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RESPONSES

HARD CASES AND TOUGH CHOICES:

A RESPONSE TO PROFESSORS SUNSTEIN AND VERMEULE†

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In *The Morality of Administrative Law*,[1] Professors Cass Sunstein and Adrian Vermeule offer a novel and insightful theory that unites a series of familiar but seemingly disparate principles of administrative law under the umbrella of Professor Lon Fuller's core principles of a legal system. Their article recognizes the tension between administrative agencies' adherence to Fullerian principles and other values (including promoting agency flexibility). This Response contemplates a framework for negotiating that tension.

Fullerian principles — common to many conceptions of the Rule of Law — are both intuitive and ubiquitous in the law. They require binding rules to be: (1) general (rather than formulated on a purely ad hoc basis); (2) publicly promulgated; (3) prospective rather than retroactive; (4) sufficiently clear and understandable; (5) internally consistent; (6) possible to comply with; (7) relatively stable; and (8) congruent with official action.[2] Together, these principles form what Fuller called the "internal morality of law."[3]

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† Responding to Cass R. Sunstein & Adrian Vermeule, *The Morality of Administrative Law*, 131 HARV. L. REV. 1924 (2018).

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1 131 HARV. L. REV. 1924 (2018).

2 As Sunstein and Vermeule note, Fuller framed his principles in a negative way: to highlight the "failures" of a system that lacks the attributes that define "law." *See id.* at 1926–27, 1928 n.23; LON L. FULLER, THE MORALITY OF LAW 38–41, 46–91 (rev. ed. 1969).

3 FULLER, *supra* note 2, at 4; *see also* Lon L. Fuller, *Positivism and Fidelity to Law — A Reply to Professor Hart*, 71 HARV. L. REV. 630, 645 (1958) ("Law . . . contains . . . its own implicit morality. This morality of order must be respected if we are to create anything that can be called law, even bad law.").

Sunstein and Vermeule persuasively connect these principles — which, for Fuller, were fundamental to any legal system[4] — to an array of doctrines in administrative law, including the (now rather toothless) nondelegation doctrine, void-for-vagueness principles, restrictions on the retroactive application of agency rules, and the importance of agency consistency (including cases addressing whether an agency's interpretation of a statute warrants "deference" from courts).[5] Though the authors don't attempt to "track every one of Fuller's eight principles,"[6] they aim to offer in an "ecumenical spirit"[7] a comprehensive analytical framework for the recent and growing critiques of the work of administrative agencies.[8]

In keeping with that goal, Sunstein and Vermeule caution that law's internal morality only goes so far in helping us grapple with the challenges confronted by administrative agencies. *First*, the authors stress that Fuller himself maintained that his principles should not apply at all to government decisionmaking involving so-called "polycentric" issues — that is, decisions involving multifaceted issues including, for example, the "licensing of a scarce resource, such as radio spectrum, awarded to some but not all of a group of competing claimants."[9] *Second*, Sunstein and Vermeule caution that, even where applicable, Fullerian principles that manifest themselves in administrative law doctrines have their limits: There are inevitable "complex tradeoffs, on welfare grounds, between Fullerian values and competing values" and courts may not always be well positioned to "oversee agency judgments about those tradeoffs."[10] These are, as the authors put it, "the largest normative questions."[11] But Sunstein and Vermeule only briefly discuss how the courts have actually approached these tradeoffs, and they do not address how they *should* approach them.

This Response attempts to shed further light on those questions. I first discuss how courts have decided whether to even subject certain types of agency decisionmaking to Fullerian constraints (for example, by applying principles of nonreviewability and Article III standing to

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[4] *See* FULLER, *supra* note 2, at 46–90; Fuller, *supra* note 3, at 645–47.

[5] Sunstein & Vermeule, *supra* note 1, at 1932–65.

[6] *Id.* at 1929.

[7] *Id.* at 1967.

[8] For Sunstein and Vermeule, "a Fullerian approach puts contemporary criticisms of the administrative state in their best light and allows the sharpest critics to be their best selves." *Id.* at 1928. While the authors are careful to avoid a full-throated endorsement of Fuller's eight principles, *see id.* at 1929, they do praise the "promise" that a Fullerian model holds for addressing "the serious problems — from the standpoint of democratic accountability, liberty, and welfare — that arise . . . if public officials have the discretion to do whatever they want, if citizens have to guess about what the law is, and if people are unable to plan their affairs," *id.* at 1966.

[9] *Id.* at 1969 (citing Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 402–03 (1978)); *id.* at 1968–71; *see also* FULLER, *supra* note 2, at 171–76, 207–10.

[10] Sunstein & Vermeule, *supra* note 1, at 1971.

[11] *Id.*

cabin what Sunstein and Vermeule refer to as the "morality of administrative law") and how they have balanced Fullerian values against other goals. I then propose some first steps toward developing a framework that more systematically manages these tradeoffs.

I. "POLYCENTRIC" DECISIONMAKING AND THE REACH OF FULLERIAN PRINCIPLES

How have courts actually drawn the boundaries defining when Fullerian principles will — or will not — constrain the actions of administrative agencies? Although not directly addressed by Sunstein and Vermeule, we see echoes of Fuller's core concept of polycentric decisions beyond the domain of law's internal morality in the cases addressing an exception to the availability of judicial review under the Administrative Procedure Act[12] (APA) as well as cases addressing agency decisionmaking in national security and foreign affairs matters.[13] As discussed below, this tends to confirm the thesis that administrative law is indeed Fullerian — not only insofar as it embodies aspects of Fuller's *substantive* Rule of Law principles, but also in defining the *zone* in which those principles should (or should not) apply. Despite these parallels between Fuller's theories and the administrative law doctrines applied on the ground, courts have understandably been reluctant to go as far as Fuller in limiting Rule of Law constraints on agency decisionmaking in areas involving polycentric issues.

A. "Polycentric" Decisionmaking Exception in Administrative Law?

The echoes of Fullerian theory in the APA's nonreviewability exception are quite striking. Recall that Fuller saw polycentric decisionmaking as involving "inherently open-ended" tasks that are "not susceptible to lawlike decisionmaking, as opposed to managerial judgment"; the issues involved are simply too "multifarious, complex, and difficult to rationalize," such as "how best to allocate a scarce resource with a view to overall public interest, under criteria that are ill-defined and multidimensional."[14] In a similar vein, the Supreme Court has

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[12] 5 U.S.C. §§ 551–559, 701–706 (2012).

[13] *Id.* § 701(a)(2) (exception to judicial review under the APA for actions "committed to agency discretion by law"). Sunstein and Vermeule briefly mention "the presumptive unreviewability of agency enforcement actions," Sunstein & Vermeule, *supra* note 1, at 1976, but do so in the context of discussing the balancing of Fuller's principles against other values (such as judicial competence and agency resource constraints), *see id.* at 1975–77, rather than addressing the nonreviewability exception as a counterpart to Fuller's idea of polycentric decisionmaking that should be free from the constraints of the eight Rule of Law principles. In contrast, the authors do acknowledge the APA's categorical exception to judicial review for actions by military authorities, *id.* at 1968 (citing 5 U.S.C. §§ 551(I)(F)–(G), 553(a)(1)–(2)), which also tracks Fuller, *see* FULLER, *supra* note 2, at 171.

[14] Sunstein & Vermeule, *supra* note 1, at 1968–69 (citing FULLER, *supra* note 2, at 171; Fuller, *supra* note 9, at 403).

explained that the exception to judicial review for administrative actions "committed to agency discretion by law"[15] applies where "the statute is drawn so that a court would have *no meaningful standard* against which to judge the agency's exercise of discretion"[16] or where the statute is "drawn in such broad terms that in a given case *there is no law to apply*."[17] The paradigmatic example (though not the only one) involves the government's exercise of its enforcement discretion, which "often involves a complicated balancing of a number of factors which are peculiarly within [the government's] expertise," including the allocation of resources.[18] Other situations where courts have applied the nonreviewability exception involve foreign relations and certain national security matters.[19]

If courts actually applied the nonreviewability exception as expansively as Fuller's theory of polycentric decisionmaking suggests, a very large number of agency decisions — perhaps the very types of discretionary decisions that are entrusted to agencies because of their expertise and understanding of technical, scientific, and industry-specific matters — would be immunized from judicial review under the APA. But not so fast — at least according to the courts. The D.C. Circuit, in particular, has evidently been uncomfortable with walling off whole fields of administrative decisionmaking from judicial review.[20] Instead,

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15 5 U.S.C. § 701(a)(2).

16 Heckler v. Chaney, 470 U.S. 821, 830 (1985) (emphasis added).

17 *Id.* (emphasis added) (quoting Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971)); *see also* Nat. Res. Def. Council, Inc. v. SEC, 606 F.2d 1031, 1043 (D.C. Cir. 1979) ("[T]he determination of whether there is 'law' to apply necessarily turns on pragmatic considerations as to whether an agency determination is the proper subject of judicial review.").

18 *Chaney*, 470 U.S. at 831.

19 *See, e.g.*, Dep't of the Navy v. Egan, 484 U.S. 518, 527 (1988) ("[T]he grant of security clearance to a particular employee, a sensitive and inherently discretionary judgment call, is committed by law to the appropriate agency of the Executive Branch."); Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) ("[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are . . . of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry."). These cases rest on the premise that "'an outside non-expert body,' including a court, is institutionally ill suited to second-guess the agency's '[p]redictive judgment' about the security risk posed by a specific person." Palmieri v. United States, 896 F.3d 579, 585 (D.C. Cir. 2018) (quoting *Egan*, 484 U.S. at 529). A close conceptual cousin is the narrow "political question" doctrine. *Cf.* Zivotofsky v. Clinton, 566 U.S. 189, 195 (2012) ("We have explained that a controversy involves a political question . . . where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it." (omission in original) (citations omitted) (internal quotation marks omitted)).

20 Judicial review under the APA itself serves many welfarist goals. *See, e.g.*, Gillian E. Metzger, Foreword, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1320–40 (2012) (discussing the "inevitability" of administrative law developed via judicial review and its benefits, *id.* at 1330, including "creat[ing] internal checks on arbitrary agency action, encouraging agencies to take evidence and expertise into account and fostering internal deliberation," *id.* at 1339); Peter L. Strauss, *"Deference" Is Too Confusing — Let's Call Them "*Chevron *Space" and "*Skidmore

it has taken a more nuanced approach, two aspects of which are highlighted below.

B. A More Nuanced Judicial Approach

First, the Supreme Court and D.C. Circuit have recognized that nonreviewability is a "very narrow" exception to the ordinary presumption that judicial review is available.[21] As the D.C. Circuit put it, "[o]nly when 'the considerations in favor of nonreviewability . . . are sufficiently compelling to rebut the strong presumption of judicial review' will we conclude that judicial review is foreclosed."[22] And both courts have appropriately left the door open to judicial review in cases presenting colorable *constitutional* claims, even where review is unavailable under the APA itself.[23]

Second, courts draw upon Article III standing and similar principles to perform a gatekeeping function that limits the domain of the administrative law analogues to Fuller's Rule of Law principles. Again, rather than reflecting a sweeping and categorical exception to APA review, this reliance on standing and associated doctrines is nuanced and case-specific.

For example, challenges to agency licensing decisions — specifically highlighted by Fuller as a type of polycentric decisionmaking that involves the allocation of scarce economic resources[24] — are routinely brought, often by competitors of a licensee, and sometimes by members

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Weight," 112 COLUM. L. REV. 1143, 1150 (2012) ("[I]f the courts are to be referees and not players — overseers and not deciders — their function may nonetheless include supervising an agency's actions within its designated boundaries, as well as declaring when it has overstepped them." (footnote omitted)). Moreover, judicial review is neither inherently deregulatory nor proregulatory. *Compare*, *e.g.*, Michigan v. EPA, 135 S. Ct. 2699, 2711 (2015) (holding that EPA unreasonably interpreted the Clean Air Act in finding that regulation of power plants was "appropriate and necessary"), *with* Clean Air Council v. Pruitt, 862 F.3d 1, 4 (D.C. Cir. 2017) (holding that EPA lacked authority under the Clean Air Act to stay rule regulating methane emissions).

[21] *Chaney*, 470 U.S. at 830 (observing that "the exception for action 'committed to agency discretion'" is "very narrow" (quoting *Overton Park*, 401 U.S. at 410)).

[22] Local 1219, Am. Fed'n of Gov't Emps. v. Donovan, 683 F.2d 511, 515 (D.C. Cir. 1982) (quoting *Nat. Res. Def. Council*, 606 F.2d at 1044). *Cf. Zivotofsky*, 566 U.S. at 194–95 (recognizing that the "political question" doctrine is a "narrow exception" to the general rule that "the Judiciary has a responsibility to decide cases properly before it" (citations omitted)).

[23] *See, e.g.*, Webster v. Doe, 486 U.S. 592, 601, 603–04 (1988) (holding that former CIA employee's constitutional claims were judicially reviewable, even though CIA Director's decision to fire employee was not subject to APA review); Nat'l Fed'n of Fed. Emps. v. Greenberg, 983 F.2d 286, 289 (D.C. Cir. 1993) (distinguishing *Egan* in case involving constitutional claims, citing *Webster* in support, and noting that "[i]t is simply not the case that all security-clearance decisions are immune from judicial review"); *see also Palmieri*, 896 F.3d at 590 (Katsas, J., concurring) (noting that "[t]he question whether a plaintiff can seek to undo the denial or revocation of a security clearance, based on non-frivolous constitutional challenges to investigatory or even adjudicatory processes, is weighty and difficult").

[24] FULLER, *supra* note 2, at 46, 171–76; Fuller, *supra* note 9, at 400–03.

of the public in their capacities as "listeners" or "viewers."[25] But courts will rigorously enforce the injury, causation, and redressability requirements for standing when addressing these challenges to agency decisionmaking. Thus, the D.C. Circuit in *Mobile Relay Associates v. FCC*[26] has "recognized competitor standing in the licensing context," but has required any competitor disappointed by an agency's licensing decision to "demonstrate that it is a *direct* and *current* competitor whose bottom line may be adversely affected by the challenged government action."[27]

In *Mobile Relay Associates*, the D.C. Circuit held that radio licensees lacked standing to challenge a Federal Communications Commission (FCC) decision to grant their competitors licenses under an allegedly flawed valuation of the licensed spectrum where the challengers "failed to make a concrete showing that they [were] likely to suffer financial injury" and instead merely "[c]laim[ed] the regulatory action create[d] a 'skewed playing field.'"[28]

By contrast, a union and trade association successfully relied on competitor standing to challenge the Federal Motor Carrier Safety Administration's issuance of permits that allowed foreign-domiciled trucking companies to engage in long-haul trucking within the United States. Following a D.C. Circuit case, the Ninth Circuit reasoned that this agency action "introduced new competition into the market, making it more difficult for stateside truckers to profit."[29] Similarly, the D.C. Circuit has allowed radio listeners and television viewers to challenge certain FCC licensing decisions[30] and conservation groups to challenge Federal Energy Regulatory Commission licensing orders.[31] But it has not hesitated to dismiss challenges where the petitioner was unable to establish a concrete and personal injury sufficient to establish standing.[32] Indeed, a series of cases apply standing principles (rather than

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[25] *E.g.*, Llerandi v. FCC, 863 F.2d 79, 85 (D.C. Cir. 1988) (assignment of AM radio license); Office of Commc'n of United Church of Christ v. FCC, 359 F.2d 994, 1005–06 (D.C. Cir. 1966) (renewal of broadcast television license).

[26] 457 F.3d 1 (D.C. Cir. 2006).

[27] *Id.* at 13 (quoting KERM, Inc. v. FCC, 353 F.3d 57, 60 (D.C. Cir. 2004)) (internal quotation marks omitted).

[28] *Id.*

[29] Int'l Bhd. of Teamsters v. U.S. Dep't of Transp., 861 F.3d 944, 951 (9th Cir. 2017); *id.* at 950–51 (citing Int'l Bhd. of Teamsters v. U.S. Dep't of Transp., 724 F.3d 206, 212 (D.C. Cir. 2013)).

[30] *See, e.g.*, cases cited *supra* note 25.

[31] *See, e.g.*, Am. Rivers v. FERC, 895 F.3d 32, 40–42 (D.C. Cir. 2018) (holdind that conservation groups had standing to challenge FERC licensing order for hydroelectric project, where groups alleged that "one or more members use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity," *id.* at 41 (citation and alterations omitted)).

[32] *See, e.g.*, Free Press v. FCC, No. 17-1129 (D.C. Cir. July 25, 2018) (dismissing organizations' challenge to FCC's amended rule because petitioners failed to adduce evidence that "any member of any petitioner organization is a viewer in an affected market or otherwise stands to be injured

the APA's nonreviewability exception) to reject challenges to agency action involving the paradigmatic case of polycentric decisionmaking: an agency's exercise of its enforcement discretion.[33]

In short, these cases bear out Sunstein and Vermeule's point that "current doctrine is in some places more Fullerian than Fuller,"[34] in the sense that courts are applying Fuller's Rule of Law principles even where Fuller himself would have viewed the relevant agency action as more managerial than law-like and therefore wholly unconstrained by law's internal morality.

II. TOUGH CHOICES: CONFLICTING PRINCIPLES AND MANAGING TRADEOFFS

As noted at the outset, *The Morality of Administrative Law* highlights the perceived shortcomings of a strict insistence on Fuller's principles as a restraint on agency action. Sunstein and Vermeule note that "Fullerian principles . . . must inevitably be traded off against the agency's institutional role and capacities, resource limitations, and programmatic objectives."[35] But, in contrast with their detailed tracing of the linkage between several of Fuller's principles and their companion administrative law doctrines,[36] that section of the article does not discuss in detail how courts have handled these tradeoffs or (more importantly) how they should do so. This Response offers some further reflections on both points. In doing so, the discussion below focuses principally on the Supreme Court's decision in *SEC v. Chenery Corp.* (*Chenery II*)[37] and related cases that address the dichotomy between agency rulemaking and adjudication — an important fulcrum that implicates several Fullerian principles (including the generality, nonretroactivity, clarity, and stability of rules).[38]

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by the identified consolidation," thereby "fail[ing] to meet the basic requirements of associational standing").

33 *See* KERM, Inc. v. FCC, 353 F.3d 57, 60–61 (D.C. Cir. 2004) (rejecting competitor standing in suit challenging lack of enforcement action); Huddy v. FCC, 236 F.3d 720, 721–22 (D.C. Cir. 2001) (denying standing, for lack of causation, to television viewer challenging FCC's alleged underenforcement of its financial integrity policies against controlling principal of station's new licensee); Branton v. FCC, 993 F.2d 906, 909–10 (D.C. Cir. 1993) (holding radio listener lacked standing to challenge FCC's decision not to impose penalties on licensee for an isolated violation of rules proscribing broadcast "indecency," where lack of penalties would not increase the probability of future violations).

34 Sunstein & Vermeule, *supra* note 1, at 1970.

35 *Id.* at 1977.

36 *Id.* at 1932–65.

37 332 U.S. 194, 199–201 (1947).

38 *See supra* note 2 and accompanying text. The common thread throughout these principles is "the capacity of legal rules, standards, or principles to guide people in the conduct of their affairs. People must be able to understand the law and comply with it." Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 8 (1997) (footnote omitted).

Sunstein and Vermeule specifically point to *Chenery II* as an example of a tradeoff between Fullerian purity and agency flexibility. In that case, where the latter carried the day, a company challenging an SEC order argued that the agency could not retroactively apply a general standard it had formulated for the first time in an adjudicatory setting and instead must rely on rulemaking if it wished to adopt a new standard governing future conduct.[39] Over dissents by Justices Frankfurter and Jackson, the Supreme Court rejected the argument, reasoning that the SEC had broad discretion to choose between adjudication and rulemaking.[40] According to the majority, it was irrelevant that the SEC's new standard had not "previously . . . been spelled out in a general rule or regulation."[41] Any "rigid requirement" restricting agency discretion to choose between rulemaking and adjudication "would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise," for "[n]ot every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule."[42] For Sunstein and Vermeule, "*Chenery II* offers a broad lesson: Fullerian principles, however valid and appealing, have limits of both scope and weight."[43] The authors are right that *Chenery II* is a good illustration of tradeoffs in action. But how have courts approached these tradeoffs in the more than seventy years since *Chenery II* was decided, and how should they do so?

A. Balancing in the Courts

Chenery II itself offered little practical guidance. The Court expressed a general preference for agency rulemaking[44] and gestured toward a vague balancing test[45] without offering any specific standard. In subsequent cases, the D.C. Circuit (followed by other circuits) has attempted to bring more structure to the balancing exercise — at least in the context of reviewing agency decisions to adopt adjudicatory rulings with retroactive effect rather than proceeding with prospective

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[39] *Chenery II*, 332 U.S. at 199–200.

[40] *See id.* at 200.

[41] *Id.* at 201.

[42] *Id.* at 202. Justice Jackson argued that the Court's decision ran headlong into "the invalidity of retroactive law-making," *id.* at 213 (Jackson, J., dissenting), and therefore amounted to an "action outside of the law," *id.* at 215. *See also id.* ("Surely an administrative agency is not a law unto itself . . . .").

[43] Sunstein & Vermeule, *supra* note 1, at 1977.

[44] *Chenery II*, 332 U.S. at 202 ("The function of filling in the interstices of the Act should be performed, *as much as possible*, through this quasi-legislative promulgation of rules to be applied in the future." (emphasis added)).

[45] *Id.* at 203 ("[R]etroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles. If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law.").

rulemaking. At times, the court has embraced a multifactor balancing test that considers "(1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard."[46] Other times, the court has applied a simpler, but substantively similar, three-part test.[47] And sometimes it has simply said "[t]here is no need to plow laboriously through the [five] factors," because they ultimately "boil down . . . to a question of concerns grounded in notions of equity and fairness."[48]

In short, we see that courts have emphasized Fullerian principles to varying degrees. Some have put a stronger Fullerian thumb on the scale where an agency has established a new norm in an adjudicatory setting with punitive consequences or in a way that upset expectations reasonably based on a prior agency announcement. In this vein, Judge Friendly channeled Fuller when he pointed to agency actions that "raise[] judicial hackles," such as "a decision branding as 'unfair' conduct stamped 'fair' at the time a party acted," or one that "imposes a more severe remedy for conduct already prohibited."[49] As Judge Friendly put it, "the hackles bristle still more when a financial penalty is assessed for action that might well have been avoided if the agency's changed disposition had been earlier made known, or might even have been taken in express reliance on the standard previously established."[50]

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[46] Clark-Cowlitz Joint Operating Agency v. FERC, 826 F.2d 1074, 1081 (D.C. Cir. 1987) (en banc) (quoting Retail, Wholesale & Dep't Store Union v. NLRB, 466 F.2d 380, 390 (D.C. Cir. 1972)). Several other circuits have followed suit. *See, e.g.*, Beneli v. NLRB, 873 F.3d 1094, 1099 (9th Cir. 2017); De Niz Robles v. Lynch, 803 F.3d 1165, 1177 (10th Cir. 2015); Velásquez-García v. Holder, 760 F.3d 571, 581 (7th Cir. 2014); Laborers' Int'l Union of N. Am. v. Foster Wheeler Energy Corp., 26 F.3d 375, 392 (3d Cir. 1994).

[47] *See* Dist. Lodge 64, Int'l Ass'n of Machinists & Aerospace Workers v. NLRB, 949 F.2d 441, 447 (D.C. Cir. 1991) (asking whether "(1) the decision creates a new rule, either by overruling past precedents relied upon by the parties or because it was an issue of first impression, (2) retroactive application will be more likely to hinder than to further the operation of the new rule; and (3) retroactive application would produce 'substantial inequitable results.'" (internal citations omitted)).

[48] Cassell v. FCC, 154 F.3d 478, 486 (D.C. Cir. 1998) (omission in original) (quoting *Clark-Cowlitz*, 826 F.2d at 1082 n.6).

[49] NLRB v. Majestic Weaving Co., 355 F.2d 854, 860 (2d Cir. 1966) (citations omitted).

[50] *Id.*; *see also Retail Wholesale*, 466 F.2d at 391 ("Unlike *Chenery [II]*, this is not the kind of case where the Board 'had not previously been confronted by the problem' and was required by the very absence of a previous standard and the nature of its duties to exercise the 'function of filling in the interstices of the Act.' Rather it is a case where the Board had confronted the problem before, had established an explicit standard of conduct, and now attempts to punish conformity to that standard under a new standard subsequently adopted." (footnotes omitted)). Judge Friendly

Similar fairness and reliance considerations are at play in cases addressing whether an agency ran afoul of the APA by issuing a declaratory ruling — a form of adjudication — instead of issuing legally binding (or "legislative"[51]) rules following notice-and-comment procedures. Here, where concerns about retroactivity are sometimes accompanied by fears that agencies might thwart the APA's notice-and-comment requirements for informal rulemaking, courts have held that agencies abused their discretion when their action "constitutes de facto rulemaking that affects the rights of broad classes of unspecified individuals" or when their action retroactively upsets settled expectations.[52] Again, it's not difficult to see shadows of Fuller's thinking in the background. As Professor Richard Fallon has noted, although "rule-like norms . . . can sometimes be developed through adjudication, the rulemaking model typically provides the agency with a broader information base for propounding norms of broadly controlling applicability, gives clearer notice to affected parties, and avoids problems of retroactivity that sometimes arise when rules are first articulated in adjudications."[53]

As the above suggests, despite efforts to bring some rigor to the balancing exercise (at least in the limited context of evaluating an agency's choice between retroactive adjudication and prospective rulemaking), these judicial analyses tend to pivot back to Fullerian concepts of fairness. This naturally raises the question — which Sunstein and Vermeule do not address — of whether a more systematic framework for this balancing could be developed.

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was a consistent critic of the NLRB's extensive use of adjudication rather than rulemaking, *see, e.g.*, NLRB v. A.P.W. Prods. Co., 316 F.2d 899, 906 (2d Cir. 1963); Henry J. Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 HARV. L. REV. 1263, 1296 (1962), though his views did not always prevail, *see, e.g.*, NLRB v. Bell Aerospace Co. Div. of Textron, Inc., 416 U.S. 267, 295 (1974), *rev'g in part*, Bell Aerospace Co. Div. of Textron Inc. v. NLRB, 475 F.2d 485 (2d Cir. 1973) (Friendly, J.) (declining to enforce an NLRB adjudicatory order). In this respect Judge Friendly, too, was sometimes "more Fullerian than Fuller." Sunstein & Vermeule, *supra* note 1, at 1970; *see* FULLER, *supra* note 2, at 172–74 (disagreeing with Judge Friendly's treatment of "allocative" decisions by the FCC and Civil Aeronautics Board).

[51] "[L]egislative rules are issued through notice-and-comment rulemaking, and have the force and effect of law," while "[i]nterpretive rules . . . are issued . . . to advise the public of the agency's construction of the statutes and rules which it administers, do not require notice-and-comment rulemaking, and do not have the force and effect of law." Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1200–01 (2015) (omissions in original) (internal citations omitted) (internal quotation marks omitted).

[52] MacLean v. Dep't of Homeland Sec., 543 F.3d 1145, 1151 (9th Cir. 2008) (internal quotation marks omitted); *see also, e.g.*, City of Arlington v. FCC, 668 F.3d 229, 242–43 (5th Cir. 2012) (expressing "serious doubts" about whether the FCC properly proceeded via adjudication (in the form of a generally applicable declaratory ruling) rather than notice-and-comment rulemaking, but finding that any error was harmless where agency received substantial public input), *aff'd*, 569 U.S. 290 (2013); Miguel–Miguel v. Gonzales, 500 F.3d 941, 950 (9th Cir. 2007) ("[I]n certain circumstances an agency may abuse its discretion by announcing new rules through adjudication rather than through rulemaking, such as when the rule operates retroactively and disturbs settled expectations.").

[53] Fallon, *supra* note 38, at 49 n.236 (internal citation omitted).

B. Toward a Normative Framework

What would such a framework look like? To a significant extent, this involves "commensurat[ing] incommensurable legal factors."[54] For example, how are we to weigh structural virtues of a legal system such as predictability and stability with the broad category of other values that Sunstein and Vermeule group under "welfarist" considerations?[55] Presumably, some of the welfarist values could easily be quantified (such as money saved by certain regulatory actions), but others are more difficult. What kinds of valuation should be used?[56] Either due to their normative force or due to their symbolic value as Rule of Law ideals (or both), should we give special weight to some of the Fullerian virtues, with the upshot that they cannot be traded off as part of a simple cost-benefit calculus? In other contexts, for instance, Sunstein has pointed to free speech as carrying special importance in our legal tradition, furthering diverse goals that are difficult to subject to simple cost-benefit analysis.[57] Fuller likewise recognized the limits of an approach that focuses solely on what he called "marginal utility."[58] For one thing, a purely economic approach cannot "dodge[] the difficulties involved in trying to describe in wholly non-evaluative terms a process that is itself evaluative."[59] For another thing, Fuller argued that "[i]t is a great mistake to treat questions of the design and administration of our institutions as if the problem were merely one of weighing substantive ends against one another. For institutions have an integrity of their own which must be respected if they are to be effective at all."[60] If we are to engage in tradeoffs, should our valuation principle rely on values and objectives that are internal to the law (in the sense of those recognized in constitutional principles, statutory provisions, and case law) or exogenous? And who makes the judgment call? Agencies or the courts? Or both (with the agencies conducting a preliminary review, subject to further judicial review)? If these values are indeed important, how do we avoid undermining them in a death by a thousand tradeoffs?

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[54] De Niz Robles v. Lynch, 803 F.3d 1165, 1180 (10th Cir. 2015); *see also* JOSEPH RAZ, THE MORALITY OF FREEDOM 322 (1986) ("A and B are incommensurate if it is neither true that one is better than the other nor true that they are of equal value.").

[55] Sunstein & Vermeule, *supra* note 1, at 1930, 1973; *see also id.* at 1931, 1936, 1966 (discussing "social welfare").

[56] *See* Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 854–59 (1994).

[57] *Id.* at 861 ("In disputes over free speech, large questions are whether speech ought to be valued in the same way as commodities traded on markets, and whether free speech values are unitary or plural. I have suggested that we ought not to treat free speech as an ordinary commodity and that we should recognize the diverse ends it embodies."); *see also id.* at 830–32.

[58] FULLER, *supra* note 2, at 17.

[59] *Id.* at 18 n.13.

[60] *Id.* at 180.

In developing a framework for considering these balancing exercises, one useful place to start might be to consider a hierarchy amongst the eight principles. Doing so may help address not only the situation Sunstein and Vermeule have in mind (where a Fullerian principle such as nonretroactivity clashes with a distinct societal goal), but also situations where Fuller's principles may *compete with one another*. If we are able to distinguish between the relative importance of the Fullerian principles, this will aid efforts to decide how to proceed when the principles run into other (albeit often incommensurable) welfarist goals. And, even more clearly, a prioritization should help us decide when one Fullerian principle should trump another.

Fuller himself anticipated that "the various desiderata which go to make up [the internal morality of law] may at times come into opposition with one another."[61] As an example, he observed:

> [I]t is simultaneously desirable that laws should remain stable through time and that they should be such as impose no insurmountable barriers to obedience. Yet rapid changes in circumstances, such as those attending an inflation, may render obedience to a particular law, which was once quite easy, increasingly difficult, to the point of approaching impossibility. Here again it may become necessary to pursue a middle course which involves some impairment of both desiderata.[62]

In this vein, there may be cases (even if they are rare) where nonretroactivity yields to other Fullerian principles. Consider, for example, a situation where an agency tries to further the coherence of the law (eliminating self-contradictory provisions) by issuing a retroactive ruling. Indeed, one well-established purpose of declaratory rulings under the APA is to "terminate a controversy or remove uncertainty."[63] In *City of Arlington v. FCC*,[64] for example, the FCC relied on the same APA provision and a companion agency rule to resolve a circuit split over the proper interpretation of a provision of the Communications Act.[65]

This suggests that not all the Fullerian principles have the same claim to strict or relatively strict application. At one end of the continuum, for example, it is difficult to see the virtue of secret agency

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[61] *Id.* at 45.

[62] *Id.*

[63] 5 U.S.C. § 554(e) (2012).

[64] 668 F.3d 229 (5th Cir. 2012), *aff'd*, 569 U.S. 290 (2013).

[65] Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B), 24 FCC Rcd. 13994, 13999, 14016–19 (2009) (using power under 5 U.S.C. § 554(e) and companion FCC rule at 47 C.F.R. § 1.2 (2017)), *petitions for review denied in part and dismissed in part*, *City of Arlington*, 668 F.3d at 233; *see also* Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, FCC No. 18-133 ¶ 35, 2018 WL 4678555, at *12 (Sept. 26, 2018) (issuing declaratory ruling to, among other things, "resolve the conflicting court interpretations of the 'effective prohibition' language [in the Federal Communications Act] so that continuing confusion on the meaning of Sections 253 and 332(c)(7) does not materially inhibit the critical deployments of Small Wireless Facilities and our nation's drive to deploy 5G" service).

rules (rules with the force of law that are never published), except in the rarest case.[66] At the other end, consider the principle that laws should not demand the impossible. That seems logical as an abstract concept, but how would it work if applied to administrative agencies? Are we talking about what is impossible for all, most, or only some of the parties affected? What if a new regulation is impossible for only a handful of companies out of many? That may not be a good reason to refuse to enforce the rule (much less say it has no valid claim to being binding "law") where other legal concepts can help deal with cases of hardship. For example, many agencies allow parties to request waivers of rules,[67] including retroactive waivers; other issues may be handled with "impossibility" defenses akin to those in criminal law and the sound exercise of enforcement discretion. A normative framework that prioritizes among the principles should help guide more systematic thinking about managing not just tradeoffs between Fullerian principles on the one hand and other welfarist goals on the other, but also conflicts between those principles.

Two other considerations may usefully inform a framework for analyzing potential tradeoffs. First, it may be helpful to disaggregate the sorts of countervailing considerations (which Sunstein and Vermeule group under the broad category of welfarist goals), identifying those of singular importance. Second, there may be a benefit to tracking the closest prior case involving a similar balancing of interests. And here, the post-*Chenery II* case law discussed above may provide a good starting point. As Sunstein has written elsewhere, "[w]hen incommensurable goods are at stake, it is typically asked: What was the resolution of a previous case with similar features? Through this process, people seek to produce . . . consistency among their various judgments. This system of testing is designed not to line goods up along a single metric, but to produce the sort of consistency and rigor that characterizes the successful operation of practical reason."[68]

Developing this sort of framework would better help realize the promise of the Fullerian concept of law's morality. Without it, recognizing the shortfalls of a rigid insistence on each principle (and corresponding need for tradeoffs in certain cases) could end up coming full circle, leaving us with a system of administrative law that gives an

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[66] One example might be an agency tasked with developing cybersecurity rules that discuss current system vulnerabilities — which, of course, we would not want potential wrongdoers to access and exploit.

[67] *See, e.g.*, Small Business Exemption from Open Internet Enhanced Transparency Requirements, 32 FCC Rcd. 1772, 1773–74 ¶¶ 5–6 & n.15 (2017) (citing 47 C.F.R. § 1.3) (noting that the FCC's rules may be "waived if good cause is shown," *id.* at 1774 ¶ 6, and granting retroactive waiver of rule).

[68] Sunstein, *supra* note 56, at 858.

agency free rein to decide whatever seems best "all things considered."[69] If that were the outcome — and nothing in *The Morality of Administrative Law* suggests it must be — that would undermine the promise of viewing administrative law through the lens of Fuller's principles.

[69] *Cf.* Fallon, *supra* note 38, at 42 ("A legal system — and the institutions, practices, and decisions that it comprises — must pursue many goals, and would ideally reflect many values. To do so in the best way, a legal system requires intermediate ideals of prioritization and order that are more local than that of overall 'justice.'").

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