THE MORALITY OF ADMINISTRATIVE LAW

Cass R. Sunstein & Adrian Vermeule

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Cass R. Sunstein[*] *and Adrian Vermeule*[**]

As it has been developed over a period of many decades, administrative law has acquired its own morality. An understanding of the morality of administrative law puts contemporary criticisms of the administrative state in their most plausible light. Reflected in a wide array of seemingly disparate doctrines, but not yet recognized as such, the morality of administrative law includes a set of identifiable principles, often said to reflect the central ingredients of the rule of law. Closely related to what Professor Lon Fuller described as the internal morality of law, the resulting doctrines do not deserve an unambiguous celebration, because many of them have an ambiguous legal source; because from the welfarist point of view, it is not clear if they are always good ideas; and because it is not clear that judges should enforce them.

Is law moral? If a law is immoral, or sufficiently immoral, is it therefore not a law at all?

Some people think that the second question is foolish and that it is both possible and important to separate claims about what the law is from claims about the morality of the law.[1] But others, most prominently Professor Ronald Dworkin, contend that for judges, there can be no such separation, because judgments about the content of law depend on moral judgments, at least in hard cases.[2] Professor Lon Fuller offers a different argument.[3] In his view, law has an internal morality, including both a minimal morality of duty and a higher morality of aspiration.[4] If a purported legal system violates the internal morality of duty, it is not "a legal system at all, except perhaps in the Pickwickian sense in which a void contract can still be said to be one kind of contract."[5]

Our main emphasis here shall be on the minimal morality of duty, which Fuller believed to be nonnegotiable as to the class of governmental decisions subject to law in the first place (as opposed to decisions that Fuller thought irreducibly managerial or otherwise not susceptible to law-governed treatment).[6] As to this class of decisions, a violation of

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[1] There are many versions of this view. The most influential is found in H.L.A. HART, THE CONCEPT OF LAW (1961). *See, e.g.*, H.L.A. HART, THE CONCEPT OF LAW 7–8 (3d ed. 2012).

[2] *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE 1, 15–20 (1986).

[3] *See* LON L. FULLER, THE MORALITY OF LAW (rev. ed. 1969).

[4] *Id.* at 4–6, 42.

[5] *Id.* at 39.

[6] *See id.* at 42, 207–09.

that minimal morality means that no legal system exists at all.[7] But Fuller contended that even if a legal system does not violate the morality of duty, it is still subject to the internal morality of aspiration, which calls for "*Perfection in Legality*,"[8] understood as a kind of utopia in which rules are clear, consistent, perfectly known, and "scrupulously observed."[9] Insofar as law aspires to become what it ought to be in the utopian sense, it should pursue its internal morality, but only to the extent feasible and with reference to costs.[10]

But in what exactly does law's internal morality consist? In his most vivid presentation, cataloguing the various failures of a would-be lawmaker named Rex, Fuller specifies eight ways "that the attempt to create and maintain a system of legal rules may miscarry."[11] These are:

(1) a failure to make rules in the first place, ensuring that all issues are decided on a case-by-case basis;

(2) a failure of transparency, in the sense that affected parties are not made aware of the rules with which they must comply;

(3) an abuse of retroactivity, in the sense that people cannot rely on current rules and are under threat of change;

(4) "a failure to make rules understandable";

(5) issuance of rules that contradict each other;

(6) rules that require people to do things that they lack the power to do;

(7) frequent changes in rules, so that people cannot orient their action in accordance with them; and

(8) a mismatch between rules as announced and rules as administered.[12]

In each of these cases, there is a violation of the minimal morality of duty. By producing these failures and abuses, Rex "never made any" law at all.[13] As Fuller describes them, some of these ways of "miscarrying" are extreme. Deciding every issue "on a case-by-case basis," unconstrained by any rules of any kind at all, is highly unusual, if only because some such rules typically operate in the background; "a failure to make

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[7] *Id.* at 41–44.

[8] *Id.* at 41.

[9] *Id.* Fuller's treatment is worth quoting:

> What appear at the lowest level as indispensable conditions for the existence of law at all, become, as we ascend the scale of achievement, increasingly demanding challenges to human capacity. At the height of the ascent we are tempted to imagine a utopia of legality in which all rules are perfectly clear, consistent with one another, known to every citizen, and never retroactive. In this utopia the rules remain constant through time, demand only what is possible, and are scrupulously observed by courts, police, and everyone else charged with their administration.

Id.

[10] *Id.* at 44–46. In our view, Fuller's account of costs is helpful but not quite adequate. We offer some words on a welfarist approach below. *See infra* section II.C.2, pp. 1973–75.

[11] FULLER, *supra* note 3, at 38–39.

[12] *Id.* at 39.

[13] *Id.* at 41.

rules understandable," in the sense that people are unable to know what rules mean, is not easy to do, so long as officials write in a recognizable language with the intention of communicating. But for citizens in modern nations, democratic or not, some of Fuller's failures are perfectly recognizable. On one view, for example, agencies all too often fail to make rules and proceed instead on a case-by-case basis,[14] impeding planning and promoting unpredictability. On another, agencies require people to do things that they cannot do.[15] On yet another, agencies fail to make their rules and practices sufficiently understandable, producing guessing games.[16]

It should not be surprising that in light of his jurisprudential concerns and his own substantive areas of interest, Fuller usually discussed "law" in a general sort of way, often drawing on examples from contract law, criminal law, and other fields. Our main aims here are not at all jurisprudential; rather we aim to bring Fuller's claims into sustained contact with current debates in administrative law, where, we think, his arguments are most pertinent.[17] Our largest suggestion is that a Fullerian approach, emphasizing *the morality of administrative law*, helps to unify a disparate array of judge-made doctrines and perhaps even the field as a whole.[18]

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[14] *See* KENNETH CULP DAVIS, DISCRETIONARY JUSTICE 21–24 (1969).

[15] *See* EUGENE BARDACH & ROBERT A. KAGAN, GOING BY THE BOOK 58–92 (2002) (describing examples of the "mismatch between [agency] rules and [the] diverse circumstances" they regulate and the resulting "unreasonableness" and "unresponsiveness," *id.* at 58).

[16] ORG. FOR ECON. CO-OPERATION & DEV., REDUCING THE RISK OF POLICY FAILURE: CHALLENGES FOR REGULATORY COMPLIANCE 14–15 (2000), https://www.oecd.org/gov/regulatory-policy/1910833.pdf [https://perma.cc/J6TD-H35V].

[17] Others have done this briefly, *see, e.g.*, Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 397–408 (1989); Kevin M. Stack, Essay, *An Administrative Jurisprudence: The Rule of Law in the Administrative State*, 115 COLUM. L. REV. 1985, 2002–09 (2015), or in a tangential way while pursuing more purely constitutional or jurisprudential concerns, *see, e.g.*, J.W.F. ALLISON, *The Limits of Adversarial Adjudication*, *in* A CONTINENTAL DISTINCTION IN THE COMMON LAW 190 (2004); DAVID DYZENHAUS, THE CONSTITUTION OF LAW (2006); Nestor M. Davidson & Ethan J. Lieb, *Regleprudence — At OIRA and Beyond*, 103 GEO. L.J. 259 (2015); David Dyzenhaus, *Positivism and the Pesky Sovereign*, 22 EUR. J. INT'L L. 363, 367–68 (2011). Particularly helpful here is Professor David Dyzenhaus's explication of Fullerian principles as constitutive of a "thick" version of the rule of law. *See* DYZENHAUS, *supra*, at 147. It is important to emphasize that our focus is on the morality of administrative law, informed by Fuller, and that we do not intend to offer anything like a full exegesis of Fuller's thought, which is complex on some of the questions we explore. *See id.*

[18] Fuller participated in once-famous debates with Professor H.L.A. Hart about the relationship between law and morality. For Hart's view, see H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); for Fuller's response, see Lon L. Fuller, *Positivism and Fidelity to Law — A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958). For present purposes, we are bracketing the jurisprudential questions (and neither supporting nor rejecting Hart's claims about the separation of law and morality).

We also contend that a Fullerian approach puts contemporary criticisms of the administrative state in their best light and allows the sharpest critics to be their best selves. Since the early part of the twentieth century, many judges and lawyers have expressed serious concerns about the power of administrative agencies, and in particular about the exercise of discretion by federal bureaucrats.[19] In the last few decades, those concerns have reached a high level of intensity, a kind of fever pitch — certainly among academic observers[20] and occasionally also among judges.[21] Some versions of this concern have rested on novel constitutional theories, often rooted in controversial understandings of Articles I, II, and III.[22]

We suggest that most sympathetically understood, the critics are tracking Fuller's fundamental principles.[23] As we understand these critics, they are seeking to prevent a miscarriage of the legal system by ensuring that the administrative state respects the internal morality of law, at least as an aspirational matter. In their view, agencies often violate that morality.

To be sure, the critics' arguments go well beyond Fuller insofar as they suggest (for example) that under the Constitution, Congress must confine agency discretion[24] or that agencies may not issue binding rules.[25] But to the extent that the critics are concerned with the rule of law[26] and the risks of unstructured discretion, Fuller's concerns, applied

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[19] *See, e.g.*, DANIEL R. ERNST, TOCQUEVILLE'S NIGHTMARE (2014); Roscoe Pound, *Administrative Law: Its Growth, Procedure, and Significance*, 7 U. PITT. L. REV. 269 (1941).

[20] *See, e.g.*, PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014); DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY (1993); Larry Alexander & Saikrishna Prakash, Essay, *Delegation Really Running Riot*, 93 VA. L. REV. 1035 (2007) ("Knowledgeable observers of the administrative state recognize that as the public has demanded more federal regulation, Congress has responded by creating 'junior varsity' legislatures throughout the federal government. The result is a fifty-volume Code of Federal Regulations that dwarfs the statutory text found in the U.S. Code. The so-called nondelegation doctrine, a judicial doctrine which formally holds that Congress cannot delegate its legislative powers, is more aptly styled the 'delegation nondoctrine.'" *Id.* at 1036.); D.A. Candeub, *Tyranny and Administrative Law*, 59 ARIZ. L. REV. 49 (2017); Richard A. Epstein, *The Perilous Position of the Rule of Law and the Administrative State*, 36 HARV. J.L. & PUB. POL'Y 5 (2013).

[21] *See, e.g.*, Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (expressing concern that "executive bureaucracies . . . swallow huge amounts of core judicial and legislative power").

[22] *See* HAMBURGER, *supra* note 20, at 1–5. We have been critical of those theories. *See, e.g.*, ADRIAN VERMEULE, LAW'S ABNEGATION (2016); Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393 (2015).

[23] Fuller emphasized certain "failures"; for ease of exposition, we shall describe his account as offering corresponding "principles," consisting of avoidance of those failures. This usage is consistent with his own. *See* FULLER, *supra* note 3, at 41 (referring to "all eight of the principles of legality").

[24] *See* SCHOENBROD, *supra* note 20, at 155–64.

[25] *See* HAMBURGER, *supra* note 20, at 277–81.

[26] *See* Epstein, *supra* note 20.

to the administrative state, overlap with their own. If those concerns are somewhat more modest, in the sense that they do not call for use of the heaviest constitutional artillery (such as invalidation of a grant of discretionary authority on nondelegation grounds), at least their resolution would ensure robust rule-of-law constraints on agency behavior.

As we shall attempt to show, a surprisingly large number of doctrinal principles, both small and large, can be understood to fall out of this framework.[27] Whether or not they have clear legal foundations, those doctrinal principles have evidently broad appeal. In the coming decades, many of them could be elaborated or extended.

Part I offers a tour of the horizon, applying Fuller's principles to a range of doctrinal issues and current controversies in administrative law. We examine Fuller-compatible approaches to the problems of (non)delegation; issues of clarity and vagueness; problems of retroactivity; issues of reliance and the consistency of agency views under a diverse array of doctrines, including *Auer*[28] deference, arbitrariness review, and *Chevron*[29] deference; and the obligation of agencies to follow their own rules. Emphasizing the most important doctrines, we do not track every one of Fuller's eight principles (though we think it would be possible to do so) or proceed with them in precise sequence, but we hope to show that those principles, and certainly their animating spirit, have a foundational character in administrative law. One of our aims in this Part is to connect law's internal morality with agency procedures and decisionmaking in ways that make sense of recent and not-so-recent judicial attempts to impose and increase constraints on agency discretion.

In Part II, we return to the distinction between the morality of duty and the morality of aspiration, and we indicate the limits of Fullerian administrative law. Although our aim is to put anxieties about the administrative state in their best light, we do so without endorsing them — especially if the critics' project is not merely to recommend an internal morality of duty to agencies themselves but instead to recommend that judges enforce upon agencies an internal morality of aspiration.

On this count, several points are important. First, Fuller was explicit that not all governmental or administrative decisions are the sorts of decisions that should be subject to law's internal morality in the first place — not even the morality of duty. The morality of administrative law applies within a certain domain of governmental decisions, but not

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[27] We do not mean to suggest that judges are self-consciously tracking Fuller, or even that they have read his work (though at least some probably have). The argument is instead that his principles, capturing widespread understanding about the rule of law, are ubiquitous in the ambient legal culture and have a kind of gravitational force and therefore help to organize much of the field of administrative law.

[28] Auer v. Robbins, 519 U.S. 452 (1997).

[29] Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

otherwise. There is, accordingly, an analogue to "*Chevron* Step Zero" for administrative law's internal morality: a logically antecedent inquiry into whether the sort of decision is one to which Fuller's principles apply at all. A potential example involves problems of economic allocation of scarce resources among competing claimants, which Fuller thought — rightly or wrongly — to be inherently nonprincipled and thus to fall outside the domain of law's internal morality.[30]

Second, in at least some cases, Fuller's principles may be unsupported by positive law, inconsistent with welfarism, or both. Fuller himself was a believer in natural law, at least of a certain limited kind,[31] and natural law does not easily coexist with positivist strands of contemporary administrative law.[32] As we shall see, an insistent question is whether judges can point to a legal source that authorizes them to override agency judgments in the name of law's internal morality; sometimes they cannot.

It is tempting to think that the Due Process Clause codifies some or perhaps all of Fuller's principles. In some cases, a violation of those principles would indeed violate the Due Process Clause.[33] It would be easy to regard Rex, Fuller's imaginary ruler, as a repeated violator of the Due Process Clause. But in many of the cases that we discuss here, a convincing due process objection is difficult to muster, and it is not easy to identify an obvious statutory foundation for judge-made law.

On welfarist grounds, moreover, it is not always clear when and where agencies are justified in compromising Fuller's principles. By definition, an "abuse" of retroactivity is hard to accept, because it is an abuse. Writing against the background of the Nazi experience, which was not distant history, and which appears to have had a formative impact on his thinking,[34] Fuller characterized violations of the principles

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[30] *See* FULLER, *supra* note 3, at 170–77.

[31] Fuller himself so stated. See *id.* at 96–106, and in particular his suggestion that his principles "are like the natural laws of carpentry, or at least those laws respected by a carpenter who wants the house he builds to remain standing and serve the purpose of those who live in it." *Id.* at 96; *see also* Douglas Sturm, *Lon Fuller's Multidimensional Natural Law Theory*, 18 STAN. L. REV. 612 (1966).

[32] *See* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199 (2015); Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519 (1978).

[33] *See* Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) (holding an ordinance "void for vagueness" under the Due Process Clause, *id.* at 162).

[34] *See* FULLER, *supra* note 3, at 40 (noting "a general and drastic deterioration in legality, such as occurred in Germany under Hitler"). See also Fuller, *supra* note 18, and especially the assertion that it is:

> impossible to dismiss the problems presented by the Nazi regime with a simple assertion: "Under the Nazis there was law, even if it was bad law." We have instead to inquire how much of a legal system survived the general debasement and perversion of all forms of social order that occurred under the Nazi rule, and what moral implications this mutilated system had for the conscientious citizen forced to live under it.

Id. at 646.

as "failures," and it is hard to approve of those failures. Before or after the 1930s, lawlessness of the Nazi kind is hardly limited to the German experience under Hitler. But as Fuller's emphasis on the morality of aspiration suggests, we are often dealing with questions of degree, or a continuum rather than a dichotomy.[35] It may not be obvious that an agency has abused its legitimate discretion with respect to the topics covered by his eight principles. If what matters is social welfare, a degree of retroactivity may be affirmatively desirable, even required — for example, to punish unambiguously harmful conduct.

A final point is institutional. Even where law has a well-defined internal morality in principle, it does not follow that courts deciding particular cases should impose their own views of principle upon agency decisionmakers, who must trade off legitimate aims and allocate resources across a broad array of cases and programs, in a complex set of practical judgments. Fuller's colleague, Louis Jaffe, was alert to this point. In a magisterial treatise that distilled the post–Administrative Procedure Act (APA)[36] consensus, he argued that although courts enjoy authority to say what the law is, the law itself should often be taken to vest extensive procedural discretion in agencies because of the systemic problems of resource allocation across programs that agencies face.[37]

Put in Fuller's terms, minimal legal morality is one thing; aspirational legal morality is another. Even if judges have the authority to enforce the minimum procedural morality of Fullerian administrative law — and as we shall see, that authority is not obviously theirs — it is an entirely separate question whether judges should have this authority with respect to aspirational legal morality. After all, judicial judgments might go wrong. It is not easy to explain when and why, exactly, judicial judgments about the costs, benefits, and limits of aspirational legal morality should be taken to override an agency's judgment that insistence on those aspirations will undermine or strangle the execution of the agency's mission. We draw upon the Court's opinion in *SEC v. Chenery Corp. (Chenery II)*[38] as an example of judges who are alert to the benefits of Fullerian legal morality but also tolerant of a wide margin of discretion for agency judgments.

A brief conclusion follows.

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[35] See FULLER, *supra* note 3, at 41–44, and in particular the suggestion that:

> [A]s we leave the morality of duty and ascend toward the highest levels of a morality of aspiration, the principle of marginal utility plays an increasing role in our decisions. On the level of duty, anything like economic calculation is out of place. In a morality of aspiration, it is not only in place, but becomes an integral part of the moral decision itself — increasingly so as we reach toward the highest levels of achievement.

Id. at 44.

[36] Ch. 324, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551, 553–559, 701–706 (2012)).

[37] LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 567 (1965).

[38] 332 U.S. 194 (1947).

I. FULLERIAN DOCTRINES

In this Part, we offer an overview of areas of administrative law that resonate with Fullerian themes. In most of these areas, judge-made doctrine is explicitly Fullerian; in some of them, nominal doctrine is non-Fullerian or even counter-Fullerian, but actual judicial behavior is consistent with — and, plausibly, even inspired by — Fullerian intuitions.

A. Failure to Make Rules

We begin with an investigation of judge-made doctrines that directly respond to what Fuller sees as the "first" and an "obvious"[39] way to produce something other than a legal system: a "fail[ure] to develop any significant rules at all."[40] In that context, Fuller makes explicit reference to our concern here, urging that "perhaps the most notable failure to achieve general rules has been that of certain of our regulatory agencies."[41] Fuller argued that agencies may have acted "in the belief that by proceeding at first case by case they would gradually gain an insight which would enable them to develop general standards of decision."[42] But for some agencies, "this hope has been almost completely disappointed."[43] (As we will discuss later, there is obvous tension between Fuller's view and the Supreme Court's willingness in *Chenery II* to give agencies broad discretion to decide whether to proceed case by case.[44])

Fuller attributed this failure to the agencies' effort to use adjudication to develop general standards, an effort that he thought (wrongly, in our view) could not succeed.[45] However that may be, he lamented that some agencies "have failed to develop any significant rules at all."[46] He contended that "there must be rules of some kind, however fair or unfair they may be."[47] As we shall see, many judges agree with that conclusion and the all-important word "must." We begin with old doctrines and end with newer ones.

1. Administration Without Rules? — For some people, of course, it is entirely clear that agencies must be governed by rules.[48] Article 1,

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[39] FULLER, *supra* note 3, at 46.

[40] *Id.* at 47.

[41] *Id.* at 46.

[42] *Id.*

[43] *Id.*

[44] *See infra* pp. 1976–77.

[45] FULLER, *supra* note 3, at 46; *see also* Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 363 (1998) (involving an effort by an adjudicating agency to set out and apply rules). Though as discussed below, the Supreme Court found a kind of Fullerian violation in the particular case. *See infra* pp. 1942–43.

[46] FULLER, *supra* note 3, at 47.

[47] *Id.*

[48] *See, e.g.*, Gary Lawson, *Discretion as Delegation: The "Proper" Understanding of the Non-Delegation Doctrine*, 73 GEO. WASH. L. REV. 235, 266 (2005).

section 1 of the Constitution vests all legislative power in Congress,[49] and on one view, a grant of open-ended, rule-free authority is a violation of that provision.[50] Whenever Congress grants authority to agencies, it must cabin their discretion. The Supreme Court nominally agrees with this standard insofar as it states that any grant of authority must be accompanied by an "intelligible principle."[51] But even while reiterating this principle, the Court has repeatedly found broad grants of authority, arguably failing to create rules at all, to be sufficient to comply with this requirement.[52]

The nondelegation doctrine, as it is called, is rooted in the idea that Congress, with its distinctive form of accountability, must exercise its constitutional authority to make law, which requires limits on the discretion of those who exercise executive power.[53] That idea is not Fuller's. But in making arguments with strong Fullerian resonances, many defenders of the nondelegation doctrine emphasize what they see as its intimate connection with the rule of law.[54] In their view, the doctrine forbids situations in which people cannot know what the law is and in which agencies are allowed to proceed however they wish.[55] In a way, the nondelegation doctrine can be seen as a backdoor route toward avoidance of Fuller's first failure. The courts' reluctance to enforce the nondelegation doctrine is, on this view, a catastrophe from the standpoint of rule-of-law values and law's internal morality.

From that standpoint, the APA does not appear to offer much help.[56] Indeed, it seems to authorize agencies to avoid rules and to proceed in an ad hoc fashion, if that is what they want to do.[57] In the early decades of the modern administrative state, agencies typically proceeded not through rulemaking but through case-by-case adjudication, which is precisely what Fuller abhorred. For example, the Securities and

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[49] U.S. CONST. art. I, § 1.

[50] LAURENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW § 5-19, at 982 (3d ed. 2000).

[51] Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)).

[52] *See id.* at 474.

[53] For an argument that Congress does exactly that when it grants discretion, see Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1723 (2002).

[54] *See, e.g.*, Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 685–86 (1980) (Rehnquist, J., concurring in judgment).

[55] *See, e.g.*, Am. Trucking Ass'ns v. EPA, 175 F.3d 1027, 1034 (D.C. Cir. 1999) (per curiam), *aff'd in part*, *rev'd in part sub nom Whitman*, 531 U.S. 457.

[56] A valuable overview of agency use of rulemaking and adjudication under the APA is David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965).

[57] *See* 5 U.S.C. §§ 553–554, 556–557 (2012).

Exchange Commission[58] (SEC), the Federal Trade Commission,[59] and the National Labor Relations Board[60] (NLRB) did essentially no rulemaking; they developed policy through encounters with particular cases.[61] To be sure, it is possible, and it often happens, that agency judgments in such cases, no less than judicial judgments, will create a regime of rules. But at the time, it was common to object, Fuller-style, that agencies failed to do that, resulting in a serious problem for the rule of law.[62]

No provision of the APA squarely addresses the problem. If agencies want to go through rulemaking, they are entitled to do that.[63] If they prefer to proceed through adjudication, that approach is also available.[64] But through several different doctrinal routes, with ambiguous legal sources, lower courts have put serious pressure on the idea that agencies have license to avoid rules. One of the routes has proved to be a dead end (or so the Supreme Court has ruled).[65] The others have not lived up to what seemed their original promise, but they remain viable to some uncertain degree, notwithstanding the continuing absence of clear legal foundations.[66]

2. K.C. Davis's Proposal. — Some necessary background comes from the work of Professor Kenneth Culp Davis, who may well have been the

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[58] *See* Manuel F. Cohen & Joel J. Rabin, *Broker-Dealer Selling Practice Standards: The Importance of Administrative Adjudication in Their Development*, 29 LAW & CONTEMP. PROBS. 691, 699 (1964) (noting twenty-two rules issued by the Securities and Exchange Commission but denying that the Commission has "sought to develop a group of rules to comprehend all, or even most, fraudulent practices"); *id.* at 725 (observing that "adjudication seems to have been particularly appropriate and extremely important").

[59] Antonin Scalia, Vermont Yankee*: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 376 n.134 ("The FTC had not attempted to issue [a rule prohibiting unfair trade practices] until 1963." (citation omitted)).

[60] Cornelius J. Peck, *A Critique of the National Labor Relations Board's Performance in Policy Formulation: Adjudication and Rule-Making*, 117 U. PA. L. REV. 254, 261–62 (1968) ("[T]he [National Labor Relations] Board has failed to utilize its substantive rule-making powers formally, though I believe that upon a number of occasions it has in fact done so *sub rosa*, and hence improperly."). For a similar and more recent (and sympathetic) statement, see Joan Flynn, *The Costs and Benefits of "Hiding the Ball": NLRB Policymaking and the Failure of Judicial Review*, 75 B.U. L. REV. 387–93 (1995).

[61] The Federal Trade Commission was not thought to even enjoy rulemaking authority until 1973. *See* Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 673–74 (D.C. Cir. 1973).

[62] *See generally, e.g.*, Warren E. Baker, *Policy by Rule or* Ad Hoc *Approach — Which Should It Be?*, 22 LAW & CONTEMP. PROBS. 658 (1957) (noting a benefit of "rule-making" is that the policy is not "'sprung' upon the surprised party in a particular adjudicatory decision, but . . . made clear through prior rule-making proceedings," *id.* at 660); Shapiro, *supra* note 56 (noting that "observers from the 1930's to the present have argued that the rulemaking power has been inadequately used," *id.* at 922).

[63] *See* 5 U.S.C. § 553 (2012).

[64] *See id.* §§ 554, 556–557.

[65] *See infra* pp. 1940–41.

[66] *See infra* pp. 1938–40.

nation's most influential administrative law scholar in the period between 1950 and 1980. In 1969, Davis published a short essay called *A New Approach to Delegation*.[67] The essay sounded like Fuller's broader argument; it could easily be read as "applied Fuller."

Foreshadowing some contemporary complaints about the administrative state,[68] Davis's central claim was that the American legal system faced a serious problem, even a crisis, in the form of exercises of open-ended discretion. In his view, the administrative state suffers from one problem above all others: rule-free law and ad hoc judgment. He began boldly:

> The non-delegation doctrine is almost a complete failure. It has not prevented the delegation of legislative power. Nor has it accomplished its later purpose of assuring that delegated power will be guided by meaningful standards. More importantly, it has failed to provide needed protection against unnecessary and uncontrolled discretionary power. The time has come for the courts to acknowledge that the non-delegation doctrine is unsatisfactory and to invent better ways to protect against arbitrary administrative power.[69]

Davis wanted a kind of revolution, to be enforced by judges. Without referring to Fuller but apparently drawing on the idea of law's internal morality, he argued that courts should abandon the nondelegation doctrine and insist on "a much broader requirement, judicially enforced, that as far as is practicable administrators must structure their discretionary power through appropriate safeguards and must confine and guide their discretionary power through standards, principles, and rules."[70] In his view, courts should "protect private parties against injustice on account of unnecessary and uncontrolled discretionary power."[71]

A good way to do that would be to "require administrative standards whenever statutory standards are inadequate."[72] Notably, Davis did not specify the legal foundation for this requirement. He appeared to think that it could be imposed through a form of federal common law, which was consistent with his view of the topic in general.[73] Also notably, Davis wrote as if discretionary justice was axiomatically bad — as if his "much broader requirement" was self-evidently in the public interest.

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[67] Kenneth Culp Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713 (1969).

[68] *See* Christopher DeMuth, *Can the Administrative State Be Tamed?*, 8 J. LEGAL ANALYSIS 121, 121–22 (2016).

[69] Davis, *supra* note 67, at 713.

[70] *Id.*

[71] *Id.* at 725 (emphasis omitted).

[72] *Id.* at 729.

[73] *See* Kenneth Culp Davis, *Administrative Common Law and the* Vermont Yankee *Opinion*, 1980 UTAH L. REV. 3.

For him (as for many who have followed him[74]), the exercise of agency discretion was, or should be, the principal target of administrative law. We should note that this view is controversial. If the goal is to promote social welfare, discretion may be a problem, but on plausible assumptions, it might be a solution,[75] and in any case the more fundamental question is whether agencies are making welfare-promoting policy choices.[76] We shall return to these points. But there is no question that to lawyers and judges, Davis's claims had, and continue to have, a great deal of intuitive appeal, above all because they build on a commitment to the rule of law and law's internal morality.

3. Standards and Discretion in the D.C. Circuit. — Davis's argument found a sympathetic reader just two years later, in the form of Judge Leventhal, one of the most distinguished court of appeals judges of that period, sitting on a federal district court.[77] The case involved a constitutional attack on the statute that authorized President Nixon to establish a freeze on wages and prices.[78] The statute offered no rules or criteria by which to discipline the President's exercise of discretion. For that reason, it appeared to create a nondelegation problem. Acting as a district court judge, Judge Leventhal found sufficient constraints in the statutory context.[79] But in a section pointedly titled, "Need for ongoing administrative standards as avoiding undue breadth of executive authority,"[80] he introduced Davis's point and gave it an unambiguously Fullerian cast:

> Another feature that blunts the "blank check" rhetoric is the requirement that any action taken by the Executive under the law, subsequent to the freeze, must be in accordance with further standards as developed by the Executive. This requirement, *inherent in the Rule of Law and implicit in the Act*, means that however broad the discretion of the Executive at the outset, the standards once developed limit the latitude of subsequent executive action.[81]

Judge Leventhal added that "there is an on-going requirement of intelligible administrative policy that is corollary to and implementing of the legislature's ultimate standard and objective."[82] For our purposes, the most important words are "inherent in the Rule of Law and implicit

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[74] *See, e.g.*, Philip Hamburger, Chevron *Bias*, 84 GEO. WASH. L. REV. 1187 (2016).

[75] *See generally* PHILIP K. HOWARD, THE DEATH OF COMMON SENSE (1994) (arguing that modern laws and regulations are too rule-bound and promoting discretion as a solution).

[76] In this vein, see STEPHEN BREYER, REGULATION AND ITS REFORM (1982); and CASS R. SUNSTEIN, THE COST-BENEFIT REVOLUTION (forthcoming 2018).

[77] Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737 (D.D.C. 1971).

[78] *Id.* at 745.

[79] *Id.* at 757–58.

[80] *Id.* at 758.

[81] *Id.* (emphasis added).

[82] *Id.* at 759.

in the Act." Apart from constitutional provisions that may embody it, the Rule of Law (whether capitalized or not) is not, of course, enforceable as such, and Judge Leventhal made no claim that the Due Process Clause, or any provision of the Bill of Rights, requires the Executive to develop further standards and adhere to them. And as is often the case, the word "implicit" turns out to mean "not." Nothing in the underlying statute required the development of implementing standards.

Notwithstanding these concerns, Judge Leventhal's basic approach played a central role in several important decisions by the D.C. Circuit, and for a significant period, something like "applied Fuller" seemed to be the law of the land. A significant decision involved the constitutionality of a key provision of the Occupational Safety and Health Act,[83] which grants the Secretary of Labor the authority to issue regulations that are "reasonably necessary or appropriate to provide safe or healthful employment and places of employment."[84] Because of the provision's apparent open-endedness, the D.C. Circuit ruled that these words would violate the nondelegation doctrine unless the Department of Labor specified their meaning.[85] This was, of course, exactly what Davis sought, and it would be a sufficient cure for Fuller's objection to rule-free law. On remand, the Department did what the court demanded, clarifying how it would exercise its discretion and offering what it saw as sufficient discipline on its own future choices.[86] In the court's view, the constitutional problem was therefore solved, because the Department no longer operated in the absence of rules.[87]

A few years later, the same problem arose under a seemingly open-ended provision of the Clean Air Act.[88] The D.C. Circuit again responded by saying that the problem could be cured if the EPA disciplined itself through clear implementing rules.[89] In the court's words, in the face of an unconstitutional delegation of power, "our response is not to strike down the statute but to give the agency an opportunity to extract a determinate standard on its own."[90] But as for Davis's proposal, so for this idea: *What is the legal source*? By way of answer, the court directly invoked the nondelegation doctrine, urging, in Davis's footsteps, that if agencies produce intelligible principles, then some of

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[83] Pub. L. No. 91-956, 84 Stat. 1590 (codified as amended at 29 U.S.C. §§ 651–678 (2012)).

[84] 29 U.S.C. § 652(8); *id.* § 655.

[85] Int'l Union v. OSHA, 938 F.2d 1310, 1318, 1321 (D.C. Cir. 1991).

[86] Int'l Union v. OSHA, 37 F.3d 665, 667 (D.C. Cir. 1994).

[87] *Id.* at 668.

[88] Am. Trucking Ass'ns v. EPA, 175 F.3d 1027 (D.C. Cir. 1999) (per curiam), *aff'd in part*, *rev'd in part sub nom* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001).

[89] *Id.* at 1038.

[90] *Id.*

the core purposes of the doctrine will be fulfilled.[91] In that way, the court squarely linked the nondelegation doctrine with both Davis and Fuller.

On appeal, the Supreme Court was incredulous.[92] If there is a genuine nondelegation problem, it arises under Article I, section 1, because *Congress* has failed to provide an intelligible principle, and so the agency's approach is neither here nor there. "The idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us internally contradictory."[93]

With those words, the Court essentially destroyed the doctrinal development that Judge Leventhal inaugurated. But Fuller's concerns continue to play a significant role in other domains. With different names and different legal sources, his concerns (and Davis's as well) have continued to serve an important function in judicial oversight of the administrative state.

4. Vagueness. — Suppose that a statute makes it a crime for people to "loiter" and that the term is not clearly defined. There is a good chance that the statute will be struck down as void for vagueness.[94] Criminal statutes must provide people with fair notice and also discipline the discretion of the police. The void-for-vagueness doctrine can easily be seen as an embodiment of Fuller's emphasis on the "failure to achieve rules at all, so that every issue must be decided on an ad hoc basis."[95] Even more clearly, it reflects Fuller's concerns about "a failure to make rules understandable."[96] By definition, a vague law is not understandable. Both kinds of failure have played a significant role in the arc of administrative law.

It is true that insofar as we are speaking only of the criminal law, control of the administrative state is only intermittently involved. But in a series of important cases in the 1960s, most of which continue to be good law, federal courts began to extend the void-for-vagueness doctrine and to understand the Due Process Clause to require administrators to move in the direction marked out by Davis and Fuller.

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[91] *Id.* ("[Allowing an agency to extract a determinate standard] serves at least two of three basic rationales for the nondelegation doctrine. If the agency develops determinate, binding standards for itself, it is less likely to exercise the delegated authority arbitrarily. And such standards enhance the likelihood that meaningful judicial review will prove feasible." (citing Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737, 758–59 (D.D.C. 1971))).

[92] *Whitman*, 531 U.S. at 472–73.

[93] *Id.* at 473.

[94] Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972).

[95] FULLER, *supra* note 3, at 39.

[96] *Id.*

Hornsby v. Allen[97] involved an unsuccessful application to operate a retail liquor store in Atlanta, Georgia. A disappointed applicant objected that the licensing system was rule-free and that the authorities made decisions on an ad hoc basis.[98] In essence, the system was not one of law at all (in Fuller's sense). The court of appeals held that the system as alleged violated the Due Process Clause.[99] The key holding was that if "no ascertainable standards have been established by the Board of Aldermen by which an applicant can intelligently seek to qualify for a license, then the court must enjoin the denial of licenses under the prevailing system."[100] The court came close to saying that the system was unlawful because it suffered from "a failure to make rules understandable." It should be clear that this holding could have been explosive. It could have meant, and could mean, that any administrative agency, state or federal, violates the Due Process Clause if it does not act pursuant to "ascertainable standards." And if federal courts so held, they would have vindicated Fuller's principle.

In *Holmes v. New York City Housing Authority*,[101] a court of appeals moved in that direction, accepting the idea pressed by the *Hornsby* court in a very different context. During the relevant period, the New York City Housing Authority received 90,000 applications each year for public housing; it could select, on average, about 10,000.[102] Plaintiffs contended that they had filed applications and received no answer. More fundamentally, they added that applications were not processed "in accordance with ascertainable standards, or in any other reasonable and systematic manner."[103] In their view, that was a violation of the Due Process Clause.

In an unmistakably Fullerian opinion, the court agreed. Citing *Hornsby*, the court proclaimed: "It hardly need be said that the existence of an absolute and uncontrolled discretion in an agency of government vested with the administration of a vast program, such as public housing, would be an intolerable invitation to abuse."[104] It added that "due process requires that selections among applicants be made in accordance with 'ascertainable standards.'"[105] If *Holmes* and *Hornsby* are read together, they seem to accept Fuller's view of the internal morality of law,

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[97] 326 F.2d 605 (5th Cir. 1964).

[98] *Id.* at 607.

[99] *Id.* at 610, 612.

[100] *Id.* at 612.

[101] 398 F.2d 262 (2d Cir. 1968).

[102] *Id.* at 263.

[103] *Id.* at 264. Consider whether *Bush v. Gore*, 531 U.S. 98 (2000), might be best understood to rest on the concern that votes were not processed "in accordance with ascertainable standards, or in any other reasonable and systematic manner."

[104] *Holmes*, 398 F.2d at 265 (citing *Hornsby*, 326 F.2d at 609–10).

[105] *Id.* (quoting *Hornsby*, 326 F.2d at 612).

as channeled through Davis, and to ground that view, as Fuller and Davis did not, in the Due Process Clause. That view could easily be a foundation, even now, for full-bore attacks on the many domains of administration in which "ascertainable standards" cannot be found. Perhaps surprisingly, the results of those attacks are mixed. In domains that include licensing,[106] housing,[107] parole,[108] disability,[109] and assistance payments,[110] *Holmes* and *Hornsby* have borne some fruit. But in other cases, involving water quality,[111] academic tenure,[112] and agriculture,[113] due process challenges have been rejected.

Under modern doctrine, one prerequisite for a valid due process claim is that the plaintiff must have a protected liberty or property interest.[114] It would seem that statutes and regulations that lack ascertainable standards, and do not confer some kind of statutory entitlement, cannot violate the Due Process Clause: if plaintiffs do not have a protected liberty or property interest, they are unable to claim a violation of the clause.[115] And indeed, several cases reject generalization of the *Holmes* and *Hornsby* holdings on exactly that ground.[116] The Supreme Court has yet to explore the question.[117] There is no doubt that if taken broadly, the current holdings could be used to challenge numerous domains of regulatory practice.

Our goal here is not to pronounce on the appropriate reading of those holdings, or even on whether they are correct. The point is that *Holmes* and *Hornsby*, and those cases that follow them, are making a statement about the morality of administrative law — and working hard to invoke the Due Process Clause as the legal hook.

5. APA and Rules. — Might the APA help? Suppose that the administrative state must not fail "to make rules in the first place, ensuring that all issues are decided on a case-by-case basis."[118] Does the APA require agencies to use rulemaking rather than adjudication? In an

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106 *See, e.g.*, Jensen v. Adm'r of FAA, 641 F.2d 797, 799 (9th Cir. 1981), *vacated*, 680 F.2d 593 (9th Cir. 1982).

107 *See, e.g.*, Ressler v. Pierce, 692 F.2d 1212, 1214–16 (9th Cir. 1982).

108 *See, e.g.*, Franklin v. Shields, 569 F.2d 784, 789–90 (4th Cir. 1977) (en banc) (per curiam).

109 *See, e.g.*, Ginaitt v. Haronian, 806 F. Supp. 311, 314–19 (D.R.I. 1992).

110 *See, e.g.*, Carey v. Quern, 588 F.2d 230, 232–34 (7th Cir. 1978).

111 *See, e.g.*, City of Albuquerque v. Browner, 97 F.3d 415, 429 (10th Cir. 1996).

112 *See, e.g.*, San Filippo v. Bongiovanni, 961 F.2d 1125, 1134–36 (3d Cir. 1992).

113 *See, e.g.*, Bama Tomato Co. v. Dep't of Agric., 112 F.3d 1542, 1547–48 (11th Cir. 1997).

114 *Board of Regents v. Roth*, 408 U.S. 564 (1972), remains the foundational decision. We are briskly summarizing some complex doctrine here and not venturing into the complexities. For example, liberty interests may exist whether or not there is a statutory entitlement. *See id.* at 572.

115 *See* Perry v. Sindermann, 408 U.S. 593, 599–603 (1972).

116 *See, e.g.*, Hill v. Jackson, 64 F.3d 163, 170–71 (4th Cir. 1995).

117 For relevant discussion, see generally William Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445 (1977).

118 *See* FULLER, *supra* note 3, at 39.

early case, the Court seemed to suggest that it did, at least sometimes.[119] The case involved the NLRB, which has long made national labor relations policy not through rulemaking but through case-by-case adjudication. The NLRB has been fiercely criticized on exactly that ground, often with arguments that implicitly channel Fuller and Davis.[120] In the 1960s and 1970s, many agencies shifted to rulemaking as their preferred vehicle for policymaking. The NLRB was the most prominent exception.

Its recalcitrance came to a head in *NLRB v. Wyman-Gordon Co*.[121] The case involved the NLRB's order, in an adjudication, requiring Wyman-Gordon to provide a list of the names and addresses of its employees to unions seeking to organize them. The order came in turn from a previous decision, *Excelsior Underwear Inc.*[122] (a good name), in which the NLRB had established the relevant rule of law (through adjudication) but concluded that it should only be applied prospectively (so as to avoid unfairness).[123] In *Wyman-Gordon*, the NLRB applied the *Excelsior Underwear* order for the first time.[124]

The Supreme Court invalidated the NLRB's order on procedural grounds that seemed to channel Fuller.[125] The broadest reading of the ruling, supported by at least one separate opinion,[126] was that certain kinds of decisions with general effects must go through rulemaking; case-by-case decisions would be unlawful. The plurality opinion emphasized that the APA's rulemaking provisions, "which the Board would avoid, were designed to assure fairness and mature consideration of rules of general application."[127] As the plurality put it, those provisions "may not be avoided by the process of making rules in the course of adjudicatory proceedings."[128] In *Excelsior Underwear*, the agency created a rule, but it did so without using the APA's procedures for doing so. To this extent, the Court flirted with the idea that if an agency is making a sufficiently general policy, it must use rulemaking.

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[119] NLRB v. Wyman-Gordon Co., 394 U.S. 759, 764 (1969) (plurality opinion) ("The rule-making provisions of that Act . . . may not be avoided by the process of making rules in the course of adjudicatory proceedings.").

[120] The arguments are implicit insofar as they criticize avoidance of rulemaking, and reliance on adjudication, by reference to rule-of-law values. *See, e.g.*, Mark H. Grunewald, *The NLRB's First Rulemaking: An Exercise in Pragmatism*, 41 DUKE L.J. 274, 295 (1991); *see also* Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 163 (1985).

[121] 394 U.S. 759.

[122] 156 N.L.R.B. 1236 (1966).

[123] *Id.* at 1240 n.5, 1246.

[124] *Wyman-Gordon*, 394 U.S. at 766.

[125] *Id.* at 765.

[126] *Id.* at 775–80 (Douglas, J., dissenting).

[127] *Id.* at 764 (plurality opinion).

[128] *Id.*

A more plausible and much narrower reading of the ruling is that the problem in *Excelsior Underwear* was that the order was prospective only. On that view, agencies may proceed in an ad hoc fashion, and may make general policy through adjudication, but they must apply their orders to the particular parties. If they do not, they are engaged in rulemaking.

In *NLRB v. Bell Aerospace Co.*,[129] decided five years later, the Court clarified that the narrower reading was correct.[130] In its words, "the Board is not precluded from announcing new principles in an adjudicative proceeding," and "the choice between rulemaking and adjudication lies in the first instance within the Board's discretion."[131] But in pointing to the fact that the Board's decision, in the case itself, depended on particular circumstances, the Court simultaneously offered a warning: "[T]here may be situations where the Board's reliance on adjudication would amount to an abuse of discretion or a violation of the Act."[132] Those words could be taken to invite a Fullerian approach to agency choice of procedure: to the extent that agencies used adjudication to set out policies on a case-by-case basis, they would be abusing their discretion; broad policies must be set out through rulemaking.

The Court has not revisited the issue in decades, and *Bell Aerospace* is generally thought to give agencies a great deal of room to choose between rulemaking and adjudication.[133] But there are two important cautionary notes. First, the "abuse of discretion" language has proved significant in some cases, in which lower courts, invoking rule-of-law considerations, have said that if agencies are making general policy, they must use the APA's rulemaking provisions.[134] In such cases, courts have essentially held that for certain kinds of policymaking, going well beyond the particular facts, agencies must establish and act on the basis of rules; they may not proceed case by case.[135]

Second, Fuller's concerns played (we think) an unmistakable and prominent role in the Supreme Court's otherwise puzzling decision in *Allentown Mack Sale & Service, Inc. v. NLRB*.[136] The Court's central objection was that the NLRB was acting on an unduly ad hoc basis,

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129 416 U.S. 267 (1974).

130 *Id.* at 294.

131 *Id.*

132 *Id.*

133 *See, e.g.*, Nestle Dreyer's Ice Cream Co. v. NLRB, 821 F.3d 489, 501 (4th Cir. 2016) (citing *Bell Aerospace*, 416 U.S. at 294) ("Ordinarily, the Board may adopt new regulatory principles through adjudication rather than rulemaking.").

134 *See, e.g.*, Ford Motor Co. v. FTC, 673 F.2d 1008, 1010 (9th Cir. 1981).

135 *See, e.g.*, Jean v. Nelson, 711 F.2d 1455, 1476–77 (11th Cir. 1983), *vacated and rev'd on other grounds*, 727 F.2d 957 (11th Cir. 1984) (en banc), *aff'd*, 472 U.S. 846 (1985).

136 522 U.S. 359 (1998).

unconstrained by and indeed in violation of its own standards.[137] In fact, the NLRB failed to make rules, even though it purported to do so. It is safe to say that the NLRB's continuing failure to use rulemaking processes lay in the background of the Court's ruling.[138]

In *Allentown Mack*, the Court struck down the NLRB's decision to forbid an employer from withdrawing recognition of a union. Much of the opinion consisted of flyspecking the agency's factfinding,[139] in a way that seemed highly unusual for the Court, but the unmistakably Fullerian concern was that *the NLRB's articulated standard was not the standard that it was actually applying*. The articulated standard was that the employer must show a "good-faith reasonable doubt" that the union no longer had majority support.[140] The actual standard (according to the Court) was elimination of the "good-faith reasonable doubt" idea in favor of something close to a "strict head count."[141]

In essence, the Court complained of "a failure of congruence between the rules as announced and their actual administration" (Fuller's words),[142] objecting to a situation in which "the announced standard is not really the effective one" (the Court's words).[143] In a passage that Fuller would have celebrated, the Court said that "the Board must be required to apply in fact the clearly understood legal standards that it enunciates in principle."[144] The Court added: "It is hard to imagine a more violent breach of that requirement than applying a rule of primary conduct or a standard of proof which is in fact different from the rule or standard formally announced. And the consistent repetition of that breach can hardly mend it."[145]

In its finding of a "violent breach," the Court implicitly pointed to three of Fuller's principles. The first, of course, is the failure to make rules at all; rules that are violated as a matter of course are, arguably at least, not really rules at all. The second is a failure of transparency, in the sense that affected parties are not made aware of the rules with which they must comply. The third is a mismatch between rules as announced and rules as administered.

Allentown Mack looks like a mundane substantial evidence case, but it is far more ambitious than that. It is really a case about the rule of

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137 *Id.* at 372–79.

138 *Id.* at 374 ("The National Labor Relations Board, uniquely among major federal administrative agencies, has chosen to promulgate virtually all the legal rules in its field through adjudication rather than rulemaking.").

139 *See id.* at 368–72.

140 *Id.* at 361.

141 *Id.* at 372.

142 FULLER, *supra* note 3, at 39.

143 *Allentown*, 522 U.S. at 373 (emphases omitted).

144 *Id.* at 376.

145 *Id.* at 374.

law and what the Court saw as the internal morality of administrative law.

B. Retroactivity

Fuller was acutely concerned with an abuse of retroactivity, in the sense that people cannot rely on current rules and are under threat of change. In 1988, the Supreme Court announced a new canon of construction, forbidding administrative retroactivity unless Congress has explicitly authorized it.[146] Though the announcement came very late in the twentieth century, the Court purported to speak for a tradition and for the presumptive morality of administrative law.

The case, *Bowen v. Georgetown University Hospital*,[147] had a complex background, one that did not exactly provide fertile ground for the new canon. In accordance with statutory law, the Department of Health and Human Services (HHS) is authorized to establish limits on how much taxpayer money can be used to reimburse hospitals under the Medicare program.[148] In 1981, HHS promulgated a rule that specified such limits.[149] The rule did not go through notice and comment, and it was invalidated on that ground.[150] In 1984, HHS issued a procedurally valid rule, in which it reissued the 1981 rule and applied its limits retroactively to the interim years (and thus denying cost reimbursement to certain hospitals).[151] The hospitals objected to the retroactive application of the invalidated rule.[152]

At first glance, the objection is puzzling. The hospitals could not exactly claim unfair surprise. The original rule was issued in 1981. Nor did any source of law seem to forbid HHS from doing what it did. No one argued that HHS had violated its organic statute. An arbitrariness challenge would plainly fail. In the circumstances, there was nothing arbitrary about HHS's decision to reissue its 1981 rule in order to ensure that it was not paying out excessive sums by way of reimbursement.

The Court's opinion announced what it took to be a background principle, apparently reflecting part of the morality of administrative law: "Retroactivity is not favored in the law."[153] With that principle in mind, the Court announced that legislation and regulations "will not be construed to have retroactive effect unless their language requires

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146 Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988).
147 488 U.S. 204.
148 *Id.* at 205–06.
149 *Id.* at 206.
150 *Id.* at 206–07.
151 *Id.* at 207.
152 *Id.*
153 *Id.* at 208.

this result."[154] For that reason, a statutory grant of rulemaking authority would not be taken to give the agency "the power to promulgate the retroactive rules unless that power is conveyed by Congress in express terms."[155] In this case, there was no such express grant, and so the agency's decision was unlawful. The basic idea is simple: unless Congress has plainly authorized agencies to apply their rules retroactively, they will not have that power.

Note that the antiretroactivity canon was, and is, in serious tension with the *Chevron* principle, which requires courts to defer to reasonable agency interpretations of ambiguous statutes.[156] At first glance, *Chevron* applies with full force to the retroactivity question. *Chevron* could easily be taken to suggest that, subject to the constraints of reasonableness, it is up to agencies to decide whether the balance of considerations justifies retroactive application. *Bowen* would seem to be a prime situation for invocation of *Chevron*. Nonetheless, the Court made it plain that the antiretroactivity canon trumps *Chevron*.[157] Consistent with the perceived morality of administrative law, the central point of *Bowen* is to restrict agency authority to apply rules retroactively and to require express congressional authorization for such applications. And because Congress will rarely decide, in terms, to confer that authority on agencies, *Bowen* is effectively a flat ban on retroactivity, at least most of the time.

The Court was unanimous in its conclusion. But Justice Scalia offered a quite different argument on behalf of that conclusion.[158] In his view, there was no need to make up a new canon, for the APA explicitly prohibits retroactive rulemaking. It does so in its very definition of a "rule," which is "the whole or a part of an agency statement of general or particular applicability and future effect."[159] Justice Scalia put the words "future effect" in italics, to underline his view that "rules have legal consequences only for the future."[160] Parsing the difference between orders, which emerge from adjudications, and rules, he urged that there "is really no alternative except the obvious meaning, that a rule is a statement that has legal consequences only for the future."[161] And in support of this reading, he pointed to the 1947 Attorney General's

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154 *Id.* (first citing Greene v. United States, 376 U.S. 149, 160 (1964); then citing Claridge Apartments Co. v. Comm'r, 323 U.S. 141, 164 (1944); then citing Miller v. United States, 294 U.S. 435, 439 (1935); and then citing United States v. Magnolia Petroleum Co., 276 U.S. 160, 162–63 (1928)).

155 *Id.* (citing Brimstone R.R. & Canal Co. v. United States, 276 U.S. 104, 122 (1928)).

156 Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

157 *Bowen*, 488 U.S. at 212–13.

158 *Id.* at 216 (Scalia, J., concurring).

159 5 U.S.C. § 551(4) (2012).

160 *Bowen*, 488 U.S. at 216 (Scalia, J., concurring).

161 *Id.* at 217.

Manual on the Administrative Procedure Act, which states that a rule "operates in the future."[162]

Justice Scalia's separate opinion was characteristic; he was skeptical about judicial invention of new canons. But his reading of the APA is hardly inevitable.[163] To make sense of it, we might have to speculate that it was infused by the same rule-of-law concerns that animated the majority opinion. The rule at issue in *Bowen* certainly had "future effect." It also had retroactive effect. The APA does not define a rule as something that has *exclusive* future effect. A mere definition of a rule — as an agency statement of general or particular applicability (fairly broad territory!) and future effect — is a singularly odd way of imposing a substantive prohibition on agencies from imposing their rules retroactively, even when they have excellent reason to do so.

It is more natural, and more consistent with contextual evidence, to understand the definition as an effort to distinguish rules from orders, which come out of adjudications. To be sure, orders almost always have retroactive effect, in the sense that they generally apply to the parties, even if the rule of law was not entirely clear in advance. But note that orders also have future effect, in the sense that they may supply binding precedents, and even rules of law, that govern private conduct, and no one thinks that the APA definitions raise questions about the "future effect" of orders. In short, it is difficult to read the APA definitions to justify the conclusion that agencies lack the authority to apply their rules retroactively.

Bowen is best understood as a response to the internal morality of administrative law. That is how the majority opinion is written. Characterized this way, it is quite precise and a qualified version of the bolder idea that Fuller had in mind: agencies need clear legislative authorization in order to apply their rules retroactively. If Congress wants to empower them to do so, it certainly can, by speaking with sufficient clarity. To that extent, administrative law's internal morality, as *Bowen* understands it, imposes no constraints on the national legislature. It is designed specifically for the administrative state.

Predictably, *Bowen* has produced a great deal of confusion within the lower courts.[164] Because Congress rarely authorizes retroactivity, agencies must operate within *Bowen*'s constraints. But what are those constraints? In imaginable cases, the answer is obvious. Funding agencies may not impose ex post reimbursement rules on recipients that acted pursuant to different rules; the Occupational Safety and Health Administration may not impose penalties on employers for violating, in

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[162] *Id.* at 219 (quoting U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 14 (1947)).

[163] *See* Frederick Schauer, *A Brief Note on the Logic of Rules, with Special Reference to* Bowen v. Georgetown University Hospital, 42 ADMIN. L. REV. 447, 454 (1990).

[164] *Compare, e.g.*, Covey v. Hollydale Mobilehome Estates, 125 F.3d 1281 (9th Cir. 1997), *with* Serv. Emps. Int'l Union, Local 102 v. County of San Diego, 60 F.3d 1346, 1353 (9th Cir. 1995).

2014, safety rules that were issued in 2015; the Department of the Interior may not sanction oil companies for failing to comply with rules that were not in effect when their allegedly unlawful conduct occurred. But many cases are much harder.

Suppose that the Department of State issues visas to certain foreigners, stating that the visas are indefinite. Suppose that the Department changes its mind and states that the relevant visa holders must reapply and meet certain novel requirements. Is that unlawful? Or suppose that the Department of Transportation grants licenses to certain people to be truck drivers, authorizing them to transport hazardous materials, and then issues a rule, stating that such licenses will be withdrawn from drivers who have been convicted of a crime. Does that violate *Bowen*?

Courts have struggled with such questions.[165] On one formulation, there is a large difference between (1) a rule that "impos[es] new duties with respect to transactions already completed"[166] or that impairs rights possessed when people acted (prohibited by *Bowen*) and (2) a rule that applies to ongoing conduct initiated before the regulation was issued or that "upsets expectations based in prior law"[167] (not prohibited by *Bowen*). On another formulation, there is a large difference between (1) "a rule that imposes new sanctions on past conduct, which is . . . invalid unless explicitly authorized" and (2) "one that merely 'upsets expectations,' which is secondarily retroactive and invalid only if arbitrary and capricious."[168] These formulations, whatever their precise scope, essentially attempt to implement one of Fuller's principles, which now stands as a defining part of contemporary administrative law.

C. Reliance and Consistency

Fuller contended that a purported legal system may fail to qualify as such as a result of "introducing such frequent changes in the rules that the subject cannot orient his action by them."[169] With a point of that kind in mind, administrative law has long been concerned with the consistency, over time, of agency decisionmaking, both in rulemaking and in adjudication.[170] A closely related concern involves reliance by regulated parties, including but not limited to economic actors who must plan long-term investments or other projects in a regulatory environ-

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165 *See* Landgraf v. USI Film Prods., 511 U.S. 244, 268–69 (1994).

166 *Id.* at 280.

167 *Id.* at 269.

168 Nat'l Petrochemical & Refiners Ass'n v. EPA, 630 F.3d 145, 159 (D.C. Cir. 2010) (quoting Nat'l Cable & Telecomms. Ass'n v. FCC, 567 F.3d 659, 670 (D.C. Cir. 2009)).

169 FULLER, *supra* note 3, at 39.

170 *See, e.g.*, Ariz. Grocery Co. v. Atchison, Topeka & Santa Fe Ry. Co., 284 U.S. 370, 389 (1932); Shaw's Supermarkets, Inc. v. NLRB, 884 F.2d 34, 36–37 (1st Cir. 1989).

ment. Although consistency has value even apart from reliance interests — a measure of consistency in the carrying out of plans over time is arguably constitutive of rationality — as a practical matter, protecting justified reliance is a core aim of administrative law doctrines that attempt to promote consistency. Consistent with Fuller's own discussion,[171] we will treat the two ideas together.

1. Auer *Deference and* Skidmore *Deference.* — Let us begin in a slightly unusual place, with so-called *Auer* deference to agency interpretations of their own regulations. *Auer* has been the site for a great deal of opposition and contest in recent years, and skeptics have objected to the underlying rationale of the rulings that preceded and gave rise to it.[172] Some Justices and commentators have called for abolishing *Auer* altogether.[173] However, in *Perez v. Mortgage Bankers Ass'n*,[174] six Justices — including the Chief Justice and Justice Kennedy — instead laid out a set of constraints on *Auer*, prominently including an emphasis on consistency:

> Even in cases where an agency's interpretation receives *Auer* deference, however, it is the court that ultimately decides whether a given regulation means what the agency says. Moreover, *Auer* deference is not an inexorable command in all cases. See *Christopher v. SmithKline Beecham Corp.*, 567 U.S. [142, 155] (2012) (*Auer* deference is inappropriate "when the agency's interpretation is plainly erroneous or inconsistent with the regulation" or "when there is reason to suspect that the agency's interpretation does not reflect the agency's fair and considered judgment" (internal quotation marks omitted)); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 . . . (1994) ("[A]n agency's interpretation of a . . . regulation that conflicts with a prior interpretation is entitled to considerably less deference than a consistently held agency view" (internal quotation marks omitted)).[175]

Here the Court offers three important constraints on *Auer*: (1) plain inconsistency between the regulation and the agency's interpretation — itself a question for the court; (2) lack of "fair and considered judgment"[176] by the agency;[177] and (3) inconsistent interpretations over time,

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171 *See* FULLER, *supra* note 3, at 80 (linking the concern about rapid changes in the law with the concern about retroactivity).

172 *See, e.g.*, Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1210 (2015) (Alito, J., concurring in part and concurring in the judgment); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 619–31 (1996).

173 *Mortg. Bankers*, 135 S. Ct. at 1213 (Scalia, J., concurring in the judgment); *see id.* at 1213–14 (Thomas, J., concurring in the judgment); Kevin O. Leske, *A Rock Unturned: Justice Scalia's (Unfinished) Crusade Against the* Seminole Rock *Deference Doctrine*, 69 ADMIN. L. REV. 1, 30–32 (2017).

174 135 S. Ct. 1199.

175 *Id.* at 1208 n.4.

176 *Id.*

177 Possible examples might include (1) situations in which the relevant interpretation is offered only by a local agency, *see* VERMEULE, *supra* note 22, at 2; *cf.* David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 204 ("We contend that the [*Chevron*]

which are entitled to "considerably less deference"[178] than a consistently held agency view.

In *Mortgage Bankers*, the Court did not explain why, exactly, inconsistent interpretations over time are especially problematic in an *Auer* setting.[179] (As we will see, the official view in the related setting of *Chevron* deference is that inconsistency of agency interpretation over time is not a problem and is indeed entirely compatible with the rationales for *Chevron* deference.[180]) In general, three reasons are possible: *arbitrariness*, *vagueness*, and *reliance*.

First, constantly shifting interpretations suggest a kind of willful arbitrariness, in turn raising the possibility that agency decisions are being driven by shifting circumstances and political opportunism rather than enduring views about policy.[181] This concern is enhanced in an *Auer* setting, given the relatively low costs of adjusting interpretations over time, without going through the notice-and-comment process. Second, rapidly changing rules are in a sense just as unclear as rules that are intrinsically vague or ambiguous. No matter how specific the rule, if it changes minute by minute, the costs to regulated entities of knowing their rights and duties become prohibitive, just as if an unchanging regulation were hopelessly opaque. Recall here Fuller's concern about "introducing such frequent changes in the rules that the subject cannot orient his action by them."[182]

Third, where economic planning or other reliance interests are involved, a shifting regulatory landscape raises the question whether the law should place the burden of anticipating the change on regulated

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deference question should turn on . . . the position in the agency hierarchy of the person assuming responsibility for the administrative decision."), or is not the central command given by Congress; and (2) situations in which the interpretation is offered only by agency counsel in litigation, rather than by agency policymakers during prelitigation proceedings. The latter possibility, if it becomes clearly developed in the case law, would overturn the Court's occasional, relatively untheorized practice of deferring to agency interpretations contained in amicus briefs and other litigation materials. *See, e.g.*, Chase Bank USA, N.A. v. McCoy, 562 U.S. 195, 203 (2011); Auer v. Robbins, 519 U.S. 452, 461 (1997).

178 *Mortg. Bankers*, 135 S. Ct. at 1208 n.4.

179 Nor does the underlying precedent. *Mortgage Bankers* here followed *Thomas Jefferson University v. Shalala*, 512 U.S. 504 (1994), which in turn followed *INS v. Cardozo-Fonseca*, 480 U.S. 421 (1987), which in turn followed *Watt v. Alaska*, 451 U.S. 259 (1981), which in turn followed *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). Remarkably, nowhere in this line of precedent is any rationale or legal basis offered by the majority for the principle that inconsistent agency interpretations of regulations deserve less deference. This suggests that judges are here responding to a kind of intuition about administrative law's inner morality.

180 Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1002 (2005).

181 Here the debates over the role of political considerations in arbitrariness review become relevant. *Compare* Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2 (2009), *with* Mark Seidenfeld, *The Irrelevance of Politics for Arbitrary and Capricious Review*, 90 WASH. U. L. REV. 141 (2012).

182 FULLER, *supra* note 3, at 39.

firms and other parties. And indeed, the Court has explicitly held that when an agency's interpretation defeats reliance interests, imposing significant costs on the private sector, *Auer* deference is inapplicable: "To defer to the agency's interpretation in this circumstance would seriously undermine the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires.' Indeed, it would result in precisely the kind of 'unfair surprise' against which our cases have long warned."[183] It is no stretch to say that Fuller's claims about the morality of law are being brought to bear here.

There is a substantial literature on these questions in law and economics.[184] For our purposes, all we need note is that disappointment of reliance interests smacks of retroactivity, and the banality that under certain conditions, sheer administrative irresolution and inconsistency can make all worse off than would be the case even if the agency consistently adhered to a suboptimal rule.

If *Auer* deference doesn't apply to agency interpretations, what does? The fallback position is *Skidmore* deference, which is taken to be persuasive rather than authoritative deference.[185] Under *Skidmore v. Swift & Co.*,[186] courts examine "the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[187] On the important dimension of consistency, then, the choice between *Auer* and *Skidmore* is doctrinally irrelevant; inconsistency counts against the agency under both approaches. The choice between the two is, in this regard, a low-stakes affair after *Mortgage Bankers*, which clarified that a supermajority of the current Court is unlikely to overrule *Auer* deference but is willing to hedge it around with constraints, including a preference for consistency and protection of reliance interests.

2. Arbitrariness Review. — In the litigation that produced *Mortgage Bankers*, the lower court — the D.C. Circuit — had applied its own longstanding doctrine, established by *Paralyzed Veterans of America v. D.C. Arena L.P.*,[188] which held that once an agency issues a definitive interpretation of its own regulation, any new interpretation would have

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183 Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 156 (2012) (alteration in original) (first quoting Gates & Fox Co. v. Occupational Safety & Health Review Comm'n, 790 F.2d 154, 156 (D.C. Cir. 1986); and then quoting Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 170 (2007)).

184 *See, e.g.*, Saul Levmore, *Changes, Anticipations, and Reparations*, 99 COLUM. L. REV. 1657 (1999).

185 Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944).

186 323 U.S. 134.

187 *Id.* at 140.

188 117 F.3d 579 (D.C. Cir. 1997).

to go through the notice-and-comment process.[189] The Court quite rightly rejected this innovation out of hand, observing that it was inconsistent with the express text of the Administrative Procedure Act, which says that "interpretative rules" (evidently including those that are new or amended) are exempt from the notice-and-comment process.[190] Yet the Court was also clear that the D.C. Circuit's approach responded to real concerns, principally reliance.[191] It was just that the D.C. Circuit had chosen an impermissible doctrinal means for articulating those concerns.[192]

What were the right means? In addition to citing inconsistency over time as a reason to reduce the level of *Auer* deference, the *Mortgage Bankers* Court cited two other considerations. First, Congress itself might by statute shape and limit agency authority to change interpretations over time.[193] We will return to this class of issues in Part II, when we ask whether administrative law's internal morality necessarily implies that courts should enforce their own views of what that morality entails upon agencies or should instead leave the assessment of what legal morality requires to Congress and the agencies themselves.[194]

Second, the Court noted that arbitrary and capricious review itself was available to check inconsistent agency behavior over time.[195] In *FCC v. Fox Television Stations, Inc.*,[196] Justice Scalia wrote for the Court to reject the claim that agencies must supply a rationale for a new policy that shows it to be better than the agency's old policy.[197] Rather, the agency need only show that the new policy is permissible under the statute and is itself supported by valid reasons.[198] Crucially, however, Justice Scalia warned that agencies may not "depart from a prior policy *sub silentio* or simply disregard rules that are still on the books," and detailed some cases in which heightened justification would be required: (1) where the agency's "new policy rests upon factual findings that contradict those which underlay its prior policy;" and (2) "when its prior policy has engendered serious reliance interests that must be taken into

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189 *See id.* at 586.

190 *See* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1203–04 (2015). *Compare* 5 U.S.C. § 553(b)(3)(A) (2012) (exempting "interpretative rules" from notice-and-comment "rule making"), *with id.* § 551(5) (defining "rule making" as an "agency process for *formulating*, *amending*, or repealing a rule" (emphasis added)).

191 *Mortg. Bankers*, 135 S. Ct. at 1209.

192 *Id.*

193 *Id.*

194 *See infra* section II.C.3, pp. 1975–77.

195 *Mortg. Bankers*, 135 S. Ct. at 1209.

196 556 U.S. 502 (2009).

197 *Id.* at 515.

198 *Id.*

account."[199] The disapproval of "sub silentio" departures can be linked with *Allentown Mack* and in particular with a Fullerian insistence on transparency, as well as with protection of reasonable expectations.

Justice Kennedy's concurrence[200] and Justice Breyer's dissent[201] also emphasized reliance interests. The importance of reliance interests, although arguably dictum in *Fox*, soon became holding. In a subsequent opinion, *Encino Motorcars, LLC v. Navarro*,[202] Justice Kennedy wrote for the Court and overturned an agency action for inadequately explaining the agency's departure from the prior rule, noting the new rule's harm to reliance interests.[203] Two Justices dissented, but on other grounds.[204]

There thus appears to be broad consensus on the Court for the proposition that arbitrariness review should impose a heightened burden of justification on agencies when serious reliance interests are at stake — both in adjudication and rulemaking. Although *Fox* happened to involve agency adjudication, the Court's reasoning was not limited to that context;[205] *Smiley v. Citibank*,[206] another Justice Scalia opinion cited in *Fox*, invoked the same principle in the context of a rulemaking,[207] albeit in dictum; and *Encino*, in which the reliance issue was holding rather than dictum, involved a rulemaking.[208] It is thus fair to take it as established doctrine that agencies must account for serious reliance interests to survive arbitrariness review, whatever the agency's choice of policymaking form.

Interestingly, however, the full legal basis for the principle is not spelled out in any of the cases. We can certainly imagine a counterfactual, but not remote, legal system in which reliance interests are *not* taken to demand heightened justification from agencies. The template for this approach would be the first part of *Fox*, in which Justice Scalia, for the Court, denied that a change in policies generally demands more justification than would a new policy adopted on a blank slate.[209] On this approach, so long as agencies offer an intrinsically adequate justification for the new policy, reliance interests would be neither here nor

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199 *Id.* (first citing Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 742 (1996); and then citing United States v. Nixon, 418 U.S. 683, 696 (1974)).

200 *Id.* at 536 (Kennedy, J., concurring in part and concurring in the judgment).

201 *Id.* at 549 (Breyer, J., dissenting).

202 136 S. Ct. 2117 (2016).

203 *Id.* at 2126.

204 *Id.* at 2129–31 (Thomas, J., dissenting).

205 *See Fox*, 556 U.S. at 515.

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

207 *Id.* at 742.

208 *Encino*, 136 S. Ct. at 2126.

209 556 U.S. at 513–15. Under current doctrine, this is still true where there is no reliance issue and no other exception applies. *See Encino*, 136 S. Ct. at 2128 (Ginsburg, J., concurring); *Fox*, 556 U.S. at 514.

there, and regulated parties would have the full burden of anticipating and adjusting to regulatory change. Indeed, to the extent that regulated parties are best positioned to bear those costs, some law-and-economics approaches would favor such a regime.[210]

We certainly do not mean to say that such a regime would be superior to our own. Our point is that no amount of repeating the phrase "arbitrary and capricious" rules out such a regime. The extant positive legal texts, such as the APA and the Constitution, do not clearly settle the issue one way or another, and judges have done surprisingly little to spell out their intuitions in this regard. The judges are here best understood to be relying on unarticulated Fullerian intuitions about the internal morality of administrative law, and in particular his concern about "frequent changes in the rules [so] that the subject cannot orient his action by them."[211] Whether these intuitions are correct or incorrect, understanding the doctrine in this way at least puts it in its best light.

3. Chevron *Deference.* — So far, we have seen that, under current doctrine, the Court takes account of consistency and reliance both in adjusting the degree of *Auer* deference and in adjusting the demands of arbitrariness review. The picture with respect to *Chevron* deference is different — although perhaps less different than recent cases suggest. Here the Fullerian approach is in tension with current doctrine yet can be taken as supporting an older approach and as explaining actual practice.

Deference to administrative agencies on questions of law long predates *Chevron*. Indeed, precursors have been identified going back to the early twentieth century and even beyond (consider Lord Coke's frustrated outburst, in a speech in Parliament in 1628, that "in a doubtful thing, interpretation goes always for the king").[212] For present purposes, the important thing is that the line of case law after World War II that emphasized deference to agencies on questions of law sometimes adverted to agency consistency as a reason for deference,[213] although that view was itself inconsistent. This preference for consistency was usually left without much of a theoretical basis. The most explicit rationale was the intentionalist or originalist idea that if an agency adopted an interpretation soon after a new statute was enacted and adhered consistently to that interpretation over time, it most likely captured the intentions of the enacting legislature.[214]

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[210] *See, e.g.*, Saul Levmore, *The Case for Retroactive Taxation*, 22 J. LEGAL STUD. 265 (1993).

[211] FULLER, *supra* note 3, at 39.

[212] ADAM TOMKINS, OUR REPUBLICAN CONSTITUTION 87 (2005).

[213] In this respect, *Skidmore* was tracking broader practice in referring to "consistency with earlier and later pronouncements." 323 U.S. 134, 140 (1944).

[214] *See* Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 49–50 (2d Cir. 1976).

After *Chevron* was decided in 1984,[215] however, the doctrinal status of the preference for consistent agency interpretation was unclear. The major rationales for *Chevron*, expertise and political accountability,[216] do not obviously make consistency valuable or even relevant. Indeed, *Chevron* itself involved inconsistency, in the form of a sudden shift in the interpretation of "source" from the Carter Administration by the Reagan Administration.[217] Upholding that shift, the Court did not seem to think that the inconsistency mattered at all.[218]

If we emphasize agency expertise, a preference for consistency might seem to make sense, if it suggests an enduring technocratic consensus. But that preference might also turn out to be senseless, if it makes it harder for experts to update the agency's position in the face of new knowledge and changing circumstances. Political accountability even suggests that a preference for consistency is affirmatively a bad idea. The whole point of political accountability is to allow new policy directions as presidential administrations come and go. In the case law on arbitrariness review, political accountability has typically been cited as a reason to allow agencies to switch their policies over time.[219]

Later *Chevron* cases expressly abandoned the preference for consistency. Nominally, the current law is that agency consistency is neither here nor there for purposes of *Chevron* deference.[220] In *Smiley*, in 1996, Justice Scalia wrote for the Court that inconsistency does not remove an agency's entitlement to *Chevron* deference that would otherwise exist, observing that "the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency."[221] In 2006, Justice Thomas's important opinion in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*[222] confirmed and amplified this point. Observing that *Chevron* itself deferred to a recent change in agency policy, the Court made it explicit that "[a]gency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework. Unexplained inconsistency is, at most, a reason for holding an interpretation

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

216 *Id.* at 865 ("Judges are not experts in the field, and are not part of either political branch of the Government.").

217 *See id.* at 857–58.

218 *Id.* at 866. Writing not long after *Chevron*, Justice Scalia squarely addressed the issue and said that inconsistency was no longer important. *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517.

219 *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part) ("A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations.").

220 *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005).

221 517 U.S. 735, 742 (1996).

222 545 U.S. 967.

to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act."[223]

At the level of theory, the current position makes a great deal of sense. An important consideration pulls in the opposite direction, however: actual judicial behavior.[224] Although no subsequent case has denied the rule expressly laid out in *Brand X*, federal court opinions have occasionally adverted to consistency as a *Chevron* factor, counting in favor of deference — and some of these opinions come from the Supreme Court.[225] This sort of unexplained inconsistency about consistency blurs the nominal rules. At the level of large-N research, recent work by Professors Chris Walker and Kent Barnett shows that judges in fact tend to defer more heavily to consistent agency interpretations:

> [O]nce *Chevron* applied, interpretive duration seems to matter, although the nature of that relationship is unclear. Long-standing interpretations prevailed 87.6% of the time, approximately thirteen and fourteen percentage points more often than new interpretations and those of unclear duration, respectively, and twenty-two percentage points more often than evolving interpretations. Accounting for an interpretation's longevity in the deference process, despite seeming contrary to *Chevron* itself, would be consistent with courts thinking of deference on a sliding scale . . . .[226]

The interesting point here is the discrepancy between the law on the books and the law in action. In the abstract, many explanations are possible. The Barnett/Walker dataset begins in 2003 and ends in 2013,[227] after *Smiley* but spanning the *Brand X* pronouncement. Perhaps the latter rule failed to take hold during a part of this period; every Supreme Court decision influences the legal system only after a lag. Another possibility is that judges educated and trained in an earlier era, before *Brand X* rejected any role for consistency under *Chevron*, are applying consistency as a real factor despite the nominal rules. But we suggest a different sort of explanation: *Brand X*'s approach may simply be at odds with Fullerian intuitions about consistency over time as a component of law's intrinsic morality, intuitions that pull at judges even when the nominal rules are otherwise.

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[223] *Id.* at 981.

[224] *See* Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 64–66 (2017).

[225] *See, e.g.*, Cuozzo Speed Techs., LLC v. Lee, 136 S. Ct. 2131, 2145 (2016) (referring to the Patent Office's longstanding use of a certain interpretation as a factor supporting its reasonableness under *Chevron* step two). To be fair, if one believes — as many do — that *Chevron* step two is best understood as arbitrariness review by another name, then this reference makes doctrinal sense; we have seen that consistency is a valid consideration under arbitrariness review. But that's the point: *Brand X* notwithstanding, the Court just isn't entirely clear or consistent about the role of consistency under *Chevron*.

[226] Barnett & Walker, *supra* note 224, at 65.

[227] *Id.* at 5.

D. "Agencies Must Follow Their Own Rules"

One of the most time-honored principles in all of administrative law requires agencies to follow their own regulations. Sometimes called the *Arizona Grocery*[228] principle (and we shall adopt that term), and sometimes called the *Accardi* principle after *United States ex rel. Accardi v. Shaughnessy*,[229] this idea imposes significant constraints on agency action. It is foundational to contemporary restrictions on the discretion of the administrative state. Remarkably, the Supreme Court has never clarified its legal sources, and it is not clear that it can claim any. The *Arizona Grocery* principle seems to be rooted in ambient thinking about the internal morality of administrative law, as captured in Fuller's eighth principle, which forbids "a failure of congruence between the rules as announced and their actual administration."[230] It is easy to see *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Railway Co.*[231] as a straightforward effort to embody Fuller's principle.

To appreciate the breadth of the principle, suppose that, by rule, the Food and Drug Administration has informed certain categories of farmers that they are exempt from food safety regulations — but that, alarmed by the resulting health risks, the Agency initiates proceedings against them. Or suppose that the Department of Justice issues a rule stating that if employers engage in specified actions designed to promote building access, they will be found in compliance with the Americans with Disabilities Act (ADA) — but that after investigating the particular circumstances, the Department concludes that one employer, who engaged in that specified action, did not do enough to promote building access, and undertakes enforcement action under the ADA. Or suppose that by rule, the Attorney General says that a special prosecutor, investigating White House officials, can be discharged only for "extraordinary improprieties" — but that, under order from the White House itself, the Attorney General discharges a special prosecutor, believing that he has cause to do so, even though no gross improprieties can be identified.[232]

In all of these cases, the *Arizona Grocery* principle means that agency officials would be bound by their rules — and therefore lose in court. In a prominent decision during the Watergate era, a lower court invoked the principle to rule that acting Attorney General Robert Bork could not lawfully fire Special Prosecutor Archibald Cox — because Department

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[228] *See* Ariz. Grocery Co. v. Atchison, Topeka & Santa Fe Ry. Co., 284 U.S. 370 (1932).

[229] 347 U.S. 260 (1954); *see* Thomas W. Merrill, *The* Accardi *Principle*, 74 GEO. WASH. L. REV. 569, 569 (2006).

[230] FULLER, *supra* note 3, at 39.

[231] 284 U.S. 370.

[232] *See* Nader v. Bork, 366 F. Supp. 104, 107 (D.D.C. 1973).

of Justice regulations gave Cox a measure of independence, and those regulations were binding unless and until they were changed.[233]

In *Arizona Grocery* itself, the Interstate Commerce Commission determined, through rate prescription orders in 1921, the maximum permissible rate for shipping sugar from California to Arizona: 96.5 cents per 100 pounds.[234] In a 1925 adjudication, the Agency lowered the rate to 73 cents per 100 pounds and awarded reparations, reflecting the difference between 73 cents and the actual charges over the preceding years.[235] Sounding very much like Fuller, the Supreme Court struck down the latter ruling. It held that so long as the rate prescription order was on the books, the Agency "may not in a subsequent proceeding, acting in its quasi-judicial capacity, ignore its own pronouncement promulgated in its quasi-legislative capacity and retroactively repeal its own enactment as to the reasonableness of the rate it has prescribed."[236]

Because of the ambiguities created by those "quasis," *Arizona Grocery* was not exactly a clean reflection of the *Arizona Grocery* principle; *Accardi* was much simpler.[237] The case involved an effort to deport Joseph Accardi, an Italian national who had entered the United States unlawfully.[238] Accardi did not deny that he was deportable, but he asked the Attorney General to exercise his statutory discretion to suspend deportation.[239] The Attorney General refused, announcing at a press conference that he would deport a list of "unsavory characters."[240] Accardi's name was on that list, which was then distributed to the Board of Immigration Appeals (BIA), which promptly affirmed the denial of suspension of deportation.[241]

The Supreme Court ruled that — assuming Accardi could prove his allegations — the Attorney General had acted unlawfully, because he had violated his own regulations.[242] Those regulations specifically outlined the procedures to be used for processing petitions to suspend deportation. They directed the BIA to "exercise such discretion and power conferred upon the Attorney General by law,"[243] which required the BIA to use its own "understanding and conscience,"[244] which meant

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[233] *Id.* at 108.
[234] *Arizona Grocery*, 284 U.S. at 381.
[235] *Id.* at 382, 390.
[236] *Id.* at 389.
[237] United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260 (1954).
[238] *Id.* at 262.
[239] *Id.* at 262–63.
[240] *Id.* at 263.
[241] *Id.* at 263–64.
[242] *See id.* at 267–68.
[243] *Id.* at 266 (quoting 9 C.F.R. § 90.3 (1949)).
[244] *Id.* at 267.

in turn that the Attorney General could not bypass the BIA or direct its decisions.

Under the regulations, the BIA was made an independent entity, and the Attorney General would have to comply with that mandate.[245] His apparent order to the BIA, requiring it to deport those on the list, was therefore unlawful. In a series of cases in the 1950s, the Court used the same basic rationale, generally to require agencies to follow procedural requirements that they had laid down in regulations.[246] In the 1970s, the lower courts occasionally invoked the idea that agencies must follow their own rules for this purpose and also to hold agencies to substantive requirements.[247] The basic idea was (and remains) simple: if regulations are on the books, agencies must adhere to them unless and until they are amended.[248]

The problem is that while neither *Arizona Grocery* nor *Accardi* could be taken to embed Fuller and to reflect the perceived morality of administrative law, neither decision offers a clear justification for the principle they announce. What source of law is involved? The question became highly relevant in 1979, when the Supreme Court investigated precisely that issue. *United States v. Caceres*[249] involved electronic surveillance by the Internal Revenue Service of meetings that it had with certain taxpayers. The surveillance was in clear violation of Department of Justice regulations, which required preapproval by that Department of any such surveillance.[250] Because the Department had not given its approval, Caceres, the subject of surveillance, contended that the tape recordings and associated testimony had to be excluded under the *Arizona Grocery* principle.[251]

The Court disagreed on the ground that no provision of law required the exclusion.[252] The Due Process Clause was not implicated, for Caceres could not "reasonably contend that he relied on the regulation, or that its breach had any effect on his conduct."[253] Nor was the APA involved, for this was "a criminal prosecution in which respondent seeks judicial enforcement of the agency regulations by means of the exclusionary rule."[254] In a key passage, the Court evidently struggled to explain why it was not jettisoning a longstanding principle of administrative law:

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[245] *See id.* at 266.
[246] See Merrill, *supra* note 229, at 576–78, for a valuable overview.
[247] *See id.* at 591–92.
[248] *See id.* at 571.
[249] 440 U.S. 741 (1979).
[250] *Id.* at 744 n.3, 748–49.
[251] *See id.* at 749.
[252] *Id.* at 749–50.
[253] *Id.* at 753.
[254] *Id.* at 754.

> The APA authorizes judicial review and invalidation of agency action that is arbitrary, capricious, an abuse of discretion, or not in accordance with law, as well as action taken "without observance of procedure required by law." Agency violations of their own regulations, whether or not also in violation of the Constitution, may well be inconsistent with the standards of agency action which the APA directs the courts to enforce. Indeed, some of our most important decisions holding agencies bound by their regulations have been in cases originally brought under the APA.[255]

In dissent, Justice Marshall argued that the *Arizona Grocery* principle was rooted in the Due Process Clause.[256] In his words, the Court's cases reflected "a judgment, central to our concept of due process, that government officials no less than private citizens are bound by rules of law. Where individual interests are implicated, the Due Process Clause requires that an executive agency adhere to the standards by which it professes its action to be judged."[257] Whenever an agency departs from its own rules, it is violating due process, at least if people's interests are injured as a result. Because the Court rejected that conclusion, it left open two serious questions: Was the *Arizona Grocery* principle vulnerable? Is it rooted in the APA, and if so, exactly how?

Nearly four decades since *Caceres*, the principle remains intact. The Supreme Court has shown no interest in revisiting it. To be sure, its precise domain remains in dispute. Within the lower courts, there is general (though not universal) agreement that the principle applies only to legislative rules, which have the force of law, and that agencies need not comply with interpretive rules or general statements of policy.[258] There is also a question whether and when the existence of the *Arizona Grocery* principle, and a claim based on that principle, are sufficient to provide a basis for judicial review, when such a basis is otherwise lacking.[259] Notwithstanding continuing debates over questions of this kind, the basic principle is secure.

Arizona Grocery plainly reflects Fuller's insistence that a system of law, to count as such, must show "congruence between the rules as announced and their actual administration."[260] The congruence appears to lie at the heart of the internal morality of administrative law — a claim that is put in sharp relief by the evident difficulty of justifying *Arizona Grocery* by reference to standard legal sources. Without referring to Fuller (but speaking his language), Professor Thomas Merrill puts it bluntly: "The most honest answer is that it is just one of those

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255 *Id.* at 753–54 (footnotes omitted).

256 *See id.* at 758 (Marshall, J., dissenting).

257 *Id.* (footnote omitted).

258 *See* STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 420–21 (8th ed. 2017).

259 *See* Merrill, *supra* note 229, at 591.

260 FULLER, *supra* note 3, at 39.

shared postulates of the legal system that cannot be traced to any provision of enacted law."[261] In his view, *Arizona Grocery* is one of a set of "foundational assumptions vital to the operations of our legal system," serving as "constitutional principles in the small 'c' sense of the term."[262] Perhaps so. But the question remains: what provision of law calls for *Arizona Grocery*?

We could imagine cases in which departures from rules might violate the Due Process Clause. If a liberty or property interest were at stake, if people reasonably relied on a rule, and if the government abandoned the rule on an ad hoc basis, a due process challenge might have force. We could also imagine cases in which such departures would be arbitrary or capricious. But we could easily imagine cases in which such departures would raise no due process problem and would be perfectly reasonable. It would be difficult to defend the idea that, by definition, departures from existing rules qualify as arbitrary. Perhaps an agency has seen that, as applied, a rule does more harm than good and that application of a statute protecting (say) food safety is a good idea even though the rule contains an exemption. It is also true that the APA allows courts to strike down agency action that is inconsistent with legally required procedures.[263] But do departures from rules count as that? It would beg the question to say that they do.

If we need a source in positive law, the best argument would take the following form. The APA defines legislative rules as those "of general or particular applicability and future effect."[264] Such rules also have the force of law. If legislative rules have both the force of law and "future effect," then it stands to reason that agencies must follow them. It is built into the nature of legislative rules that they bind agencies until they are amended or repealed.

The argument may sound plausible, but it is not clearly convincing. A rule can have "future effect" even if agencies feel free to depart from it, on occasions when it is not arbitrary for them to do so; the agency would presumably be obligated to give adequate reasons for the departure, so that the rule would still be shaping the agency's legal obligations. Merrill is right in claiming that the *Arizona Grocery* principle is one of those "foundational assumptions vital to the operations of our legal system."[265] What we are adding is that the foundational assumption, although not clearly rooted in any explicit source of positive law, is far from random. It is an understanding of the internal morality of administrative law.

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261 Merrill, *supra* note 229, at 598.
262 *Id.* at 599.
263 5 U.S.C. § 706(2) (2012).
264 *Id.* § 551(4).
265 Merrill, *supra* note 229, at 599.

E. Due Process, Adjudication, and Rulemaking: Two Puzzles

We turn now to two puzzles of due process and administrative law's morality. These are both cases in which administrative law rules are ascribed, vaguely, to "due process" in a way that is cursory and legally dubious or unconvincing, yet widely appealing. In such cases, we suggest that judges possess widely shared, inarticulate intuitions about administrative law's inner morality, and recite "due process" as a kind of shorthand or placeholder for such intuitions. In these cases, none of Fuller's concrete principles are involved. But as we shall see, broadly Fullerian thinking about the rule of law, and about what makes a legal system count as such, plays an unmistakable role.

1. Formal Adjudication and "Telephone Justice." — Telephone justice is a Soviet-era legal term; according to a common story, the desk of the Soviet judge reportedly featured two phones, a black one for regular business and a red one for "special" calls from the Party. It occurs when the Executive intervenes directly in formal adjudication, as between particular parties, through an ex parte communication instructing the judge to rule one way or another.[266] In terms of Fuller's eight principles, telephone justice threatens to exemplify the "failure to achieve rules at all, so that every issue [is] decided on an ad hoc basis."[267] Legally speaking, it raises two distinct but related issues: ex parte contacts by a third party with the judges and the so-called "directive power" of the President over the administrative state. The two issues do not necessarily overlap, but telephone justice is their intersection.

Telephone justice is certainly impermissible over Article III courts, where the President has no directive power anyway. A core component of judicial independence is freedom from executive direction in formal adjudication in court. The much harder question is whether telephone justice is impermissible in formal administrative adjudication, especially in core executive branch agencies. It is tempting, but mistaken, to draw an uncritical equivalence between judicial and administrative adjudication with respect to direction by the executive. The equivalence is problematic because all administrative adjudication is, from the standpoint of constitutional law, an exercise of executive power, not of judicial power. Instead administrative adjudication can be seen as the (preliminary) application of statutes to facts, a core executive task. Indeed, if administrative officials exercised the judicial power of the United States vested in the courts by virtue of Article III, such exercise would be unconstitutional. Thus the Supreme Court noted in *City of Arlington v. FCC*[268] that:

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[266] *See, e.g.*, Alena Ledeneva, *Telephone Justice in Russia*, 24 POST-SOVIET AFF. 324, 326–29 (2008).

[267] FULLER, *supra* note 3, at 39.

[268] 569 U.S. 290 (2013).

> Agencies make rules ("Private cattle may be grazed on public lands *X*, *Y*, and *Z* subject to certain conditions") and conduct adjudications ("This rancher's grazing permit is revoked for violation of the conditions") and have done so since the beginning of the Republic. These activities take "legislative" and "judicial" forms, but they are exercises of — indeed, under our constitutional structure they *must be* exercises of — the "executive Power."[269]

From this standpoint, it is hardly obvious that the President should not be able to direct administrative adjudicators, at least in executive branch agencies as opposed to independent agencies (a distinction that cuts across the rulemaking-adjudication divide; the President cannot direct rulemaking by independent agencies either).[270] We can easily imagine a counterfactual legal system in which the President might, in virtue of the vesting of executive power in Article II, intervene at will even in formal administrative adjudication, directing the exercise of executive power by agencies.

In fact, however, this is not our world. Even in *Myers v. United States*,[271] arguably the high-water mark of executive power in the United States Reports, the Court was careful to limit the directive power of the President to shield formal adjudication within the executive branch. Chief Justice Taft observed that "there may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President can not in a particular case properly influence or control."[272]

Modern case law has consistently followed suit. In *Sierra Club v. Costle*,[273] the D.C. Circuit adopted an expansive view of presidential authority to intervene in informal (notice-and-comment) rulemaking, but observed in dictum that:

> [T]here may be instances where the docketing of conversations between the President or his staff and other Executive Branch officers or rulemakers may be necessary to ensure due process. This may be true, for example, where such conversations directly concern the outcome of adjudications or quasi-adjudicatory proceedings; there is no inherent executive power to control the rights of individuals in such settings.[274]

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[269] *Id.* at 304 n.4 (quoting U.S. CONST. art. II, § 1, cl. 1).

[270] For a historical analysis of presidential control over agencies and an overview of common positions on this topic, see Robert V. Percival, *Who's in Charge? Does the President Have Directive Authority over Agency Regulatory Decisions?*, 79 FORDHAM L. REV. 2487 (2011).

[271] 272 U.S. 52 (1926).

[272] *Id.* at 135.

[273] 657 F.2d 298 (D.C. Cir. 1981).

[274] *Id.* at 406–07.

What was dictum in *Costle* became holding in *Portland Audubon Society v. Endangered Species Committee*,[275] which held that presidential intervention in formal administrative adjudication counts as an ex parte contact under sections 557(a) and (d) of the APA and is not constitutionally immunized from the ex parte rules as an exercise of presidential directive power.[276]

An intriguing feature of all three cases — *Myers*, *Costle*, and *Portland Audubon* — is that their legal basis is unclear or at best highly contestable. *Costle* and *Portland Audubon* mention "due process," but only in the vaguest way.[277] *Myers* offered no legal basis at all.[278] *Portland Audubon* relied heavily on the text of section 557(d), which bars ex parte contacts from "interested person[s] outside the agency,"[279] but this begged the question, for the President's whole contention was that he was not "outside the agency" in a legal sense.[280] The court rejected that contention by denying that the President could direct the delegated discretion of his agents, exercised in adjudication,[281] but that was to assume the conclusion the court was trying to prove. Ultimately, *Portland Audubon* rested on a striking, if circular, claim that "[e]x parte contacts are antithetical to the very concept of an administrative court reaching impartial decisions through formal adjudication."[282]

Of these suggested bases, "due process" is a common lawyerly reflex, but a moment's reflection suggests that, at best, only a penumbral emanation of due process can be at issue here. As with the language of APA section 557(d), so too with due process: the crucial issue in such cases is not whether the neutrality of the adjudicator has been compromised, but rather *who* exactly the adjudicator should be understood to be. The executive position, of course, is that the agency adjudicator is ultimately exercising *the President's own power* to execute the law, as a subordinate to the President, so that it is a categorical mistake to see the President as "interfering" in the decision of the tribunal. The President in such cases is just supervising the delegated discretion of his own agents.

Our point is not that the executive position is correct or that *Myers*, *Costle,* and *Portland Audubon* are wrong to constrain executive intervention in formal adjudication. Rather our point is that the asserted legal bases for this approach are unclear and that vague gestures toward

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[275] 984 F.2d 1534 (9th Cir. 1993).
[276] *Id.* at 1546.
[277] *Id.* at 1549; *Costle*, 657 F.2d at 406–07.
[278] 272 U.S. 52, 135 (1926).
[279] 5 U.S.C. § 557(d)(1)(A) (2012).
[280] *Portland Audubon*, 984 F.2d at 1545.
[281] *Id.* (citing United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260 (1954)).
[282] *Id.* at 1543.

background principles of "due process" do not add up to a legal argument. The best account is that the judges are recording and applying a set of intuitions about paradigmatic cases of adjudication, and adjudication's natural morality, and applying them to the administrative setting.

This is a highly Fullerian enterprise in one sense, and not at all Fullerian in another. Fuller derived an account of the "forms and limits" of adjudication by just this sort of naturalistic reasoning about the conceptual elements of adjudication.[283] As we will discuss below, however, Fuller saw adjudication as essentially unsuitable to one of the main tasks entrusted to many administrative agencies: the allocation of scarce economic resources, including government-created resources such as licenses, which he saw as an exercise in irreducibly political judgment.[284] In that sense, Fuller was sharply aware of the limits of adjudication.

2. Rulemaking Due Process. — From the standpoint of conventional administrative law doctrine, "rulemaking due process" is something of a misnomer, even an oxymoron. A foundational rule of due process in administrative law, originally derived from the famous pair of opinions in *Londoner v. City & County of Denver*[285] and *Bi-Metallic Investment Co. v. State Board of Equalization*,[286] is that due process attaches to administrative adjudication, not rulemaking.[287] When agencies make general rules under standard APA procedures, due process attaches no requirements at all; the Due Process Clause is inapplicable to rulemaking.[288] The only requirements are statutory.

In a recent decision, however, the D.C. Circuit recognized a limited but significant exception to this rule, one that is unmistakably Fullerian in spirit. In the 1936 case *Carter v. Carter Coal Co.*,[289] the Supreme Court, in dictum, discussed extending the impartiality requirements of adjudicative due process to rulemaking as well, suggesting that the delegation of statutory power requires public officials to act in a "presumptively disinterested" fashion.[290] *Carter Coal* had been thought to be a dead letter; after 1937, the Court itself had upheld many such delegations of rulemaking power.[291] But in a 2016 case involving Amtrak, which the court saw as having received statutory power to regulate

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[283] *See* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 354–55 (1978).

[284] *See id.* at 400–03.

[285] 210 U.S. 373 (1908).

[286] 239 U.S. 441 (1915).

[287] *See id.* at 445–46.

[288] *See id.*

[289] 298 U.S. 238 (1936).

[290] *Id.* at 311.

[291] *See, e.g.*, Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 394–97 (1940); United States v. Rock Royal Coop., 307 U.S. 533, 577 (1939).

its competitors, the D.C. Circuit revived *Carter Coal*, holding that due process is violated when a statute "authoriz[es] an economically self-interested actor to regulate its competitors."[292] In an earlier case, the Supreme Court had declared Amtrak a public entity,[293] so the D.C. Circuit was in effect saying that a public entity could not wear two hats, making official rules that gave it an advantage in its proprietary capacity as a market participant.[294]

Here too, the court's analysis was ultimately conclusory. Again and again, the court argues by stipulation and by adjective, such as "biased" decisionmaking.[295] If, as the government argued, Congress intended to give Amtrak legal priority over track time and other shared resources, and intended to give Amtrak a role in setting standards applicable to railroads precisely because doing so would best enable Amtrak to protect its priority, why should that role count as "biased"? What is the baseline from which "bias" is implicitly being measured?

The best defense of the decision, if there is one, invokes the internal institutional morality of administrative decisionmaking, whether in rulemaking or adjudication. On this view, all public and official decisionmaking must be "presumptively disinterested," even if from a larger perspective Congress wanted precisely to vest decisionmaking in a self-interested entity. The intrinsic integrity of official action itself requires attention only to the overall public good by any given official body. Whether such a strong view is convincing or even defensible, as a constitutional restriction on Congress's powers, is not our concern here. The key point is that in this case, as in others we have examined, ambitious doctrines with no clear legal basis are best understood as derived from an implicit Fullerian analysis of the internal morality of administrative law.

II. THE PROMISE AND LIMITS OF FULLERIAN ADMINISTRATIVE LAW

A. Promise

As we have noted, some contemporary critiques of the administrative state invoke heavy artillery. It has been urged, for example, that courts should reinvigorate the nondelegation doctrine and strike down grants of discretionary authority to regulatory agencies.[296] It has also been urged that even if agency discretion is cabined, the Constitution forbids

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[292] Ass'n of Am. R.Rs. v. U.S. Dep't of Transp., 821 F.3d 19, 23 (D.C. Cir. 2016).

[293] Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1228 (2015).

[294] *See Ass'n of Am. R.Rs.*, 821 F.3d at 27.

[295] *Id.* at 27–30.

[296] David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1289–90 (1985).

Congress from authorizing agencies to issue rules that are "binding," in the sense that violators face sanctions.[297] In our view, it is difficult to justify these proposals. They receive little support in the original constitutional materials.[298] From the standpoint of external ideals — involving democratic self-government, liberty, or promotion of social welfare — invalidation of the relevant grants of authority would do far more harm than good.[299] We have pressed these points in other places and do not belabor them here.

In our view, Fullerian administrative law has more promise, not least because of its comparative modesty. Claims about law's internal morality help to underscore the serious problems — from the standpoint of democratic accountability, liberty, and welfare — that arise, for example, if public officials have the discretion to do whatever they want, if citizens have to guess about what the law is, and if people are unable to plan their affairs. When courts draw on Fuller's principles, they can claim to be vindicating time-honored thinking about the rule of law, in a "thick" sense of the rule of law.[300] It is for that very reason, we think, that so many of the doctrines explored here have only ambiguous legal foundations. The underlying principles seem so insistent, and so obviously part of a well-functioning legal system, that judges and others embrace them even if their legal basis is murky. Recall the illuminatingly bare proclamation: "Retroactivity is not favored in the law."[301]

We have acknowledged that the most severe critics of the administrative state[302] would not be wholly satisfied by Fullerian administrative law.[303] Many of them want Congress itself to make specific decisions, and Fuller's principles will not achieve that goal.[304] On the other hand, those critics are also concerned about the perceived lawlessness of administrative action in its own right. Put in what we see as the most sympathetic light, their concerns are about maintaining the rule of law, very much as Fuller understood it. The animating spirit of their strongest arguments, we think, is Fuller's own.

It is easy to imagine a government in which those arguments would be entirely convincing. With his tale of the lawless, hapless Rex, Fuller did exactly that.[305] It is doubtful that the American administrative state, or any administrative state in a mature democracy, will look a lot like

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297 HAMBURGER, *supra* note 20, at 3–5.

298 *See* JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION (2012); Posner & Vermeule, *supra* note 53, at 1729, 1732–36.

299 *Cf.* Posner & Vermeule, *supra* note 53, at 1743–54.

300 *See* DYZENHAUS, *supra* note 17, at 4–7, 58.

301 Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988).

302 *See, e.g.*, HAMBURGER, *supra* note 20; SCHOENBROD, *supra* note 20.

303 *See supra* p. 1928.

304 *See, e.g.*, HAMBURGER, *supra* note 20; SCHOENBROD, *supra* note 20.

305 FULLER, *supra* note 3, at 33–41.

such an imaginary government. But there is no question that at some times and places, governors and governments have acted, are acting, or will act like Rex, and the argument for a judicial response will seem powerful.[306]

B. Limits: The Morality of Law, Step Zero

Our main project has been to put Fullerian administrative law in its best light. We have also suggested that the best and most promising version of the critique of the administrative state is Fullerian, in both inspiration and detail. Here we turn to the limits of the Fullerian approach. Although we offer that approach in an ecumenical spirit, we reiterate that we do not subscribe to wholesale critiques of the administrative state,[307] and we believe that there are distinct boundaries within which the Fullerian approach is most cogent. Outside of those boundaries, it should and typically does give way to other considerations. The question, in other words, is how we can understand the domain of administrative law's morality, even if we are dealing with the minimal morality of duty.

An administrative law analogy may help. Fuller's account of "eight ways to fail to make a law"[308] presupposes that the decisionmaker is

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[306] We are not of course attempting to offer an exhaustive account of all principles potentially bearing on administrative law, only an account of the Fullerian internal morality of administrative law, as judges understand it. For an example of principles beyond the scope of our project, consider judge-made doctrines that insist on *rights of public participation*. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), itself involved a lower court effort to recognize such rights. Several other doctrines, embraced or unquestioned by the Supreme Court, similarly recognize such rights. An important example is the "logical outgrowth" test, which states that any final regulation must be a logical outgrowth of the proposed rule, *see* Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 174 (2007) (quoting Nat'l Black Media Coal. v. FCC, 791 F.2d 1016, 1022 (2d Cir. 1986)) — a requirement that is designed to promote public participation in the rulemaking process but that lacks clear foundations in the APA. *See* Jack M. Beermann & Gary Lawson, *Reprocessing* Vermont Yankee, 75 GEO. WASH. L. REV. 856, 894–96 (2007). Another example is the requirement that agencies disclose, and make available for public comment, the technical data on which they relied, *see* Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 393 (D.C. Cir. 1973) — a requirement that also promotes public participation, but that cannot be easily rooted in positive law, *see* Am. Radio Relay League, Inc. v. FCC, 524 F.3d 227, 246–47 (D.C. Cir. 2008) (Kavanaugh, J., concurring in part, concurring in the judgment in part, and dissenting in part).

Rights of participation have a long history in administrative law. When the Supreme Court struck down an apparently open-ended grant of authority in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), it was at pains to say that other apparently open-ended grants, to the Federal Trade Commission and Federal Radio Commission, were accompanied by adjudicative procedures, which give affected parties a right to participate and in that sense promote accountability. *See id.* at 532–34, 540. But participatory rights are foreign to Fuller's framework. He was speaking for a conception of the rule of law and for associated values of fair notice and limited discretion; rights of participation, which are ultimately grounded in democratic values, were not part of his conception of law's internal morality.

[307] *See supra* p. 1926.

[308] FULLER, *supra* note 3, at 33.

faced with a type of decision that is susceptible to lawlike decisionmaking in the first place. Just as the *Chevron* doctrine includes not only the step(s) of the test itself, but also a set of boundary conditions for deciding whether the test should apply at all — "*Chevron* Step Zero"[309] — so, too, there is a kind of "*Chevron* Step Zero" problem for the morality of law. The threshold problem is to understand the domain within which Fuller's principles apply in the first place — The Morality of Law, Step Zero.

Fuller himself repeatedly insists on this point. "The internal morality of law," he wrote, "is not and cannot be a morality appropriate for every kind of governmental action."[310] Fuller's examples included (1) "military command," which should not "subject itself to the restraints appropriate . . . to a discharge of the judicial function";[311] (2) managerial decisionmaking, such as the attempt to extract electricity from the tides;[312] (3) government subsidies for public institutions and the arts; and, as we will discuss shortly, (4) economic allocation of scarce resources among multiple competing claimants.[313] In these cases (stipulating that government should be involved at all), Fuller himself thought that the appropriate mode of doing governmental business would be managerial rather than law-bound. His basic claim about such domains — whether correct or incorrect — is that the relevant considerations were so open-ended, multifarious, complex, and difficult to rationalize that the principles of law's morality were ill-suited to the task.[314]

Current administrative law is partly, but only partly, consistent with Fuller's understanding of the limited domain of law's morality.[315] On the one hand, the APA contains exceptions for a number of Fuller's situations. The definition of "agenc[ies]" in § 551 excludes "courts martial and military commissions" and "military authority exercised in the field in time of war or in occupied territory."[316] Rulemaking procedures do not apply to "a military or foreign affairs function of the United States" or to "a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts."[317] Formal adjudicative

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309 Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 191 (2006).

310 FULLER, *supra* note 3, at 171.

311 *Id.*

312 *Id.* at 207–10.

313 Fuller, *supra* note 283, at 400–01.

314 FULLER, *supra* note 3, at 171–76.

315 For an overview of the APA exceptions, see Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095 (2009).

316 5 U.S.C. § 551(1)(F)–(G) (2012).

317 *Id.* § 553(a)(1)–(2). To be sure, some decisions that fall within these domains might be exempted for reasons that have nothing to do with Fuller's Step Zero. For example, foreign affairs decisions governing visas might be susceptible to his principles.

procedures do not apply to "the conduct of military or foreign affairs functions."[318]

In limiting his argument, Fuller went further. Some of the most important tasks of the administrative state were, in Fuller's view, simply unsuited to resolution in a way that was consistent with the internal morality of law, even if those tasks were best committed to administrative agencies. His prime example, in both *The Morality of Law* and the posthumously published *The Forms and Limits of Adjudication*, involved economic allocation and (what Fuller called) "polycentric tasks."[319] Fuller's paradigmatic example was licensing of a scarce resource, such as radio spectrum, awarded to some but not all of a group of competing claimants.[320]

Fuller saw this sort of task as inherently open-ended and not susceptible to lawlike decisionmaking, as opposed to managerial judgment. In his account, the considerations and criteria were too numerous and diverse, too infused with inarticulate judgment, and too much a matter of promoting aggregate social goods rather than defining and respecting the entitlements of individual claimants.[321] In an example from Judge Henry Friendly, which Fuller quoted with approval, it is as if an agency were given the task of deciding which famous opera singer should play the lead role in a production at the Met.[322] There is here no issue of rights, or even of justice to individual claimants. Rather the issue is how best to allocate a scarce resource with a view to overall public interest, under criteria that are ill-defined and multidimensional.

Although Fuller drew his critique in part from Judge Friendly, Fuller also thought that Judge Friendly's own treatment of agency decisionmaking,[323] which had explored something like the internal morality of administrative law, had gone wrong by failing to recognize these limits of adjudication.[324] Judge Friendly and others failed to realize that the agencies they criticized for incoherent decisionmaking, especially the Federal Communications Commission (FCC), had been instructed to allocate economic resources through the forms of adjudication. (Note in this regard that the APA defines adjudication to include licensing.[325]) Their poor performance was, in Fuller's view, entirely predictable.[326]

A moment's thought suggests that if it is accepted, Fuller's view of the inherent unsuitability of economic allocation to legal (as opposed to

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[318] *Id.* § 554(a)(4).
[319] FULLER, *supra* note 3, at 171–76; Fuller, *supra* note 283, at 394–404.
[320] Fuller, *supra* note 283, at 402–03.
[321] *Id.* at 403.
[322] FULLER, *supra* note 3, at 172.
[323] *See* HENRY J. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES (1962).
[324] FULLER, *supra* note 3, at 172–76.
[325] 5 U.S.C. § 551(5)–(6) (2012).
[326] FULLER, *supra* note 3, at 173.

managerial) resolution, would exclude a substantial chunk of what agencies do from the domain of administrative law's morality. Explicit licensing or other allocation among claimants hardly exhausts the domain of economic allocation involving polycentric interests. And despite Fuller's interest in the limits of adjudication, his emphasis on the inherent unsuitability of the morality of law for economic allocation cuts across the APA's rulemaking-adjudication divide. Licensing in many ways straddles the divide between the two, which is why the APA had to clarify its status by providing expressly that it should count as adjudication for APA purposes.[327]

So Fuller believed that his principles of law's morality were inherently unsuited for allocative regulatory decisions. Ironically, then, current doctrine is in some places more Fullerian than Fuller. Consider the saga of the D.C. Circuit's attempts to extend the ex parte contacts prohibition to informal (notice-and-comment) rulemaking. In a pair of cases decided in 1977, *Home Box Office, Inc. v. FCC*[328] and *Action for Children's Television v. FCC*,[329] the court first announced[330] and then (largely) retracted[331] the principle that ex parte contacts with industry might be problematic even in informal rulemaking, which is not subject to the APA's ex parte contact provisions.[332] In light of the subsequent decisions in *Vermont Yankee Nuclear Power Corp. v. Natrual Resources Defense Council*[333] and *Mortgage Bankers*, which emphatically reject countertextual procedural innovation in administrative law,[334] it seems plain that *Home Box Office* is no longer good law.

The interesting point for our purposes, however, is that even *Action for Children's Television* attempted to maintain a common law ex parte contacts prohibition in a subset of rulemakings that involved "competing [private] claims to a valuable privilege."[335] This class of rulemakings — the classic example involves an FCC decision on whether to

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[327] 5 U.S.C. § 551(6).

[328] 567 F.2d 9 (D.C. Cir. 1977).

[329] 564 F.2d 458 (D.C. Cir. 1977).

[330] *Home Box Office*, 567 F.2d at 57.

[331] *Action for Children's Television*, 564 F.2d at 474.

[332] *Compare* 5 U.S.C. § 553(c) (1946), *with id.* § 557(d)(1).

[333] 435 U.S. 519 (1978).

[334] *See* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1206 (2015) ("The *Paralyzed Veterans* doctrine is contrary to the clear text of the APA's rulemaking provisions, and it improperly imposes on agencies an obligation beyond the 'maximum procedural requirements' specified in the APA." (quoting *Vt. Yankee*, 435 U.S. at 524 (1978))); *Vt. Yankee*, 435 U.S. at 549 ("The court should . . . not stray beyond the judicial province to explore the procedural format or to impose upon the agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good.").

[335] *Action for Children's Television*, 564 F.2d at 477 (quoting *Home Box Office*, 567 F.2d at 64 (MacKinnon, J., concurring specially)).

switch a station license from one city to another[336] — is in effect an allocative decision, a polycentric proceeding in another guise, like the FCC licensing proceedings that Fuller thought unsuited to legalized, adjudicative resolution. As such, the common law ex parte prohibition for contacts in rulemaking proceedings that arbitrate "competing private claims to a valuable privilege," although it sounds Fullerian, is actually a perfect example of the sort of legal moralizing that Fuller would have condemned.[337]

In all this, we do not argue that Fuller was in fact correct to exclude allocative decisions and regulatory licensing from the domain of law's morality. It is an open question whether he was, and it is unnecessary for our project here to arbitrate that question.[338] The broader point is that such decisions are only one class of possible examples of a larger phenomenon that Fuller was surely correct about: not everything government does is subject to, or best understood through the lens of, law's internal morality. That morality, however excellent within its proper domain, has inherent limitations.

C. Costs and Benefits; Duty and Aspiration

We now turn to the largest normative questions. Notwithstanding its evident appeal, Fullerian administrative law runs into three objections: (1) a potential absence of sufficient grounding in legal materials; (2) complex tradeoffs, on welfare grounds, between Fullerian values and competing values; and (3) potential lack of judicial competence to oversee agency judgments about those tradeoffs.

1. Legal Grounding. — The *Vermont Yankee* problem looms over each and every claim about the internal morality of administrative law. In that case, the Court famously ruled that courts may not impose procedural requirements beyond those set out in the APA or other sources of positive law.[339] The Court's central claim was that positive law established those requirements; courts have no business going beyond the statutory minima. To that extent, any principles that judges use to discipline the administrative state, even in the interest of the rule of law, must be grounded in something other than moral judgments or even natural law.[340] One must be careful, because Fuller believed that moral

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[336] Sangamon Valley Television Corp. v. United States, 269 F.2d 221, 225 (D.C. Cir. 1959).

[337] We are bracketing the possibility that in cases involving competing claims to a valuable privilege, the Due Process Clause imposes constraints on ex parte contacts.

[338] An argument against Fuller would suggest that for allocative decisions, it is certainly possible to respect transparency, to discipline the exercise of ad hoc discretion, to make the rules understandable, and to ensure that the rules operate in the world as they do on the books. Whether or not rigidly rule-bound decisions make sense, in such contexts, would depend on the usual considerations that justify either rules or standards. *See generally* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992). Or so the argument would run; we need not resolve the question here.

[339] *Vt. Yankee*, 435 U.S. at 523–25.

[340] Recall that Fuller believed in a form of natural law. *See supra* p. 1930.

judgments and something like natural law were themselves part of the law; judges might, for example, draw upon them to interpret the scope and meaning of ambiguous positive statutes. Still, *Vermont Yankee* at least constrains the set of admissible moral arguments in administrative law, where statutes are clear. Our aim here is not to mount a full-scale defense of *Vermont Yankee*, but simply to observe that it is the law, and that to the extent that the decision forbids courts from imposing their own preferred constraints on the administrative state — without some kind of legal warrant for doing so — the decision has evident appeal, not least from the standpoint of the rule of law itself.

Taken together, *Vermont Yankee* and *Mortgage Bankers* make it necessary to ask: What is the legal foundation for judicially imposed requirements? Can the internal morality of administrative law, as reflected in the doctrines we have discussed, be rooted in positive law? After *Vermont Yankee* made it clear that procedural mandates need some kind of legal foundation,[341] several of those doctrines were bound to be questioned or repudiated as a product of an era in which administrative law was a form of (illicit) common law.[342]

To be sure, some of those doctrines have survived and promise to endure. The reasons are various. Some of them enjoy clear Supreme Court approval (as in the cases of the antiretroactivity canon[343] and limits on *Auer*[344]); others can claim to find sufficient support in existing legal materials; still others reflect practice rather than formal law (as in the reduced respect given to inconsistent interpretations).[345] But to the extent that the doctrines are based on judicial intuitions about the rule of law, but lack grounding in positive legal materials, their foundations remain insecure.[346] For those who seek to defend the relevant doctrines, the task is to identify such grounding, and that may not be easy to do.

On that question, there is a large elephant in the room: the Due Process Clause. It is tempting to root the doctrines, and Fuller's enterprise more broadly, in that clause.[347] The void-for-vagueness doctrine is a good example,[348] and we could imagine cases in which retroactivity would raise serious due process concerns. In Fuller's own stark rendition of failures of the rule of law, featuring Rex, due process objections

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341 *Vt. Yankee*, 435 U.S. at 524–25.

342 *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) (rejecting the idea that, to cure a nondelegation issue, it is necessary and sufficient for agencies to produce standards that limit their discretion).

343 *See* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 215 (1988).

344 *See* Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155 (2012).

345 *See supra* pp. 1948–50.

346 An example is *Portland Audubon Society v. Endangered Species Committee*, 984 F.2d 1534 (9th Cir. 1993).

347 Fuller made some gestures in this direction. *See* FULLER, *supra* note 3, at 105–06.

348 *See* Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).

would be more than plausible. But in the cases we have explored, courts have generally avoided those objections, and for good reasons. We have noted that an agency's refusal to follow its own rules — for example, because of changed understandings of facts or unanticipated circumstances — need not create a due process problem.[349] We do not deny that in some cases, the relevant doctrines could be conceived in a way that makes that problem real. But as they now stand, they overshoot the due process mark.

2. Tradeoffs. — The second problem is broadly welfarist. The internal morality of law is important, but it does not point to the only consideration that institutional designers and legal decisionmakers must take into account. By definition, an "abuse" of retroactivity is not a good idea, but there are claims on behalf of retroactivity, which might turn out to be justified on welfare grounds.[350] Recall the difference between the morality of duty and the morality of aspiration: Fuller himself saw that law's morality falls along what he called a sliding scale, with a movable pointer operating between the minimum morality necessary to constitute a legal system, on one end, and the aspiration to perfect legality on the other.[351]

We can agree that, most of the time, a violation of the minimum morality is unacceptable (on welfarist or other grounds). It is hard to defend the idea that the law should be utterly unintelligible. But for Fuller's concerns, the two endpoints — the morality of duty and the morality of aspiration — bound a wide range in which most institutions operate and most decisions are made, in a developed legal system anyway. Doctrines that purport to vindicate the rule of law, and that draw support from Fuller's judgments about the internal morality of law, generally involve various points on the range, not at the endpoints.

Administrative law is no exception. Return to the first four of Fuller's failures: (1) a failure to make rules in the first place, ensuring that all issues are decided on a case-by-case basis; (2) a failure of transparency, in the sense that affected parties are not made aware of the rules with which they must comply; (3) an abuse of retroactivity, in the sense that people cannot rely on current rules, and are under threat of change; and (4) "a failure to make rules understandable."[352] We may agree that there is a real problem if case-by-case judgments are made without any kind of orienting framework; if people absolutely have no way of knowing what the law is; if retroactivity is "abused" (no one wants that); and if the language of law is essentially an inkblot. For some legal systems, these failures are pervasive, and Fuller can be taken

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[349] *See supra* pp. 1960.
[350] *See, e.g.*, Levmore, *supra* note 184, at 1686–99.
[351] *See* FULLER, *supra* note 3, at 42.
[352] *Id.* at 39.

as a beacon of light.[353] But in the real world of American administrative law, the problem will usually be less a *failure* than an arguable *insufficiency* — arguably insufficient constraints on discretion, arguably insufficient transparency, arguably unjustified retroactivity, arguably insufficient intelligibility.[354] No legal system has come close to the utopian picture associated with the morality of aspiration, but that is hardly a fatal defect, as Fuller himself saw.[355] Another way to put it is to suggest that there is an optimal level of constraints on discretion, transparency, retroactivity, and intelligibility, and to arrive at the optimal level, tradeoffs must be made, including consideration of costs of multiple kinds.[356]

The point is easiest to see for Fuller's first principle. Suppose that an agency is deciding whether to issue a relatively open-ended standard (for example, with a phrase such as, "to the extent feasible") or instead a pellucid rule.[357] One advantage of the former is that it imposes lower decisional burdens at the initial stages.[358] Perhaps the agency lacks information and so is not in a good position to specify the content of its rule. Another advantage of open-ended standards is that they may reduce the number and magnitude of errors.[359] Perhaps a rule would be ill-suited to the variety of circumstances to which it would apply. Indeed, a prominent critique of the administrative state is that it is far too rigid and prescriptive, and that it should consist, far more than it now does, of grants of authority to exercise "common sense."[360] On this view, what is needed is a shift from rules, specifying what people must do, to statements of principles or goals, which may not exactly be wonderful from the standpoint of the rule of law.

None of this means that agencies should be allowed to proceed without any criteria and to decide on an entirely ad hoc basis. Putting the question of legal authority to one side, the practices in *Holmes* and *Hornsby* are indeed troubling. We may agree that an agency should face a serious burden of justification if a regulation says that conduct will be deemed unlawful, or that benefits will be given out or not, "depending

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353 *See* PÁDRAIG MCAULIFFE, TRANSITIONAL JUSTICE AND RULE OF LAW RECONSTRUCTION (2015); YUHUA WANG, TYING THE AUTOCRAT'S HANDS: THE RISE OF THE RULE OF LAW IN CHINA (2015).

354 For an effort to counteract the last problem, see Plain Writing Act of 2010, Pub. L. No. 111-274, 124 Stat. 2861 (codified as amended at 5 U.S.C. § 301 note (2012)).

355 FULLER, *supra* note 3, at 44–45.

356 *See id.* at 44–46 (emphasizing the importance of economic calculations in the context of the morality of aspiration). *See generally* VERMEULE, *supra* note 22.

357 On the relevant tradeoffs, see generally Kaplow, *supra* note 338.

358 *Id.* at 579–80.

359 *Id.*

360 *See* PHILIP K. HOWARD, THE RULE OF NOBODY (2014).

on the circumstances." But if it leaves significant gaps for itself and the private sector to fill in, nothing need be amiss.

It is for this reason, we think, that however appealing, some of Fuller's principles have had relatively little traction in administrative law. Take (2) and (4): failure of transparency and "failure to make rules understandable."[361] Most of the time, administrative law does not exhibit either failure. The law is not hidden, and while it might be complicated, usually it does not defy understanding. At the same time, no one should deny that people in the private sector are sometimes concerned about a lack of sufficient transparency and intelligibility. The Plain Writing Act of 2010[362] was meant as a response. The problem is that there is an optimal level of plainness, and as regulations (for example) become simpler and more comprehensible, they might also lose important nuance. We can celebrate (2) and (4) as Fuller states them, but agencies can make a range of reasonable judgments about where to fall on the relevant spectrum.

3. Judicial Competence. — The third problem involves judicial competence. If the question involves sufficiency and optimality, there is no question that agencies may err, perhaps because of incompetence, perhaps because of institutional self-interest. (*Holmes* and *Hornsby* seem to be examples.) But courts may also err themselves, and in doing so may end up disrupting rational and predictable agency policymaking schemes, thereby reducing — not promoting — satisfaction of the Fullerian ideals by the overall system. Even the threat or risk of blunders by reviewing courts may overhang the administrative process, with disruptive effects.

At a minimum, courts lacking full information may not be in the best position to know whether an agency has erred. The Court recognized the point in *Vermont Yankee* itself: whether to add procedures beyond those specified by the rulemaking provision of the APA requires complex tradeoffs and judgments about scarce resources — judgments that courts should not impose upon agencies, absent arbitrariness or a violation of clear statutes.[363]

Whenever agencies decide on procedures, they are always and inevitably allocating resources across programs and priorities, taking into account opportunity costs, the direct costs and benefits of more procedures for an array of cases, and the nature of the program or task at hand. Examining cases one by one at the behest of particular injured claimants, courts risk taking a myopic view that distorts agency resource allocation. Understanding this point, the Supreme Court has acted to

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361 FULLER, *supra* note 3, at 39.

362 Pub. L. No. 111-274, 124 Stat. 2861 (codified as amended at 5 U.S.C. § 301 note (2012)).

363 *See* Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 546–48 (1978).

constrain oversight by lower courts in such cases. It has cited agency discretion over resource allocation as a rationale for central doctrines of administrative law, including not only *Vermont Yankee*'s ban on judge-made administrative procedure, but also the presumptive unreviewability of agency enforcement actions[364] and even the *Chevron* doctrine itself.[365]

More broadly, the Court has long recognized that agencies must have broad discretion to make procedural choices, even in domains where Fullerian principles might be thought to be threatened or even violated, because the choice of procedures depends upon so many complex programmatic considerations. A foundational example, adopted right at the beginning of modern administrative law and in tension with the occasional judicial insistence on rulemaking,[366] is *Chenery II*, which examined agency discretion to choose between proceeding by rulemaking and adjudication.[367] The challengers in effect complained that the SEC had violated core Fullerian principles of nonretroactivity by issuing a disgorgement order based on previous conduct not covered by an administrative rule;[368] the consequence of their view would have been to require the agency to proceed by first making a (prospective) rule, so the retroactivity issue had collateral effects on the agency's choice of procedural form.

The Court disagreed, saying that the agency had done only what common law courts could have done, and — critically for our purposes — that even if the agency order counted as "retroactive," such retroactivity should not be understood as a per se bar to agency action.[369] Rather, the right analysis would involve a balancing of harms to the regulated parties, on the one hand, and the needs of the agency's enterprise, on the other[370] — an enterprise that extends over an aggregate or array of cases and which therefore transcends the principles at issue in any particular case and transcends the interests of any particular claimant. The decision whether to proceed by rule or by order would necessarily be a decision that looked to the needs of an open-ended, multifarious, and distinctly administrative process of policy formulation, for which the Fullerian principles proposed by the challengers were ill-suited. The Court's explanation is worth quoting at length:

> [A]ny rigid requirement to that effect would make the administrative process inflexible and incapable of dealing with many of the specialized prob-

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364 Heckler v. Chaney, 470 U.S. 821, 831–32 (1985).

365 Massachusetts v. EPA, 549 U.S. 497, 527 (2007).

366 *See supra* pp. 1937–40 (discussing *Holmes*, *Hornsby*, and progeny); *supra* pp. 1940–41 (describing a broad reading of *Wyman-Gordon*).

367 332 U.S. 194 (1947).

368 *See id.* at 199–200.

369 *Id.* at 203.

370 *Id.*

> lems which arise. Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations. . . .
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> In other words, problems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule. Or the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. In those situations, the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective. There is thus a very definite place for the case-by-case evolution of statutory standards. And the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency.[371]

Chenery II offers a broad lesson: Fullerian principles, however valid and appealing, have limits of both scope and weight. They must inevitably be traded off against the agency's institutional role and capacities, resource limitations, and programmatic objectives. *Chenery II*'s lesson became the consensus view among administrative lawyers of the postwar era, as reflected in the magisterial treatise by Louis Jaffe, Fuller's colleague.[372] We like to think that Fuller, who understood that law's morality hardly exhausts the domain of what government does, that his principles had an aspirational dimension, and that a valid legal system might instantiate them only partially, would be the first to agree.

CONCLUSION

Our major aim here has been to identify the morality of administrative law and to demonstrate that disparate judge-made doctrines, both large and small, are unified by a commitment to that morality. In numerous cases, federal courts have ruled that agencies act unlawfully when they fail to make rules at all, act retroactively, act inconsistently, and ensure that the actual administration of rules is incongruent with rules as announced.

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[371] *Id.* at 202–03 (citations omitted).

[372] Jaffe insisted that although judges have authority to say what the law is, the law itself might afford agencies law-interpreting power and — crucially for present purposes — he summarized his conclusions this way:

> (1) that the exercise of [agency] discretion is relevant to the making of procedural decisions; (2) that in the absence of a clear legal prescription, a reasonable procedural decision should withstand judicial interference; and (3) that reasonableness should be considered in terms of the responsibility of the agency for a total program, allowing for the fact that the agency's resources are limited.

JAFFE, *supra* note 37, at 567. For discussion, see Adrian Vermeule, Essay, *Bureaucracy and Distrust: Landis, Jaffe, and Kagan on the Administrative State*, 130 HARV. L. REV. 2463, 2476–77 (2017).

Some of the underlying decisions have an ambiguous legal source. Sometimes they purport to be rooted in the Due Process Clause or the APA, but the link to formal law is weak. In vindicating the perceived morality of administrative law, federal courts have been responsive to what they see as background principles. This is clearest in the context of retroactivity, which, according to the Supreme Court, "is not favored in the law," but several of the doctrines discussed here can be understood in similar terms.

We have suggested that many contemporary critics of the administrative state are best seen as offering Fullerian objections — of urging that agencies are violating one or more of his eight principles. Understanding the objections in this way puts the critics in the best possible light and helps them to be their best selves. At the same time, we have argued in favor of caution in celebrating judicial use of those principles, not only because of the absence of clear legal foundations, but also because the domain of law's morality is intrinsically limited and because agencies may reasonably choose, in a broad range of situations, to compromise Fuller's principles even where they apply.