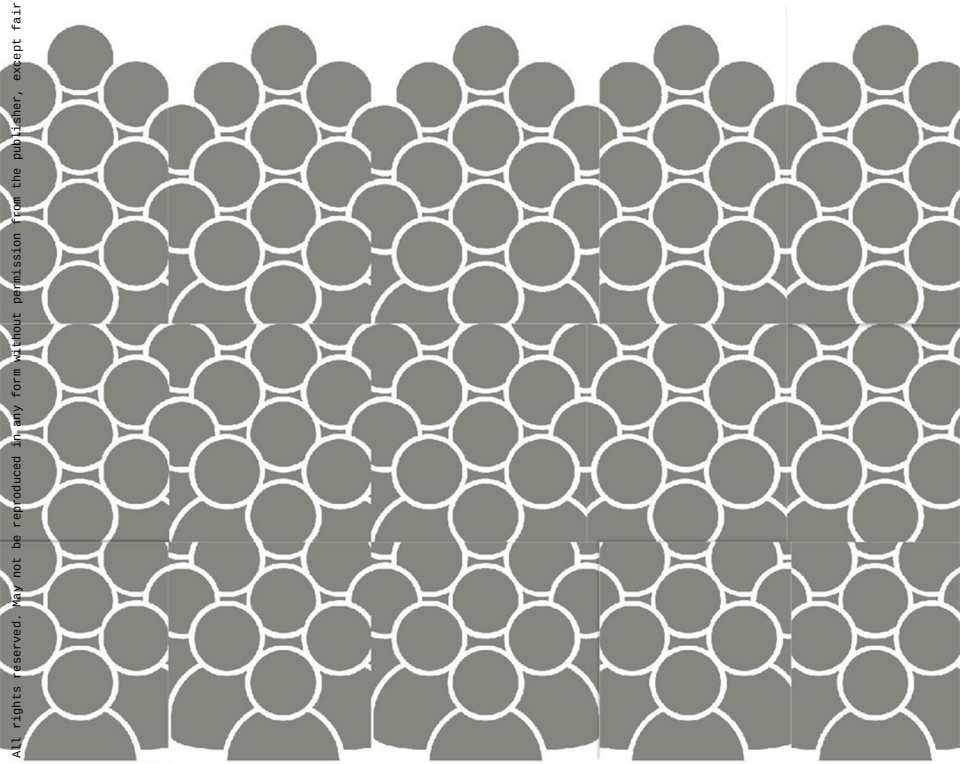
LAW & LEVIATHAN

REDEEMING THE ADMINISTRATIVE STATE



CASS R. SUNSTEIN

ADRIAN VERMEULE

LAW & LEVIATHAN

LAW & LEVIATHAN

Redeeming the Administrative State

CASS R. SUNSTEIN

ADRIAN VERMEULE

The Belknap Press of Harvard University Press
Cambridge, Massachusetts · London, England · 2020

Printed in the United States of America

First printing

Jacket image courtesy of the Noun Project
Jacket design by Tim Jones

9780674249813 (EPUB)
9780674249820 (MOBI)
9780674249837 (PDF)

THE LIBRARY OF CONGRESS HAS CATALOGED THE PRINTED EDITION AS FOLLOWS:

Names: Sunstein, Cass R., author. | Vermeule, Adrian, 1968– author.
Title: Law and Leviathan : redeeming the administrative state / Cass R. Sunstein and Adrian Vermeule.
Description: Cambridge, Massachusetts : The Belknap Press of Harvard University Press, 2020. | Includes bibliographical references and index.
Identifiers: LCCN 2020008221 | ISBN 9780674247536 (cloth)
Subjects: LCSH: Administrative discretion—United States. | Government accountability—United States. | Administrative agencies—United States.
Classification: LCC KF5407 .S835 2020 | DDC 342.73/066—dc23
LC record available at https://lccn.loc.gov/2020008221

To our families

O, it is excellent
To have a giant's strength; but it is tyrannous
To use it like a giant.
—William Shakespeare

CONTENTS

LAW & LEVIATHAN

INTRODUCTION

"Long-Continued and Hard-Fought Contentions"

Is the modern administrative state illegitimate? Unconstitutional? Unaccountable? Dangerous? Intolerable? American public law has long been riven by persistent, serious conflict, even a kind of low-grade cold war, over these questions.

Critics of the administrative state argue that constitutional and administrative law have come to license an administrative apparatus wielding executive powers of frightening scope and power. According to the critics, these developments threaten to undo the original constitutional structure, intrude on private ordering and economic liberties, and produce unaccountable and undemocratic policymaking. The critics make three separate points.

First: Broad grants of authority to agencies amount to an unconstitutional transfer of legislative power to the executive. In defiance of Article I, Section 1 of the US Constitution, agencies now exercise that power. *Second:* Some of the most powerful agencies are independent of the president, and so represent an invalid encroachment on the executive power. In defiance of Article II, Section 1 of the Constitution, these agencies exercise executive power free from presidential control. *Third:* The modern rule of judicial

deference to agencies on questions of law is an encroachment on the judicial power, or perhaps an abdication of the judges' obligation to say what the law is. In defiance of Article III, Section 1 of the Constitution, agencies are allowed to interpret the law.

In the critics' view, then, the administrative state manages a neat trick. All at once, it violates the original constitutional allocations for the vesting of legislative, executive, and judicial powers.

The critics are no monolith; with respect to particular issues, they combine in shifting coalitions. Some of them are originalists; they aim to speak on behalf of what they see as the original meaning of the Constitution. Others are libertarian; they are focused on liberty, as they understand it, and they think that modern administrators endanger it. Still others are democratic; they are concerned with accountability and democratic control. There are important differences among these perspectives (and in different variations, they can be found in many nations). But they converge, above all, on one major concern: that *the administrative state threatens the rule of law.*

To originalists, the administrative state is a patent betrayal of the commitments of the original constitutional scheme and the system of separated and divided powers.[1] To libertarians, agencies possess largely unchecked discretion that allows them to wield arbitrary power, intruding on private liberty and private property and acting in violation of core rule-of-law values.[2] To democrats, the chain of accountability from We the People to officials wielding state power is simply too weak; it is undermined by grants of excessive agency discretion, which allow legislators to duck political responsibility for ultimate policy choices.[3] Of course these concerns can be mixed and matched in all sorts of ways. Originalists may say that the Constitution, rightly understood, creates a chain of demo-

cratic accountability, libertarians may say that the original Constitution was libertarian, and so on. In any case, the very existence of the contemporary administrative state is said to create some kind of crisis of legitimacy.[4]

Supporters of the administrative state, although highly diverse in their approaches and emphases, reject the idea that it is in some wholesale way politically or legally illegitimate, whatever local problems and pathologies it doubtless displays.[5] They think that it is essential to promoting the common good in contemporary society; that it does far more good than harm; that it is a clear reflection of democratic will; and that it is entirely legitimate on constitutional grounds. In short, they welcome it. Sometimes they urge that far from being constitutionally forbidden, the administrative state is constitutionally mandatory, in the service of the general welfare.

Pointing to early practice in the American republic, the supporters emphasize what they see as the weakness of the originalist arguments against the administrative state. They deny that it violates the original meaning of the Constitution. They insist that nothing in Article I, Article II, or Article III is inconsistent with the general operation of modern administrative agencies. They point to the constitutional legitimacy of the administrative state as embodied in valid congressional authorizations (which, after all, created the Department of Transportation, the National Labor Relations Board, the Environmental Protection Agency, and the rest). Some of them contend that originalism is not the proper approach to constitutional interpretation. They add that it would be arrogant, a form of hubris, to reject many decades of settled understandings, even if those understandings did turn out to run up against widely held views in the 1780s and 1790s.

Some supporters of the administrative state also underscore its democratic accountability, mediated through both Congress and the presidency in different ways. They note that Congress, which is democratically accountable, is subject to the citizenry, even if it grants broad discretion to administrative agencies. If Congress does that, perhaps that is exactly what the citizenry wants it to do. If so, what's the democratic problem? Recall that all of the major agencies are creations of Congress. In any case, many of the most important agencies, including the cabinet departments, are run by people who serve at the pleasure of the president, and so are in that sense highly accountable to him.

To be sure, some agencies are "independent" of the president, in the sense that their members can be fired only for cause. This is true of the Federal Trade Commission, the Federal Communications Commission, the Federal Reserve Board, and the Nuclear Regulatory Commission. But the independent agencies are not all that independent. Their chairs are appointed by the president, after all, and most of the time, their policy preferences are broadly in line with the White House. Even if the president cannot order these appointees to make particular decisions, the power of appointment, together with other authorities, ensures that they are anything but a "headless fourth branch" of government.

Finally, supporters defend the administrative state as embodying a reasonable set of judgments about the common good and the general welfare. Indeed, they say that the administrative state is, in some form or other, essential to protecting the liberty and welfare of many people who would otherwise be hurt or subordinated by market exploitation or unjust terms of employment, or harmed by the vagaries of ill health, poverty, pollution, and old

age.[6] They argue that much of administrative activity is a response to market failures, as when polluters are able to avoid paying for the problems they cause.[7] They also contend that administrators respond to an absence of information (on the part of, say, employees, consumers, and investors) and to unfair background conditions, deprivation, and unfairness.

In these ways, those who support the administrative state deny that it is a threat to liberty, properly understood. Consider some of the actual activities of that state. Would people be freer without child labor laws? Without occupational safety laws? Without food safety laws? Without protection from sexual harassment? Without air pollution laws? Without protection against pandemics? Some defenders of the administrative state argue that it is not only constitutionally permissible, but also in some sense mandatory, if the goal is to carry into execution the promises of the constitutional scheme.[8]

Separately and together, we have argued for our own, first-order views on these matters, which distinctly incline toward broad discretion for the administrative state.[9] One of us (Sunstein) has argued that this broad discretion should be subject to welfarist principles, ensuring a focus on human consequences and employing cost-benefit analysis.[10] The other (Vermeule) is not enthusiastic about cost-benefit analysis, while agreeing that promotion of the common good and human well-being, broadly understood, are the proper ends of government. But neither of us believes that the status quo is perfect; we might favor quite significant reforms, while not always agreeing on the forms they should take.

Our project here, however, is definitely not to repeat and insist upon our first-order views, although we just as definitely do not mean to abandon them. The goal is simultaneously more modest

and more ambitious. We hope to understand and address the concerns of the critics from the inside, offering a structure that can transcend the current debates and provide a unifying framework for accommodating a variety of first-order views, with an eye to promoting the common good and helping to identify a path forward amid intense disagreements on fundamental issues. In our view, this framework can be embraced not only by ambivalent or uncertain observers attempting to make sense of fundamental questions, but also by the most enthusiastic supporters of the administrative state (even if they would prefer fewer constraints, in their ideal world) and by the most committed skeptics (even if they would prefer constitutional invalidation, in their ideal world). We acknowledge that this hope is highly optimistic. We nonetheless believe that it is realistic—and we shall offer some evidence in support of that belief.

As analogies, consider enduring legal and political frameworks such as the US Constitution, the Universal Declaration of Human Rights, and the Nicene Creed, all of which have allowed wide scope for contest and conflict within a common order.[11] Our framework is meant as an effort to draw on, and embrace, what we see as the strongest arguments on various sides, emphatically including those of the most vigorous advocates of the administrative state, and also the most severe skeptics about it. We acknowledge that those skeptics may not agree with our claims about what is strongest in their positions.

A framework of this sort need not, of course, attempt to prescribe specific outcomes or eliminate disagreement. That is not the point of frameworks. Rather, their point is to provide a common language and common horizon within which disagreements can occur in a productive, structured way. By so doing, we hope to pro-

mote goods common to both critics and supporters of the administrative state, including the overarching and genuinely common good of a shared constitutional enterprise.

To make this hope more concrete, we will look back to a crucial, foundational moment in the history of constitutional and administrative law. In 1950, Justice Robert Jackson wrote for the Supreme Court of the United States in *Wong Yang Sung v. McGrath*.[12] The legal issue was somewhat technical.[13] For our purposes, the main importance of *Wong Yang Sung* lies in its identification of a macro-principle for understanding the role of the Administrative Procedure Act (APA) and its accompanying doctrine in American public law. The APA, Jackson wrote in a famous passage:

> represents a long period of study and strife; it settles long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest. It contains many compromises and generalities and, no doubt, some ambiguities. Experience may reveal defects. But it would be a disservice to our form of government and to the administrative process itself if the courts should fail, so far as the terms of the Act warrant, to give effect to its remedial purposes where the evils it was aimed at appear.[14]

Jackson's understanding lay more or less dormant until it was rehabilitated in 1978 by one of his former law clerks, a certain William H. Rehnquist. The common-law improvisation of agency procedures by the United States Court of Appeals for the District of Columbia Circuit was invalidated by the unanimous opinion of the Supreme Court in *Vermont Yankee v. NRDC*.[15] The opening of Rehnquist's opinion was memorably described by Justice Antonin

Scalia as law's equivalent of "In the beginning was the Word."[16] Rehnquist said this:

> In 1946, Congress enacted the Administrative Procedure Act, which, as we have noted elsewhere, was not only "a new, basic and comprehensive regulation of procedures in many agencies," Wong Yang Sung v. McGrath, 339 U.S. 33 (195), but was also a legislative enactment which settled "long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest."[17]

In the succeeding chapters we aim to recover and renew the force of the principles emphasized in *Wong Yang Sung* and *Vermont Yankee.* As we shall show, those principles offer a powerful response to many, though certainly not all, of the objections to the administrative state. We aim to describe a view of administrative law and its relationship to the administrative state that supplies a framework that promises to "settle[] long-continued and hard-fought contentions," a modus vivendi for the limited domain of the administrative state, on which "opposing social and political forces [may] come to rest." The centerpiece of our view is a set of principles with widespread appeal in many legal systems, so widespread that they are often discussed under the heading of natural justice, natural procedural justice, or some such formulation. In the American system, they are often said—rather vaguely—to be inherent in the notion of "due process of law," in "tradition," or in unspecified constitutional sources.

We will call these principles *the morality of administrative law.* Examples are offered throughout, but just to motivate intuitions, we will examine principles such as these:

agencies must follow their own rules;
retroactive rulemaking is disfavored and must be limited to prevent abuse; and
official agency declarations of law and policy must be congruent with the rules that agencies actually apply.

Such principles have a great deal of power. Every day, they shape and enable the authority of administrative agencies. As we shall see, these and associated principles are, in minimal form, constitutive of legality. In more robust aspirational forms, they are ideals that address many of the concerns that critics of the administrative state tend to lump together under headings such as "the rule of law."

We are keenly alert to a degree of irony in our position. The morality of administrative law that we will defend rests on principles that are themselves, in certain cases, difficult to root in the text of the APA, as we will discuss in Chapters 2 and 3. Some of them are reasonably seen as judicial innovations. An example is the fundamental principle that agencies must follow their own rules—a principle that is central to the rule of law, on a broad range of conceptions, but that is nowhere expressly laid down in the APA. From the standpoint of *Vermont Yankee,* with its textualist positivism, it might seem odd to defend such a principle as a way to settle "long-continued and hard-fought contentions."

Yet on a higher level, we believe that our approach represents a faithful translation or interpretation of Justice Jackson's project in *Wong Yang Sung.* On that higher level, our overall approach serves the Jacksonian purpose, the search for a modus vivendi, for which Chief Justice Rehnquist appealed to the APA's text. Moreover, this purposive approach is, in some measure, itself a restoration of

Jackson's original conception, which Rehnquist edited and implemented in only one particular way. In *Wong Yang Sung*, Jackson's conclusion was that because the APA provides a formula for settling hard-fought contentions, it should be interpreted by courts "to give effect to its remedial purposes where the evils it was aimed at appear." This purposive approach was conspicuously dropped by *Vermont Yankee* in 1978, which cut off the quotation from Jackson before the end of the passage and took a strict textualist line. In that sense, we are appealing from Rehnquist to Jackson. As we will see, it is not possible to describe all or even most principles of administrative law, as it has evolved, as rooted in the text or original understanding of the APA in any straightforward way.[18]

The largest point is simple. Current administrative law is riven by severe conflict. *Wong Yang Sung* and *Vermont Yankee,* taken together, establish that a major and legitimate aim of administrative law is to establish a common framework to regulate and civilize, without eliminating, ongoing disagreements about the scope, aims, and powers of the administrative state, while also promoting values that should appeal to people with diverse foundational commitments. Our approach, elaborating the morality of administrative law, is entirely in this spirit.

Surrogate Safeguards and the Second Best

Here is another way of describing our approach, one rooted in a second-best approach to the administrative state and its institutions.[19] Many critics of the administrative state articulate deeply held concerns about the rule of law and about excessive admin-

istrative discretion, but embed these concerns in an originalist constitutional discourse that has unclear grounding in constitutional history and practice. Their preferred approach is to institute substantive constitutional limitations on agency authority, especially through judicial enforcement of doctrines that would fundamentally restrict what agencies may do—and strike down, now and forever, important parts of national law, potentially including important provisions of the Clean Air Act, the Occupational Safety and Health Act, and the Federal Communications Act.

Insofar as current law is concerned, the critics' approach has been strikingly unsuccessful. As we discuss in Chapter 5 and throughout, the excitement and anticipation generated by the critics in recent years that administrative law would be fundamentally revamped by the Roberts Court have been sorely disappointed (at least thus far). In important cases, majorities of the Court have turned back highly anticipated challenges to the operations of the administrative state.

It hardly follows, however, that the Court as a body has been deaf to the critics' legitimate concerns. Rather, we will argue, the best account of current law is that judges have adopted a different approach, one that from the standpoint of the critics might be acceptable or at least tolerable as a non-ideal second best. Administrative law has reached the sort of equilibrium accommodation that, under the *Wong Yang Sung* principle, reconciles long-standing and hard-fought contentions. Under this approach, administrative law has converged on the principles of law's morality as *surrogate safeguards*.[20] These safeguards help protect many of the values and concerns articulated by the critics about violations of the rule of

law, excessive administrative discretion, arbitrariness, and the erosion of judicial power. The surrogate safeguards capture the workings of contemporary administrative law at its most appealing, and they also have critical power for the future.

It is important to note that the concept of the rule of law, on which we will place particular emphasis, is greatly contested.[21] Our own understanding will be relatively "thin." We will not identify the rule of law with respect for free markets, with a general commitment to social justice, or even with respect for freedom of speech and the right to vote. The thin conception of the rule of law nonetheless shapes the ways in which governments may pursue the common good and general welfare. The principles we discuss should be understood as essential safeguards, even if they are not safeguards against all imaginable evils, including imaginable violations of rights, and—crucially—even though they are enablers as well as constrainers. As we will discuss, the principles of administrative law's morality are best understood as preconditions for the efficacy of administrative law as law. In that sense, they both channel and enable.

In their aspect as safeguards, principles of administrative law's morality were unmistakably on display in the October 2018–2019 term of the Supreme Court, when the conflict over the law of the administrative state reached a fever pitch. The Court's reaction was to reject substantive limitations on agency authority, but to channel agency discretion through surrogate procedural principles and thorough review to ensure that agencies' official declarations are congruent with their actual motivations and behavior. In these and other ways, the Court has consistently pursued an approach of just the sort we identify.

We are acutely aware, of course, that the 2018–2019 term is only a snapshot, and that it is rapidly receding in time. We explore it on the ground that it illustrates and illuminates the framework that we describe. As we will try to show, that framework has enduring appeal. It is, for the foreseeable future, "a formula on which opposing social and political forces have come to rest." And its creative potential is hardly exhausted. It can provide the springboard, not only for new applications, but also for fresh thinking about new and better ways to promote rule-of-law values.

Legality and Authority

A note by way of clarification and also warning: We will touch on some of the largest issues facing contemporary democracies, with a particular focus on the United States, but with the goal of speaking to fundamental problems in many nations. Is the administrative state a serious problem, constitutional or otherwise? Does it promote democracy, by allowing public officials to respond to serious problems, or does it undermine democracy, by allowing legislators to duck hard questions and to empower public officials who were elected by no one? Does it promote freedom and welfare, properly understood, by (for example) allowing experts to help decide how to reduce highway deaths and increase occupational safety, or does it undermine freedom and welfare, properly understood, by allowing unelected bureaucrats to order people around? Should bureaucrats be seen as some kind of "deep state"?

To answer these questions, we must explore some concrete and fairly technical issues of legality—the stuff of lawyers' dreams, or perhaps nightmares. We must get into some weeds. For example: Does

Congress have the constitutional authority to give the Federal Communications Commission the power to regulate radio and television so as to promote "the public interest"? To allow the Department of Labor to issue health and safety regulations that are, in its view, "necessary or appropriate"? To authorize the Department of Transportation to issue road safety rules that are "practicable"? To answer these questions, we need to explore the "nondelegation doctrine," as it is called.

And: Do federal agencies have the authority to interpret ambiguities in federal law? If Congress has left an ambiguity in the Clean Air Act, does the Environmental Protection Agency get to resolve it? Or is that question for the courts? This is the issue of "*Chevron* deference."

And: Do federal agencies have the authority to interpret ambiguities in their own regulations? If the Federal Trade Commission issues a regulation governing deceptive advertising, is it entitled to sort out the meaning of ambiguous terms? Or would that be an atrocity and an abuse? This is the question of "*Auer* deference."

We shall have a fair bit to say about the nondelegation doctrine, *Chevron* deference, *Auer* deference, and other technical questions. It is not possible to understand the fundamental issues—the large-scale challenges to the modern administrative state and the question of how to respond to them—without reference to specifics. One of our main themes, which we leave largely implicit, is that the intensity of those who venture dramatic, large-scale challenges might soften in light of a careful encounter with the concrete materials of actual law. We hope that the technical issues will not be an excessive distraction from the largest themes.

Plan of the Book

Chapter 1 sketches the main views—frequently contending views—about the constitutional legitimacy of the administrative state. We identify a complex of positions, which we call the New Coke, that radically criticizes the administrative state's constitutional standing, labeling it a departure from the common-law baselines encoded by the original Constitution of 1789. We respond that the putatively originalist claims of the New Coke are, in critical cases, presentist claims in originalist language. In our view, they are innovations on the constitutional scene that have become prominent as ways of articulating the critics' concerns over the rule of law and administrative discretion.

But suppose that we are wrong as a matter of history. Or suppose that the innovations, taken as such, deserve support or even celebration. We do not mean to dismiss the underlying concerns. On the contrary, a premise of the book is that such concerns should be taken seriously and addressed, even, or perhaps especially, by those who do not doubt the basic legitimacy of the administrative state. Our central claim in the following chapters is that the law can, does, and should address those concerns in a different way. Even to those who insist that the modern administrative state does indeed raise serious constitutional problems, we hope that this central claim will have considerable appeal, if only as a second best.

Chapters 2, 3, and 4 present our affirmative view. These chapters emphasize specific principles associated with the rule of law. In the extreme, a legal system that lacks such principles is unjust to such a degree that it amounts to no real legal system at all. The American

administrative state, on any sane account, does not suffer from defects of that level of severity. Even above that minimum threshold of legality, however, these specific principles function as guidelines and aspirations for a system that respects and instantiates the rule of law.

As we will also argue, however, the aspiration to ever-more-ideal legality is hardly the *only* proper aim of the American system of administrative law. Given constraints on administrative and judicial time, attention, and resources, procedural idealism must inevitably be traded off against a variety of other legitimate objectives. In many cases, therefore, the law does not place rigid procedural limits on agencies, but merely asks them to provide a reasonable explanation of their procedural (and other) choices, connecting them to their programmatic aims.

Chapter 2 examines these themes with respect to what Justice Antonin Scalia called "the rule of law as a law of rules."[22] Justice Scalia was addressing the question whether judge-made law should take the form of rules or discretionary standards. We place special emphasis on the law's effort to cabin the exercise of unbounded discretion by administrators.

Chapter 3 turns to an issue that is central to the operation of the rule of law: the extension of administrative decision-making over time. We explore the consistency of agency decision-making, the reliance interests it generates, and the extent to which courts police both in the interest of legality. We emphasize the virtues of rules and of consistent decision-making, both as constraints on arbitrariness and as enabling agencies to act efficaciously through legality.

At the same time, we contend that they are not the only goals that administrative law properly keeps in view. As we have noted,

those goals must be traded off against the fulfillment of other legitimate programmatic objectives of agencies; courts often do best by asking only that agencies justify their choices, taking account of the uncertainty of the relevant policy environment. The requirement of reasoned justification is central here. Chapter 4 steps back to consider the limits within which our approach operates, the trade-offs inherent in the aspirational principles of legal morality we advocate, and the limits of judicial capacity to discern those principles or to enforce them in the face of reasonable administrative judgments to the contrary.

Chapter 5 is an extended case study. It places our themes in the context of some epic struggles over the law and legality of the administrative state, many of which have become critical in key decisions of the Roberts Court. The general theme is surrogate safeguards. Among other questions, we explore the nondelegation doctrine, *Auer* deference to agencies' interpretations of their own regulations, and the question whether agency decision-making should be reviewable for pretext. To date, the most vigorous critics of the administrative state have not succeeded in obtaining any of the clear successes they have sought, insofar as they hoped to constrain the scope of administrative authority through constitutional originalism or through novel interpretations of the APA. Yet the Court has hardly been oblivious to their concerns. Instead it has pursued a second-best approach, the use of rule-of-law principles as surrogate safeguards for legality.

In the context of deference to agencies, for example, the Supreme Court has aimed to ensure that agency interpretations represent the agency's considered judgment and take account of reliance interests over time, without asserting the sort of first-best (optimal)

constitutional principles of de novo judicial review of legal questions that critics hoped to obtain. Likewise, the Court's experiment with pretext review of the Commerce Department's decision to include a citizenship question on the census—a Court decision that also offered broad deference to the department's substantive judgments and to its predictions in the face of uncertainty—pursues the theme of expecting considered agency judgments, while declining to impose substantive constraints.

The overall thrust of the Roberts Court's decisions on administrative law, at least to date, has been to take account of concerns over legality and administrative discretion through indirect safeguards, rather than through wholesale invalidation or aggressive substantive review. Through this elaboration of administrative law's implicit procedural logic, the law has redeemed the legitimacy of the administrative state while recognizing the complaints of its critics—opening up a path to the resolution of long-fought contentions.

In our view, that path is promising both for the United States and for nations all over the world. It is promising because it has the potential to authorize the legitimate functions of the contemporary administrative state, and thus to promote the common good and human welfare, while also helping to make real the values associated with the rule of law.

1

THE NEW COKE

In the early twenty-first century, American public law is being challenged by a fundamental assault on the legitimacy of the administrative state, usually marching under the banner of "the separation of powers." Mainly found in academia, but with some support on the bench, the challengers frequently refer to the specter of tyranny or absolutism. Sometimes they speak of Stuart despotism, and they valorize a (putatively) heroic opponent of Stuart despotism: the common-law judge, symbolized by Edward Coke.

As we understand the term here, the New Coke is shorthand for a cluster of impulses stemming from a belief in the illegitimacy of the modern administrative state. The New Coke can take relatively modest forms, which would push existing doctrine incrementally in directions consistent with those impulses. But it occasionally takes far more aggressive forms, which would invoke heavy constitutional artillery, either to invalidate long-standing practices or to transform them in light of what its advocates see as background principles for statutory interpretation. In the most aggressive forms, the Constitution would be invoked to threaten invalidation of important provisions of federal regulatory law, including the Clean Air Act, the Federal Communications Act, the Occupational

Safety and Health Act, and the National Traffic and Motor Vehicle Safety Act.

Prominent declarations of the New Coke include Justice Neil Gorsuch's dissenting opinion in *Gundy v. United States*, arguing for a revamped and strengthened version of the nondelegation doctrine.[1] Another is Justice Clarence Thomas's separate opinion in *Perez v. Mortgage Bankers Ass'n,* arguing for an overturning of both *Chevron* deference to agency interpretation of statutes and *Auer* deference to agency interpretations of their own rules.[2] The New Coke can also be found in Judge Janice Rogers Brown's provocative opinions for the D.C. Circuit Court of Appeals, arguing against public regulation and for a revival of the nondelegation doctrine.[3] Several of these opinions draw upon the work of an assortment of libertarian-originalist legal scholars and think-tank commentators, most prominently Gary Lawson and Philip Hamburger.[4]

Those who embrace the New Coke often speak for what they see as the original meaning of the Constitution. They are keenly interested in history. Some of their historical elaborations are both informative and impressive.[5] Nonetheless, and with respect, we think that the New Coke is best understood as a living-constitutionalist movement, a product of thoroughly contemporary values and fears.[6] These contemporary fears are clearly prompted by continuing rejection, in some quarters, of the New Deal itself. The New Coke is analogous to other movements in American public law, in which a form of "normal science" has been opposed by a vigorous effort at legal and social reform, based on fundamental principles coming from an identifiable ideological direction.

In constitutional law, intellectual insurgencies are not hard to find. In the first third of the twentieth century, for example, the US

Supreme Court's scrutiny of economic legislation ran into severe objections from Justices Oliver Wendell Holmes and Louis Brandeis, who spoke on behalf of judicial restraint, endorsed at the time by many progressive commentators. In the middle of the twentieth century, the Supreme Court's occasionally cautious approach to civil liberties and civil rights was vigorously challenged by Justices William O. Douglas and Hugo Black, who generally argued for a more aggressive posture than the Court's majority was willing to support. In the 1970s and 1980s, Justices William Brennan and Thurgood Marshall—accompanied by a chorus of academic theorists—made similar arguments on behalf of a large-scale overhaul of constitutional law. These efforts were not, in general, based on an insistence on the original meaning of the Constitution; they were rooted in large-scale claims about democracy, liberty, and equality. Our point is that even if the New Coke can claim a solid historical pedigree, which we question, it should be seen as a similarly ambitious effort at constitutional reform.

There is no question that in the first decades of the twenty-first century, a fundamental assault on the legitimacy of the administrative state is playing a growing role in separate opinions. On occasion, it finds its way into majority opinions as well. Justice Thomas is the principal advocate, and his views are quite extreme; on the Court, he speaks only for himself. But on some prominent occasions, Justices Samuel Alito and Neil Gorsuch, along with (to a lesser degree, and in different ways) Chief Justice Roberts and Justice Brett Kavanaugh, have also shown significant concern about discretionary authority wielded by contemporary administrative agencies. Those who express this concern sometimes appeal to putative principles of the Anglo-American constitutional order,

particularly resistance to executive prerogative—the lawless despotism of the Stuart kings. The heroic opponent of Stuart despotism is the common-law judge, symbolized by Edward Coke. Where there are newly enthroned Stuarts, there must also be a New Coke.[7]

Our aims in this chapter do not involve English constitutional history. We pay little attention to whether the stylized account of that history, implicit in the New Coke, is actually true—although we are skeptical.[8] Instead, our aims are to illuminate both the specific legal commitments and the broader constitutional theory of the New Coke, and to bring them in contact with what we see as a more sober view of American public law, above all as reflected in the Administrative Procedure Act (APA) and the Constitution. Those aims are relatively modest. We do not attempt anything like a full reconstruction of the original understanding of the founding document. We do hope to say enough to show why it is challenging, at best, to link the New Coke, and the constitutional assault on the administrative state, with that understanding.

We have said that the New Coke, like most previous attacks on "normal science," is largely a product of modern values and fears. Notwithstanding the New Coke's claimed historical pedigree, its use by judges and justices is methodologically of a piece with such presentist decisions as *Roe v. Wade, Obergefell v. Hodges,* and (arguably) *District of Columbia v. Heller.*[9] In these decisions—whether or not written in originalist terms—such values and fears also played a central role.

The main concern of the New Coke is the overriding fear that the executive will abuse its power.[10] That fear was entirely familiar to those who designed the Constitution, and to that extent, critics of

contemporary executive power can certainly find support in the original understanding. After all, the Constitution was written in the aftermath of a revolution against a king, and fears of executive power were unquestionably prominent in that period. Before the American Revolution was won, those fears were defining.

But the US constitutional order in general, and administrative law in particular, attend to other goals and risks as well, and do not take prevention of executive abuses as the overriding goal or master principle. Indeed, members of the founding generation wanted a strong national government, not a weak one. They did not want a powerless executive branch. They knew that an administrative apparatus would be required. With respect to the abuse of authority, they were mainly concerned with the "legislative vortex" that might draw all power to itself, as well as with executive abuses per se.[11] Under the Articles of Confederation, they were reminded of the risk of that vortex anew and came to see it as seriously threatening, no less and perhaps more than executive power. Members of the founding generation were also concerned with the risk of oppression from an unaccountable judiciary. Neither executive, nor legislative, nor judicial abuses were to be strictly minimized, either as a matter of original understanding or optimal institutional design.[12]

Instead, as James Madison wrote in the great but neglected Federalist No. 41, "in every political institution, a power to advance the public happiness involves a discretion which may be misapplied and abused."[13] Public law, in effect, trades off the risks of official abuse against other goals and commitments. These include public participation and accountability, which will sometimes lead to a stronger executive; efficiency in government, which can lead in the

same direction; rational and coordinated policymaking; and (a crucial theme in Alexander Hamilton's work) the promotion of the common good and overall welfare, often by means of executive action from public officials, who sometimes display constitutionally legitimate "energy."[14]

In the service of these multiple goals, the Constitution and the administrative state attempt to channel and constrain, rather than eliminate or minimize, executive discretion. The New Coke is inherently limited and one-sided, a reflection of a subset of the relevant concerns, and for that reason it offers an irremediably partial account of both administrative and constitutional law. It is true, of course, that broad propositions about plural aims cannot dispose of concrete questions, such as the nature of the nondelegation doctrine or the appropriate degree of deference to be given to agency interpretations of agency regulations. But an understanding of plural aims can, we think, dispel central assumptions of the New Coke that treat executive discretion as a kind of large-scale departure from the constitutional plan, or that see heightened judicial scrutiny as a cure for what ails us.

An Accelerating Movement

Outside the courts, the recipe for the New Coke has been brewing for a very long time; in some respects, its origins can be found in the New Deal period, especially in the writings of Dean Roscoe Pound, who spoke of "absolutism."[15] But it has been a particular focus during the period that concerns us, which is the past two decades.

In the George W. Bush administration, civil libertarians of both the left and the right—but especially the left—invoked the rhetoric of tyranny with respect to Guantánamo Bay and the

so-called USA PATRIOT Act, calling the president "George III" or otherwise citing the risk or reality of large-scale overreaching.[16] Roughly simultaneously, but with a marked acceleration after the Obama administration came into office, a broad movement in libertarian and conservative legal scholarship offered a wholesale critique of modern exercises of executive power. Leaders of the movement were devoted to restoring the "lost Constitution" or the "Constitution-in-Exile."[17] They began to suggest that the administrative state or the presidency, or the "executive" (loosely defined), threatened to accumulate tyrannous strength and to threaten the rule of law itself.

In the Trump administration, suspicion of executive power has been in a sense bipartisan, although the parties have focused on different executive organs. The administration's supporters critique the "deep state," a supposed network of de facto independent bureaucracies in law enforcement and national security that the supporters see as illicitly thwarting the administration's valid exercise of legal authority. The so-called resistance to the administration praises bureaucratic and judicial obstruction of agency initiatives that undo Obama administration decisions or that break new ground that the resistance finds objectionable.

In the legal academy, skeptics about the administrative state have developed different approaches. The Constitution-in-Exile movement, as it has been rightly called, drew attention to a supposedly lost set of constitutional commitments and asked the courts to return them to their rightful place. Books appeared with titles such as *The Once and Future King: The Rise of Crown Government in America* and *Is Administrative Law Unlawful?*[18] The authors argued explicitly that the administrative state recreated a type of Stuart prerogative, albeit in a light disguise. At the same time, the

conservative legal movement showed definite fault lines, which could also be found across parties and ideological commitments. Although some conservatives expressed anxiety about presidential power, others expressed anxiety about the swelling power of the administrative bureaucracy, which was seen as insufficiently accountable to anyone, including the president. Some expressed anxiety about both.

Those two anxieties sometimes stood, and stand, in tension. Most broadly, the conservative legal movement contains both libertarians and government-lawyer types; the former insist on private liberty and abolition of large bureaucracies while the latter are, chronically, far more cautious and hence ambivalent about the New Coke and its suspicion of executive power. For the latter, large bureaucracies may be tolerable so long as they are accountable to the president. In the *Free Enterprise Fund* case, invalidating an independent agency within an independent agency (the Securities and Exchange Commission), Chief Justice Roberts's majority opinion emphasized the need for the president to have broad power to control the bureaucracy.[19] The strong presidency is, in American constitutional law, perhaps the main check on the bureaucracy.[20] The (supposedly) headless fourth branch flourishes where presidential control ends. So far, perhaps, so good. But who controls that branch? And if the president is ultimately in charge, who controls the president?

Inside the Courts

Our analysis is meant to go beyond any particular period in American law, but it is illuminating to find that with respect to questions

of executive power, the Roberts Court has been fraught with tensions and conflicts. The record of that Court includes a decision reaffirming broad deference to the presidency in matters of immigration and national security, in *Trump v. Hawaii.*[21] There are also unprecedented decisions rejecting claims of executive power, such as *Boumediene v. Bush* and *Medellin v. Texas.*[22] Another unprecedented ruling rejecting such claims, in *Department of Commerce v. New York,* involves a "pretext" for a citizenship question on the US census form.[23] And then there is an unprecedented decision affirming the paramount constitutional claims of executive power, even in the face of clear contrary legislation, in *Zivotofsky v. Clinton.*[24]

Indeed, the tensions even appear to lie not only between but also within some of the justices themselves. Aleksandr Solzhenitsyn noted that "the line dividing good from evil runs through the heart of every human being."[25] Something analogous can be said about executive power; a number of the justices have issued opinions that seem to be in tension with other opinions by the same justice, or may even be internally conflicted. The most obvious cases are the late Justice Antonin Scalia and Chief Justice John Roberts, both of whom served in the executive branch before ascending to the bench.

As to Justice Scalia, a Martian observer would be unlikely to guess that the same justice had written both a remarkably broad affirmation of agencies' authority to determine the limits of their own jurisdiction, in *City of Arlington v. FCC,* and also impassioned separate opinions that criticize judicial deference to agency interpretations of their own regulations, on the ground that such deference makes agencies judges in their own cause.[26] As to Chief Justice Roberts, the observer would be unlikely to guess that the same

justice had authored both a strong endorsement of the Unitary Executive, in *Free Enterprise Fund,* resting on the virtues of political accountability through the executive, and also attempted to limit the scope of deference to agencies, including executive branch agencies.[27] This deference was often justified by reference to political accountability.[28] These positions may be reconcilable on various grounds—we do not deny that possibility—but they do seem animated by quite different concerns.

Amid the swirl of precedent, however, a consistent trend has been the growth of New Coke rhetoric, emphasizing the importance of political accountability and private liberty and seeing the administrative state as a serious danger to both.[29] A place to start, perhaps surprising but clearly linked to the emergence of the New Coke, is the Second Amendment. A moment's thought suggests that this isn't surprising at all; the issue about the Second Amendment is essentially the scope of government's regulatory authority over dangerous articles of technology, a type of issue central to the development and quotidian operation of the administrative state.

In *District of Columbia v. Heller,* the majority—in an opinion written by Justice Scalia—grounded an individual right to keep and bear arms for purpose of self-defense in a larger rationale: prevention of executive tyranny.[30] The specter of the Stuarts was explicitly invoked.[31] In the majority's words, "[i]f . . . the Second Amendment right is no more than the right to keep and use weapons as a member of an organized militia . . . it does not assure the existence of a 'citizens' militia' as a safeguard against tyranny. . . . It guarantees a select militia of the sort the Stuart kings found useful, but not the people's militia that was the concern of the founding generation."[32]

Yet the context of *Heller,* however important and attention-grabbing it may be, was somewhat unusual and indeed limited. The case involved a particular right—the individual right to bear arms—and that very right was, according to *Heller* itself, subject to "reasonable" restrictions.[33] Lower courts, by and large, have declined to expand the right to the limits of its logic.

An even larger question, hovering in the background, was whether prevention of tyranny would be invoked in the setting of legal limitations on the administrative state. Justice Scalia was also a pioneer in that setting. In a widely discussed concurrence in *Decker,* in which he declared that he would no longer afford agencies *Auer* deference on the interpretation of their own regulations, Scalia argued from the risk of tyranny. For an agency to "resolve ambiguities in its own regulations" would, he wrote,

> violate a fundamental principle of separation of powers—that the power to write a law and the power to interpret it cannot rest in the same hands. "When the legislative and executive powers are united in the same person . . . there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner." Montesquieu, Spirit of the Laws. . . . *Auer* is . . . a dangerous permission slip for the arrogation of power.[34]

That large-scale rhetoric, emphasizing the threat to liberty and the arrogation of power, can be seen as an iconic illustration of the New Coke in action.

The Risk of Executive Abuse

The New Coke is obviously animated by a fear of executive abuse. One of our primary goals here is to explore how to address that fear. We have said, however, that those who embrace the New Coke focus too myopically and selectively on one set of risks, neglecting the full universe of risks. We can make this point in strictly legal terms by focusing on legal documents, or more pragmatically or theoretically by focusing on the set of relevant values and how best to accommodate them.

THE APA

Recall the Court's recognition—in *Wong Yang Sung* and *Vermont Yankee*—that the APA was a "formula upon which opposing . . . forces have come to rest."[35] But it was not just any formula. More particularly, the APA settlement reflects a particular effort to balance a range of variables, including stability, constraints on executive power, accountability, and the need for expedition and energy, for vigorous government.[36] For the theorists and architects of the modern administrative state, private power, exercised through delegation of legal powers and entitlements by the common law and by market ordering, was itself a threat to individual liberty.[37] Hence vigorous government, checking the abuse of corporate and other private power, was deemed just as indispensable to liberty as were constraints on executive abuse.[38] Consider, for example, the question whether the Social Security Administration, the National Labor Relations Board, the Securities and Exchange Commission, and the Federal Trade Commission are threats to freedom or indispensable to it—questions on which reasonable people differ.

A particular argument, vigorously advanced in the early part of the twentieth century and often disregarded today, was that the common-law system, including the law of property and contract, is itself a regulatory system, filled with permissions and prohibitions. If some people have a lot and other people have only a little, it is hardly because nature so decreed, and not because of purely voluntary achievements and failures, important as those are. It is also because of what the law chose to recognize, protect, or reward. A homeless person, for example, is deprived of access to shelter by virtue of the law of property, which is emphatically coercive. In these circumstances, the creation of modern agencies, including those just mentioned, did not impose law or coercion where unregulated freedom previously flourished. They substituted one regulatory system for another. In the view of many supporters of administrative agencies, the question was whether the substitution would increase liberty or welfare, properly understood, not whether coercion suddenly appeared out of the blue.

The APA settlement did not by any means reflect a wholesale victory for the proponents of the New Deal and vigorous government. The defenders of private liberty, as they understood it, mattered greatly; they played an important role in the settlement. But the balance involved a national recognition—prominent in the New Deal era—of the multiple values served by modern administrative agencies. The opponents of the New Deal did not win, even if they also did not lose.[39] In the APA compromise, Congress created procedural safeguards to reduce the risk of executive abuse, and also recognized and in some ways fortified the judicial role, above all with the "substantial evidence" test.[40] But those safeguards also channel and empower agency action. The APA does not embrace

anything like the New Coke—on the contrary, it pointedly declines to do so.[41]

No one doubts that the APA leaves gaps and ambiguities, and consistent with its terms, courts might move in the direction of strengthening those constraints on executive action that they see as infringing on liberty. They might, for example, insist on independent judicial interpretation of statutes and regulations (issues that we take up in Chapter 5). But they cannot possibly claim that the APA, taken as a whole, requires the kind of role sketched by Justice Thomas and his occasional allies. The New Dealers—villains, according to those who embrace the New Coke—were willing to accept the APA, and they came to embrace it with some enthusiasm. Taken seriously, the New Coke vision stands opposed to the APA. It brands the accommodation of the administrative state as fundamentally wrong.

THE CONSTITUTION

What of the Constitution, the allegedly authentic source of the New Coke? We think that, broadly speaking and on the relevant counts, the founding document is analogous to the APA. It too is a compromise, a balance among competing values and views, including protection of private liberty, and it does not speak single-mindedly of constraining the executive.[42] Of course the framers were intensely concerned with the dangers of creating a monarchy, and the antifederalists vigorously objected to the document in part on the ground that it had not sufficiently counteracted that danger. Of course private liberty mattered. But the founding generation also deplored the absence of executive power in the Articles of Confederation. In part under the influence of Alexander Hamilton, they sought to ensure an energetic and coordinated executive

branch, one that would be able to get things done.[43] They sought a degree of efficiency in government, and they wanted to create a framework that would overcome the weakness and the paralysis that they found under the Articles of Confederation.

In Hamilton's own words, "A feeble Executive implies a feeble execution of the government. A feeble execution is but another phrase for a bad execution; and a government ill executed, whatever it may be in theory, must be, in practice, a bad government."[44] As Hamilton put it, "all men of sense will agree in the necessity of an energetic Executive," and so the only question is, "what are the ingredients which constitute this energy"?[45] In his terms, they include "first unity, secondly duration, thirdly an adequate provision for its support, fourthly, competent powers."[46]

We do not contend that Hamilton's abstract claims can resolve particular questions. They do not prove that Congress is allowed to grant open-ended authority to executive agencies. They do not prove that *Chevron* or *Auer* is correct. But they are significant. At the very least, they raise serious doubts about the claimed constitutional pedigree of the New Coke, and about the view that executive discretion, for the founding generation, was the central constitutional evil to be averted, a reprisal of the monarchical legacy.

Surprisingly to some, Madison emphatically agreed. In Federalist 41, Madison offered a general overview of the need for a robust national government, and rejected the thought—pervasive in the New Coke literature—that the risk of abuse is, by itself, sufficient reason to limit government power:

> It cannot have escaped those who have attended with candor to the arguments employed against the extensive powers of the government, that the authors of them have very little

> considered how far these powers were necessary means of attaining a necessary end. They have chosen rather to dwell on the inconveniences which must be unavoidably blended with all political advantages; and on the possible abuses which must be incident to every power or trust, of which a beneficial use can be made. . . . [C]ool and candid people will at once reflect, that the purest of human blessings must have a portion of alloy in them; that the choice must always be made, if not of the lesser evil, at least of the GREATER, not the PERFECT, good; and that in every political institution, a power to advance the public happiness involves a discretion which may be misapplied and abused. They will see, therefore, that in all cases where power is to be conferred, the point first to be decided is, whether such a power be necessary to the public good; as the next will be, in case of an affirmative decision, to guard as effectually as possible against a perversion of the power to the public detriment.[47]

To be sure, Madison is here speaking of the power of the federal government as a whole, rather than of executive power in particular. Yet it is also true that Madison, like Hamilton, thought that excessive limitations of executive power could be affirmatively perverse and counterproductive. At a more general level, in any event, Madison is here diagnosing a fallacious mode of reasoning that afflicts the New Coke critics of executive power in the same way, *mutatis mutandis,* that it afflicted the antifederalists.

The problem lies in selective attention to certain risks—to the risks of (federal) government action, as opposed to inaction; to the risks arising from the functions of government, as opposed to dys-

functional governments, such as the regime of the Articles of Confederation; to the risks generated by new powers, as opposed to the risks arising from old powers that new powers could be used to counter. Selective attention of this kind produces misguided calls to eliminate or sharply constrain powers whose existence is beneficial, if taken as a whole, and that could be paired with adequate procedural safeguards. Here is a perfect diagnosis of the fallacies of the New Coke, especially insofar as it finds inadequate the procedural principles inherent in the scheme of the APA and in evolving American administrative law.

At the level of practice, the existence of broad grants of discretion to the executive in the earliest days of the republic testifies to the capacious view of the founding generation.[48] So do a wide range of practices in the early period, which recognize the importance and advantages of executive authority for promoting the general welfare.[49] Those who think that the Constitution is inconsistent with the modern administrative state have yet to grapple sufficiently with the historical materials, elaborated in great detail by Jerry Mashaw.[50] Among other things, it is challenging to find—in the Constitutional Convention, the ratifying debates, or the first decades of the nineteenth century—anything like widespread support for the nondelegation doctrine as its contemporary advocates understand it.[51] Most of the alleged grounds consist of abstract passages about the separation of powers (which no one disputes) and the particular need to separate legislative and executive powers (which no one disputes), rather than of particular claims that Congress lacks the constitutional authority to grant discretionary authority to the executive.

On the broadest questions, the constitutional settlement cannot easily be taken to favor the New Coke. That is why we suggest that

those who invoke the founding document as the basis for large-scale attacks on administrative agencies are speaking less for history and the original understanding than for early twenty-first-century views and convictions.[52] Despite frequent references to the founding period, their concerns sound less in originalism than in current social movements and common-law constitutionalism.

To say this is not to say that the words of the founding document rule the New Coke out of bounds, or even that important debates during the Constitutional Convention and ratification could not be mustered on its behalf. Though we do not favor it, a heightened version of the nondelegation doctrine would not obviously be inconsistent with the text of the document itself. Though we do not favor it, Justice Thomas's disapproval of binding regulations is not a textually unintelligible understanding of Article I taken by itself, in a vacuum. Though we do not favor it, background principles, involving the separation of powers, have been invoked in good faith and with a straight face to challenge both *Chevron* and *Auer*.[53] (We take up these questions in Chapter 5.) We do not reject the claim that, standing by itself, the constitutional text could be taken to call for restrictions on executive authority that would move in the direction of the New Coke.

To the extent that the Constitution leaves gaps or ambiguities, and to the extent that the relevant legal materials allow them, should judges embrace the New Coke, or at least take steps in its direction? If new historical work turns out to uncover unexpectedly strong originalist support for the New Coke, should judges do that? We do not think so. Settled practices, a product of felt necessities for a period of many decades, have their claims. Constraints

and invalidations have costs, including democratic costs, and they might even endanger liberty, however it is understood. The problem is greatly heightened if constraints on executive discretion amount, in practice, to increases in judicial discretion, allowing the political values of judges to play a significant role, as James Landis and others argued—a shift that should be especially unwelcome when technocratic expertise and political accountability greatly matter. An ironic consequence of the New Coke would be to produce large-scale shifts of that kind, and in some singularly unappealing contexts.[54]

Some people are of course deeply committed to the New Coke and to a wholesale constitutional assault on the administrative state. We are under no illusion that the arguments in this chapter will be sufficient to dispel that commitment. Recall our larger goal, which is to suggest that people of disparate convictions, with different first-order views, might be willing to converge on a distinctive approach if only as an appealing second best. We turn now to that goal.

2

LAW'S MORALITY, 1

RULES AND DISCRETION

OUR PROPOSED framework centers on a set of procedural principles for making genuine administrative law (so long as minimal conditions are met) and perhaps even attractive and successful administrative law (if more aspirational conditions are met). And although we have focused on skeptics about contemporary administrative law, and how best to accommodate their concerns, the framework is also meant to address enthusiasts about the administrative state—past, present, and future—and to sketch principles that help the administrative state to become fully efficacious, by means of procedures that channel agency action. The principles we will discuss, in other words, are by no means to be solely understood as constraints. We will suggest instead that, in their most minimal form, they are also preconditions for the efficacy of administrative law as law, and in a more aspirational form, they are regulative ideals for administrative law, even if complex trade-offs are always necessary.

The underlying principles, we have said, are in many cases not rooted directly in the express language of controlling legal texts such as the Constitution, the Administrative Procedure Act (APA), or

relevant federal organic statutes that specify agency authority—although, as we will also see, judges are often tempted to read these principles into such texts, where vague or open-ended language permits. Rather, these principles follow a kind of natural logic for the creation of (real) law that serves the common good, emphatically including administrative law. We argue throughout that judges have, in part intuitively, created a body of doctrine on judicial review of agency action that draws heavily upon these principles.

Our approach makes sense of current doctrine; it fits with what courts have actually been doing and also casts their decisions in an attractive light.[1] It also has a degree of critical bite in many countries, including the United States, insofar as current law does not perfectly track the implications of our approach. The promise of the rule of law, as we understand it here, remains imperfectly realized.

Law and Morality

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.[2] But others, most prominently 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.[3] Lon Fuller offers a different but related argument, based on what he saw as the procedural preconditions for accomplishing the tasks of law.[4] In his view, law has an internal morality, including both a minimal

morality of duty and a higher morality of aspiration.[5] If a purported legal system violates the internal morality of duty, sinking below even a minimal threshold, 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."[6] In making this charge, Fuller might well have had Nazism in mind. In his view, some purported legal systems are not legal systems at all.

But of what exactly does law's internal morality consist? In his most vivid presentation, cataloging 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."[7] 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.[8]

In each of these cases, there is a violation of the minimal morality of duty. By producing these failures and abuses, the hapless Rex "never made any" law at all.[9] (Note that a democratic or nondemocratic nation might violate the morality of law, and that a democratic or nondemocratic nation might comply with the morality of law. After all, Fuller's Rex was a king.) As Fuller describes them, some of these ways of "miscarrying" are extreme, something out of a nightmare. 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 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. Many people believe, for example, that agencies all too often fail to make rules, and proceed instead on a case-by-case basis.[10] They object that this failure impedes planning and promotes unpredictability. In another view, some agencies actually do require people to do things that they cannot do.[11] In yet another, some (many!) agencies fail to make their rules and practices sufficiently understandable, producing guessing games and intolerable confusion.

What is the utility of these principles for thinking about the administrative state and administrative law? Our main aims here are not at all jurisprudential. H. L. A. Hart famously objected to Fuller's claim about what a legal system must be in order to be a legal system.[12] We do not mean to take a stand on the underlying debate. Indeed, we are not sure that it is especially interesting. It is

certainly intelligible to insist that a system that does not comply with the rule of law, as Fuller understands it, is—in the extreme—not one of law at all. To come to terms with that claim, one would need to define "a system of law," and in our view, debates of this kind are largely semantic and not particularly useful. Whether or not we are correct on that point, we invoke the Fullerian idea of the rule of law as a way of understanding how a system of administrative law might function well as law, not in order to make contentious jurisprudential claims.[13]

Instead of doing jurisprudence, we aim to repurpose the morality of law, bringing it into sustained contact with long-standing debates in administrative law, where, we think, it is most pertinent.[14] Our largest suggestion is that an understanding of the morality of administrative law helps to unify a disparate array of judge-made doctrines, and perhaps even the field as a whole.

We also contend that an understanding of the internal morality of law puts contemporary criticisms of the administrative state in their best light, and points the way to a kind of macro-settlement that, as previously explained, would allow "long-continued and hard-fought contentions" to come to rest, in accordance with the foundational principles of administrative small-c constitutionalism laid out in *Wong Yang Sung* and *Vermont Yankee.* As we saw in Chapter 1, concerns about the exercise of discretionary authority by bureaucrats have reached a high level of intensity, a kind of fever pitch—certainly among academic observers.[15] Occasionally judges share these concerns. Some versions of this concern have rested on novel constitutional theories, often rooted in controversial understandings of Articles I, II, and III.

We suggest that, most sympathetically understood, the critics are speaking on behalf of the internal morality of law. As we under-

stand these critics, they are seeking to prevent a misfiring of the legal system by ensuring that the administrative state respects that internal morality, at least as an aspirational matter. In their view, agencies often violate that morality.

We do not claim that the critics will accept this understanding of their objections. Their arguments go well beyond Fuller insofar as they suggest (for example) that under the Constitution, Congress must sharply confine agency discretion or that agencies may not issue binding rules. But to the extent that the critics are concerned with the rule of law and the risks of unstructured discretion, the internal morality of law, applied to the administrative state, captures some of their most important concerns. If the internal morality of law does not call for use of the heaviest constitutional artillery (such as invalidation of a grant of discretionary authority on nondelegation grounds, see Chapter 5), at least it would ensure that agency behavior is infused and structured by a conception of the rule of law, one that channels and shapes agency discretion in ways that make it both efficacious and efficacious *as law,* rather than as arbitrary command.[16]

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. Whether or not they have clear positive foundations, those doctrinal principles have evidently broad appeal. In the coming decades, many of them could be elaborated or extended.

Rules and the Rule of Law

We begin with an investigation of judge-made doctrines that directly respond to what Fuller sees as the "first" and an "obvious" way to produce something other than a legal system: a "fail[ure] to

develop any significant rules at all."[17] In that context, Fuller made 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."[18] 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."[19] But for some agencies, "this hope has been almost completely disappointed."[20]

Fuller attributed this failure to the agencies' effort to use adjudication to develop general standards, an effort that he thought could not succeed.[21] However that may be, he lamented that some agencies "have failed to develop any significant rules at all."[22] He contended that "there must be rules of some kind, however fair or unfair they may be."[23] 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. Article I, Section 1 of the Constitution vests all legislative power in Congress, and in one view, a grant of open-ended, rule-free authority is a violation of that provision. Whenever Congress grants authority to agencies, it must cabin their discretion. The US Supreme Court nominally agrees with this principle insofar as it states that any grant of authority must be accompanied by an "intelligible principle."[24] 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.[25]

We will explore the nondelegation doctrine in some detail in Chapter 5. Note for now that it 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.[26] 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.[27] 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. 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, in 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. 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. 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 Exchange Commission, the Federal Trade Commission, and the National Labor Relations Board did essentially no rulemaking; they developed policy through encounters with particular cases. To be sure, 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 that agencies failed to create such a regime, resulting in a serious problem for the rule of law.[28]

No provision of the APA squarely addresses the problem. If agencies want to go through rulemaking, they are entitled to do that.[29] If they prefer to proceed through adjudication, that approach

is also available.[30] 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). 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.

2. K. C. Davis's proposal.—Some necessary background comes from the work of Professor Kenneth Culp Davis, who may well have been the 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."[31] The essay could easily be taken to speak for the internal morality of law.

Foreshadowing some contemporary complaints about the administrative state, 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.[32]

With those "better ways," Davis hoped to inspire a kind of revolution, to be enforced by judges. 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."[33] In his view, courts should "protect private parties against injustice on account of unnecessary and uncontrolled discretionary power."[34]

A good way to do that would be to "require administrative standards whenever statutory standards are inadequate."[35] 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.[36] Also notably, Davis wrote as if discretionary justice was axiomatically bad—as if his "much broader requirement" was self-evidently in the public interest. For him (as for many who have followed him), the exercise of agency discretion was, or should be, the principal target of administrative law.[37] 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, and in any case the more fundamental question is whether agencies are improving people's lives by making welfare-promoting policy choices. 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 Court of Appeals.— Davis's argument found a sympathetic reader just two years later, in the form of Judge Harold Leventhal, one of the most distinguished court of appeals judges of that period, sitting on a federal district court.[38] The case involved a constitutional attack on the statute that authorized President Nixon to establish a freeze on wages and prices. 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. Judge Leventhal found sufficient constraints in the statutory context. But he included a section pointedly titled, "Need for ongoing administrative standards as avoiding undue breadth of executive authority."[39] There, he introduced Davis's point, and seemed to speak in terms of what law must do or be, to qualify as law at all:

> 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.[40]

Judge Leventhal added that "there is an on-going requirement of intelligible administrative policy that is corollary to and imple-

menting of the legislature's ultimate standard and objective."[41] For our purposes, the most important words are "inherent in the Rule of Law and implicit 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 Constitution's due process clause, or any other provision of the Bill of Rights, requires the executive branch 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 key decision involved the constitutionality of a major provision of the Occupational Safety and Health Act, which grants the secretary of labor the authority to issue regulations that are "necessary or appropriate to provide safe and healthful employment and places of employment."[42] Because of its apparent open-endedness, the D.C. Circuit ruled that these words would violate the nondelegation doctrine unless the Department of Labor specified their meaning.[43]

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 of appeals demanded, clarifying how it would exercise its discretion, and offering what it saw as sufficient discipline on its own future choices.[44] In the court's view, the constitutional problem was therefore solved, because the agency no longer operated in the absence of rules.

A few years later, the same problem arose under a seemingly open-ended provision of the Clean Air Act.[45] The D.C. Circuit again responded by saying that the problem could be cured if the Environmental Protection Agency disciplined itself through clear implementing rules. 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."[46] 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 the core purposes of the doctrine will be fulfilled.[47] In that way, the court of appeals squarely linked the nondelegation doctrine with both Davis and Fuller.

On appeal, the Supreme Court was incredulous.[48] 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."[49]

With those words, the Court essentially destroyed the doctrinal development that Judge Leventhal had inaugurated. But the underlying concerns about the internal morality of law continue to operate in other domains. With different names and different legal sources, Fuller's concerns (and Davis's as well) have continued to play an important role 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.[50] 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." Even more clearly, it reflects Fuller's concerns about "a failure to make rules understandable." 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. Most agencies do not enforce criminal statutes. But in a series of important cases in the 1960s, most of which are still 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.

Hornsby v. Allen involved an unsuccessful application to operate a retail liquor store in Atlanta, Georgia.[51] A disappointed applicant objected that the licensing system had no rules and that the authorities decided on an ad hoc basis; in essence, the system was not one of law at all. The court of appeals held that the system violated the due process clause.[52] 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." 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,* a court of appeals moved in exactly that direction, accepting the idea pressed by the *Hornsby* court in a very different context.[53] During the relevant period, the New York City Housing Authority received 90,000 applications for public housing; it could select, on average, about 10,000. 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."[54] In their view, that was a violation of the due process clause.

Reflecting a commitment to the internal morality of law, the court of appeals 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."[55] It added that "due process requires that selections among applicants be made in accordance with 'ascertainable standards.'"[56] If *Holmes* and *Hornsby* are read together, they seem to accept Fuller's view of the internal morality of law, 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, housing, parole, disability, and assistance payments, *Holmes* and *Hornsby* have borne some

fruit, mandating constraints on agency discretion.[57] But in other cases, involving water quality, academic tenure, and agriculture, due process challenges have been rejected.[58]

One reason is somewhat technical. Under modern doctrine, a prerequisite for a valid due process claim is that the plaintiff must have a protected liberty or property interest.[59] It would seem that statutes and regulations that lack ascertainable standards, and so do not confer some kind of statutory entitlement, cannot possibly 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. And indeed, several cases reject generalization of the *Holmes* and *Hornsby* holdings on exactly that ground.[60] The Supreme Court has yet to explore the question. 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. Rules and the APA.—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." Does the APA require agencies to use rulemaking rather than adjudication?

In an early case, the Court seemed to suggest that it did, at least sometimes.[61] The case involved the National Labor Relations Board (NLRB), which has long made national labor relations policy not through rulemaking but through case-by-case adjudication. It has been fiercely criticized on exactly that ground, often with

arguments that implicitly channel Fuller and Davis.[62] 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.*[63] 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.,* in which the NLRB had established the relevant rule of law through adjudication, but concluded that it should only be applied prospectively to avoid unfairness.[64] In *Wyman-Gordon,* the NLRB applied the *Excelsior Underwear* order for the first time.

The Supreme Court invalidated the NLRB's order on procedural grounds that seemed to channel Fuller.[65] The broadest reading of the ruling, supported by at least one separate opinion, 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."[66] As the plurality put it, those provisions "may not be avoided by the process of making rules in the course of adjudicatory proceedings."[67] 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.

A more plausible and much narrower reading of the ruling is that the problem in *Excelsior Underwear* was that the order was

prospective only. In 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 *Bell Aerospace,* decided five years later, the Court clarified that the narrower reading was correct.[68] 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."[69] 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: "there may be situations where the Board's reliance on adjudication would amount to an abuse of discretion or a violation of the Act."[70] 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 Supreme 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.[71] 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.[72] 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.[73]

Second, concerns about the internal morality of law played (we think) an unmistakable and prominent role in the Supreme Court's otherwise puzzling decision in *Allentown Mack*.[74] The Court's central objection was that the NLRB was acting on an unduly ad hoc basis, unconstrained by and indeed in violation of its own standards. 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.

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 carefully reassessing the agency's fact-finding in a way that seemed highly unusual for the Supreme Court of the United States, which normally focuses on large legal issues. But the unmistakable rule-of-law 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. 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.

In essence, the Supreme Court complained of "a failure of congruence between the rules as announced and their actual administration" (Fuller's words), objecting to a situation in which "the announced standard is not really the effective one" (the Court's words). 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."[75] 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."[76]

In its finding of a "violent breach," the Court implicitly pointed to three of Fuller's principles. The first 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 law and what the Court saw as the internal morality of administrative law.

Retroactivity

Like many contemporary critics of the administrative state, 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.[77] 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,* had a complex background, one that did not 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. In 1981, HHS promulgated a rule that specified such limits. The rule did not go through the usual notice-and-comment process, which allows a period of public comment on all proposed rules, and it was invalidated on that ground. In 1984, HHS issued a procedurally valid rule in which it reissued the 1981 rule and applied its limits retroactively to the interim years, thus denying cost reimbursement to certain hospitals. The hospitals objected to the retroactive application of the invalidated rule.

At first glance, the objection is puzzling. The hospitals could not claim unfair surprise; the original rule had been issued in 1981. Nor did any source of law seem to forbid HHS to do 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 the HHS decision to reissue its 1981 rule in order to ensure that it was not paying out excessive sums by way of reimbursement.

The Supreme 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."[78] With that principle in mind, the Court announced that legislation and regulations "will not be construed to have retroactive effect unless their language requires this result." 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." 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 anti-retroactivity canon was, and is, in serious tension with the *Chevron* principle, requiring courts to defer to reasonable agency interpretations of ambiguous statutes. 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 opportunity for invocation of *Chevron.* Nonetheless, the Court made it plain that the anti-retroactivity canon trumps *Chevron.* 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 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.[79] 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."[80] Justice Scalia put the words "future effect" in italics, to underline his view that "rules have legal consequences only for the future." 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." And in support of this reading, he pointed to the 1947 Attorney General's Manual on the Administrative Procedure Act, which states that a rule "operates in the future."[81]

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.[82] To make sense of it, we might have to speculate that it was infused by the same rule-of-law concerns that animate 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. And

on that count, it is quite precise, and a qualified version of the bolder idea that Fuller had in mind: Agencies need clear legislative authorization 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 in the lower courts.[83] 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 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 both 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.[84] In one formulation, there is a large difference between (1) a rule that imposes new

duties with respect to transactions already completed 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 on prior law (not prohibited by *Bowen*).[85] In 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) a rule "that merely 'upsets expectations,' which is secondarily retroactive and invalid only if arbitrary and capricious."[86] 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, and hence of the morality of administrative law.

3

LAW'S MORALITY, 2

CONSISTENCY AND RELIANCE

A CENTRAL GOAL of the rule of law is to allow people to have room to maneuver—to create a sphere of action in which citizens do not have to worry about what their government will do. Many people have been concerned that the administrative state can turn into a form of absolutism, in which citizens must constantly be fearful of what public officials might do. The internal morality of law offers a response.

In Fuller's view, 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."[1] With that point in mind, administrative law has long been concerned with the consistency, over time, of agency decision-making, both in rulemaking and in adjudication. 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 environment. 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—still, as a practical matter, protecting justified reliance is a core aim of

administrative law doctrines that attempt to promote consistency. We will treat the two ideas together.

"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* principle (we shall adopt that term), and sometimes called the *Accardi* principle, the idea imposes significant constraints on agency action.[2] It is foundational to contemporary restrictions on the discretion of the administrative state. Remarkably, the US 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."[3] It is easy to see *Arizona Grocery* 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, 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—but that after investigating the particular circumstances, the department concludes that one employer who engaged in those specified actions

did not do enough to promote building access, and undertakes enforcement action. Or suppose that by rule, the US attorney general says that a special prosecutor who is investigating White House officials can be discharged only for "gross improprieties"—but that, under orders from the White House, the attorney general discharges a special prosecutor, believing that he has cause to do so, even though no gross improprieties can be identified.[4]

In all of these cases, the *Arizona Grocery* principle means that agency officials would be bound by their rules, and therefore would lose in court. In a prominent decision during the Watergate era, a lower court invoked the principle to rule that Solicitor General Robert Bork could not lawfully fire a special prosecutor, Archibald Cox, because Department of Justice regulations gave Cox a measure of independence, and those regulations were binding unless and until they were changed.[5]

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.[6] In an adjudication in 1925, the agency lowered the rate to 73 cents per 100 pounds and awarded reparations to shippers, reflecting the difference between 73 cents and the actual charges over the preceding years. 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."[7]

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.[8] The case involved an effort to deport Joseph Accardi, an Italian national who had entered the United States unlawfully.[9] Accardi did not deny that he was deportable, but he asked the US attorney general to exercise his statutory discretion to suspend deportation. The attorney general refused, announcing at a press conference that he would deport a list of "unsavory characters."[10] 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.

The Supreme Court ruled that the attorney general had acted unlawfully because he had violated his own regulations. Those regulations specifically outlined the procedures to be used for processing petitions to suspend deportation. The regulations directed the BIA to "exercise such discretion and power conferred upon the Attorney General by law," which required the BIA to use its own "understanding and conscience," which meant in turn that the attorney general could not sidestep the board or direct its decisions.

Under the regulation, the board was made an independent entity, and the attorney general had to comply with that mandate. 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.[11] In the 1970s, the lower courts frequently invoked the idea that agencies must follow their own rules for this purpose and also to hold agencies to substantive requirements. The basic idea was (and remains)

simple: If regulations are on the books, agencies must adhere to them unless and until they are amended.

The problem is that although both *Arizona Grocery* and *Accardi* could be taken to embed Fuller, and to reflect the perceived morality of administrative law, neither decision offers a clear justification for that basic idea. What source of law is involved? The question became highly relevant in 1979, when the Supreme Court investigated precisely that issue in *United States v. Caceres*.[12] The case 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 that department to preapprove any such surveillance. Because the department had not given its approval, the subject of the surveillance (Caceres) contended that the tape recordings and associated testimony had to be excluded under the *Arizona Grocery* principle. The Court disagreed on the ground that no provision of law required the exclusion.[13] The due process clause was not implicated, for Caceres "cannot reasonably contend that he relied on the regulation, or that its breach had any effect on his conduct."[14] Nor was the Administrative Procedure Act (APA) involved, for this was "a criminal prosecution in which respondent seeks judicial enforcement of the agency regulations by means of the exclusionary rule."[15] In a key passage, the Court evidently struggled to explain why it was not jettisoning a long-standing principle of administrative law:

> 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.[16]

In dissent, Justice Marshall argued that *Arizona Grocery* was rooted in the due process clause.[17] 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."[18] 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?

Decades after *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.[19] There are also questions of 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. 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." 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 shared postulates of the legal system that cannot be traced to any provision of enacted law."[20] 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."[21] 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. 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."[22] 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. Professor Merrill is right in claiming that *Arizona Grocery* is one of those "foundational assumptions vital to the operations of our legal system."[23] 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.

Auer Deference

Let us now turn to an unexpected place in which to find vindication of the internal morality of law: *Auer* deference to agency interpretations of their own regulations. *Auer* has been the site of a great

deal of opposition and contest, and skeptics have objected to the underlying rationale of the rulings that preceded and gave rise to it.[24] Some justices and commentators have called for abolishing *Auer* altogether, often with reference to the Constitution in exile.[25] In their view, the idea that agencies can interpret their own regulations is a recipe for authoritarianism.

We will turn to the question in detail in Chapter 5. For the moment, note that before the October term in 2018, there was high anticipation that the Court might overrule *Auer* deference, as it was asked to do in *Kisor v. Wilkie.* But in a striking rejection of the New Coke and the most radical criticisms of judicial deference, the Court refused to do so. Justice Kagan, writing for five justices on these points, said both that *Auer* deference is securely a part of American law within its boundaries, and also laid out a series of limits and procedural conditions for such deference that fit perfectly with Fuller's approach, and with the general framework here. We will have more to say about that later, but for the moment, we focus on what Justice Kagan described as procedural conditions of deliberation, consistency, and respect for reliance interests. These conditions are strikingly Fullerian:

> [A] court should decline to defer to a merely "convenient litigating position" or "post hoc rationalizatio[n] advanced" to "defend past agency action against attack." And a court may not defer to a new interpretation, whether or not introduced in litigation, that creates "unfair surprise" to regulated parties. . . . That disruption of expectations may occur when an agency substitutes one view of a rule for another. We have therefore only rarely given *Auer* deference to an agency

> construction "conflict[ing] with a prior" one. Or the upending of reliance may happen without such an explicit interpretive change. This Court, for example, recently refused to defer to an interpretation that would have imposed retroactive liability on parties for longstanding conduct that the agency had never before addressed. . . . Here too the lack of "fair warning" outweighed the reasons to apply *Auer*.[26]

This proceduralist approach was hardly innovative; indeed, Justice Kagan took pains to note that she was merely restating and expanding upon limitations already present in the case law.[27] The immediate precursor of *Kisor v. Wilkie* was *Perez v. Mortgage Bankers,* in which six justices—including the chief justice and Justice Kennedy—laid out a set of constraints on *Auer,* prominently including an emphasis on consistency.[28] In *Kisor* and *Mortgage Bankers,* the Court did not explain why, exactly, inconsistent interpretations over time are especially problematic in an *Auer* setting.[29] (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.)[30] 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. 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."

Third, where economic planning or other reliance interests are involved, a shifting regulatory landscape is a serious problem. It raises the question whether the law should place the burden of anticipating the change on regulated 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."[31] It is obvious that Fuller's claims about the morality of law are being brought to bear here.[32]

There is a substantial literature on these questions in law and economics.[33] 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 would? The fallback position is *Skidmore* deference, which is taken to be "persuasive" rather than authoritative deference.[34] Under

Skidmore, 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."[35] 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 *Kisor,* which clarified that a majority of the current Court is unwilling to overrule *Auer* deference but is willing to hedge it round with Fullerian constraints, including a preference for consistency and protection of reliance interests.

In the litigation that produced *Mortgage Bankers,* the lower court (the United States Court of Appeals for the District of Columbia Circuit) had applied its own long-standing doctrine, established by the *Paralyzed Veterans* case, which held that once an agency issues a "definitive" interpretation of its own regulation, any new interpretation would have to go through the notice-and-comment process.[36] The Court quite rightly rejected this innovation out of hand, observing that it was inconsistent with the express text of the APA, which says that "interpretative rules" (evidently including those that are new or amended) are exempt from the notice-and-comment process. Yet the Court was also clear that the D.C. Circuit's approach responded to real concerns, principally reliance. It was just that the D.C. Circuit had chosen an impermissible doctrinal means for articulating those concerns.

What was the right means? In addition to citing inconsistency over time as a reason to reduce the level of *Auer* deference, the

Court in *Mortgage Bankers* cited two other considerations. First, Congress itself might by statute shape and limit agency authority to change interpretations over time. We will return to this class of issues in Chapter 4, 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.

Second, the Court noted that arbitrary and capricious review itself was available to check inconsistent agency behavior over time. In *FCC v. Fox,* Justice Scalia wrote for the Court in rejecting the claim that agencies must supply a rationale for a new policy that shows it to be better than the agency's old policy.[37] The agency need only show that the new policy is permissible under the statute and is itself supported by valid reasons. 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: where the agency's "new policy rests upon factual findings that contradict those which underlay its prior policy" and when its "prior policy has engendered serious reliance interests that must be taken into account."[38] The disapproval of *sub silentio* departures can be linked with *Allentown Mack* and with a Fullerian insistence on transparency, as well as with protection of reasonable expectations.

Justice Kennedy's concurrence and Justice Breyer's dissent also emphasized reliance interests.[39] The importance of reliance interests, although arguably dictum in *Fox,* soon became holding. In a subsequent opinion, *Encino Motorcars LLC v. Navarro,* 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.[40] Two justices dissented, but on other grounds.

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, in both adjudication and rulemaking. Although *Fox* happened to involve agency adjudication, the Court's reasoning was not limited to that context.[41] *Smiley v. Citibank,* another Justice Scalia opinion cited in *Fox,* invoked the same principle in the context of a rulemaking, albeit in dictum.[42] *Encino,* in which the reliance issue was holding rather than dictum, involved a rulemaking. 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.[43] In this approach, so long as agencies offer an intrinsically adequate justification for the new policy, reliance interests would be neither here nor 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, one might favor such a regime.

We certainly do not mean to say that such a regime would be superior to that embodied in current law, in which reliance interests really do matter under arbitrariness review. On the contrary, we prefer current law. But no amount of repeating the phrase "arbitrary and capricious" rules out such a counterfactual 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 rules, so that people cannot orient their action in accordance with them." Whether these intuitions are correct or incorrect, understanding the doctrine in this way at least puts it in its best light.

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 some rulings suggest. Here the Fullerian approach is in tension with current doctrine, yet can be taken as both supporting an older approach and explaining actual practice.

To make things concrete, suppose that under President Barack Obama, the Environmental Protection Agency interpreted ambiguous statutes differently from how it did under President George W. Bush. Perhaps it took a strong stand against greenhouse

gases, concerned as it was with climate change. Then suppose that under President Donald Trump, the Environmental Protection Agency interprets ambiguous statutes differently from how it did under President Obama. Perhaps it does not want to take a strong stand against greenhouse gases, concerned as it is with reducing the regulatory burden on the American economy.

These examples are not hypothetical. Significant interpretations shifted from the Bush administration to the Obama administration, and then shifted again under the Trump administration. Some of those shifts, and the most highly publicized, involved political commitments. Some of them involved expertise and new understandings of facts; they were technical in nature. If the interpretation of a law shifts from one administration to another, or from one year to another, is there a problem?

Deference to administrative agencies on questions of law did not start in 1984; on the contrary, it long pre-dates *Chevron*. Precursors have been identified going back to the early twentieth century (and consider Lord Coke's frustrated outburst, in a speech in Parliament in 1628, that "in a doubtful thing, interpretation goes always for the King").[44] In the 1940s—immediately before enactment of the APA—the Supreme Court deferred to agency interpretations on prominent occasions.[45] The important point here 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, although that view was itself inconsistent.[46] 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 ad-

hered consistently to that interpretation over time, it most likely captured the intentions of the enacting legislature.[47]

After *Chevron* was decided in 1984, however, the doctrinal status of the preference for consistent agency interpretation was unclear. The major rationales for *Chevron,* expertise and political accountability, 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 to the Reagan administration. Upholding that shift, the Court did not seem to think that the inconsistency mattered at all.[48]

If we emphasize agency expertise, a preference for consistency might seem to make sense if there is 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 suggests that a preference for consistency is 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.[49]

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.[50] In *Smiley v. Citibank,* 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."[51] In 2005, Justice Thomas's opinion in *National Cable & Telecommunications Assn. v. Brand X Internet Services* 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 to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act."[52]

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.[53] 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 have come from the Supreme Court.[54] This sort of unexplained inconsistency-about-consistency blurs the nominal rules. In a study of a very large number of cases, illuminating 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 interpreta-

> tion's longevity in the deference process, despite seeming contrary to *Chevron* itself, would be consistent with courts thinking of deference on a sliding scale. . . . [55]

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 data set used by Walker and Barnett begins in 2003 and ends in 2013, after *Smiley v. Citibank* but spanning the *Brand X* pronouncement.[56] 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.

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 internal morality, and recite "due process" as a kind of shorthand or placeholder for such intuitions. In these cases, none of Fuller's concrete principles is involved. But 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 term; 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 Communist 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. 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."[57] 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 in 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 Article III, such exercise would be unconstitutional. Thus the Supreme Court noted in *City of Arlington v. FCC* that:

> 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."[58]

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. This distinction cuts across the rulemaking–adjudication divide; the president cannot direct rulemaking by independent agencies either. 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,* 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.[59] 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."[60]

Modern case law has consistently followed suit. In *Sierra Club v. Costle,* the D.C. Circuit adopted an expansive view of presidential authority to intervene in informal (notice-and-comment) rulemaking, but observed in dictum that "there 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."[61] What was dictum in *Costle* became holding in *Portland Audubon v. Endangered Species Committee.*[62] In *Portland Audubon,* the US Court of Appeals for the Ninth Circuit 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.[63]

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. *Myers* offered no legal basis at all. *Portland Audubon* relied heavily on the text of section 557(d), which bars ex parte contacts from "interested person[s] outside the agency," but this begged the question, for the president's whole contention was that he was not "outside the agency" in a legal sense.[64] The court rejected that contention by denying that the president could direct

the delegated discretion of his agents, exercised in adjudication.[65] That denial assumed 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."[66]

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 557(d), so too with due process: the crucial issue is not whether the neutrality of the adjudicator has been compromised, but 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. In such cases, the president 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. Our point is that the asserted legal bases for this approach are unclear, and that vague gestures toward 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.[67] 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. In that sense, Fuller was sharply aware of the limits of adjudication.

2. Rulemaking due process.—In 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 and County of Denver* and *Bi-Metallic Investment Co. v. State Board of Equalization of Colorado,* is that due process attaches to administrative adjudication, not rulemaking.[68] When agencies make general rules under standard APA procedures, due process attaches no requirements at all; the due process clause is inapplicable to rulemaking. The only requirements are statutory.

In an important decision, however, the D.C. Circuit recognized a limited but significant exception to this rule, one that is unmistakably Fullerian in spirit. In 1936, *Carter v. Carter Coal Co.,* a plurality opinion from the Supreme Court, had extended 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.[69] *Carter Coal* had been thought to be a dead letter; after 1937, the Court itself had upheld many such delegations of rulemaking power. But in a 2016 case involving Amtrak, which the court saw as having received statutory power to regulate 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."[70] In an earlier case, the Supreme Court had declared Amtrak a public entity.[71] 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.[72]

Here, too, the court's analysis was ultimately conclusory. Again and again, the court argues by stipulation and by adjective, such as "biased" decision-making. 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 (and we are not at all sure that there is), invokes the internal institutional morality of administrative decision-making, whether in rulemaking or adjudication. In this view, all public and official decision-making must be presumptively disinterested, even if from a larger perspective Congress wanted to vest decision-making 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 commitment to the internal morality of administrative law.

4

LAW'S MORALITY, 3

LIMITS, TRADE-OFFS, AND THE JUDICIAL ROLE

We have emphasized that some contemporary critiques of the administrative state invoke heavy artillery. The critics would like courts to reinvigorate the nondelegation doctrine and strike down grants of discretionary authority to regulatory agencies. It has also been urged that even if agency discretion is limited, the Constitution forbids Congress from authorizing agencies to issue rules that are binding, in the sense that violators face sanctions.[1] In our view, these proposals are not easy to justify. To reiterate: It is not clear that we should be originalists, and even if we should be, the proposals do not find much support in the original constitutional materials. Long-settled practices should not lightly be disrupted in their name. From the standpoint of democratic self-government, liberty, or promotion of the common good, invalidation of the relevant grants of authority would do far more harm than good.

The approach that we are sketching has more promise, not least because of its comparative modesty. Claims about law's internal morality help to underscore the serious problems of accountability, liberty, and welfare that arise if, for example, 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 the internal morality of law, they can claim to be vindicating time-honored thinking about the rule of law. 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 naturally 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."

The most severe critics of the administrative state would not be entirely satisfied by what we are calling the internal morality of administrative law. Many of them want Congress itself to make specific decisions, and the principles emphasized here will not achieve that goal. 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. It is doubtful that the American administrative state, or any administrative state in a mature democracy, will look a lot like 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.[2]

Limits

Our main project has been to put contemporary administrative law in its best light. We have also suggested that the best and most promising version of the critique of the administrative state emphasizes the morality of law, in both inspiration and detail. Here we turn to the limits of that approach. Although we offer that approach in an ecumenical spirit, we do not subscribe to wholesale critiques of the administrative state, and we believe that there are distinct boundaries within which the Fullerian approach is most cogent. Outside those boundaries, it should and typically does give way to other considerations. The first question, in other words, is how to 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" presupposes that the decision maker is faced with a type of decision that is susceptible to law-like decision-making in the first place.[3] Just as the *Chevron* doctrine includes not only the steps of the test itself, but also a set of boundary conditions for deciding whether the test should apply at all—"*Chevron* Step Zero"—so too, there is a kind of *Chevron* Step Zero problem for the morality of law.[4] 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 government action."[5] Fuller's examples included "military command," which should not "subject itself to the restraints appropriate . . . to a discharge of the judicial function";

managerial decision-making, such as the attempt to "extract electricity from the tides"; government subsidies for public institutions and the arts; and, as we will discuss shortly, economic allocation of scarce resources among multiple competing claimants.[6] 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 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.

Current administrative law is partly, but only partly, consistent with Fuller's understanding of the limited domain of law's morality.[7] On the one hand, the Administrative Procedure Act (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."[8] 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."[9] Formal adjudicative procedures do not apply to "the conduct of military or foreign affairs functions."[10] So too, reviewability doctrine can profitably be interpreted in light of Fuller's concerns.[11]

In explicating 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 *Forms and Limits of Adjudication,* involved economic allocation and what Fuller called "polycentric adjudication."[12] 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.

Fuller saw this sort of task as inherently open-ended and not susceptible to law-like decision-making, 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.[13] 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 singer should play the lead role in a production at the Metropolitan Opera.[14] 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 decision-making, which had explored something like the internal morality of administrative law, had gone wrong by failing to recognize these limits of adjudication.[15] Judge Friendly and others failed to realize that the agencies they criticized for incoherent decision-making, especially the Federal Communications Commission (FCC), had been instructed to allocate economic resources through the forms of adjudication. (Note that the APA defines adjudication to include licensing.) The agencies' poor performance was, in Fuller's view, entirely predictable.[16]

A moment's thought suggests that if it were accepted, Fuller's view of the inherent unsuitability of economic allocation to legal (as opposed to 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 licensing should count as adjudication for APA purposes.

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 prohibition of ex parte contacts to informal (notice-and-comment) rulemaking. In a pair of cases decided in 1977, *Home Box Office v. FCC* and *Action for Children's Television v. FCC,* the court of appeals first announced and then (largely) retracted 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.[17] In light of the subsequent decisions in *Vermont Yankee* and *Mortgage Bankers,* which emphatically reject countertextual procedural innovation in administrative law, it seems plain that *Home Box Office* is no longer good law.[18]

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."[19] The classic example involves an FCC decision on whether to switch a station license from one applicant or city to another.[20] This kind of rulemaking 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. (We are not speaking here about the possibility that in cases involving competing claims to a valuable privilege, the due process clause imposes independent constraints on ex parte contacts.)

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, and it is unnecessary for our project here to arbitrate that question.[21] 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.

Objections

We now turn to the largest normative questions. The morality of administrative law, as we have elaborated it here, runs into three

objections: (1) a potential absence of sufficient grounding in legal materials; (2) complex trade-offs, on welfare grounds, between rule-of-law values and competing values; and (3) potential lack of judicial competence to oversee agency judgments about those trade-offs.

1. Positivism. The *Vermont Yankee* problem looms over each and every claim about the internal morality of administrative law. In that case, the Supreme Court famously ruled that courts may not impose procedural requirements beyond those set out in the APA or other sources of positive law.[22] 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.

One must be careful, because Fuller believed that moral 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 simply to observe that *Vermont Yankee* is the law, and that to the extent that the decision forbids courts to impose their own preferred constraints on the administrative state, without some kind of legal warrant for doing so, the decision must be taken into account from the standpoint of the rule of law itself.

Vermont Yankee makes 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, 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.[23]

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 anti-retroactivity canon and limits on *Auer*); 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. 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. 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. The void-for-vagueness doctrine is a good example, 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 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. 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.

If none of the positive groundings for central doctrines of administrative law—*Chenery I, Arizona Grocery,* and others—are wholly convincing, and thus the tension with *Vermont Yankee* is to an important degree unresolved, what then? Our answer is simple: *Vermont Yankee* is not all there is to administrative law, put in its best light. Of course that case establishes a foundational principle of administrative law; the text of the APA is worthy of great respect. But the text does not exhaust the law, which also contains Fullerian principles that promote reasoned administrative lawmaking and that are hallowed by long usage, the explicit endorsement of the courts, and the tacit acquiescence of Congress. The Fullerian morality of administrative law is not something at odds with the law, but part of it.

2. *Trade-offs.* The second problem is broadly welfarist, focusing on the common good. The internal morality of law is important, but it does not point to the only consideration that institutional designers and legal decision makers 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.[24] 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.

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 end points—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 the end points.

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. We may agree that there is a real problem if case-by-case judgments are made without any kind of orienting framework; if people 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 as a beacon of light.

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. No legal system has come close to the utopian picture associated with the morality of aspiration, but that is hardly a fatal defect. Another way to put it is to suggest that there is an optimal level of transparency, retroactivity, and intelligibility, and to arrive at the optimal level, trade-offs must be made, including consideration of costs of multiple kinds.

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. One advantage of the former is that it imposes lower decisional burdens at the initial stages. 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. 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."[25] In this view, what is needed is a shift from rules, specifying what people must do, to statements of principles or goals, which may not 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 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 they may be, some of Fuller's principles have had relatively little traction in administrative law. Take (2) a failure of transparency and (4) a failure to make rules understandable. Most of the time, administrative law does not exhibit either failure. The law is not hidden, and although it might be complicated, usually it does not defy under-

standing. 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 was meant as a response.[26] 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. As a matter of abstract ideal principle, we can and should 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 mistakes and decisional burdens.* The third problem involves judicial competence, taken to include both the risk and costs of judicial errors, and the sheer burdens of decision-making, in terms of time and information. 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 hang over 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 trade-offs and judgments about scarce resources—judgments that courts should not impose upon agencies, absent arbitrariness or a violation of clear statutes.

Whenever agencies decide on procedures, they are 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 claimants, courts risk taking a myopic view that distorts agency resource allocation. Understanding this point, the Supreme Court has acted to 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 and even the *Chevron* doctrine itself.[27]

More broadly, the Court has long recognized that agencies must have broad discretion to make procedural choices. This is so 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, is *Chenery II,* which examined agency discretion to choose between proceeding by rulemaking and adjudication.[28] The challengers in effect complained that the Securities and Exchange Commission had violated core Fullerian principles of nonretroactivity by issuing a disgorgement order based on previous conduct not covered by an administrative rule.[29] 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 Supreme 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 was seen as "retroactive," such retroactivity should not be understood as a per se bar to agency action.[30] 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.[31] It is important to note here that the agency's enterprise extends over an aggregate or array of cases and therefore transcends the principles at issue in any particular case and 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 problems 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. . . . 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.[32]

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 Professor Louis Jaffe, Fuller's colleague.[33] 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.

A Path Forward

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 fail to make the actual administration of rules congruent with rules as announced.

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 rule-of-law objections—of urging that agencies are violating one or more of Fuller's eight principles. Understanding the objections in this way puts the critics and their arguments in the best possible light. 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 to compromise Fuller's principles even where they apply. Current law recognizes both the virtues and limits of the internal morality of administrative law. Indeed, as we attempt to show in Chapter 5, the Supreme Court has converged on a commitment to the internal morality of administrative law—an approach to accommodating grand conflicting visions of the administrative state, an approach of just the sort we advocate.

Neoclassical Administrative Law?

We conclude with an extended note on an alternative to our approach. Professor Jeff Pojanowski has offered an elegant and admi-

rable legal framework with roots in the history of American public law.[34] This framework is embodied most famously in *Crowell v. Benson.*[35] Known as neoclassical administrative law, it has two main features: plenary or de novo judicial decision-making on questions of law, and substantial judicial deference on discretionary questions of policy choice (in modern terms, deferential arbitrary-and-capricious review).[36] Pojanowski suggests that neoclassical administrative law represents a *via media* between recent sweeping, putatively originalist criticisms of the administrative state, on the one hand, and the abnegation of law to administrative supremacy, on the other. Exercising de novo review of legal questions, judges will at least vigilantly police the boundaries of statutes, binding agency regulations, and agency "jurisdiction," while leaving policy-making to administrative discretion.

Pojanowski's achievement is admirable, yet we do not think the framework can ultimately succeed. We will put to one side, and so not explore here, the most fundamental questions about whether neoclassical administrative law represents the best reading of the underlying legal texts and constitutional principles as a matter of first impression, and instead look to administrative law doctrine and feasible reforms of that doctrine. Because Pojanowski aims for a *via media,* he quite explicitly aims to advance a view that has a reasonable degree of fit with current American law; his framework does not claim to be a radical proposal for legal revolution.

As it turns out, however, neoclassical administrative law is almost as radical as the not-fainthearted originalism to which it claims to provide a moderate alternative. Not only did the Supreme Court reject one of the central tenets of neoclassical administrative law in the recent past, but in a larger sense it has already

been tried and rejected by the evolution of our law.[37] Pojanowski's putatively neoclassical administrative law is in fact a lightly reworked version of a classical position, one that proved deeply unstable and unworkable under the institutional conditions of the modern administrative state. In this sense, it is not obvious what exactly is neo- about his position.

The point comes in narrower and broader versions, focusing respectively on current doctrine and on the larger path of the law since the 1930s. As to current doctrine—discussed in detail in Chapter 5—the main appearance for neoclassical administrative law in recent years was a footnote to Justice Thomas's *dissenting* opinion in *Department of Commerce v. New York*.[38] That decision in effect took the opposite of Pojanowski's approach by affording the Department of Commerce broad statutory authority while closely scrutinizing its policy choices for pretext. So too, the Court dealt a serious blow to neoclassical administrative law by reaffirming, in *Kisor v. Wilkie,* deference to agencies' interpretations of their own regulations.[39] (We explore the issue in more detail in Chapter 5.) *Kisor* is squarely inconsistent with the neoclassical approach; it amounts to a bad setback for the hopes of those who would eliminate all agency deference from administrative law, whether deference to agencies' interpretations of their own rules or deference to agencies' statutory interpretations.

In our view, Pojanowski's treatment of *Kisor* is not wholly convincing. He emphasizes that authority-based deference under *Auer,* as clarified in *Kisor,* may largely overlap, in practice, with deference based on the plausibility of the agency's reasoning under *Skidmore v. Swift & Co.*[40] Whatever the precise scope of these doctrines, however, the larger significance of *Kisor* is that it leaves firmly

embedded within the law a *principle* of authority-based deference on legal questions, a principle that is squarely inconsistent with neoclassical administrative law and that lies there like a loaded gun, just waiting to be picked up by future lawyers and judges when deference strikes them as useful.[41]

The result in *Kisor* also bodes extremely ill for the project of overruling *Chevron* deference, much discussed and much hoped-for in certain conservative-libertarian legal circles.[42] The basis for Chief Justice Roberts's controlling concurrence in *Kisor* was long-standing precedent, and although he carefully reserved the *Chevron* issue as distinct, it is a reasonable guess that if *Auer* cannot be overruled, *Chevron* will not be either.[43] Before *Kisor,* conservative-libertarian legalists saw the overruling of *Auer* as the first and easier step on the path to overruling *Chevron.* Having clearly failed at Step One, it is unreasonable to expect success at Step Two. *Chevron* may well be increasingly hemmed in, but there too, narrowing dispositions will leave the basic principle of deference embedded in the law.[44]

The problem with Pojanowski's framework is more than (although it is not less than) a question of understanding recent doctrine. It is also a much larger question of feasible paths for the law, under the real constraints of time, information, and capacities that afflict judges. Why would neoclassical administrative law prove any more stable, over time, than did its classical counterpart? The main thing to observe about the *Crowell* framework, the major doctrinal inspiration for neoclassical administrative law, is that it began to come undone within about a decade of its creation in 1932. By 1943, in *NLRB v. Hearst,* the Court was speaking of deference to agency interpretations with a "rational basis in law," as well as according deference to agency determinations of fact and policy

under the substantial evidence test.[45] After a period of intermittent and frankly inconsistent opinions, the Court coalesced around deference to agency interpretations of law in *Chevron* in 1984. That deference, which is antithetical to the letter and the spirit of *Crowell*'s classical administrative law, has remained the law to date, albeit with a number of important modifications and vicissitudes.

Pragmatically speaking, again putting to one side all the arguments about whether deference to agency interpretations of law is consistent with the text, structure, and original understanding of the APA and with the Constitution, this sort of breakdown of (neo)classical administrative law seems entirely predictable. The reasons for this spillover of deference from questions of policy and fact to law are not mysterious.

First is the notorious slipperiness, especially for real-world judges, of the distinctions among questions of law, fact, and discretion or policy, at least in hard cases.[46] In *Hearst,* the problem involved a so-called mixed question of law and fact, the question whether to classify newsboys as employees or as independent contractors within the terms of the National Labor Relations Act. *Hearst* perfectly exemplifies the Court's inability, over time, to sustain a clear distinction between pure and mixed questions of law in controversial cases at the moving frontier of administrative law. Is the question presented there one of law, fact, or policy? In truth it is all three, inextricably and simultaneously; and even if, by elaborate analytic argument, one could disentangle all the components, federal judges lack the time and inclination for elaborate analytic argument. The same is true for the many statutes that require or authorize agencies to take reasonable, appropriate, or necessary action. It is chronically true in such cases that lines between law, fact, and policy discretion are uncertain and unstable.

The acknowledgment that such distinctions are not stable or tenable has been reflected in several strands of precedent, which together highlight the difficulty of drawing Pojanowski's sharp distinction between review of legal questions, on the one hand, and review of facts and discretionary policymaking, on the other. One example, following directly on *Hearst,* has been the ongoing instability in practice of the distinction between so-called "pure questions of law" and "mixed questions of law and fact."[47] The instability of the distinction, which is far easier to state than to apply, undermines the sharp distinction between legal and nonlegal questions on which the (neo)classical framework is constructed.

Similarly, in *City of Arlington v. FCC,* Justice Scalia wrote for a majority (including Justice Thomas) to reject the idea that it is even coherent to draw a distinction between questions of agency "jurisdiction" and other questions of law bearing on agency authority.[48] This too is theoretically crucial, insofar as the category of agency "jurisdiction" was a centerpiece of the *Crowell* framework.[49] Pojanowski, aware that this is a problem for his view, denies that he means to revive the "jurisdiction" exception, but then immediately says that courts should decide de novo the "scope" of the agency's authority.[50] But this is a semantic distinction without a difference—and indeed it is a distinction specifically rejected by the Court, which *defined* questions of agency "jurisdiction" as questions about the scope of agency authority.[51]

Finally, consider the question of which factors are relevant to agency policy choice—under *Citizens to Preserve Overton Park, Inc. v. Volpe,* the first question in arbitrariness review.[52] The Court has generally said, quite sensibly, that if Congress has clearly ruled factors in or out, agencies must respect that decision, but that if Congress has been silent or ambiguous, agencies have discretion

to decide which factors are relevant.[53] The Court, in other words, has treated the first step in arbitrariness analysis as itself a *Chevron* question, partially collapsing the inquiries that Pojanowski would cleanly separate.[54] This creates a serious dilemma for neoclassical administrative law. If statutes are what make relevant factors relevant, and if courts are to determine all statutory questions de novo, then courts must decide for themselves, all things considered, what factors agencies may, may not, or must consider when making policy choices. But that would hardly seem to produce the sort of deferential review of policymaking Pojanowski recommends. The neoclassical framework is either internally inconsistent, or else it must abandon even the *Overton Park* framework and all the law that has flowed from it—a much more radical enterprise than the advertisement for neoclassical administrative law lets on.

We turn now to a distinct problem, although one that is related to the instability of law–fact–policy distinctions, especially as applied to complex modern statutes: the jurisprudential problem of legal realism. It is no accident that realism has arisen and flourished roughly in conjunction with the growth of the administrative state, and with the spread of legal forms and instruments that challenge common-law categories. The context of statutory delegations to administrative agencies tends to inspire the thought that interpretation is often, at least or especially in hard cases, an exercise in discretionary policymaking. *Chevron* itself is an obvious example: Was the validity of the "bubble regulation," at issue in that case, really a strictly legal question in any sense that a nineteenth-century judge would recognize? Doesn't an evaluation of the Environmental Protection Agency's choice turn largely on issues on policy? Pojanowski says that "[e]ven if the law un-

derdetermines a small fraction of the litigated cases posing legal questions, it does not follow that we should structure the entire system of judicial review based on those exceptional cases."[55]

Fair enough. The problem is that the "exceptional cases" do not come neatly pre-labeled as such, and numerous questions of law, in the administrative state, are hardly exceptional at all, insofar as resolution of a seemingly legal question turns on judgments of policy. As one moves higher on the appellate ladder, it becomes increasingly plausible for judges to argue about whether statutes are or are not ambiguous. One ends up with the spectacle—often on display at the Supreme Court—of two groups of justices of basically equal size, each arguing vehemently that the statute "clearly" favors their own view. In such a world, lawyers naturally begin to conclude that *both* groups are wrong to insist woodenly that the statute has a single determinate meaning (on which they differ), that in fact the statute is ambiguous, and that the tools of neoclassical interpretation are simply inadequate to settle the issue.[56]

The problem of irreducible ambiguity in hard cases is exacerbated by the phenomenon of "old statutes, new problems."[57] As the administrative state confronts new problems and challenges under old statutes—statutes, such as the Clean Air Act or the immigration laws, that a politically polarized and fractured Congress rarely updates, but that are expected to govern ever-changing problems—it becomes less and less plausible to insist that statutes provide a single right answer, no matter what problems arise that were completely unforeseen by the statute's drafters. Thus there is a marked tendency for old framework statutes and quasi-constitutional statutes to become essentially common-law constitutions governing part of the administrative state, developed over time by interaction

between changing agency interpretations and more or less deferential judicial review.

In this perspective, *Crowell,* penned by a chief justice born in 1862, represents a kind of holdover from the world of classical legal thought, one that broke down almost immediately in the face of developing conditions. *Chevron* itself is, from a jurisprudential standpoint, best understood as a product of a limited form of legal realism, one that understands that when agencies interpret statutes such as the Clean Air Act over time, in changing and unforeseen circumstances, they will inevitably be faced with policy choices whose resolution is not obviously better entrusted to a generalist and unaccountable judiciary. Put differently, the very point of *Chevron* is to articulate a conception of interpretation that opens up a "policy space" for agency discretion, as opposed to the attempt of classical legal interpretation to reduce statutory meaning to a single point.[58]

Pojanowski argues that "the structure of *Chevron* itself rests on pre–legal realist assumptions that pragmatists and supremacists ostensibly reject," because at Step One the judge decides whether the statute is clear, and "to stipulate that a question can be clear or not presupposes a stable measure with which to judge clarity."[59] But this is not at all the pre–legal realist approach to interpretation, which asked (barring special cases such as mandamus, arguably the origin of *Chevron* itself) not whether statutes were "clear" but simply what the *best* interpretation was, all things considered.[60] *Hearst* and *Chevron* mark a fundamental conceptual break with this regime by introducing the supposition that in some range of cases, an administrative agency may reasonably disagree with the court's judgment about what interpretation is best, and that where

such reasonable disagreement occurs, the agency will prevail. That break with the past cannot be minimized. Once it has occurred, it is probably impossible to return to the belief structures of the old world by brute force, any more than we could induce in ourselves an unironic belief in the four humors of Hippocratic medicine.

Pojanowski never focuses on the pragmatic impossibility of truly independent judicial analysis of highly complex modern statutes, whose interpretation carries enormous policy consequences, by judges laboring under realistic constraints of time and expertise. The canonical illustration came during the Court's internal deliberations on *Chevron* itself. According to Justice Harry Blackmun's papers, Justice John Paul Stevens, the decision's author, said, at conference on the case, "when I am confused, I go with the agency."[61] This is an entirely rational decision-making strategy by generalist judges who face intricate, specialized regulatory statutes, who know the limits of their own knowledge, and who know that the consequences of a judicial blunder may be extremely serious. More important, this sort of deference is difficult to control by formal legal doctrine. Any Supreme Court decision, statute, or even constitutional amendment would be largely helpless to stamp out this sort of epistemological deference, which operates behind the scenes, in the judge's internal deliberative processes. The choice is not between deference or no deference; it is between open or hidden deference.

The reasons for the instability of the classical *Crowell* framework carry over to the very similar neoclassical framework. Indeed, it is not obvious what is particularly neo- about Pojanowski's approach, which presupposes essentially the same pre-realist distinction between legal interpretation and legal policymaking on which *Crowell*

rested. Pojanowski tries to distinguish the two by saying, counterintuitively, that *Crowell*'s sharp law–fact distinction was *insufficiently* formalist, because courts of the era engaged in purposive legal interpretation, whereas "[t]he neoclassicist's legal formalism . . . marks a return to pre–legal realist thought."[62] Even accepting the premise that interpretation in the *Crowell* era was highly purposive and antiformalist—a view that basically conflates the classical framework of the 1930s with the legal process approach of the 1950s—there can be no such return of the sort Pojanowski desires.[63] Once the apple of realism has been tasted, everything changes, and the way back to the garden of naive classicism is forever barred. It is not possible to reinstate belief in a classical law–policy distinction by fiat, however useful the resulting framework would be. To attempt to return to a more formalist version of the *Crowell* framework would, at best, merely recreate the adjudicative conditions and intellectual difficulties that led to the collapse of that framework in the first place.[64] As Valery Giscard D'Estaing said in a different context, "There is no question of returning to the pre-1968 situation, if only for the reason that the pre-1968 situation included the conditions that led to 1968."[65]

Overall, Pojanowski's proposal, whatever its abstract merits, is implicitly far more radical than it claims to be. It is out of step with too much doctrine, practice, and history, and lays out no feasible path for the law. Administrative law cannot go home again, even assuming home lies in the direction to which Pojanowski points. There is much to admire and to learn from in Pojanowski's essay. But there is not much that is truly neo- in it, and a return to classical administrative law, no matter how ardently desired, is not a realistically possible future.

In this perspective, we believe a critical advantage of our own framework is that it is genuinely interpretive, in a way that neither radical originalism nor neoclassical administrative law can claim. It captures the developing path of American administrative law, which has, over time, explicated and clarified the intrinsic morality of (administrative) law in ways that have maintained continuity with the past. It is this dynamic tradition that, we hope, offers a way to settle long-fought contentions. In the next chapter, we apply our account to some important developments in the Roberts Court—developments that, we think, have enduring lessons.

5

SURROGATE SAFEGUARDS IN ACTION

As we have emphasized, the US Supreme Court is a major locus of conflict over the scope, limits, and operation of the administrative state. At several points, anticipation of major decisions paring back executive and administrative authority has been widespread, especially among commentators of the libertarian and originalist right. Expectations grew after the confirmation of Justice Gorsuch, a major critic of *Chevron* deference to agency interpretations of statutes.[1] The New Coke appeared to be on the ascendancy.

When Professor Gillian Metzger wrote her foreword to the *Harvard Law Review* in 2017, speaking of "the 1930s redux," it seemed that a genuine crisis might be in view.[2] In the succeeding months, the Supreme Court granted certiorari to hear a challenge to the constitutionality of the Sex Offender Registration and Notification Act (SORNA) under the nondelegation doctrine, despite the lack of any conflict among the circuits on the issue, and separately to consider whether to abandon judicial deference to administrative interpretations of regulations. The anticipation of fundamental change reached an ever-higher pitch.

In the Court's 2018–2019 term, however, the expectations were distinctly disappointed. In *Gundy v. United States,* the Court, in a

fractured decision and over a Gorsuch dissent, declined to invalidate SORNA's seemingly open-ended statutory provision for registration of preexisting offenders, which had been claimed to effect an invalid delegation of legislative authority to the US attorney general.[3] In *Kisor v. Wilkie,* the Court reaffirmed the validity of *Auer* deference to administrative interpretations of the agency's own regulations, over a Gorsuch opinion that was effectively a dissent.[4] In *Department of Commerce v. New York,* involving the politically fraught question whether a citizenship question could be added to the census, the Court determined that the department had broad authority to do so; that the secretary, as agency head, was in no way bound by the contrary advice of expert agency staff; and that the secretary's predictive judgments under uncertainty were owed broad deference by the judiciary.[5]

By the same token, however, the Court as a body was interested in exploring guidelines for the exercise of administrative power, guidelines with a distinctly Fullerian profile. In *Gundy,* the majority worked hard to show that because of the context, SORNA did not, in fact, give the attorney general open-ended authority, but used interpretation of statutory aims and purposes to channel the attorney general's discretion. In *Kisor,* the majority reemphasized and clarified the preconditions and limits of *Auer* deference, emphasizing especially that agencies should make considered, official, and consistent judgments on such matters. In the census case, the Court ultimately remanded for further administrative explanation on the ground that the Commerce Department's official rationale for its action was pretextual, incongruent with the department's own professed rationale.

In all of these cases, we believe that the Roberts Court moved toward an equilibrium approach to administrative law and the

administrative state that relies on principles of administrative law's internal morality, deploying those principles to protect rule-of-law values. This approach is strikingly consistent with our framework, and far less consistent with other possible frameworks, or so we will argue, amplifying our points against neoclassical administrative law at the end of Chapter 4.

We will offer a discussion of these developments as a kind of case study. We are acutely aware that any such study, focused on a particular Court term, will rapidly become dated. We are also acutely aware that the future is likely to contain surprises, and our few predictions are offered tentatively. But in some circumstances, one can find something like a universe in a grain of sand. In our view, the significance of the developments explored here transcends any particular term of the Supreme Court, even such an important and indeed climactic term as that of 2018–2019. The broader point is that administrative law has increasingly converged on Fullerian principles as a set of safeguards for the values underlying the rule of law. Rather than protecting those values by eliminating administrative power directly, the law hopes to inform, limit, and improve the exercise of such power.

We have emphasized that from the standpoint of New Coke critics of the administrative state, this is clearly a second-best solution. The main objection of these critics is, above all, to the modern regime of sweeping delegations itself; the principles of administrative law's morality, as we explained in Chapter 2, channel but do not directly limit such delegations. But the critics simply cannot have everything they want, for what they want is legally contestable and contested, is inconsistent with pillars of modern administrative law, and would radically destabilize too many extant arrangements; for these reasons, the critics' maximum aims have been consistently

rejected by the Supreme Court and by the political branches. The point of *Wong Yang Sung*'s master principle is to find accommodations on which "opposing social and political forces [may] come to rest," even if those accommodations are non-ideal relative to the different first-best theories of constitutional law held by different parties. Given the gravity of the disagreements, neither supporters nor critics can fairly complain if they do not get everything they want; it is enough if their major concerns are accommodated under broadly just arrangements. The surrogate safeguards conspicuously on display in the Roberts Court have exactly this character.

We begin with the nondelegation doctrine, explaining both that and why the Court is so reluctant to invoke the doctrine, whose legal pedigree is unclear and whose structural and functional justifications are ambiguous and contestable. Our aim is not to refight the first-order debates over the nondelegation doctrine, but to show how and why the Court has rejected the revisionist proposals of the New Coke in favor of a surrogate-safeguards approach that accommodates the anxieties underpinning those proposals. We then turn to several important episodes, involving deference to administrative interpretations of regulations and of statutes, and review of agency reasoning, in which the Roberts Court clearly adopted principles of administrative law morality as surrogate safeguards, accommodating the legitimate demands of administrative policymaking with rule-of-law concerns.

The Nondelegation Doctrine

Article I, Section 1 of the Constitution vests legislative power in "a Congress of the United States." But administrative agencies exercise broad discretionary authority, often under statutes that ask them to

promote the "public interest," or to issue regulations that are "practicable" or "reasonable," or "requisite to protect the public health." Is that unconstitutional? Some people think so. They invoke the nondelegation doctrine, which, in their view, means that Congress cannot "delegate" broad discretionary authority to agencies. This argument takes various forms. For a long time, the central argument has been that Congress must sufficiently cabin or limit agency discretion with some kind of "intelligible principle."

Justice Gorsuch—joined by Chief Justice Roberts and Justice Thomas—has gone much further.[6] He has argued that Congress is allowed to do only three things: to authorize agencies to find facts; to instruct them to fill in the details; and to grant them, or the president, the authority to act in domains, such as foreign affairs, that are peculiarly the constitutional prerogative of the executive branch. Gorsuch's argument might well mean that much of contemporary administrative authority is unconstitutional. In his approach, key provisions of the Clean Air Act, the Occupational Safety and Health Act, and the National Traffic and Motor Vehicle Safety Act might well be struck down.

Gorsuch, along with many others, offers a simple narrative about the arc of the nondelegation doctrine over time. In this view, the doctrine was a defining part of the constitutional structure, and was generally respected until some time in the early or middle part of the twentieth century. Starting in the 1950s, the Supreme Court essentially abandoned the nondelegation doctrine. It did so by turning the "intelligible principle" test into no test at all. On too many occasions, the Court said that open-ended terms ("feasible" or "requisite to protect the public health") actually contained an intelligible principle. That was an egregious blunder. As Gorsuch

puts it, "Before the 1930s, federal statutes granting authority to the executive were comparatively modest and usually easily upheld. But then the federal government began to grow explosively."[7] In short order, the constitutional settlement fell apart, and "maybe the most likely explanation of all lies in the story of the evolving 'intelligible principle' doctrine." As Gorsuch tells the story, the phrase "took on a life of its own," "mutated," and became essentially a blank check to Congress.

In Gorsuch's view, the intelligible principle test should either be abandoned, or else should be understood in its original terms, "consistent with more traditional teachings," as a shorthand phrase for the idea that Congress can ask agencies to find facts or fill in the details. In either case, what is necessary is restoration of a core constitutional principle and abandonment of a catastrophic constitutional error that has gone on for eighty years and counting. Justice Samuel Alito agrees: "If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort."

There is a competing narrative, one that we favor as a first-order matter. In that view, the nondelegation doctrine, as Gorsuch understands it, lacks anything like secure constitutional roots. Careful historical research supports that conclusion.[8] On the contrary, the nondelegation doctrine, as he understands it, was a judicial creation—and the Supreme Court created it relatively late. It is largely a product of the late nineteenth and twentieth centuries, not the eighteenth.

Some people who endorse this view do not believe that the Constitution forbids Congress to grant broad discretionary power to administrative agencies. As long as the agency acts with the

bounds of the grant of statutory authority, it is *exercising* executive power, even if the bounds are very wide. Congress's decision to grant that authority in the first place is itself an *exercise* of legislative power, not an invalid *transfer* of legislative power to the executive. Other people agree that for either originalist or nonoriginalist reasons (or both), it is right to say that there are constitutional limits on the power of Congress to grant open-ended authority to the executive branch. They might be prepared to emphasize that at least since 1935, the Court has said that such limits exist, even if the Court has not found any statute, since that time, to transgress those limits. They also think that the intelligible principle test is a good way of identifying the constitutional limits, and that even with apparently open-ended statutory wording, courts are generally able to investigate both text and context to identify an intelligible principle. Because courts can do that, and because judges are appropriately deferential to Congress in this domain, the current state of the nondelegation doctrine—not enforced, but available for truly extreme cases—is nothing to lament.

In either case, our conclusion is that, in general, courts should not understand Article I, Section 1 of the Constitution to require Congress to legislate with specificity, by sharply limiting the discretion of administrators. To promote the internal morality of law, there are other things that courts can do instead. We have offered numerous examples. The Roberts Court has indeed taken this other path in prominent cases, as we now explain.

THE COURT'S APPROACH

To date, Justice Gorsuch's approach in dissent in *Gundy* has not swayed a majority of the Court. Indeed, the bottom line of the deci-

sion was that the Court upheld against nondelegation challenge a quasi-criminal statute with very open-ended language. (The majority was composed from Justice Kagan's plurality opinion and Justice Alito's somewhat anguished concurrence.) It would not be hard to imagine a decision invalidating such a statute, in part on the ground that criminal law especially requires well-defined legislative boundaries. That the Court as a whole declined to invalidate even in these circumstances was a blow to the hopes of those who would reinvigorate the nondelegation doctrine.

But our interest goes beyond Court-watching, and what the Supreme Court did instead bears emphasis because of its broader importance for the administrative state and the rule of law. Drawing heavily on a predecessor decision, the Court concluded that the statute should be read in light of its purpose, which was to ensure registration of sex offenders, to the extent feasible.[9] Congress was aware that for people who had been convicted before the statute's enactment, registration would present logistical and administrative challenges. The relevant text, read out of context, could be taken to tell the US attorney general: "Do what you want!" But read in its context, it could also be taken to tell the attorney general to register convicted sex offenders to the maximum extent feasible. The Court chose the second reading.

It did so partly because that seemed the better reading, period. Of greater interest is that the Court did so because it sought to find a way to channel and discipline agency discretion through an emphasis on reading the text in light of legislative purposes, taken in the context. The basic idea here is simple. If they can, *courts should interpret statutes in such a way as to avoid giving blank checks to administrative agencies.* That is a Fullerian idea. It is specifically designed to

promote the internal morality of law. And insofar as courts follow that approach, they can generally read seemingly open-ended statutes in a way that supplies an intelligible principle, and thus averts completely open-ended grants of authority to agencies. If so, then nondelegation challenges will succeed very rarely, if at all. After all, "feasibility" principles, like the one the Court finds implicit in SORNA, are ubiquitous in federal law. It would be unthinkable to declare that such principles, as a class, violate the constitutional prohibition on delegation of legislative power.

To be sure, Justice Alito's concurrence in *Gundy* immediately became the focus of hope for New Coke advocates. In an appropriate case, Alito indicated, he would be open to considering a Gorsuch-like reworking of the intelligible principle test. One ought not overreact to such declarations, however. The Court's modern history has seen a string of concurrences and dissents by justices indicating discomfort with expansive delegations of authority. To date, however, these opinions have never coalesced into a clear five-justice majority actually voting to invalidate a statute on nondelegation grounds.[10] The chief justice's behavior, especially, suggests he is extremely reluctant to provide the fifth vote to overturn precedent or otherwise institute new and shocking restrictions on administrative authority, even to the extent that he wishes to cabin and constrain it—a point to which we will return in both *Kisor v. Wilkie* and the census case (*Department of Commerce v. New York*).

The main point, for our purposes, is that since 1935, a majority of the Supreme Court has never been willing to pursue a strategy of directly invalidating delegations to agencies on constitutional grounds. Rather, as *Gundy* shows, the Court has conspicuously

pursued second-best strategies for channeling and shaping the exercise of administrative authority. Those strategies develop surrogate safeguards based on Fullerian principles of the sort discussed in Chapters 2 and 3. Their hallmarks are process orientation and a naturalistic derivation whose grounding in authoritative texts is unclear, except insofar as they can vaguely be attributed to "due process" or, under the Administrative Procedure Act (APA), the grant to courts of authority to set aside "arbitrary and capricious" agency decision-making.

Deference to Agency Interpretations of Regulations

We saw, at the end of Chapter 4, that in *Kisor v. Wilkie,* the Court reaffirmed the *Auer* doctrine and thus turned back a sweeping challenge to judicial deference to agency interpretations of their own regulations. Our focus here is not on the first-order arguments for and against *Auer,* as though on a blank slate; the Court appears to have decided that a properly cabined version of *Auer* is here to stay. We will indicate the essentials of the issues for context.

Suppose that Congress expressly grants the Department of Health and Human Services, or the Environmental Protection Administration, or the Federal Communications Commission the power to interpret ambiguities in its own regulations—or expressly denies the agency that authority. That direction should be authoritative, subject to any constitutional constraints. The resulting question is simple: Has Congress in fact exercised that authority, either globally or in particular statutes?

This question brings us directly to *Auer.* Nothing in the APA either endorses or rejects *Auer,* at least in express terms. Courts are

instructed to "determine the meaning or the applicability of the terms of an agency action," but perhaps Congress has said, in general or in particular instances, that where ambiguity exists, the meaning of a regulation turns on the agency's interpretation of its meaning. In that case, courts fulfill their duty to "determine the meaning" by deferring to that view, so long as it is reasonable. If so, courts might say that where legislative rules are ambiguous, the law is what the agency says it is (for example, through an interpretive rule).

It is true that Congress has not issued any such express instruction—but it has not issued a contrary instruction, either. In that light, *Auer* itself might be defended in two different ways. The first points to the agency's comparative epistemic advantage as an interpreter. Perhaps the agency has the best understanding of what the underlying legislative rule actually meant. A second defense of *Auer* points not to the agency's epistemic advantages as an interpreter, but to its comparative advantages as a policymaker. In this view, the interpretation of ambiguous regulations is really an exercise in policymaking, at least much of the time. A regulatory term such as "subject to" calls for further specification in a diverse array of cases, an exercise that in turn requires judgments of policy. Agencies have technical expertise as well as political accountability, and so long as regulations are ambiguous, they should be interpreted by agencies, not by courts, which lack those advantages. Where there is genuine ambiguity, the agency has comparative policymaking advantages.

Critics of *Auer* have several independent concerns. All of them raise significant questions about methodology. In one view, *Auer* creates an unfortunate and even dangerous incentive for agencies, which "is to speak vaguely and broadly, so as to retain a 'flexibility'

that will enable 'clarification' with retroactive effect."[11] *Auer* therefore encourages opportunistic behavior: Agencies will issue vague, broad regulations, knowing full well that when the time comes, they will be able to impose the interpretation they prefer.

In the abstract, the concern is certainly intelligible. With *Auer,* agencies can know that they will have the benefit of being able to clarify ambiguities; without *Auer,* they would not have that benefit, and might therefore speak precisely. But the idea that *Auer* results in motivated and nefarious obscurity—"a dangerous permission slip for the arrogation of power"—strikes us as a phantasmal terror. Indeed, we are unaware of, and no one has pointed to, *any* regulation in American history that was designed vaguely and broadly because of *Auer.*[12] In theory, we cannot rule out the possibility that some agencies have done that. But on the basis of the evidence, the risks seem very small.

Indeed, *Auer* also offers an incentive to write regulations with clarity, and eliminating it would eliminate that incentive: If an agency leaves a regulation ambiguous, it cannot be certain that an administration with different values will interpret the regulation as the agency now sees fit. For agencies, ambiguities are a threat at least as much as they are an opportunity. One administration might well want to ensure that its successor will not be allowed, with the aid of *Auer,* to shift from a prior position. There are multiple incentives cutting in multiple directions, and their net magnitude is at best unclear. Our own view, based on both principle and experience, is that ambiguities are essentially inevitable in regulations, and not usually intentional, and that when agencies do leave significant vagueness or ambiguity, or try very hard not to do that, *Auer* is not even a tiny part of the reason.

Auer's critics have a more fundamental objection, one that involves heavy artillery and has intuitive appeal. The decision produces a constitutionally suspect combination of the power to make law with the power to interpret law. Quoting Montesquieu, Justice Scalia insisted that this is a serious problem, because when "legislative and executive powers are united in the same person . . . there can be no liberty."[13] He concluded: "He who writes a law must not adjudge its violation."[14] At least *Chevron* preserves that separation, because agencies interpret what Congress enacts, but *Auer* obliterates it, because agencies interpret what agencies enact. Or so the argument runs.

But this critique of *Auer* is both unsound and too sweeping. There are three critical points. First, the traditional and mainstream understanding in American public law is that when agencies—acting within a statutory grant of authority—make rules, interpret rules, and adjudicate violations, they exercise *executive* power, not legislative or judicial power. Second, the separation of powers critique of *Auer,* and of the combination of rulemaking and rule-interpreting functions, is pitched at the wrong level. The separation of powers is fully satisfied as long as the principal institutions set out in the Constitution—the Congress, the president, and the judiciary—while exercising their prescribed functions, devise and approve the scheme of agency authority that combines rulemaking and rule-interpreting power in the agency's hands. If the constitutional institutions, operating as they were set up to operate, have decided that such an arrangement is both valid and wise, then respect for the separation of powers counsels approval of the arrangement. Conversely, there is no constitutional rule that each and every subordinate body set up by the constitutional institu-

tions must itself have the same internal structure as the Constitution of 1789, in some oddly fractal way.

Third, if the combination of lawmaking and law-interpreting functions in agencies really is constitutionally suspect as such, then there are much larger problems than *Auer* to discuss. The combination of functions in agencies is a hallmark of the administrative state, so the Federal Communications Commission, the Federal Trade Commission, the Securities and Exchange Commission, and myriad other agencies would seem to be constitutionally suspect as well. All of these agencies write binding rules, bring enforcement actions, and adjudicate violations, in the course of which they interpret the very rules that they themselves have made.

There is something overheated, wildly disproportionate, about the separation of powers critique of *Auer.* Is constitutional liberty really at risk if an agency is allowed to interpret the phrase "subject to" or the word "diagnosis," within the bounds of textual meaning? "Bound books"? "Diaries"? Is liberty less at risk if, in the face of ambiguity, courts, composed of generalist judges, interpret such terms on their own? Does it matter that agency interpretations often *increase,* rather than confine, the freedom of the regulated class, by telling its members that they may in fact do what they want to do? Does it matter that in hard cases, judicial interpretation of ambiguities often entails political judgments, as reflected in the conspicuously and predictably different views of Republican and Democratic appointees? Does it matter that we are typically speaking of interstitial and highly technical judgments, in which agencies understand an ambiguous term ("diaries") in a linguistically permissible way?

Auer and Surrogate Safeguards

All this said, our main point is not to reargue the merits. In the abstract, reasonable minds can and do differ about the constitutional permissibility and merits of *Auer* deference. After years of denying certiorari petitions seeking a reconsideration of the doctrine, the Court finally made up its mind, institutionally speaking, in *Kisor v. Wilkie,* in which the Court turned back a sweeping challenge to judicial deference to agency interpretations of their own regulations.[15] The Court's approach has not been to directly limit administrative authority through constitutional limitations (the lesson of *Gundy*), nor has it been to insist on fully independent judicial interpretation of statutory and regulatory provisions. Instead it has been to articulate a series of safeguards intended to ensure that agencies make fully considered official judgments, taking account of reliance interests of regulated entities over time.

The plurality opinion in *Kisor* articulates the following constraints on *Auer* deference: the regulation being interpreted must be genuinely ambiguous; the agency interpretation must be reasonable; the "character and context" of the agency's interpretation must show that it warrants deference, because the interpretation is the agency's "authoritative" or "official" position; it implicates the agency's substantive expertise; and it reflects the agency's "fair and considered judgment" rather than a "*post hoc* rationalization."[16] In the plurality's words, "[w]hat emerges is a deference doctrine not quite so tame as some might hope, but not nearly so menacing as they might fear."[17]

Justice Kagan's plurality in *Kisor,* with its attention to the level at which agency decisions are made and to their consistency over

time, seems to capture the equilibrium on the current Court and illustrates our theme perfectly. Rather than make sweeping, direct proclamations of de novo judicial authority over interpretation, of the sort eagerly anticipated by libertarian-originalists, the center of gravity on the Court lies with a substitute-safeguards approach.

Chevron as a Legal Framework

What about *Chevron*? Under Chief Justice Roberts, the Court has been quite uneasy about it, and its fate is not yet resolved. A whole book could easily be written about the topic. We offer a brief note here, drawing on our discussion of *Auer* and showing the crucial role of surrogate safeguards. We also suggest, in an echo of the principle we drew from *Wong Yang Sung,* that *Chevron,* properly confined, is best understood as an overarching framework for review of legal questions involving agency interpretation of statutes, a framework within which competing views can reach a stable if uneasy equilibrium. In this way, the reaffirmation of *Auer* deference through the reticulated framework laid out in *Kisor* finds a parallel in the reticulated framework for *Chevron* deference laid out in the Court's jurisprudence, as we will explain.

In terms of the current uneasiness: Justice Gorsuch objects that *Chevron* "[t]ransfer[s] the job of saying what the law is from the judiciary to the executive."[18] Justice Thomas argues that *Chevron* is inconsistent with the Constitution.[19] In his view, the decision "wrests from Courts the ultimate interpretive authority to 'say what the law is,' and hands it over to the Executive."[20] Chief Justice Roberts seeks ways to confine *Chevron*'s reach.[21] As he puts it, "[t]he Framers could hardly have envisioned today's 'vast and

varied federal bureaucracy' and the authority administrative agencies now hold over our economic, social, and political activities."[22] The chief justice adds:

> When it applies, *Chevron* is a powerful weapon in an agency's regulatory arsenal. Congressional delegations to agencies are often ambiguous—expressing "a mood rather than a message." By design or default, Congress often fails to speak to "the precise question" before an agency. In the absence of such an answer, an agency's interpretation has the full force and effect of law, unless it "exceeds the bounds of the permissible." . . . It would be a bit much to describe the result as "the very definition of tyranny," but the danger posed by the growing power of the administrative state cannot be dismissed.[23]

Focusing on the question of legal foundations, Justice Kavanaugh describes *Chevron* as "an atextual invention by courts" and as "nothing more than a judicially orchestrated shift of power from Congress to the Executive Branch."[24] More colorfully, he writes, "when the Executive Branch chooses a weak (but defensible) interpretation of a statute, and when the courts defer, we have a situation where every relevant actor may agree that the agency's legal interpretation is not the best, yet that interpretation carries the force of law. Amazing."[25] Whether or not that is amazing, *Chevron* has become the flashpoint for contemporary concerns over the power and the legitimacy of the modern administrative state.

None of this is to say that *Chevron* will be overturned. No one now knows that, but while predictions are hazardous, we tend to

doubt it. Although the chief justice's concurrence in *Kisor* emphasized that the Court did not resolve the *Chevron* question, the fact that *stare decisis* was the basis for his vote bodes ill for any attempt to overturn *Chevron* in the foreseeable future. After all, *Chevron* has been applied in thousands of cases at all levels of the federal judicial system since 1984, and the decision has roots far older than that. In many ways, *Auer* deference was the lower-stakes issue, and overruling *Auer* would have been a less consequential decision. As commentators noted, therefore, if the Court is unwilling to overturn *Auer* deference, it seems to follow *a fortiori* that *Chevron* itself is likely secure.[26]

We suggest that the Court's institutional reluctance to overturn its deference doctrines is as sensible in the *Chevron* context as in the *Auer* context. The criticisms are overdrawn, and the legitimate concerns behind them have already been accommodated within the properly cabined version of *Chevron* that the Court has developed in the decades since 1984. Current *Chevron* doctrine builds in a number of surrogate safeguards that address those concerns while affording ample scope for the equally legitimate requirements of administrative policymaking under complex modern regulatory statutes and changing conditions.

Put another way, the right doctrinal genre within which to situate *Chevron,* we suggest, is the legal framework—paradigmatically, a doctrine with multiple parts, prongs, or components that internally accommodates competing concerns.[27] Frameworks have staying power insofar as they are both flexible and coordinating. They must be flexible enough to appeal to judges with competing views, who can all articulate their positions within the framework. Current *Chevron* doctrine allows exactly this, providing a

kind of macro-settlement that can reconcile a range of competing views about the administrative state.

Though *Chevron*'s nominally two-step framework is familiar to insiders, a brief refresher will be helpful, with particular reference to what the Court actually said.[28] Under the Clean Air Act Amendments of 1977, a permit is required whenever a company builds a new industrial source or modifies an existing one, unless the incremental pollution falls within the statutory limits.[29] The particular issue in *Chevron* was whether a "source" had to be a single building or smokestack (as environmental groups argued), or whether it could be an entire plant (as the government urged). A plantwide definition of "source" would give companies greater flexibility. It would create a kind of bubble over the plant, allowing companies to build new pollution-emitting devices or to modify old ones, as long as they did not exceed the total statutory limit. Under the plantwide definition, a company might build a new pollution-emitting device within its plant, but also take one offline, and in that way avoid the Clean Air Act's permit requirements.

As many were aware, the plantwide definition of "source" had been adopted by the Reagan administration, which rejected the narrower definition from the Carter administration. Environmental groups were deeply skeptical of the Reagan administration, and they sought to challenge the decisions of its Environmental Protection Agency at every turn. They believed that the plantwide definition was both harmful from an environmental perspective and inconsistent with the purposes of the Clean Air Act. The D.C. Circuit Court of Appeals agreed.[30] No one should have been surprised. That court had long been aggressively reviewing agency action, especially in the environmental context,

and had been pressing agencies in directions favored by environmental groups.

The Supreme Court offered its framework in that context. In the Court's own words: "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Step One has come to be understood to require an inquiry into whether Congress's instructions are ambiguous. If they are, courts must proceed to Step Two: "[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." With the second step, courts ask whether the agency's interpretation is "permissible," not whether it is right.

It is important that, under current law, *Chevron* deference is carefully confined, embedded in a reticulated doctrinal framework of surrogate safeguards that attempt to address concerns about legality and administrative discretion while also accommodating the forces that produced *Chevron* itself in the first place. We will mention only some of the most prominent.

1. Delegation. As the Court has come to understand *Chevron,* it is rooted in an antecedent judgment—often referred to as Chevron Step Zero—that a grant of rulemaking or adjudicative authority implicitly carries with it the power to interpret ambiguities, as long as the interpretation is reasonable.[31] The apparent idea is that although courts decide relevant questions of law, the answers to those questions may depend, by congressional direction, on what the agency has said—at least if the agency has rulemaking or adjudicative

authority, the statute is ambiguous, and the agency's interpretation is reasonable. In our view, the Court's approach violates nothing in the APA or the US Constitution.

2. *Clarity.* In the first step, there is no deference to the agency. Courts decide *on their own* whether a statutory term is ambiguous. Agencies are not entitled to any deference on that question. That is an important limit on *Chevron.* If agencies were allowed to say whether statutes are ambiguous, there might be a serious question under Article III. But as the law stands, agencies have interpretive authority only in the face of what a court finds to be ambiguity. That is hardly everything. Nonetheless, agencies are far better off with *Chevron* than they would be without it, in the sense that they have room to interpret ambiguous provisions as they reasonably see fit.[32]

Put another way: Under *Chevron,* the court is always required to exercise its own independent judgment at Step One in deciding whether there is ambiguity. The word "take" cannot mean "sing," or "admire," or "sneeze." *It is only after the court has made an independent judgment that the term is ambiguous that Chevron's framework applies.* We could imagine, and should emphasize, that a serious constitutional question would arise if Congress prohibited that independent judgment—if it said that agencies, rather than courts, will decide whether there is ambiguity in the law. But *Chevron* does not rest on any such prohibition. On the contrary, courts remain in the driver's seat, in the sense that they are entitled to decide whether the statute really is ambiguous.

3. *Reasonableness.* In Step Two, agencies are always charged with showing that their interpretations are reasonable. Thus, even when the Supreme Court finds that Congress has charged agencies with

offering interpretations carrying the force of law (Step Zero), and even when the traditional tools of interpretation indicate a gap or ambiguity (Step One), it is still true that an agency's interpretation must both represent a reasonable construal of the ambiguity and rest on reasonable policy choices. (Here, as the Court has often observed, Step Two overlaps with arbitrariness review.)

4. Major questions and agency expertise. In an important 2015 decision, *King v. Burwell,* Chief Justice Roberts wrote for the Court to turn aside a statutory challenge to policy under the Affordable Care Act.[33] The Court stated that the Internal Revenue Service's interpretation of the Affordable Care Act was entitled to no deference, essentially for two reasons. First, the issue amounted to a "question of major economic and political significance," such that Congress should be presumed not to have relegated it to agency decision-making. Second, the issue, one of health policy, lay beyond the distinctive competence of the Internal Revenue Service. As we have seen, this second idea was picked up, by analogy, by Justice Kagan in the *Kisor* plurality opinion, which suggested that the agency's interpretation "must in some way implicate its substantive expertise."[34]

Chief Justice Roberts's opinion in *King v. Burwell* presages the likely future of *Chevron:* it will probably prevail as an organizing framework, subject to calibrated safeguards. Judicial deference to agency interpretations of statutes, in some form or another, is likely here to stay. (Note that several past and present justices who expressed opposition to *Auer* deference refused to join more radical critiques of *Chevron* deference; Justices Alito and Scalia are examples.) *Chevron* continues to serve as a kind of governing regime, a broad and open-ended mini-constitution for judicial deference,

one that tolerates and incorporates a diversity of approaches in a modus vivendi. For the future, something like Justice Kagan's opinion in *Kisor* provides an excellent guide—maintaining *Chevron* while insisting that it is for judges, not agencies, to decide whether statutes delegate law-interpreting power to administrators, whether statutes contain ambiguities, and whether agencies' resolutions of those ambiguities are reasonable.

Arbitrariness Review, Pretext, and Congruence

We have advocated a general approach that the Court has deployed with respect to both *Auer* and *Chevron* deference: a surrogate-safeguards approach, in which agencies enjoy expansive authority, but in which that authority is shaped and constrained by the morality of administrative law. This same approach dominated the most politically divisive case of the 2018 term, the census case, *Department of Commerce v. New York.*[35]

One position, strongly urged by the plaintiffs and adopted in some cases by lower courts, was to declare it beyond the authority of the secretary of commerce to add a citizenship question, either on constitutional grounds under the enumeration clause, or on statutory grounds, under the statute delegating Congress's census authority to the secretary.[36] A clear majority of the Court brushed these contentions aside without much ado, noting the breadth of the constitutional and statutory language. (Here is an interesting comparison and contrast with *Gundy;* in the census case, the majority was far less concerned about sweeping delegations under essentially unconstrained statutory language.) Furthermore, the majority was at pains to emphasize—contrary to assumptions in the

lower court, assumptions that have no foundation in administrative law doctrine—that agency heads are in no way bound by the recommendations of staff experts, and do not even owe courts any special justification for declining to follow those recommendations. Finally, the Court expressly adopted a strongly deferential posture toward predictive agency judgments under uncertainty.

By the same token, however, the majority was unwilling to declare the relevant questions "committed to agency discretion by law" and hence unreviewable under the APA, a course urged by Justice Alito in dissent. The majority thought there was "law to apply," under the main reviewability standard, in part because of judicial authority under APA § 706 to review the "general requirements for reasoned agency decisionmaking." This might be seen as a distinctly expansive construal of the "no law to apply" standard, given that those requirements are at least arguably always present for agency action and so can always be said to create law to apply for purposes of determining reviewability. The Court probably does not mean to radically limit the exception for agency action "committed to agency discretion by law," but its approach to reviewability does underscore the double-sided character of the Court's approach: permissive with respect to the substantive scope of agency authority, but attentive to the procedural modes through which, and the reasons for which, agencies exercise that authority.

In contrast to both of the rejected approaches—placing tight substantive limits on the scope of agency authority, or declaring agency discretion unreviewable altogether—the Court pursued a different strategy, one highly reminiscent of the "surrogate safeguards" approach and one that fits our aims perfectly: a limited

and confined form of pretext analysis for agency reasoning, under the arbitrary and capricious test of the APA. The Court's pretext analysis was notably limited, insofar as it expressly does not apply where the agency has both stated and unstated reasons for its decision (as long as the stated reasons are sincerely held). Nonetheless, the Court indisputably indicated that in "unusual circumstances" a reviewing court might declare an agency's sole stated reason pretextual, in light of the whole course of the agency's behavior, and thus remand for further explanation or a change of course by the agency.

A simple way of understanding this remedy is that the Court instructs an agency that has engaged in pretexual justification to bring its reasoning into *congruence* with its actions, one way or another—either by changing the actions, or by admitting to the real justifications. In this way, pretext review is best understood as an application of Fuller's eighth way to fail to make a law: "a failure of congruence between the rules as announced and their actual administration." Put positively, a desideratum of law-like government conduct—and, in the extreme, a minimum requirement of legality—is that *stated justifications must not be impossible to square with the actual behavior of the officials who state them.*

As with all the principles of administrative law's morality, this is a scale or continuum rather than a binary switch. Outside the limited contexts in which the law gives strict scrutiny to the tailoring of justification to action, agencies have ample room to offer plausible justifications that are legally reasonable even if not precisely congruent with everything the agency does. Nonetheless, *Department of Commerce v. New York* is best understood to say that a degree of incongruence so great as to render the administrative rationale es-

sentially unrelated to the agency's action is a failure of lawmaking entirely, such that the agency has offered no legally cognizable statement of its reasoning for purposes of arbitrariness review. This is quintessentially Fullerian.

None of this is to endorse the view that so-called hard look review is anything like the norm in judicial review of administrative action, especially not at the Supreme Court level.[37] Indeed, the Court quite pointedly held that inclusion of a citizenship question on the census would have been an entirely reasonable course of action, given the intrinsic uncertainties of the consequences, had the department offered a transparent, non-pretextual justification. Here too, the Court's approach is rooted in the morality of administrative law, understood as surrogate safeguards. Rather than attempt to give substantive scrutiny to agency policy choices, the Court here acts to ensure only that minimal preconditions for the legality of agency action are observed. This is the very enterprise we have urged, one that tries to accommodate controversial and contentious views of both supporters and critics of administrative action, allowing wide scope for policy initiative while addressing the ultimate concerns about the rule of law that animate critics of the administrative state. The Court's redemptive enterprise is to legitimate, rather than curtail, the administrative state by eliciting and formalizing the internal principles and logic of law's morality.

FINAL WORDS

As in the 1930s, so in the first decades of the twenty-first century: The exercise of broad discretionary authority by the administrative state is under fundamental assault, not only in the political process but also as a matter of constitutional law. In our view, engagement with particular agencies, and particular practices, greatly weakens the force of that assault. Consider the cabinet agencies, including not only the Departments of Defense and State, but also the Departments of Agriculture, Commerce, Transportation, Energy, and Health and Human Services, along with the Environmental Protection Agency. All of these have been created by Congress. In many cases, Congress has sharply limited their discretion. In all cases, they are subject to the ongoing control of the president.

Or consider the independent agencies, including the Federal Reserve Board, the Federal Communications Commission, the Federal Trade Commission, the Consumer Product Safety Commission, the Social Security Administration, and the Nuclear Regulatory Commission. All of these are also creations of Congress. Much of the time, their discretion is also sharply limited. And while they are not subject to the ongoing control of the president, their members are appointed by him. Their policies tend to fit with his inclinations.

Simply as a matter of history, it is not easy to demonstrate that the modern administrative state transgresses lines drawn by the original Constitution, whether in Article I, Article II, or Article III. Some of the most prominent claims of transgression turn out to be exercises in rhetoric, not history. Even if those claims could be defended, many people are not "originalists." They agree, of course, that the text of the Constitution is binding, but they do not agree that its meaning is settled by what people thought in 1787.

If we are concerned with democracy, freedom, or the general welfare, there is a great deal to be said for, not against, the modern administrative state. In contemporary government, federal and state agencies are arguably products of democratic will (acknowledging the role of self-interested private groups). In some cases, they promote freedom, at least on certain specifications of that contested ideal. They can and often do promote the common good and increase human welfare. Many people do not love cost-benefit analysis, but if we care about welfare, it is at least noteworthy that the benefits of agency action often exceed the costs, and by a large margin.

We acknowledge that some agency practices do raise serious constitutional questions, and we are keenly aware that many people will find the picture we have just drawn to be far too rosy. This is far from the best of all possible worlds. Sometimes agencies violate the law. Sometimes they act arbitrarily. They can be unfair. They can be influenced by powerful private interests; they might even do their bidding. They might not use their expertise. They can threaten liberty. They can reduce welfare and act in ways contrary to the common good.

Our central claim here has been that, at its best, American administrative law has its own internal morality, a reflection of the

internal morality of law. That internal morality embraces many of the concerns and objections of those who are deeply skeptical of the administrative state. It empowers but also channels administrative authority, not by abolishing agencies but by insisting on a set of principles that might fairly be said to constitute the old ideal of the rule of law as a rational order that helps to promote the common good. It offers surrogate safeguards—not constitutional invalidation, but checks and limits that promote fidelity to law and that call for reasoned justifications. Crucially, these both shape and legitimate the administrative state, helping to make agency action efficacious not as arbitrary command but as law.

This is one of the oldest ideas in law and legal theory, particularly the law of executive power. In the thirteenth century, Bracton's treatise on the laws of England observed something very similar of the king—in terms that, for all we know, may have influenced Fuller's account. "[B]ecause law makes the king," Bracton (or an interpolation to Bracton) said, "let him therefore bestow upon the law what the law bestows upon him, namely, rule and power. [For] there is no *rex* where will rules rather than *lex*."[1] The point here is not best understood in terms of constraints on the king, although that corollary can be drawn. Rather, the point is that law is *constitutive* of the place and office of "the king," and that ruling according to law is itself a precondition for the efficacy of rule *as* king. This, appropriately transposed and modified, is our basic claim about the morality of administrative law. Its procedural principles both constitute and channel administrative action, making it efficacious as law.

The result is Janus-faced: the principles of administrative law's morality both empower and constrain the administrative state. It is precisely this duality that makes us hopeful that these principles

can serve the basic aim of administrative law, explained in the Introduction, of settling "long-continued and hard-fought contentions, and enact[ing] a formula upon which opposing social and political forces have come to rest."[2]

In our view, the morality of administrative law is something to celebrate. To the extent that the United States lives by it, it is something for which Americans should be grateful. And even in its modest forms, it has critical bite. It suggests reform, not only celebration. In multiple domains, and all over the world, we need more fidelity to it.

NOTES

INTRODUCTION

1. Gary Lawson, *The Rise and Rise of the Administrative State,* 107 Harv. L. Rev. 1231, 1240–41 (1994); Philip Hamburger, Chevron *Bias,* 84 Geo. Wash. L. Rev. 1187 (2016). This view is defended passionately and at length in Joseph Postell, Bureaucracy in America (2017).

2. Richard A. Epstein, How Progressives Rewrote the Constitution (2006).

3. Theodore Lowi, The End of Liberalism (2009); David Schoenbrod, Power Without Responsibility (1995). *See* Postell, *supra* note 1, who also emphasizes this theme, with particular reference to originalist sources.

4. We do not necessarily agree that these claims of a legitimacy crisis are in fact warranted. Nonetheless, as we explain in the text, our basic project here is to meet the critics where they are, bracketing our own views in order, as it were, to address their concerns from the inside, insofar as possible. For the first-order views of one of us, see Adrian Vermeule, *Bureaucracy and Distrust,* 130 Harv. L. Rev. 2463 (2017).

5. It is familiar that "legitimacy" may refer to legal, moral, or sociological legitimacy. *See* Richard H. Fallon, Jr., *Legitimacy and the Constitution,* 118 Harv. L. Rev. 1787 (2005). Because our purposes here are not jurisprudential, we need not choose among these senses, once and for all. We will typically mean to refer to legal legitimacy, although sometimes the context will make clear otherwise. The distinctions are of secondary importance for our project, insofar as, we will suggest, rules that fail of moral and sociological legitimacy in sufficiently egregious ways, or to sufficiently egregious degrees, may on our account fail even to enjoy legal legitimacy.

6. On foundational issues, see Matthew Adler, Welfare and Fair Distribution (2011).

7. *See* Stephen Breyer, Regulation and Its Reform (1981), for an influential account in this vein.

8. Gillian Metzger, *1930s Redux: The Administrative State Under Siege,* 131 Harv. L. Rev. 1 (2017).

9. Adrian Vermeule, Law's Abnegation (2016).

10. Cass R. Sunstein, The Cost-Benefit Revolution (2017).

11. For the category of legal frameworks, see Adrian Vermeule, *Chevron as a Legal Framework,* Jotwell (October 24, 2017), https://adlaw.jotwell.com/chevron-as-a-legal-framework/.

12. 339 U.S. 33 (1950).

13. Even the technical holding is not simple to state; roughly, it was that the separation of functions requirements of the then-novel Administrative Procedure Act, enacted a mere four years before, should be read by implication into the procedures for administrative hearings in deportation cases, to avoid the constitutional questions of due process of law that would arise if such hearings were conducted by immigration inspectors acting simultaneously as both adjudicators and as prosecutors. The immediate consequence was to separate the roles of adjudication and prosecution in deportation hearings. On this level, the half-life of *Wong Yang Sung* proved comically short. Six months after the case came down, Congress took the occasion of a supplemental appropriations law to revise the relevant immigration statutes in pointed terms, providing expressly for the combination of roles in deportation adjudications, thereby making the relevant constitutional questions unavoidable. In 1955—a year after the death of Justice Jackson—the Supreme Court, doubtless moved by this display of legislative resolve, squarely faced the constitutional question in *Marcello v. Bonds,* 349 U.S. 302 (1955), and brusquely upheld the combined-role arrangements.

14. *Wong Yang Sung,* 339 U.S. at 40–41.

15. 435 U.S. 519 (1978).

16. Antonin Scalia, *Vermont Yankee, the APA, and the DC Circuit,* 1978 Sup. Ct. Rev. 345 (1978).

17. *Vermont Yankee,* 435 U.S. at 523.

18. We are aware, of course, that there is a sharp and continuing debate about whether judges should follow "text" or instead "purpose." We do not mean to venture a view about that debate here. In referring to purpose in Jackson's sense, our only goal is to embrace a larger aspiration for the system of administrative law, not to suggest that judges should interpret particular texts by reference to purpose.

19. For the second best as a method of treating problems in public law, see Adrian Vermeule, The System of the Constitution (2011).

20. The term is used in Cass R. Sunstein, *Interest Groups in American Public Law,* 38 Stan. L. Rev. 29 (1985).

21. Friedrich Hayek, The Road to Serfdom (1944); Lon Fuller, The Morality of Law (1962); Joseph Raz, *The Rule of Law and Its Virtue, in* The Authority of Law: Essays of Law and Morality 210, 210 (1986). We draw on Fuller's understanding; Raz's brisk, pointed, and illuminating account is compatible with it.

22. Antonin Scalia, *The Rule of Law as a Law of Rules,* 56 U. Chi. L. Rev. 1175 (1989).

1. THE NEW COKE

1. 139 S. Ct. 2116, 2131 (Gorsuch, J., dissenting).

2. 135 S. Ct. 1199, 1213 (Thomas, J., concurring).

3. For citations, see Cass R. Sunstein and Adrian Vermeule, *Libertarian Administrative Law,* 82 U Chi. L. Rev. 393 (2015).

4. *See Gundy,* 139 S. Ct. at n.29, n.62, n.74; *Perez,* 135 S. Ct. at 1218, 1220.

5. *See* Joseph Postell, Bureaucracy in America (2017).

6. We recognize that a great deal of historical work would be necessary to earn this conclusion. For valuable treatments, see Jerry L. Mashaw, Creating the Administrative Constitution (2012); Keith Whittington and Jason Iuliano, *The Myth of the Nondelegation Doctrine,* 165 U. Pa. L. Rev. 379 (2017).

7. For those who know that in Commonwealth countries, Coke (the judge) is often pronounced "Cook": imagine a counterfactual paper structured around a different image, that of the new cook who serves inedible dishes.

8. *See, e.g.,* Adam Tomkins, Our Republican Constitution 5–88 (2005) (detailing the conflicts between the Stuarts and the common-law judges before the English Civil War, and explaining that the common-law judges largely *supported* the monarch's legal claims); Paul P. Craig, English Foundations of U.S. Administrative Law: Four Central Errors (2016).

9. *Roe v. Wade,* 410 U.S. 113 (1973); *Obergefell v. Hodges,* 135 S. Ct. 2584 (2015); *District of Columbia v. Heller,* 554 U.S. 570 (2008). We acknowledge that there are plausible arguments for *Heller* that do not rest on contemporary values.

10. For a vigorous statement, see Charles Murray, By the People: Rebuilding Liberty without Permission (2015) (calling for widespread civil disobedience to counteract agency abuse).

11. The Federalist No. 47 (James Madison).

12. Adrian Vermeule, The Constitution of Risk (2013).

13. The Federalist No. 41 (James Madison).

14. *See* The Federalist No. 70 (Alexander Hamilton), *in* The Federalist 471, 471–76 (1982) (Jacob E. Cooke, ed.).

15. *See* Roscoe Pound, Administrative Law: Its Growth, Procedure, and Significance (1942). See also *id.* at 132, suggesting, "We must bear in mind that the theories of disappearance of law go along with, have developed side by side with, absolute theories in politics. . . . The real foe of absolutism is law." *See also* Roscoe Pound, *The Place of the Judiciary in a Democratic Polity,* 27 A. B. A. J. 133 (1941). On antecedents, see Postell, *supra* note 2.

16. *See, e.g.,* Geoffrey R. Stone, *King George's Constitution,* U. Chi. L. Sch. Fac. Blog (Dec. 20, 2005), http://uchicagolaw.typepad.com/faculty/2005/12/king_georges_co.html.

17. *See generally,* Randy E. Barnett, Restoring the Lost Constitution: The Presumption of Liberty (2013); *see, e.g.,* Douglas H. Ginsburg, *Delegation Running Riot,* 1995 Reg. 79, 83–84 (1995) (reviewing David Schoenbrod, Power Without Responsibility: How Congress Abuses the People through Delegation).

18. F. H. Buckley, The Once and Future King: The Rise of Crown Government in America (2015); Philip Hamburger, Is Administrative Law Unlawful? (2014).

19. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477 (2010).

20. The classic argument to this effect is, however, not American. *See* Max Weber, *The Reich President,* 53 Soc. Research 125, 128–32 (1986).

21. 138 S. Ct. 2392 (2018).

22. 553 U.S. 723 (2008); 552 U.S. 491 (2008).

23. 139 S. Ct. 2551 (2019).

24. 132 S. Ct. 1421 (2012).

25. Aleksandr I. Solzhenitsyn, 1 The Gulag Archipelago 131 (1997).

26. *City of Arlington, Tex. v. F. C. C.,* 569 U.S. 290 (2013) (Scalia, J.). For decisions critical of judicial deference to agencies' interpretations, *see, e.g.,* Talk Am., Inc. v. Michigan Bell Tel. Co., 564 U.S. 50, 67–69 (2011) (Scalia, J., concurring); Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597, 617–18 (2013) (Scalia, J., concurring in part, dissenting in part).

27. 561 U.S. at 494–95 (Roberts, J.); *see, e.g., City of Arlington,* 590 U.S. at 311 (Roberts, J., dissenting); *Decker,* 568 U.S. at 616 (Roberts, J., concurring) (expressing willingness to reconsider *Auer*).

28. *See* Chevron, USA, Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984).

29. Very much including rhetoric that explicitly valorizes Coke himself. *See, e.g., Perez,* 135 S. Ct. at 1220 (Thomas, J., concurring in judgment); Dep't of Transp. v. Ass'n of Am. Railroads, 135 S. Ct. 1225, 1243 (2015) (Thomas, J., concurring in judgment). Ironically enough, the earliest formulation of judicial deference to executive interpretation comes from the same judge. "[I]n a doubtful thing, interpretation goes always for the king." Sir Edward Coke, House of Commons, (July 6, 1628). Tomkins, *supra* note 8, at 70–71, 74.

30. 554 U.S. 570 (Scalia, J.).

31. *Id.* at 592 (Scalia, J.).

32. *Id.* at 600 (Scalia, J.).

33. *Id.* at 622 (Scalia, J.).

34. *Decker,* 568 U.S. at 619–20 (Scalia, J., concurring in part, dissenting in part).

35. *Perez,* 135 S. Ct. at 1207.

36. For a classic statement, see generally James M. Landis, The Administrative Process (1938).

37. *See* Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State,* 38 Pol. Sci. Q. 470, 478 (1923). *See generally* Cass R. Sunstein, The Second Bill of Rights: FDR's Unfinished Revolution and Why We Need It More Than Ever (2006); Daniel R. Ernst, Tocqueville's Nightmare: The Administrative State Emerges in America, 1900–1914 (2014).

38. Adrian Vermeule, *Optimal Abuse of Power,* 109 Nw. U.L. Rev. 673, 678–79 (2015).

39. Matthew D. McCubbins, Roger Noll, and Barry R. Weingast, *The Political Origins of the Administrative Procedure Act,* 15 J. L. Econ. & Org. 180, 182–83 (1999).

40. *See* Universal Camera Corp v. Nat. Labor Relations Bd., 340 U.S. 474, 477–88 (1951).

41. George Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics,* 90 Nw. L. Rev. 1557 (1996).

42. *See* Vermeule, *supra* note 9.

43. *See* Saikrishna Bangalore Prakash, Imperial from the Beginning: The Constitution of the Original Executive 12–13 (2015); Frank Bourgin, The Great Challenge: The Myth of Laissez-Faire in the Early Republic 54–56 (1989).

44. *See* The Federalist No. 70 (Alexander Hamilton), *in* The Federalist 471, 471–76 (1982) (Jacob E. Cooke, ed).

45. *Id.* at 472.

46. *Id.*

47. *See* The Federalist No. 41 (James Madison), available at https://avalon.law.yale.edu/18th_century/fed41.asp.

48. *See* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine,* 69 U. Chi. L. Rev. 1729, 1733 (2002).

49. *See* Mashaw, *supra* note 3, at 53.

50. *Id.* at 29. The closest thing to a response is Postell, *supra* note 2. A reply to Postell's elaborate discussion would itself require an elaborate discussion, and our goal is not to go over the original understanding in detail. Too briefly: We believe that on particular issues, Postell draws extravagant inferences from ambiguous statements and events. In the end, the discussions during the Constitutional Convention were strikingly unclear on the nature and extent of the nondelegation doctrine, even if they showed an insistence on the need to separate legislative and executive power. A conceptual problem here is that the separation of legislative and executive power, without more, does not at all imply the nondelegation doctrine. Important practices of early Congresses, often limiting executive authority, hardly demonstrate that such limitations were believed to be constitutionally compelled.

51. Julian Davis Mortenson and Nicholas Bagley, *Delegation at the Founding* (2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3512154.

52. In our view, the expansion of power of the national government is the major unanticipated development. The growth of the administrative state should be counted as unanticipated only insofar as it reflects that expansion—but not insofar as agencies wield discretion or have "binding" interpretive and rulemaking authority. We acknowledge that we cannot defend this controversial view in this brief space, nor need we do so; as always, our aim is not to rehash competing views of the first-order legal questions about the administrative state.

53. One of us once did exactly that. *See* Cass R. Sunstein, *Constitutionalism After the New Deal,* 101 Harv. L. Rev. 421, 467 (1987) ("*Chevron* suggests that administrators should decide the scope of their own authority. That notion flatly

contradicts separation-of-powers principles that date back to *Marbury v. Madison* and to The Federalist No. 78. The case for judicial review depends in part on the proposition that foxes should not guard henhouses—an injunction to which *Chevron* appears deaf. It would be most peculiar to argue that congressional or state interpretations of constitutional provisions should be accepted whenever there is ambiguity in the constitutional text; such a view would wreak havoc with existing constitutional law. Those limited by a provision should not determine the nature of the limitation."). (Oh, the folly of youth.)

54. James M. Landis, *Administrative Policies and the Courts,* 47 Yale L. J. 519, 528 (1938); and *see* Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron,* 73 U. Chi. L. Rev. 823, 841 (2006). Note that the finding in this essay is that political preferences play a role in the post-*Chevron* era; without *Chevron,* the role of those preferences would undoubtedly be magnified.

2. LAW'S MORALITY, 1

1. *See* Ronald Dworkin, Law's Empire (1985).

2. There are many versions of this view. The most influential is H. L. A. Hart, The Concept of Law (1961). *See, e.g., id.* at 7–8.

3. *See, e.g.,* Dworkin, *supra* note 1, at 15–20.

4. *See* Lon L. Fuller, The Morality of Law (rev. ed. 1969).

5. *Id.* at 4–6, 42.

6. *Id.* at 39.

7. *Id.* at 38–39.

8. *Id.* at 39.

9. *Id.* at 41.

10. *See* Kenneth Culp Davis, Discretionary Justice (1969).

11. *See* Eugene Bardach & Robert Kagan, Going By the Book (2002).

12. 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).

13. For a superb brief account of the rule of law consistent with our aims here, one from which we have learned a great deal, see John Tasioulas, The Rule of Law (John Tasioulas, The Cambridge Companion to the Philosophy of Law (Cambridge Univ. Press, 2019)). For an excellent account of Fuller's relationship to jurisprudence, see Colleen M. Murphy, *Lon Fuller and the Moral Value of the Rule of Law,* 24 L. & Phil. 239, 262 (2005).

14. Others have done this briefly, *see, e.g.,* Kevin M. Stack, *An Administrative Jurisprudence: The Rule of Law in the Administrative State,* 115, Colum. L. Rev. 1985, 2002–09 (2015); Edward L. Rubin, *Law and Legislation in the Administrative State,* 89 Colum. L. Rev. 369, 397–408 (1989), 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 (2000); Nestor M. Davidson et al., *Regleprudence,* 103 Geo. L. J. 259 (2015); David Dyzenhaus, The Constitution of Law (2006); David Dyzenhaus, *Positivism and the Pesky Sovereign,* 22 Eur. J. Int'l L. 363, 367–69 (2011). Particularly helpful here is Dyzenhaus's explication of Fullerian principles as constitutive of a "thick" version of the rule of law. *See* Dyzenhaus, *supra* note 14. 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.*

15. *See, e.g.,* D. A. Candeub, *Tyranny and Administrative Law,* 59 Ariz. L. Rev. 49 (2017); Philip Hamburger, Is Administrative Law Unlawful? (2014); David Schoenbrod, Power Without Responsibility (1993); Richard A. Epstein, *The Perilous Position of the Rule of Law and the Administrative State,* 36 Harv. J.L. & Pub. Pol. 5 (2013); Larry Alexander & Saikrishna Prakash, *Delegation Really Running Riot,* 93 Va. L. Rev. 1035, 1036 (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 non-doctrine.'").

16. In a fascinating article, Nicholas Bagley criticizes administrative law proceduralism in quite general terms as a collection of constraints that, non-neutrally, tend to hamper the attainment of the administrative state's substantive aims. "A

positive vision of the administrative state—one in which its legitimacy is measured not by the stringency of the constraints under which it labors, but by how well it advances our collective goals—has been shoved to the side." Nicholas Bagley, *The Procedure Fetish,* 118 Mich. L. Rev. 345, 350 (2019). We are deeply sympathetic to this view, having ourselves criticized "libertarian administrative law." *See* Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law,* 82 U. Chi. L. Rev. 393 (2015). Bagley tends to overlook, however, that administrative-law procedures should not be solely or perhaps even primarily viewed as constraints. Rather, as we emphasize here, such procedures also play constitutive and empowering roles, helping administrative bodies to act through and by means of law in ways that make the administrative state more efficacious than it could otherwise be.

17. Lon Fuller, The Morality of Law 46–47 (1962).

18. *Id.* at 46.

19. *Id.*

20. *Id.*

21. *See id.; see also* Allentown Mack Sales and Serv., Inc. v. NLRB, 522 U.S. 359 (1998), which involved an effort by an adjudicating agency to set out and to apply rules, though as discussed below, the Supreme Court found a kind of Fuller violation in the particular case.

22. Fuller, *supra* note 17, at 47.

23. *Id.* at 47.

24. 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)).

25. *See id.* at 474.

26. 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).

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

28. *See generally, e.g.,* David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy,* 78 Harv. L. Rev. 921; Warren E. Baker, *Policy by Rule or Ad Hoc Approach—Which Should It Be?,* 22 L. & Contemp. Probs. 658 (1957).

29. *See* 5 U. S. C. § 553.

30. *See id.* §§ 554, 556–57.

31. Kenneth Culp Davis, *A New Approach to Delegation,* 36 U. Chi. L. Rev. 713 (1969).

32. *Id.* at 713.

33. *Id.* (emphasis omitted).

34. *Id.* at 725.

35. *Id.* at 729.

36. *See* Kenneth Culp Davis, *Administrative Common Law and the* Vermont Yankee *Opinion,* 1980 Utah L. Rev. 3 (1980).

37. *See* Philip Hamburger, Chevron *Bias,* 84 Geo. Wash. L. Rev. 1187 (2016).

38. Amalgamated Meat Cutters & Butcher Workmen of N. Am. v. Connally, 337 F. Supp. 737 (D. D. C. 1971).

39. *Id.* at 758.

40. *Id.* (emphasis added).

41. *Id.* at 759.

42. 29 U. S. C. § 652(8) (2012).

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

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

45. Am. Trucking Ass'ns v. EPA, 175 F.3d 1027 (D.C. Cir. 1999), *aff'd in part, rev'd in part,* 531 U.S. 457 (2001).

46. *Id.*

47. *Id.* at 1038 ("[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." (citation omitted)).

48. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 473 (2001).

49. *Id.*

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

51. 326 F.2d 605 (5th Cir. 1964).

52. *Id.* at 610, 612.

53. 398 F.2d 262 (2d Cir. 1968).

54. *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."

55. *Id.* at 265 (citing Hornsby v. Allen, 326 F.2d 605, 609–10 (5th Cir. 1964)).

56. *Id.*

57. On licensing, *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); on housing, *see, e.g.,* Ressler v. Pierce, 692 F.2d 1212, 1214–16 (9th Cir. 1982); on parole, *see, e.g.,* Franklin v. Shields, 569 F.2d 784, 789–90 (4th Cir. 1977) (en banc) (per curiam), *cert. denied,* 435 U.S. 1003 (1978); on disability, *see, e.g.,* Ginaitt v. Haronian, 806 F. Supp. 311, 314–19 (D. R. I. 1992); on assistance payments, *see, e.g.,* Carey v. Quern, 588 F.2d 230, 232–34 (7th Cir. 1978).

58. On water quality, *see, e.g.,* City of Albuquerque v. Browner, 97 F.3d 415, 429 (10th Cir. 1996); on academic tenure, *see, e.g.,* San Filippo, Jr. v. Bongiovanni, 961 F.2d 1125, 1134–36 (3d Cir. 1992); on agriculture, *see, e.g.,* Bama Tomato Co. v. U.S. Dep't of Agric., 112 F.3d 1542, 1547–48 (11th Cir. 1997).

59. *Bd. 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 exist whether or not there is a statutory entitlement. *See id.*

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

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

62. The arguments are implicit insofar as they criticize avoidance of rule-making, 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).

63. *Wyman-Gordon,* 394 U.S. at 759.

64. Excelsior Underwear Inc., 156 N. L. R. B. 1236 (1966).

65. *Id.* at 765.

66. *Id.* at 764.

67. *Id.*

68. NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974).

69. *Id.*

70. *Id.*

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

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

73. *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).

74. Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359 (1998).

75. *Id.* at 376.

76. *Id.* at 374.

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

78. *Id.*

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

80. 5 U. S. C. § 551(4) (2012).

81. *Id.* at 219.

82. *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).

83. *Compare, e.g.,* Covey v. Hollydale Mobilhome Estates, 125 F.3d 1281 (9th Cir. 1997), *with* Serv. Employees Int'l Union, Local 102 v. Cty. of San Diego, 60 F.3d 1346, 1353 (9th Cir. 1994).

84. Landgraf v. USI Film Prod., 511 U.S. 244, 269, 280 (1994).

85. *Id.*

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

3. LAW'S MORALITY, 2

1. *See* Lon L. Fuller, The Morality of Law (rev. ed.1969).

2. *See* Ariz. Grocery Co. v. Atchison, Topeka & Santa Fe Ry. Co., 284 U.S. 370 (1932); *see* Thomas W. Merrill, *The Accardi Principle,* 74 Geo. Wash. L. Rev. 569, 569 (2006).

3. Lon Fuller, The Morality of Law 39 (1962).

4. *See* Nader v. Bork, 366 F. Supp. 104 (D. D. C. 1973).

5. *Id.*

6. 284 U.S. at 381.

7. *Id.* at 389.

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

9. *Id.* at 262.

10. *Id.* at 263.

11. *See* Merrill, *supra* note 2, at 576–78, for a valuable overview.

12. 440 U.S. 741 (1979).

13. *Id.* at 749–50.

14. *Id.* at 753.

15. *Id.* at 754.

16. *Id.* at 753–54 (citations omitted).

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

18. *Id.* at 758 (footnote omitted).

19. *See* Stephen G. Breyer et al., Administrative Law and Regulatory Policy 420–21 (2017).

20. *Id.* at 598.

21. *Id.* at 599.

22. 5 U. S. C. § 551(4) (2012).

23. *Merrill, supra* note 2, at 599.

24. *See, e.g.,* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1210 (2015) (Alito, J., concurring); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules,* 96 Colum. L. Rev. 612 (1996).

25. *Perez,* 135 S. Ct. at 1213 (Scalia, J., concurring in judgment); *see id.* at 1255 (Thomas, J., concurring in judgment); Kevin O. Leske, *A Rock Unturned: Justice Scalia's (Unfinished) Crusade Against the* Seminole Rock *Deference Doctrine,* 69 Admin. L. Rev. 1 (2017).

26. Kisor v. Wilkie, 139 S. Ct. 2400, 2417–18 (2019).

27. *Id.* at 2410.

28. 135 S. Ct. 1199 (2015).

29. 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 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.

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

31. *See* Christopher v. SmithKline Beecham Corp., 132 S. Ct. 142 (2012) (first quoting Gates & Fox Co. v. Occupational Safety & Health Review Comm'n, 790 F.2d 154, 156 (D.C. 1986); then quoting Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 170–71 (2007)).

32. Indeed, the executive branch has pursued this same approach for internal purposes. See Executive Order 13892 (October 9, 2019): "Sec. 4. Fairness and Notice in Administrative Enforcement Actions and Adjudications. When an agency takes an administrative enforcement action, engages in adjudication, or otherwise makes a determination that has legal consequence for a person, it may apply only standards of conduct that have been publicly stated in a manner that would not cause unfair surprise. An agency must avoid unfair surprise not only when it imposes penalties but also whenever it adjudges past conduct to have violated the law."

33. *See, e.g.,* Saul Levmore, *Changes, Anticipations, and Reparations,* 99 Colum. L. Rev. 1657 (1999).

34. Skidmore v. Swift & Co., 323 U.S. 134 (1944).

35. *Id.* at 140.

36. Paralyzed Veterans of Am. v. D.C. Arena L. P., 117 F.3d 579 (D.C. Cir. 1997).

37. 556 U.S. 502 (2009).

38. *Id.*

39. *Id.* at 536 (Kennedy, J., concurring); *id.* at 549 (Breyer, J., dissenting).

40. 136 S. Ct. 2117 (2016); *id.* at 2126.

41. *See* 556 U.S. at 515.

42. 517 U.S. 735 (1996); *id.* at 742.

43. 556 U.S. at 515. 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.

44. Adam Tomkins, Our Republican Constitution 87 (2005).

45. Gray v. Powell, 314 U.S. 402, 412 (1941); NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 127 (1944).

46. In this respect, *Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1941), was tracking broader practice in referring to "consistency with earlier and later pronouncements."

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

48. *Id.* at 467. 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 (1989).

49. *See, e.g.,* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (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.").

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

51. 517 U.S. 735, 742 (1996).

52. 545 U.S. at 981.

53. *See* Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts,* 116 Mich. L. Rev. 1, 64–66 (2017).

54. *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.*

55. Barnett & Walker, *supra* note 52, at 65.

56. *Id.* at 5.

57. Fuller, *supra* note 3, at 39.

58. 569 U.S. 290 (2013); *id.* at 304 n.4.

59. 272 U.S. 52 (1926).

60. *Id.* at 135.

61. 657 F.2d 298 (D.C. Cir. 1981); 657 F.2d 298, 406–07 (D.C. Cir. 1981).

62. 984 F.2d 1534 (9th Cir. 1993).

63. *Id.* at 1546.

64. 5 U. S. C. § 557(d)(1)(A) (2012).

65. 984 F.2d 1534, 1545 (9th Cir. 1993) (citing United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260 (1954)).

66. *Id.* at 1543.

67. *See* Lon L. Fuller, *The Forms and Limits of Adjudication,* 92 Harv. L. Rev. 353 (1978).

68. *Londoner,* 210 U.S. 373 (1908); *Bi-Metallic,* 239 U.S. 441 (1915); *see id.* at 445–46.

69. 298 U.S. 238 (1936); *id.* at 311.

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

71. Ass'n of Am. R.Rs. v. U.S. Dep't of Transp., 721 F.3d 666, 676 (D.C. Cir. 2013).

72. *See id.* at 676–77.

4. LAW'S MORALITY, 3

1. Philip Hamburger, Is Administrative Law Unlawful? 3–5 (2014).

2. 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. NRDC,* 434 U.S. 519 (1978), involved a lower court effort to recognize such rights, and 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 v. Coke,* 551 U.S. 158, 174 (2007)—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, e.g.,* NRDC v. EPA, 749 F.3d 1055 (2014).

Rights of participation have a long history in administrative law. When the Supreme Court struck down an apparently open-ended grant of authority in *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.

3. Lon Fuller, The Morality of Law 33 (1962).

4. Cass R. Sunstein, Chevron *Step Zero,* 92 Va. L. Rev. 187, 191 (2006).

5. Fuller, *supra* note 3, at 171.

6. On military command, *id.;* on managerial decisions, Fuller, *supra* note 3, at 207; on allocation of scarce resources, *id.*

7. For an overview of the APA exceptions, see Adrian Vermeule, *Our Schmittian Administrative Law,* 122 Harv. L. Rev. 1095 (2009). For an excellent discussion of reviewability and other relevant doctrines and their connections to Fuller's scheme, see Peter Karanjia, *Hard Cases and Tough Choices: A Response to Professors Sunstein and Vermeule,* 132 Harv. L. Rev. F. 106 (2019).

8. 5 U. S. C. § 551(1)(F)–(G) (2012).

9. *Id.* at § 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.

10. *Id.* at § 554(a)(4).

11. *See* Karanjia, *supra* note 7.

12. Fuller, *supra* note 3, at 171–76; Lon. L. Fuller, *Forms and Limits of Adjudication,* 92 Harv. L. Rev. 353, 394–404 (1978).

13. *Id.* at 403.

14. Fuller, *supra* note 3, at 172.

15. *See* Henry J. Friendly, The Federal Administrative Agencies (1962); Fuller, *supra* note 3, at 171–76.

16. *Fuller, supra* note 3, at 173.

17. On the announcement, Home Box Office, Inc. v. FCC, 567 F.2d 9, 57 (D.C. Cir. 1977); on the retraction, Action for Children's Television v. FCC, 564 F.2d 458, 474 (D.C. Cir. 1977); *compare* 5 U. S. C. § 553(c) (1946), *with id.* at § 557(d)(1).

18. Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 549 (1978) ("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."); 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 *Vermont Yankee,* 435 U.S. at 524).

19. *Action for Children's Television,* 564 F.2d at 477 (quoting *Home Box Office,* 567 F.2d at 61).

20. Sangamon Val. Television Corp. v. United States, 269 F.2d 221, 225 (D.C. Cir. 1959).

21. 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 Approach,* 42 Duke L.J. 557 (1992). Or so the argument would run; we need not resolve the question here.

22. Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 523–25 (1978).

23. *See, e.g.,* Whitman v. American Trucking Ass'ns., Inc., 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).

24. *See, e.g.,* Saul Levmore, *Changes, Anticipations, and Reparations,* 99 Colum. L. Rev. 1657 (1999).

25. *See* Philip K. Howard, The Rule of Nobody (2014).

26. Plain Writing Act of 2010, Pub. L. No. 111–274, 124 Stat. 2861 (codified as amended at 5 U. S. C. § 301 note (2012)).

27. On unreviewability: Heckler v. Chaney, 470 U.S. 821, 831–32 (1985); Massachusetts v. EPA, 549 U.S. 497, 527 (2007).

28. 332 U.S. 194 (1947).

29. *See id.* at 199–200.

30. *Id.* at 203.

31. *Id.*

32. *Id.* at 202–03.

33. 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.

Louis L. Jaffe, Judicial Control of Administrative Action 567 (1965). For discussion, see Adrian Vermeule, *Bureaucracy and Distrust: Landis, Jaffe and Kagan on the Administrative State,* 130 Harv. L. Rev. 2463, 2476–77 (2017).

34. For the notion of a legal framework, see Adrian Vermeule, *Chevron as a Legal Framework,* Jotwell (October 24, 2017), https://adlaw.jotwell.com/chevron-as-a-legal-framework/.

35. 285 U.S. 22 (1932).

36. Jeffrey A. Pojanowski, *Neoclassical Administrative Law,* 133 Harv. L. Rev. 852 (2020).

37. This is the claim of Adrian Vermeule, Law's Abnegation: From Law's Empire to the Administrative State (2016). Pojanowski seems to imply that the book is a proposal for how administrative law ought to be; in fact it is an interpretive argument about the *current* state and future direction of administrative-law doctrine. In other words, it is Pojanowski's putative *via media* that is itself a departure from the mature equilibrium of the administrative state.

38. *See* Dep't of Commerce v. New York, 139 S. Ct. 2551, 2578 n.3 (2019) (Thomas, J., dissenting) (stating that under the APA, "[d]eferential review of the agency's discretionary choices and reasoning under the arbitrary-and-capricious standard stands in marked contrast to a court's plenary review of the agency's interpretation and application of the law"). This is almost a précis of Pojanowksi, and the majority opinion in effect rejected both halves of Thomas's formulation.

39. Kisor v. Wilkie, 139 S. Ct. 2400 (2019); *see* Auer v. Robbins, 519 U.S. 542 (1997); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945).

40. *See* Pojanowski, *supra* note 36; Skidmore v. Swift & Co., 323 U.S. 134 (1944) (under certain circumstances, agency interpretations may have "the power to persuade, if not to control")

41. Korematsu v. United States, 323 U.S. 214, 246 (Jackson, J., dissenting).

42. Chevron Inc. v. Nat. Res. Def. Council, 467 U.S. 837 (1984). In that sense, the outcome in *Kisor* was of a piece with the outcome in *Gundy v. United States,* 139 S. Ct. 2116 (2019), in which five justices voted, albeit for different reasons, to reject a nondelegation challenge that had been widely anticipated to reinvigorate that shadowy doctrine. *See also* Paul v. United States, 140 S. Ct. 342 (2019) (Kavanaugh, J., respecting the denial of certiorari) (stating a willingness to consider future nondelegation challenges). For some reasons for skepticism that another such challenge will succeed anytime soon, see Adrian Vermeule, *Never Jam Today,* Yale Journal of Regulation: Notice & Comment (June 20, 2019), https://www.yalejreg.com/nc/never-jam-today-by-adrian-vermeule/. A more likely future will see the majority invoking the nondelegation doctrine solely as a narrowing canon at the level of statutory interpretation.

43. *Kisor,* 139 S. Ct. at 2424 (Roberts, C. J., concurring in part).

44. Pojanowski points to several other cases to support a picture of the Court firming up restraints on the administrative state, such as *Lucia v. SEC,* 138 S. Ct. 2044 (2018), and *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.,* 561 U.S. 477 (2010). *See* Pojanowski, *supra* note 36, at 900 n.261. But these involve the internal structure of the executive branch rather than the relationship between the executive branch and the courts directly; hence they are orthogonal to the major features of neoclassical administrative law. The fact remains that the Court's important recent pronouncements squarely relevant to the main features of the neoclassical framework—*Kisor* on judicial review of law, and the *Department of Commerce* case on arbitrary and capricious review—both came out the wrong way for Pojanowski.

45. 322 U.S. 111 (1944); *id.* at 135.

46. The Administrative Procedure Act distinguishes among "issues" of "fact, law, or discretion." 5 U. S. C. Sec. 557(c)(3)(A).

47. Compare INS v. Cardoza-Fonseca, 480 U.S. 421, 446–48 (1987) (distinguishing "a pure question of statutory construction for the courts to decide," *id.* at 446, from a "question of interpretation . . . in which the agency is required to

apply [a legal standard] to a particular set of facts," *id.* at 448), with *id.* at 454–55 (Scalia, J., concurring in the judgment) (observing that the distinction is inconsistent with *Chevron* itself); cf. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 986–97 (2005) (finding *Chevron* deference applies to agency's pure construction of a statutory definition).

48. 569 U.S. 290 (2013); *id.* at 297–98.

49. *See* Crowell v. Benson, 285 U.S. 22, 54–55 (1932).

50. Pojanowski, *supra* note 36, at 902–3.

51. *City of Arlington,* 569 U.S. at 293 ("We consider whether an agency's interpretation of a statutory ambiguity that concerns the scope of its regulatory authority (that is, its jurisdiction) is entitled to deference under [*Chevron*].").

52. 401 U.S. 402 (1971); *id.* at 416.

53. *See, e.g.,* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984). For an excellent overview, see generally Richard J. Pierce, Jr., *What Factors Can an Agency Consider in Making a Decision?,* 2009 Mich. St. L. Rev. 67.

54. *See* Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 647–48 (1990) (using the *Chevron* framework).

55. Pojanowski, *supra* note 36.

56. *See* Eric A. Posner & Adrian Vermeule, *The Votes of Other Judges,* 105 Geo. L. J. (2016); Jacob Gersen & Adrian Vermeule, *Chevron as a Voting Rule,* 116 Yale L. J. 676 (2007).

57. Jody Freeman & David B. Spence, *Old Statutes, New Problems,* 163 U. Pa. L. Rev. 1 (2014).

58. E. Donald Elliott, *Chevron Matters: How the Chevron Doctrine Redefined the Roles of Congress, Courts and Agencies in Environmental Law,* 16 Vill. J. Evtl. L. 1 (2005).

59. Pojanowski, *supra* note 36.

60. *See* United States v. Mead Corp., 533 U.S. 218, 241–43 (2001) (Scalia, J., dissenting).

61. William N. Eskridge Jr. & John A. Ferejohn, A Republic of Statutes 277 (2010).

62. Pojanowski, *supra* note 36. Here is the full passage:

"*Crowell*'s distinction between review of law and policy was unstable only so long as it rested on the interpretive antiformalism that dominated at the time of the New Deal and the subsequent Legal Process era. The neoclassicist's legal formalism, however, marks a return to the pre–legal realist thought that, while aware

of the blurriness in the lines between making, executing, and interpreting law, nevertheless insist[ed] that the division of these activities was coherent in theory and estimable in practice. To be sure, the tenability of such a classical approach to the legal craft in a post-realist world is an important challenge neoclassical administrative lawyers must address. But if it stands, the theory has better resources to patrol the line between law and policy than the strong purposivists who founded—and lost—the *Crowell* regime." Pojanowski, *supra* note 36, at 294.

As is noted in the text, what is unexplained here is how the insistence on the division between law and policy somehow becomes more tenable after legal realism than before. One cannot force oneself to believe things by fiat.

63. *See* Pojanowski, *supra* note 36, at 34 (conflating "the time of the New Deal" with "the subsequent Legal Process era.")

64. A claim fleshed out at length in Vermeule, Law's Abnegation, *supra* note 37, at 295.

65. *Id.* at 42.

5. SURROGATE SAFEGUARDS IN ACTION

1. Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

2. Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege,* 139 Harv. L. Rev. 1 (2017).

3. *See* Gundy v. United States, 139 S. Ct. 2116, 2121 (2019).

4. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2408 (2019).

5. 139 S. Ct. 2551 (2019).

6. *Gundy,* 139 S. Ct. 2116.

7. *Id.* at 2131 (Gorsuch, J., dissenting).

8. Julian Davis Mortenson and Nicholas Bagley, Delegation at the Founding (2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3512154; Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine,* 165 U. Pa. L. Rev. 379 (2017).

9. Reynolds v. United States, 556 U.S. 432 (2012).

10. Adrian Vermeule, Never Jam Today, Mirror of Justice (June 20, 2019), https://mirrorofjustice.blogs.com/mirrorofjustice/2019/06/never-jam-today.html.

11. *Decker,* 133 S. Ct. at 1341 (Scalia, J., concurring in part and dissenting in part).

12. In nearly four years in the federal government, one of us (Sunstein) dealt with well over two thousand rules, and he never heard even a single person suggest, or come close to suggesting, that a regulation should be written vaguely or ambiguously in light of *Auer,* or so that the agency could later interpret it as it saw fit.

13. Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597, 619 (Scalia, J., concurring in part and dissenting in part).

14. *Id.* at 621 (Scalia, J., concurring in part and dissenting in part).

15. On reconsideration, *see, e.g.,* United Student Aid Funds, Inc. v. Bible, 136 S. Ct. 1607 (2016).

16. *See generally Kisor,* 139 S. Ct. 2400.

17. *Id.* at 2418.

18. Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1152 (10th Cir. 2016).

19. *See* Michigan v. EPA, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring).

20. *Id.* (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

21. *See* City of Arlington v. FCC, 569 U.S. 290, 313 (2013) (Roberts, C. J., dissenting) (citation omitted).

22. *Id.*

23. *Id.* at 314–15 (citations omitted).

24. Brett M. Kavanaugh, *Fixing Statutory Interpretation,* 129 Harv. L. Rev. 2118, 2150 (2016) (reviewing Robert A. Katzmann, Judging Statutes (2014)).

25. *Id.* at 2151.

26. Chris Walker, *What Kisor Means for the Future of* Auer *Deference: The New Five-Step* Kisor *Deference Doctrine,* Yale Journal of Regulation: Notice & Comment (June 26, 2019), https://www.yalejreg.com/nc/what-kisor-means-for-the-future-of-auer-deference-the-new-five-step-kisor-deference-doctrine/; *see also* @chris_j_walker, Twitter (June 26, 2019, 10:42 A.M.), https://twitter.com/chris_j_walker/status/1143892190759985153.

27. *See* Adrian Vermeule, *Chevron as a Legal Framework,* Jotwell (October 24, 2017), https://adlaw.jotwell.com/chevron-as-a-legal-framework/.

28. *Chevron* may also be understood to embody only a single, unitary inquiry, which asks whether the agency interpretation is reasonable. *See* Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208 (2009) (employing a single-step

Chevron inquiry); Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step,* 95 Va. L. Rev. 597 (2009). Nothing in our analysis here turns on this issue.

29. *See* Clean Air Act Amendments of 1977, Pub. L. No. 95–95, § 172(b)(6), 91 Stat. 685, 747 (1977) (codified as amended at 42 U. S. C. § 7502(c)(5) (2012)).

30. *See* Nat. Res. Def. Council, Inc. v. Gorsuch, 685 F.2d 718 (D.C. Cir. 1982), *rev'd sub nom.* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

31. Cass R. Sunstein, Chevron *Step Zero,* 92 Va. L. Rev. 187, 191 (2006); *see Mead Corp.,* 533 U.S. at 229. This proposition does not mean that agency interpretations will be denied *Chevron* deference when agencies are not exercising rulemaking or formal adjudication. In such cases, we are in a kind of gray zone, for which the leading decision is *Barnhart v. Walton,* 535 U.S. 212 (2002) (stating a balancing test for cases that fall within that gray zone).

32. *See* E. Donald Elliott, Chevron *Matters: How the* Chevron *Doctrine Redefined the Roles of Congress, Courts and Agencies in Environmental Law,* 16 Vill. Envtl. L. J. 1, 3–8 (2005); Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law,* 1990 Duke L. J. 984, 1024–25.

33. 135 S. Ct. 475 (2014).

34. *Kisor,* 139 S. Ct. at 2417.

35. 139 S. Ct. 2551 (2019).

36. *See, e.g.,* New York v. U.S. Dep't of Commerce, 351 F. Supp. 3d. 502 (S. D. N. Y. 2019).

37. For relevant discussion, see Jacob Gersen & Adrian Vermeule, *Thin Rationality Review,* 114 Mich. L. Rev. 1335 (2016).

FINAL WORDS

1. Henry de Bracton, On the Laws and Customs of England 2 33 (1250) (Thorne translation).

2. *Wong Yang Sung,* 339 U.S. 33 (Jackson, J.).

ACKNOWLEDGMENTS

We owe debts to many people. Jacob Gersen, Peter Karanjia, Eric Posner, Daphna Renan, David Strauss, and Francisco Urbina provided valuable comments. Two anonymous reviewers offered helpful comments and general perspective. Dinis Cheian, Maddy Joseph, Tiernan Kane, and Zachary Manley offered excellent suggestions and essential research assistance. Special thanks to Dinis for going far beyond the call of duty. We are also grateful to two wonderful deans at Harvard Law School, Martha Minow and John Manning, for support of multiple kinds. Sarah Chalfant, our agent for the book, is owed enduring thanks for wisdom and support. And special thanks to Lloyd Weinreb for introducing one of us (Sunstein) to Lon Fuller's view on the morality of law during an undergraduate course at Harvard in the 1970s.

Portions of Chapter 1 were first published in "The New Coke: On the Plural Aims of Administrative Law," *The Supreme Court Review* (2015): 41–88. Chapters 2, 3, and 4 include text originally published as "The Morality of Administrative Law," *Harvard Law Review* 131:7 (2018): 1925–78. A version of the final section of Chapter 4 was first published as "Neo-?," 133 *Harvard Law Review Forum 103* (2020). We thank the editors of those journals for permission to draw on these publications here.

INDEX