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TAMING LEVIATHAN

Marek D. Steedman*

ROBERT MICKEY, *PATHS OUT OF DIXIE: THE DEMOCRATIZATION OF AUTHORITARIAN ENCLAVES IN AMERICA'S DEEP SOUTH, 1944-1972*, (PRINCETON UNIVERSITY PRESS 2015). PP. 584. HARDCOVER \$80.00. PAPERBACK \$35.00.

ANNE M. KORNHAUSER, *DEBATING THE AMERICAN STATE: LIBERAL ANXIETIES AND THE NEW LEVIATHAN, 1930-1970*, (UNIVERSITY OF PENNSYLVANIA PRESS 2015). PP. 336. HARDCOVER \$59.95.

How vulnerable are liberal democracies to authoritarian takeover? How thin is the line between an administrative state weakly constrained by legal and political institutions and norms, and an “electoral authoritarian” regime draped in the clothing of legal forms, popular ideology, and artfully stage-managed electoral theater? What might push a liberal democracy across that line, or, alternatively, compel authoritarian regimes, whether national or subnational, towards democratization? Both books under review prompt careful, empirically and theoretically nuanced engagement with these timely questions. The accounts on offer here detail multiple paths, rather than single “roads,” to democratization, paths that are less surely plotted towards robustly democratic outcomes than we might like to think. In doing so, they highlight for scholars of American political development the virtues of well-constructed comparative case studies, and in general illuminate the distinctive character of the American federal state by encouraging new points of contrast and new frames of comparison.

Robert Mickey's *Paths Out of Dixie* is an ambitious and ultimately impressively convincing study of “the processes of democratization undergone by Deep South states” between 1944 and 1972, one that yields a vast array of new insights into Southern political development and challenges mechanistic modernization theories of such development. Somewhat surprisingly, as Mickey points out, Southern regime change, as such, “has never been examined.”¹ An enormous literature exists on Southern economic development and political history, of course, and much attention has been given to explaining the emergence and rise of the Republican Party in the South.

* University of Southern Mississippi. The author would like to thank Sarah Cate and the editors of the *Tulsa Law Review* for comments on earlier drafts of this essay.

1. ROBERT MICKEY, *PATHS OUT OF DIXIE: THE DEMOCRATIZATION OF AUTHORITARIAN ENCLAVES IN AMERICA'S DEEP SOUTH, 1944-1972* 6 (2015).

Mickey casts the whole process of twentieth-century Southern political development in sharper relief, however, by posing it as a transition from a set of authoritarian enclaves nestled within a larger federal democracy, to procedurally democratic regimes analogous both to the American national government as a whole and individual states in other regions of the country. The frame allows Mickey to suggest a range of comparative projects that might yield greater insight into the processes of Southern political development than the, by now rather shopworn, standard comparisons to Prussia and South Africa, and provides the basis for a robust challenge to the characterization of the South as composed of “herrenvolk democracies.” Perhaps the Jim Crow South might be more usefully compared to “electoral authoritarian” regimes in PRI-dominated Mexico, or modern Iran. Or, perhaps democratization in the South is most productively compared to that of other subnational “enclaves” in Brazil or Argentina, where subnational democratization lags processes at the national level.

More central to Mickey’s own project is a narrower set of comparisons among states in the Deep South themselves. Here Mickey identifies “distinct modes of democratization” associated with his three central cases, South Carolina, Mississippi, and Georgia.² Briefly stated, the argument is that these distinct modes are best explained as the result of actions undertaken by differently situated and institutionally constrained elite political agents in each state. Mickey distinguishes three key dimensions of democratization in the South: the degree to which state regimes complied with administrative and judicial mandates to democratize; the extent to which previously excluded voters—principally, but not exclusively, black and poor white Southerners—were incorporated into state politics; and the ease and speed with which state level Democratic Parties were reconciled to and reincorporated within the national party. Distinct modes constitute different mixes of outcomes along each of these dimensions. Early, if superficial, acquiescence to federal democratization pressures by South Carolina helped that state manage the incorporation of black voters into the electorate and state party with relatively little disruption, producing an early reconciliation with the national party and what Mickey terms “harnessed” democratization. Massive, and frequently violent, resistance in Mississippi, by contrast, delayed all of these processes and made black incorporation and national reconciliation much more difficult to achieve, a result Mickey terms “protracted” democratization. Georgia emerges as a middle case, with a northern region, centered on ever-busy Atlanta, pursuing a ‘South Carolina way,’ and southern Georgia stubbornly following Mississippi.

Mickey focuses on elite agency, coupled with the institutional and factional constraints within which various political elites operated, to explain this variation in outcome. In pursuing this explanation, Mickey sets aside more standard modernization theories, focused on rates of urbanization and educational attainment, for example, or theories premised on the “labor-repressive” regime distinctive to the region—most associated with agriculture, but often also present in the various resource-extraction and processing industries associated with industrialization in the South. Mickey also downplays black political and social mobilization as a factor in explaining

2. *Id.* at 5.

variation in democratization across his cases. The point is not that any of these factors can be dismissed in a comprehensive account of Southern political development in the twentieth century. Rather, Mickey suggests, variation in these factors, while perhaps accounting for differences between the Outer South and Deep South, cannot, even where carefully specified, account for—or lead us to expect—the range of political outcomes within the Deep South itself.

The book as a whole weaves together a series of richly detailed and closely argued narratives to fill out and support the picture I have schematized here. It is impossible, even in an extended review, to do justice to the case studies on offer. I will instead highlight two issues I think shed light on the broader domain of democratization and authoritarianism engaged by these books: his attention to public higher education and authoritarianism engaged by these books: his attention to public higher education desegregation as a fulcrum of regime change, and his critique of the concept “herrenvolk democracy” as generally applied to the South. Each relates to Mickey’s conception of democracy, one that frames his insistence on defining pre-transition Southern states as authoritarian and his specification of what constitutes democratization itself.

For the purpose of this study, Mickey adopts a “proceduralist” account of democracy drawn from the literature on comparative politics: “democracies must feature free and fair elections, the safeguarding of rights necessary to sustain such elections . . . and a state apparatus sufficiently responsive to election winners and autonomous from social and economic forces that these elections are meaningful.”³ From this definition, it is perhaps surprising to find that in each case the state’s handling of its initial crisis over public higher education desegregation acts as a kind of switch point, diverting the state onto a specific path out of Dixie. However, as Mickey explains, “Jim Crow’s cornerstone was public education.”⁴ Education was a core competence of state and local government across the United States, representing a significant portion of their budgets and administrative capacity. In the South specifically, furthermore, segregated education was deeply entangled both in the reproduction of white supremacy in economic and social terms, and in policing the racial anxieties animating Jim Crow as a whole. An attack on segregated public education, therefore, “challenged rulers—and especially governors—directly in their capacity as policymakers, not merely as party leaders.”⁵ The Supreme Court’s decision in *Brown*, when it came, comprised “both a political and a cultural threat to white supremacy and a complete disruption of financial and administrative arrangements” in the Southern states.⁶

Rather than merely symbolic, then, battles over segregated universities lay at the heart of regime transition. In part, this was a result of consolidation over higher education policy by Southern states: conflicts over desegregation would inevitably and publicly embroil state legislatures and governors. But Mickey also understands the

3. *Id.* at 13.

4. *Id.* at 176.

5. *Id.* at 177.

6. MICKEY, *supra* note 1, at 176-77.

public education system as part of the state apparatus that does, or does not, safeguard those rights necessary to the functioning of “free and fair elections”: freedoms of association, expression, and speech. Segregation of universities, as well as pressure on political expression by university professors and students, functioned as part of a larger effort to constrain civil society, providing one of many “internal supports” of regime control.⁷ The picture of democracy on offer, then, is proceduralist, but not narrowly constrained to electoral institutions themselves. Desegregation battles over universities could shake “southern enclaves to their core” because electoral authoritarian regimes, like liberal democracies, require broad systems of internal and external support, systems that intersect with almost every area of public life.⁸

Even if central, why would these moments of conflict over higher education shape later political dynamics? Here my “switch point” metaphor is a little too automatic for what Mickey intends to convey, suggesting something fixed and necessary rather than contingent. The general dynamics can be illustrated through Mickey’s portrait of Mississippi. That state is almost uniquely identified in the public mind with maximalist racist intransigence and violence, but Mickey emphasizes Mississippi’s relatively “moderate” leadership in the immediate post-*Brown* era, as well as the relatively good pre-transition relations obtaining between the state party and its national counterpart.⁹ The violently protracted transition from authoritarianism in Mississippi was not, Mickey argues, a foregone conclusion. Indeed political leaders and business moderates in the state, like those elsewhere in the South, sought to accommodate to, rather than openly resist, the new federal push towards democracy. The turning point, as Mickey relates the story, was the “Battle of Oxford,” a set piece that both revealed the state’s deficit in coercive capacity and accelerated white and black insurgencies.

Here we get a clearer picture of the kinds of institutional constraints that matter for Mickey’s story. Key to the violent “debacle” that engulfed the University of Mississippi campus in the wake of James Meredith’s attempt to desegregate the university in 1962 was the severe lack of centralized coercive capacity available to Governor Barnett—leaving aside his own quixotic approach to the crisis. When push came to shove, the state of Mississippi lacked the capacity to control the crowds of white supremacists streaming in from across and beyond the boundaries of the state, failed to prevent a full-scale riot on the college campus and, consequently, suffered the “humiliation” of seeing order restored by federal and federalized National Guard troops. This lack of capacity, in turn, stemmed from two features of Mississippi state governance that distinguished it from its sister Deep South enclaves: its relatively high degree of factionalism, and its decentralized political structure. The former meant “moderates” could not maintain assured control over state responses to desegregation challenges, and indeed lost control of administration policy with the rise of Ross Barnett. The latter—decentralization—compounded the problem, providing constitutional and political roadblocks to the creation of a state police force under the di-

7. *Id.* at 56-57

8. *Id.* at 177

9. *Id.* at 199-204.

rection of the governor's office. When the crisis came, Barnett's positioning simultaneously heightened conflict with the federal government, raised the stakes of any subsequent climb down, and prevented maintenance of order on the campus itself. Militant white supremacists reacted in fury at the sight of federally imposed desegregation; white supremacist mobilization, in turn, spurred organization by black insurgents in and out of Mississippi itself.

The aftermath of the "Battle of Oxford," in other words, hardened lines in all directions, while underlining the state's inability to maintain order and prevent violence. The state lacked the capacity to co-opt white supremacists or prevent repeated federal interventions, and heightened racial tensions made attempts at compromise or accommodation almost impossible. Reputations forged in the heat of this initial battle, meanwhile, shaped subsequent interactions among the principle actors, fracturing the state Democratic Party and making both black incorporation into the state party and ultimate reconciliation with the national party divisive and long, drawn-out affairs. Here the final, and somewhat underplayed, piece of Mickey's analytical puzzle falls into place: the manner in which each state resolved, or failed to resolve, this initial challenge to higher education segregation matters for subsequent developments. Not because these moments represent some initial conditions from which all else flows, but because they produce reputational effects—for states and parties, as well as individual actors—that resonate through each subsequent development. Reputations, Mickey suggests, both constrain and shape one's room for political maneuver. Thus, the official state Democratic Party in Mississippi's reputation as a staunch defender of white supremacy and conservatism denied political space to Republican Party activists seeking a foothold in the state, while South Carolina's early and less contentious incorporation of black voters and activists constrained Democrats' ability to "craft racially conservative electoral appeals."¹⁰ Taken as a whole, then, Mickey provides an account of regime change in these states that explains variation in the direction of travel towards democracy, while preserving the contingency of each step taken along the way. Put differently, legacies work in the present as a result of causal forces operating in the present—reputational effects—rather than by the operation of lagged causal forces from some point in the past.

Much depends, of course, on whether one is willing to grant Mickey's starting place: that Southern states in the Jim Crow period are best understood as authoritarian enclaves and not, as the familiar phrase has it, "herrenvolk democracies." This understanding of racially structured polities, first applied to apartheid South Africa and quickly transferred to the U.S. South, principally by George Fredrickson, has become almost cliché, and Mickey is right to challenge its coherence.¹¹ Herrenvolk democracies, the story goes, make "whiteness" a ticket to full citizenship, providing robust participation rights and equal status within the regime to whites, while providing a subordinate status to non-whites. Lower class whites trade economic status for

10. MICKEY, *supra* note 1, at 341.

11. GEORGE FREDRICKSON, *WHITE SUPREMACY: A COMPARATIVE STUDY IN AMERICAN AND SOUTH AFRICAN HISTORY*, xi (1981).

the “psychological wage”¹² of identification and solidarity with the master race. In fact even its early proponents expressed some reservations about using the term ‘democracy’ here: Kenneth Vickery described it as a “myth” when applied to the South;¹³ Pierre Van den Berghe saw South Africa as a “quasi democracy” with a “democratic façade,” particularly after the rise of the National Party in 1948.¹⁴ Mickey’s account of democracy is intended to cut through this clutter: a regime counts as democratic when it provides the conditions for free and fair elections to all citizens, and not otherwise. The approach offers more than mere clarity. It highlights the ‘coup’ that was often required for Democratic Party activists to secure disenfranchisement provisions in the various Southern states at the turn of the twentieth century—and its partisan aim of breaking an emerging Populist-Republican alliance; the highly restricted Jim Crow electorate from which many poorer whites were effectively excluded; and the relative lack of violent popular resistance to regime change when it finally came.¹⁵ Mickey is persuasive in showing just how little of the preconditions for democracy obtained in the Jim Crow states, even for professional whites, let alone lower class ones. He also effectively challenges the evidence for “inter-class solidarity” between elite and lower class that attachment to white supremacy is presumed to have forged.¹⁶

Nonetheless, I am hesitant to abandon the phrase ‘herrenvolk’ altogether. Perhaps it would be better to refer to ‘herrenvolk regimes’ than imply a democratic reality that is rarely, if ever, obtained. It is also worth thinking through the implications of the fact that white supremacist regimes could not *simply* rely on majoritarian support from whites, even in the Deep South, even at the height of Jim Crow. But these authoritarian regimes were distinctively designed to create and maintain racial hierarchy and reproduce racial subordination. Their founders had partisan motives, sought to establish public order, created an authoritarian regime behind the trappings of electoral politics, aimed to maintain the economic hegemony of planter and industrialist labor lords alike, and so on. But they also intentionally sought—and achieved—a white supremacist social, economic, and political order, and it is not intuitively obvious why this latter aim should be taken as a subordinate, or instrumental, to the former ones. Social statuses are entangled with economic and political ones in ways that make it hard to sort out which takes priority for a given elite, but they are never wholly reducible to ideology. Challenges to social statuses, arguably, are at least as likely to provoke reactionary responses as challenges to political ones. The virtue in Mickey’s approach, however, is to force us to think more carefully about the work racial ideology performed in relation to Jim Crow. Rather than inter-class solidarity, for example, perhaps white supremacist ideology did more to forge inter-fraction

12. See generally W.E. BURGHARDT DUBOIS, BLACK RECONSTRUCTION: AN ESSAY TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860-1880 (1935) (“Phrase ‘psychological wage’ is not actually in the book, but arose from it”).

13. Kenneth P. Vickery, *‘Herrenvolk’ Democracy and Egalitarianism in South Africa and the U.S. South*, 16 Yale L.J. 309, 310 (1974).

14. PIERRE L. VAN DEN BERGHE, THE ETHNIC PHENOMENON 82 (1981).

15. MICKEY, *supra* note 1, at 347.

16. FREDERICKSON, *supra* note 11, at 154-55.

solidarity between planters and industrialists, underpinning the “capitalist and reactionary” route to modernization taken by the Southern states as a whole.¹⁷

However that may be, these considerations do not really challenge Mickey’s basic logic and claims: whatever role we assign to the racial character of these authoritarian enclaves this surely did not vary in significant ways across these states, and cannot provide an alternative explanation for the variation whose explanation lies at the heart of this carefully constructed study.

If one of the ‘procedural’ conditions for democracy is “a state apparatus sufficiently responsive to election winners and autonomous from social and economic forces [such] that . . . elections are meaningful,” how can these conditions themselves be maintained when faced with the rise of the administrative state?¹⁸ This question lies at the heart of historian Anne M. Kornhauser’s carefully delineated study, *Debating the American State*, which aims to reveal an unheralded alternative to New Deal enthusiasts and their Cold War critics.¹⁹ The point is not to ask how ‘procedural’ democracies can be made more ‘substantively’ so: I am not certain there is a meaningful distinction here, despite its ubiquity. Rather, it is the procedural conditions themselves, and the threat posed to them by the basic operations of administrative government, that attracts Kornhauser’s attention, and the attention of the loosely affiliated group of intellectuals she dubs “critical liberals.” These intellectuals, Kornhauser shows, registered a consistent set of concerns in response to the administrative state as it emerged in the 1930s: that it replaced democratic deliberation with rule by technocratic experts, the rule of law with ad-hoc administrative rule making, and legislative authority with executive power. Her “critical liberals” are a variegated bunch. What they share, however, is not only “unease” and anxiety about the increasing role of the administrative state, but also a general identification with the goals for which that state was being assembled.²⁰ The result, Kornhauser suggests, is a “sympathetic critique of statist liberalism,” one concerned more with restraining the emerging leviathan than destroying it.²¹

Kornhauser is aware that beginning her narrative in the 1930s is, in a certain sense, unfashionable. APD scholars have expanded their search for the sources of American state capacity back into the late nineteenth century, and down from the national level to that of states and localities. Nevertheless, the administrative state in the United States does undergo a kind of phase shift in the 1930s, in both scale and scope, one that justifies Kornhauser’s—and her critical liberals’—attention. Resituating critical responses to the administrative state to the 1930s and 1940s, meanwhile, shifts our focus away from the Soviet Union, which preoccupied less sympathetic critics of the New Deal state in later decades. Many of Kornhauser’s critics had direct experience of the early phases of Nazi totalitarianism, as well as of the occupation

17. BARRINGTON MOORE JR., *SOCIAL ORIGINS OF DICTATORSHIP AND DEMOCRACY: LORD AND PEASANT IN THE MAKING OF THE MODERN WORLD* xxi (1967).

18. MICKEY, *supra* note 1, at 13.

19. ANNE M. KORNSHAUSER, *DEBATING THE AMERICAN STATE: LIBERAL ANXIETIES AND THE NEW LEVIATHAN, 1930-1970* (2015).

20. *Id.* at 7.

21. *Id.* at 49.

and Nuremberg trials that followed German surrender. These experiences, in turn, would shape their understanding of both the perils and possibility inherent in bureaucratic government.

The opening chapters expand on the institutional developments that posed the greatest concern to critical liberals. The New Deal state introduced “three distinct but overlapping tensions” into the architecture of the American polity.²² The emergency conditions prompting the growth of administrative capacity—and threatening the very survival of liberal democracy itself—compelled the creation of efficient, hierarchically organized, bureaucracies, staffed and run by technocratic experts capable of both making and implementing decisions in response to contingent, and often unprecedented, crises. Technocratic ad hoc rules, issued without oversight, by unelected bureaucrats; each of these characteristics of administrative rule flew in the face of standard accounts of democratic self-governance. In particular, critical liberals worried, they short-circuited individual autonomy, skirted the rule of law, and side-stepped any majoritarian moment of consent.

Of course champions of the administrative state offered a partial defense of these developments, and while Kornhauser often chides this “administrative ideology” for incoherence and inadequacy, she does find, “[a]t times,” it roughly “cohered into a technocratic vision of a pragmatic, efficient state.”²³ This vision turned on three core contentions: that administration was a science, better left in the hands of experts than the untutored masses; that legal and political constraints on the administration merely prevented these experts from efficiently providing for the public good; and that the administration itself was best modeled on industrial and military organization, with the President positioned as “the administrator-in-chief.”²⁴ The problem with the vision, despite strong ideological support from the emerging field of public administration, was that it at times conflicted with equally central tenets of the American political system: the rule of law, constitutional checks on and balances to institutional power, and the sovereignty of the people. At its worst, administrative ideology appeared a mere counsel for “coordination for coordination’s sake,” substituting instrumental rationality for the democratic and ethical norms with which the critical liberals sought to restrain the state.²⁵

Each of the chapters that follow take up, and deepen, some aspect of the democratic tensions generated by the administrative state, as well as attempts by critical liberals to resolve them. As Kornhauser develops her account, she engagingly recovers some now slightly marginal figures, repositions others in illuminating ways, and provides enough connecting tissue to persuade that there is at least a family of overlapping democratic concepts and aspirations here, if not exactly a school of thought.

Problems of administrative accountability take center stage first. More precisely, the problem of “administrative absolutism” generated concerns among some liberals

22. *Id.* at 4.

23. *Id.* at 30.

24. KORNHAUSER, *supra* note 19, at 45.

25. *Id.* at 25.

that the operations of bureaucratic government had been worked free of any legal or political oversight, and were too prone to what we would now call ‘bureaucratic capture’ by powerful interests to be either broadly representative, or grounded in the consent, of the people as a whole.²⁶ The broad set of issues raised by law professors like Louis Jaffe and Roscoe Pound, or political scientists like E. Pendleton Herring, will be familiar. The solutions varied widely. Some sought to increase participation in the mechanisms of bureaucratic agencies by underrepresented, or less powerful, groups; others sought only to compel technocratic experts to attend to the views and needs of these groups when constructing policy. Some hoped that local boards and advisory bodies might be broadly representative of the people affected by agency regulations; others aimed only to bring the actions of bureaucrats under more sustained judicial, or legislative, review—Kornhauser reads the 1946 Administrative Procedure Act as an essentially well intentioned attempt at the latter. Critical liberals proved more adept at revealing the gulf between bureaucracy and democracy than creating the “representative bureaucracy” they presented as an alternative, however.²⁷ In part, this stemmed from a lack of consensus on the role ordinary citizens might play in formulating regulatory policy. In part, it simply reflected the difficulties inherent in reconciling popular participation with hierarchical control.

These tensions were only exacerbated by the start of World War II, a development that both heightened the need for emergency action on the part of the state and reduced the intellectual space for considered criticism of American democracy. A small group of German refugees—among them Hannah Arendt, Karl Loewenstein, and Franz L. Neumann—nonetheless continued to raise questions about the relation between administrative fiat and the requirements of democratic governance. For this group of thinkers—Kornhauser adopts the label “liberal legalists” here—the question was posed in terms of the internal relation between democracy and the rule of law.²⁸ Not persuaded by legal positivism—for which law was a mere effect of sovereignty—nor tempted by natural or common law traditions—by which their more conservative counterparts sought to separate legal substance from form—liberal legalists hoped to reveal an ethical dimension embedded in the formal requirements of law itself. “That ethical dimension,” as Kornhauser puts the point, “centered on the generality, rationality, and fairness of formal law, which, in the view of most of the [liberal] legalists, guaranteed a measure of individual freedom—personal and political—and equality.”²⁹ Guarantee the conditions of the rule of law, these legalists thought, and you provided the institutional basis for the constraint of political power and the defense of individual autonomy.

Two concrete situations put pressure on this conception. First, the Nazi regime in Germany had arisen within the legal framework of the Weimar republic, a republic supposedly constrained by the liberal constitutional principles liberal legalists hoped to defend. Indeed, the legal framework of the republic was never wholly dismantled

26. *Id.* at 56.

27. *Id.* at 84.

28. *Id.* at 113

29. KORNHAUSER, *supra* note 19, at 97.

by the Nazis and continued to cloak even this totalitarian regime in the outward trappings of law. If formal law failed to prevent, and perhaps even operated alongside, the Nazi regime, what remained of the supposed internal relation between the rule of law and democratic self-governance? Liberal legalists like Loewenstein and Neumann answered by insisting that the Nazis' rise to power had been enabled by the Weimar constitution's too "capacious emergency clause"—the infamous Article 48—rather than features of constitutional law, itself.³⁰ Further, they argued, Nazi Germany had not been a legal regime, or, as some argued, a "dual" regime with national authoritarianism underpinned by subnational legal institutions and norms—the debate has more than a passing resemblance to Mickey's concerns about the cogency of the phrase "herrenvolk democracy."³¹ Nonetheless, Nazism had emerged from a liberal democracy, and liberal legalists needed an account of why. In a particularly compelling contrast with Friedrich von Hayek—with whom liberal legalists shared some ground—Kornhauser explains that, for these liberals, the structure of monopoly capitalism itself, and the administrative state required to regulate and manage it, created the conditions for the arbitrary and unconstrained use of power that threatened authoritarianism. The argument was sobering, entailing as it did that the United States might be as vulnerable to authoritarian collapse as Weimar Germany itself.

The second challenge to the liberal legalist rule of law ideal, the American occupation of Germany and conduct of the Nuremberg trials, only served to underline the implications of these arguments. Two problems impressed themselves with particular insistence. How could a constitutional democracy be founded by military force? And by what application of law could Nazi war criminals be tried, when most of their actions had been taken under command or could not be recognized as crimes under the terms of international or national law obtaining at the time they were committed? Kornhauser is clear that the liberal legalists failed to come up with particularly convincing answers here. Indeed, she expresses concern that the arguments they did develop—including Carl Friedrich's defense of constitutional dictatorship—could later be applied by Cold Warriors to the rapidly developing national security state being built to oppose communism at home and abroad. For Kornhauser, the importance of these thinkers lies in their attempts to grapple, however unsuccessfully, with the need to ensure individual rights, legal procedures, and fair representation even under emergency conditions.

It would be fair to say that none of the thinkers canvassed so far fully realized their attempt to "theorize a third way" between untrammelled market capitalism, on the one hand, and an unconstrained leviathan, on the other.³² That task would fall to John Rawls, who Kornhauser helpfully relates to this tradition of "sympathetic" critics of the administrative state.³³ Kornhauser covers more ground here than I can

30. *Id.* at 101.

31. *Id.* at 119.

32. *Id.* at 114.

33. KORNHAUSER, *supra* note 19, at 75.

briefly indicate, but of particular note is her emphasis on Rawls's critique of utilitarianism as "a rough stand-in for a critique of the administrative state," highlighting the focus on instrumental rationality, efficiency, and cost-benefit analysis that underlies both.³⁴ Kornhauser is adept at sorting out the differences among the various forms of social choice theory and utilitarianism available to Rawls as he was formulating his ideas, as well as attending to the uses Rawls made of them. The upshot is a Rawls who insisted that the maintenance of a just society—if not the generation of its animating principles—required citizens with "an affective moral disposition" capable of understanding the principles of justice and regulating their society in light of them, as well as "social institutions—families, schools, and so on" within which this moral disposition would be formed. These Rawlsian citizens could not be as 'unencumbered' as some of his critics have avowed.

How "sympathetic" were these critics, finally? Rawls, at least, rejected "welfare state capitalism"—and "laissez-faire capitalism"—as incompatible with the principles of justice.³⁵ At least some of Kornhauser's critical liberals, as we have seen, identified "monopoly capitalism" as a potential source of fascism. It could be argued that the defense of welfare state capitalism defines "statist liberalism" itself, in which case the critical liberals might appear more radical than Kornhauser takes them to be.³⁶ Still, even were this so, Kornhauser's main contention is that other liberalisms were possible, even as the New Deal state was being constructed. Here she succeeds admirably, even if it is hard, at times, to identify just what alternative arrangement would follow. Liberalism was quite capable of producing an internal critique of the emerging liberal state without lapsing into libertarianism or nostalgia for the lost certainties of a pre-industrial age. Identifying and elaborating that alternative enriches our understanding of the liberal tradition itself, suggesting a pliability and critical purchase internal to liberalism that a one-dimensional view might miss.

"Can you draw out Leviathan with a fishhook? . . . Will he plead with you at length? Will he speak soft words to you? Will he make an agreement with you to be taken as your lifelong slave?"³⁷ Carl Schmitt thought not, famously. Emergency conditions always overwhelm normal politics; liberal, ethical, and democratic norms are unworkable at best, disingenuous and deceptive at worst. In any case, democracy is defined not by its procedures but by the identity of ruler and ruled—a definition potentially capable of rescuing "herrenvolk democracy" from the theoretical dustbin. It is at least to some degree the apparent—if perhaps spurious—coherence of this view that provokes liberal anxiety in the face of the administrative state. John Rawls's public philosophy is among the few attempts to meet this challenge from first principles, so to speak. If it does not, as Kornhauser implies, finally convince, we find ourselves relatively unarmed as we confront both a resurgent faith in technocratic expertise and administrative rule and increasingly hostile attempts to seize control of the state for reactionary purposes. No answer to this problem can be advanced here,

34. *Id.* at 181.

35. JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* 137 (Erin Kelly ed., 2001).

36. KORNHAUSER, *supra* note 19, at 49.

37. *Job* 40:25-28.

nor is it clearly the province of political historians and students of American political development to do so. Both Mickey and Kornhauser's excellent, detailed, and thought-provoking interventions, however, remind us that democratic façades are easier to construct and maintain than the institutions and norms that make for democratic realities. They each similarly suggest that the cultural and institutional means to authoritarian rule lie ready to hand in the United States as elsewhere in the industrial world. As we seek the sources of administrative capacity, and shifts in governing authority within administrative regimes, we would be wise to attend to the mechanisms that preserve and undermine procedural democracy itself.