seem to call into question bureaucrats' ability to make general decisions about institutional direction that are consonant with the common good, particularly the longer they remain within particular agencies. At bottom, if the argument outlined here holds, then the administrative state *cannot* plausibly be used as a mechanism for promoting the spiritual well-being of either its constituent members or the public at large. Integralists must choose a different path.

V. THE BUREAUCRATIC VIRTUES IN COURT

The foregoing analysis has unfolded at a very high level of generality. But the real test of any theory, of course, is in its ability to make sense of existing data. How does the account of bureaucratic virtue described here, and of how the institutional design of the federal administrative state tends to compromise that virtue, accord with the gritty details of real-world administrative law? To that question this analysis now turns, through consideration of two recent Supreme Court cases raising fundamental questions about the presence (or absence) of the bureaucratic virtues within the modern administrative state.

A. Department of Commerce v. New York and the Public Good

In 2019, the Supreme Court decided the highly controversial "census case" teed up by the presidential administration of Donald J. Trump.[94] That litigation began when Commerce Secretary Wilbur Ross announced in 2018 that the 2020 decennial census form would contain for all recipients, for the first time since 2000, a demographic question about the citizenship or birthplace of the individuals in the households receiving census forms.[95] In making that announcement, the Secretary argued that the Department of Justice had requested this more granular level of detail in order to more effectively enforce the Voting Rights Act (VRA), and that alternative approaches to obtaining this information—such as cross-referencing data from the Social Security Administration and U.S. Citizenship and Immigration Services—were likely to prove inadequate.[96] The announcement of the reinstatement of the citizenship question sparked immediate backlash, particularly from immigrants' rights organizations alleging that the Secretary's action was undertaken in bad faith as part of a larger political crackdown on migrants.[97]

In an opinion by Chief Justice John Roberts, the Supreme Court evaluated the reinstatement decision and found that the Secretary had not, in fact, abused his discretion as head of his agency: taking relevant factors into account, the Secretary "determined that reinstating a citizenship question was worth the risk of a potentially lower response rate. That decision was reasonable and reasonably explained, particularly in light of the long history of the citizenship question on the census."[98]

And yet the Court concluded that the reinstatement decision must be remanded to the agency, albeit for quite different reasons than the abuse-of-discretion analysis would seem to suggest. Following the lead of the original district court in the case, the Court reasoned that while "[i]t is hardly improper for an agency head to come into office with policy preferences and ideas, discuss them with affected parties, sound out other agencies for support, and

94. Dep't of Com. v. New York, 139 S. Ct. 2551 (2019).

95. *Id.* at 2562.

96. *Id.* at 2562–63.

97. *Id.* at 2563.

98. *Id.* at 2571.

work with staff attorneys to substantiate the legal basis for a preferred policy,"[99] in this particular context "the decision to reinstate a citizenship question cannot be adequately explained in terms of DOJ's request for improved citizenship data to better enforce the VRA."[100] Evidence suggested, in short, "a significant mismatch between the decision the Secretary made and the rationale he provided."[101]

In deeming the Secretary's decision pretextual—and remanding it to the agency—the Court explained that:

> [U]nlike a typical case in which an agency may have both stated and unstated reasons for a decision, here the VRA enforcement rationale—the sole stated reason—seems to have been contrived.
>
> We are presented, in other words, with an explanation for agency action that is incongruent with what the record reveals about the agency's priorities and decisionmaking process. It is rare to review a record as extensive as the one before us when evaluating informal agency action—and it should be. But having done so for the sufficient reasons we have explained, we cannot ignore the disconnect between the decision made and the explanation given. Our review is deferential, but we are "not required to exhibit a naiveté from which ordinary citizens are free." The reasoned explanation requirement of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public. Accepting contrived reasons would defeat the purpose of the enterprise. If judicial review is to be more than an empty ritual, it must demand something better than the explanation offered for the action taken in this case.[102]

This reasoning is worth examining closely. For one thing, the Court was well aware that its own decisionmaking process here was atypical, ranging well beyond the typical standards by which administrative agency decisions are evaluated. And so in finding that the Secretary's actions were impermissible on the grounds of pretext, the Court implicitly reached the theoretical conclusion that the Secretary's actions surrounding the reinstatement question *failed to meet a higher-order standard of lawfulness than that encompassed within the more traditionally concrete parameters of administrative law*. Lawfulness, here, was not simply a matter of *what* was done, but *how* it was done: the Court hastened to clarify that while it "d[id] not hold that the agency decision here was substantively invalid[,] . . . agencies must pursue their goals reasonably."[103] The question must be one of means as much as of ends.

The Court's ruling here does not fit neatly within the accounts of the lawfulness (or unlawfulness) of the administrative state that have been

99. *Id.* at 2574.

100. *Id.* at 2575.

101. *Id.*

102. *Id.* at 2575–76 (citation omitted).

103. *Id.* at 2576.

previously examined. For one thing, the Court reached its conclusion within the domain of administrative law without predicating its argument on the conclusion that the very existence of the administrative state is unjustifiable in view of the Anglo-American small-c constitutional tradition (à la Hamburger), or the Constitution's separation-of-powers framework (as for traditional originalists). On the other hand, the Court's decision here is challenging to explain on a purportedly "Fullerian" account of administrative law's internal morality. On its face, the Secretary's action would seem to satisfy Sunstein and Vermeule's tripartite criterion: the reinstatement decision was made pursuant to the agency's following its own rules, the decision was not retroactive, and (had the decision gone into effect) the action taken would have been consistent, at least on the face of the matter, with the declarations made. And yet the Court found the Secretary's action improper nevertheless, on the basis of the seemingly unobjectionable intuition that, for the sake of the common good, agencies ought to behave honestly.

Towards the close of *Law and Leviathan*, Sunstein and Vermeule posit that in this particular case, the agency's mistake epitomized "Fuller's eighth way to fail to make a law,"[104] which is for its part "a failure of congruence between the rules as announced and their actual administration"[105]—the third principle of Sunstein and Vermeule's internal morality of administrative law. They characterize the Court as issuing a ruling to the effect that "*stated justifications must not be impossible to square with the actual behavior of the officials who state them*,"[106] and accordingly describe the Court's move as "quintessentially Fullerian."[107]

But a closer look at the matter reveals that the census case does not fit so easily within this paradigm. Returning to the parable of Rex, Fuller illustrates this eighth failure of the rule of law by describing a situation in which, "there existed no discernible relation between those judgments and the code they purported to apply . . . in the actual disposition of controversies."[108] On Fuller's account, the relevant "behavior," for rule-of-law purposes, is the "actual disposition of controversies"—the moment, that is, of the exercise of power. So, Fuller's eighth "rule," so to speak, is that for the rule of law to hold, there must be a relation between a previously stated rationale and the moment of the exercise of power.

The relevant moment of the exercise of power, in the census case, was the administrative decision to add the citizenship question. And in that case, there *was* a "discernible relation" between the actions taken to add the citizenship question and the justification given: the VRA enforcement rationale. As Justice Breyer stated in his concurring opinion, "*[n]ormally, the Secretary would be entitled to place considerable weight upon the DOJ's expertise in matters involving the Voting Rights Act*, but there are strong reasons for discounting that

104. SUNSTEIN & VERMEULE, *supra* note 7, at 140.

105. Fuller, *supra* note 34, at 39.

106. SUNSTEIN & VERMEULE, *supra* note 7, at 140.

107. *Id.* at 141.

108. FULLER, *supra* note 34, at 38.

expertise here."[109] Those reasons involved a judicial peeking behind the curtain, so to speak, that in no sense is contemplated on Fuller's original account of the rule of law, because Fuller's criteria for the morality of law are characteristics of a system rather than of the individuals who occupy it. Indeed, for Fuller "[i]n the morality of law . . . good intentions are of little avail."[110] In purely formalist terms, the administrative "system" in the census case can be said to have "succeeded" in that it gave a reason for its decision and aimed to execute an action on that basis; the nature of its failure became clear only through the consultation of resources outside the particular framework of rationale and action that the agency provided.

Put more succinctly, Sunstein and Vermeule's characterization of the Court's ruling in the census case appears to trade on a crucial ambiguity in the word "behavior." On a Fullerian account, the relevant behavior is the actual exercise of power; in the census case, at issue was the *method* behind that exercise, which involves questions surrounding the resources consulted and the underlying motivations of the individuals behind the decision. The agency's deliberative process that the Court found to imply pretext is indeed "behavior" in the broad sense, but it is not the category of behavior contemplated by Fuller's criterion of lawfulness. Something beyond a strictly Fullerian account of lawfulness is therefore required in order to get at this point.

For their parts, those *disagreeing* with the Court's decision in this case might respond by charging that in this case, the Court simply erred—perhaps losing its judicial nerve in the face of political pressures. That claim, however, would seem to imply that an agency's providing knowingly inaccurate and pretextual reasons for its actions is altogether neutral where the promotion of the common good is concerned—a position that, at the very least, is not obviously true. Perhaps some might grasp that very nettle and defend the view that administrative agencies ought to be permitted to engage in "noble lying" behaviors for the greater good,[111] but the possibility of actually *attaining* any greater good on this view must assume the existence of a kind of bureaucratic omertà that is not, generally speaking, characteristic of large federal institutions.[112]

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109. Dep't of Com. v. New York, 139 S. Ct. 2551, 2594 (2019) (Breyer, J., concurring) (emphasis added).

110. FULLER, *supra* note 34, at 43.

111. Such an approach would amount, effectively, to an abdication of any responsibility on the part of the state to engage in truth-telling. It is worth noting that those who would adopt this approach, while simultaneously treating the administrative state as a mechanism to promote some distinctly theological end or other, must reckon with the fact that—if truth and goodness are indeed synonymous, as the classical tradition has affirmed—a fundamental moral contradiction rests at the heart of the endeavor. *See, e.g.*, THOMAS AQUINAS, SUMMA THEOLOGICA 225–27 (Fathers of the Eng. Dominican Province trans., 1911); *see also supra* note 93 and accompanying text.

112. Indeed, the COVID-19 pandemic has witnessed a sustained public backlash against such perceived "noble lies" by administrative agencies. *See, e.g.*, Ryan Cooper, *Noble Lies Are a Public Health Hazard*, WEEK (Dec. 17, 2021), https://theweek.com/coronavirus/1008155/noble-lies-are-a-public-health-hazard.

What sort of conception of lawfulness *does* underpin the Court's decision, then? Here, one should begin with the Court's own description of the moral logic behind its stance: "[t]he reasoned explanation requirement of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public."[113] Latent here is a normative commitment to the principle that since administrative agency action is taken on behalf of the public, agency decisions must be ultimately accountable to the public, an accountability which requires truth-telling at all times. And this principle, in turn, reflects the bureaucratic virtue of public-spiritedness—the tendency of an individual who occupies a position of public trust to remain constant in his pursuit of the *common* good, rather than focus on subordinate or transient goods. It is that virtue, the Court implicitly determined, that the Secretary's reinstatement decision failed to exemplify: since the attainment of the common good requires truth-telling, and the agency's rationale for its decision was pretextual, the individuals involved did not demonstrate the relevant virtue.

Lawfulness, in short, is in this case bound up for the Court with the exercise of individual virtue. Where virtue is absent, so too is lawfulness, such that the pursuit of the common good is ultimately subverted. As MacIntyre has argued, "the exercise of practical intelligence"—in this case, the faithful administration of the law by an agency—"requires the presence of the virtues of character; otherwise it degenerates into or remains from the outset merely a certain cunning capacity for linking means to any end rather than to those ends which are genuine goods for man."[114] It is difficult to imagine a better definition of "pretextual behavior" than "a certain cunning capacity for linking means to any end."

Finally, consider also that, while it is impossible for any third-party observer to know for sure, years after the fact, this failure of virtue likely emerged from the type of utility-maximizing behavior examined in the preceding Part: the desire to remain within the executive's good graces, and in so doing retain a measure of one's own administrative power. Failures like this one, in short, are entirely unsurprising within the terms of the larger theory developed here.

B. Department of Homeland Security v. Regents of the University of California and Administrative Expertise

Public-spiritedness, however, is not the only bureaucratic virtue this study has considered: what of subject-matter competence? On this front, the Supreme Court's 2020 decision in *Department of Homeland Security v. Regents of the University of California* is particularly illustrative.[115]

Shortly after acceding to office, the Trump administration began taking steps to wind down the Deferred Action for Childhood Arrivals (DACA) program, which temporarily shielded from removal—and extended various

113. *Dep't of Com.*, 139 S. Ct. at 2575–76.

114. MACINTYRE, *supra* note 64, at 154.

115. 140 S. Ct. 1891 (2020).

benefits to—certain undocumented immigrants who entered the U.S. as children.[116] Following a recommendation from Attorney General Jeff Sessions that the program was unlawful, Acting Secretary of Homeland Security Elaine Duke released a decision memorandum concluding that DACA should be terminated and explaining how the rescission process would play out over the near term.[117] Upon the announcement of this action, numerous plaintiffs sued to challenge the anticipated DACA rescission, forcing the Department of Homeland Security (DHS) to defend its actions in court. During the litigation process, Duke's successor, Kirstjen Nielsen, issued a follow-up memorandum articulating "a fuller explanation for the determination that the program lacks statutory and constitutional authority."[118]

Ultimately, the Supreme Court found that an important piece of the policymaking analysis was missing from the legal rationales DHS had provided to justify DACA's rescission: namely, "the rescission memorandum contain[ed] no discussion of forbearance or the option of retaining forbearance without benefits."[119] That is to say, in the Court's view DHS apparently had not formally reckoned with the possibility of continuing to temporarily shield DACA recipients from removal while winding down other federal benefits programs. Nor, the Court observed, did DHS appear to have seriously considered the net effects on DACA recipients and other stakeholders of ending the removal-forbearance policy.[120] Because "the agency failed to consider the conspicuous issues of whether to retain forbearance and what if anything to do about the hardship to DACA recipients," the Court—just as it did in the census case—remanded the matter to the agency.[121]

Just like the decision in the census case, important aspects of the Supreme Court's decision here do not obviously follow from the rival conceptions of the lawfulness of the administrative state that have been previously examined. Just as in the census case, the Court did not declare the administrative agency's actions unlawful tout court on the basis of the administrative state's intrinsic invalidity on Hamburgerian or originalist grounds. Nor did the agency's actions fail the Fullerian three-part test of internal administrative-agency lawfulness: rules existed, the decision was not retroactive, and the action occurred consistently with those internal rules.

Or did it? Is it not a rule of administrative law, properly speaking, that agencies must give a reasoned analysis of their decision-making process, which entails consideration of alternatives? And did not DHS allegedly fail to comply with this rule, thereby failing the third step of the test of the morality of administrative law? Accordingly, for Sunstein and Vermeule, is not the Court's decision entirely explicable within the framework that they have developed?

116. *Id.* at 1901–03.
117. *Id.* at 1903.
118. *Id.* at 1904.
119. *Id.* at 1913.
120. *Id.* at 1915.
121. *Id.* at 1916.

This objection, however, does not hold. For one thing, it is flatly impossible for any reason-giving entity to articulate a truly metaphysically comprehensive account of the facts and data and potential alternatives that were evaluated in the course of reaching a particular conclusion: any particular facet of a decision-maker's personal history, known or unknown, may have *some* influence on their reasoning process, and the range of possible alternative policies is obviously infinite. And the Court's rule itself recognizes this: DHS was not required to "consider all policy alternatives in reaching [its] decision."[122] Administrative agencies in general "are not compelled to explore every alternative device and thought conceivable by the mind of man."[123] To the extent that the considering-alternatives rule is underdeterminate—and it is—DHS in this case cannot, strictly speaking, be said to have failed the requirement that it act consistently with its own rules. So where, precisely, is the legal problem that motivated the Court to rule as it did?

Simply put, the Court's determination that the agency failed to consider relevant aspects of the problem at issue is a higher-order value judgment that while the rules may have been "followed" in a certain sense, they were not followed *in the right way*. In failing to consider certain reliance interests and policy alternatives, DHS (according to the Court) demonstrated a defect in practical reason—a failure of judgment that is, at bottom, not reducible to transgression of a single bright-line rule.

For the Court, the nature of that defect had to do, crucially, with the nature of the domain-specific question presented in the case. Because at issue in this case were not simply federal benefits for DACA recipients, but *also* the advantages inherent in DACA's policy of forbearance where actual removal was concerned, the Court found that DHS was required to examine "whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns."[124] Even if "DACA was rescinded because of the Attorney General's illegality determination," properly speaking "nothing about that determination foreclosed or even addressed the options of retaining forbearance or accommodating particular reliance interests."[125] Hence, the Court reasoned, "[a]cting Secretary Duke should have considered those matters but did not."[126] The considerations noted by the Court are, in short, DACA-specific: for the agency to behave lawfully, it was required to carefully assess the characteristics of the particular policy under review and explain why its proposed course of action was appropriate. This process of assessment cannot be collapsed down into a one-size-fits-all rule that an agency must follow, because all policies raise different questions and engender different reliance interests. For bureaucrats, rightly determining the appropriate evaluative and explanatory course of action to take

122. *Id.* at 1914 (citation omitted).

123. *Id.* at 1915 (citation omitted).

124. *Id*.

125. *Id.*

126. *Id.*

in a particular circumstance is contingent upon mastery of the specific matter under consideration by the agency.

What all this means is that at the heart of DHS's failure was, implicitly, a failure to properly exemplify the virtue of subject-matter competence, or proficiency in a particular domain of knowledge coupled with the capability to operationalize that knowledge in service of a larger goal. Absent in the DACA rescission case, the Court said, was that requisite proficiency.

All of this, at bottom, gives rise to an important conclusion: the virtue-grounded approach to the administrative state that has been developed in this article is not only a paradigm that courts *could reasonably* adopt in considering the question of lawfulness; it *already has* been adopted in particular contexts. In the next and final Part, the larger implications of this new paradigm for administrative law as a whole—and for critiques of the administrative state—will be taken up.

VI. IMPLICATIONS AND CONCLUSIONS

Barring a radical sea change in American law, the administrative state is likely here to stay. No matter how intellectually compelling originalist or other historical arguments may prove, there appears to be little judicial appetite for large-scale deconstruction of the federal bureaucracy, even on the incremental model proposed by Hamburger.

That recognition may sound like a counsel of despair. As this article has explored at length, the administrative state possesses deep tendencies to subvert the virtues essential to the attainment of its essential end—virtues that, albeit in inchoate form, already appear to factor into the judicial calculus of the Supreme Court where administrative agencies' decisions are at issue. Like cracks in a dike, the problem of virtue is making itself known. But what, if anything, can be done about it?

For one thing, from a judicial perspective, all of the aforementioned considerations seem to counsel in favor of what might be called a *hermeneutic of agency suspicion*. On this view, *Chevron*, *Auer*, and other formalized deference doctrines should go; why ought courts, which are charged with ensuring that agencies are acting as they ought, simply trust the rationales for action that they are provided, given the institutional forces that tend to undermine the core bureaucratic virtues?[127]

What might emerge out of this regime is an ongoing dialectic between courts and agencies, in which agency justifications for actions are viewed with appropriate skepticism by reviewing courts, but those agencies themselves generally retain jurisdiction over their respective areas. On this model, courts may serve a sort of chastening role, spurring agencies toward the cultivation of greater virtue by pushing back against their worst tendencies.[128] To the extent that deference doctrines are justified on the grounds of the agency's superior expertise, this reality need not counsel in favor of greater deference to agencies, but rather in favor of better-trained judges and law clerks, or perhaps the development of specialized courts better equipped to evaluate the action of agencies tasked with highly technical subject matter.

From the perspective of agencies within the administrative state, while the structural critique developed here is endemic to the nature of the entire entity, some internal reforms might prove useful. An agency might take steps to develop a structured regime of formal practices directly intended to cultivate

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127. *See also* Kevin M. Stack, *Putting Lon Fuller to Work in the Trenches*, YALE J. ON REG. NOTICE & COMMENT (Apr. 13, 2021) https://www.yalejreg.com/nc/law-leviathan-redeeming-the-administrative-state-part-02 ("Fuller's principles do not explain why a court would grant binding deference of the sort *Chevron* requires."); *cf.* EPSTEIN, *supra* note 3, at 577 ("Too often progressives show an uncritical affection for administrative expertise and impartiality in cases where both are hard to come by. They are clearly wrong on both accounts.").

128. Some evidence suggests that courts have already begun to assert such authority, albeit not couched in the conceptual terms used here. *See, e.g.*, Jonathan H. Adler, *Defensive Crouch Administrativism*, YALE J. ON REG. NOTICE & COMMENT (Apr. 22, 2021), https://www.yalejreg.com/nc/law-leviathan-redeeming-the-administrative-state-part-09 (suggesting that "[t]he law's internal pressures may be pushing against abnegation").

the virtues of public-spiritedness and subject-matter competence in their employees,[129] such as strict rules restricting departing bureaucrats from promptly pursuing lucrative private-sector employment in the same industry regulated by their agency, or requiring bureaucrats to spend a certain number of days per year observing the real-world handiwork of their agency. Such practices, naturally, would not offset the system's pathologies altogether, but might at least mitigate them. In addition, agencies might seek to cultivate the bureaucratic virtues more effectively in employees by pursuing the devolution of some of their functions to various subsidiary entities, such as state- and locally-based agencies, which pose fewer temptations towards power and profit and erect fewer procedural layers between bureaucrats and the public.[130]

Finally, to the extent they are unsympathetic to a more radical critique of the bureaucracy's existence in general, both jurists and theorists of the administrative state would likely benefit from explicitly foregrounding in their work the questions of bureaucratic virtue that this article has taken up. Something like the pair of bureaucratic virtues explored here, after all, does seem to be bound up with how the Supreme Court already conceives of *lawfulness* in the context of the administrative state, so those seeking to ascertain the shape of future doctrine would be well served to consider the matter.

But the point can be made more simply than that: more thinkers in the field should address the question of virtue because, frankly, it is always already present. To the extent that the field of public administration is a MacIntyrean "practice"—and it is—then like so many other human actions, it has certain overarching goals, the attainment of which is contingent upon individuals' exemplification of the virtues inherent to that practice. There is, in other words, no theoretical way around the question of virtue; it is simply a matter of whether the centrality of virtue is acknowledged. Indeed, for the individual who seeks to behave virtuously, "the 'knowing' [of virtue] that is here needed is a knowing that is inseparable from choosing, just as the choosing must be one that is based on knowing. Of the two, the choosing is the far more difficult to bring off"[131]—but, multiple times a day as one lives out the span of one's life, it must be done nevertheless.

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129. *Cf.* BERNARDO ZACKA, WHEN THE STATE MEETS THE STREET: PUBLIC SERVICE AND MORAL AGENCY 136–50 (2017) (outlining a paradigm for how frontline bureaucrats directly engaged in constituent-services work might engage in such practices).

130. *See, e.g.*, Patrick Overeem & Berry Tholen, *After Managerialism: MacIntyre's Lessons for the Study of Public Administration*, 43 ADMIN. & SOC'Y 722, 740 (2011) (drawing on MacIntyre's work to imagine the possibility of a practice of public administration that "might, for instance, assist and train policy makers and public administrators in developing moral and professional excellence" and that would "assist[] [bureaucrats and politicians] to fight the corrupting instrumental tendencies in their own thought and in organizational orientations," as well as "identify[] important virtues and deal[] in an appropriate manner with practice-undermining institutions").

131. HENRY B. VEATCH, RATIONAL MAN: A MODERN INTERPRETATION OF ARISTOTELIAN ETHICS 84 (1962).