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## AGENCY INTERPRETATIONS

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*What does it mean to say that an administrative agency is a source of law? Agencies constantly generate what our society regards as law, making and remaking legal obligations at a frenetic pace. Yet most of the rules agencies make lack the force of law and recognizing those that have this force is often an exceptionally complicated task. It is a task, in fact, that courts are usually not suited to performing, at least not very well. In this Article, I argue that the nature of contemporary legislative language and our turn toward informal agency processes have combined to render the bulk of lawmaking in our society unrecognizable within our conventional pictures of legality. If legal rules are, as most positivists maintain, simply “exclusionary reasons” by which legal actors guide their conduct, agency rules that are never enacted as “law” are becoming more and more of our law’s content. Informal processes like notice and comment were neither the beginning nor the culmination of our legal system’s departure from traditional, standardized forms of law. But they may be the best evidence of a highly plastic concept of law that is ascendant today.*

### I. INTRODUCTION

What does it mean to call an administrative agency a “source” of law? Agencies constantly create what we regard as law, making and remaking legal rights and duties at a frenetic pace. But what has law become when the society’s legal rules are so prodigious and yet so changeable that they themselves inject government’s unpredictability into that society’s legal order? It is striking that lawyers still invoke Marshall’s dictum that “[i]t is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments.”<sup>1</sup> For, as many have long insisted, legislation today is overwhelmingly *intransitive*: it is a delegation of authority that, in its ambiguity as to what rules ought to govern, leaves the law’s content unspecified.<sup>2</sup> What is more arresting, though, is that agency rulemaking is becoming

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1. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810).

2. *E.g.*, EDWARD L. RUBIN, *BEYOND CAMELOT: RETHINKING POLITICS AND LAW FOR THE MODERN STATE* 210–21 (2005); Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 380–85 (1989). Intransitive legislation, instead of setting the rights and duties of *A* and *B*, directs *C* to specify their rights and duties, often on an evolving basis. Now an important caveat is that *some* legislation still has “striking specificity” for the world’s *A*’s and *B*’s. Peter L. Strauss, *Legislative Theory and the Rule of Law: Some Comments on Rubin*, 89 COLUM. L. REV. 427, 434 (1989). But the exceptions prove the rule—which is, more than anything, a consequence of *scale*. *Cf. id.* at 431 (“One of the differences between the

intransitive in this sense, too. The bulk of what fills the *Federal Register* and *Code of Federal Regulations* (“CFR”)<sup>3</sup> is but a further conveyance of the authority delegated by legislation. And as the Supreme Court recognized long ago, if it is a subordinate source of some kind that actually specifies legislation’s meaning, neither is “complete without the other, and only together do they have any force.”<sup>4</sup> Still, if the “preambles” of today’s rules and regulations, the manuals and memos that explicate them, and the constant flow of guidance, circulars, bulletins, and the like defining their terms are, more often than not, what specify actual rules of conduct,<sup>5</sup> what has become of *law*? One recent answer by a panel of the D.C. Circuit is worth quoting at length.

The phenomenon we see in this case is familiar. Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in the regulations. One guidance document may yield another and then another and so on. Several words in a regulation may spawn hundreds of pages of text as the agency offers more and more detail regarding what its regulations demand of regulated entities. Law is made, without notice and comment, without public participation, and without publication in the *Federal Register* or the *Code of Federal Regulations*. With the advent of the Internet, the agency does not need these official publications to ensure widespread circulation; it can inform those affected simply by posting its new guidance or memoranda or policy statement on its web site. An agency operating in this way gains a large advantage. “It can issue or amend its real rules, i.e., its interpretative rules and policy statements, quickly and inexpensively without following any statutorily prescribed procedures.”<sup>6</sup>

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Congress of the transitive late-19th century and the Congress of the intransitive present is the simple fact of size. . . . The change reflects a dramatic alteration in the nature and possibilities of legislative function.”). See *infra* Parts IV and V for a discussion of deference in judicial recognition of agency lawmaking and the intractability of the ways in which agencies make and apply law.

3. The Federal Register Act, 44 U.S.C. §§ 1501–1511 (2006), provides that the CFR must compile the “documents of each agency of the Government having general applicability and legal effect, issued or promulgated by the agency by publication in the *Federal Register* or by filing with the Administrative Committee” of the *Federal Register*. *Id.* § 1510(a). But the “codified documents of the several agencies published in . . . the *Federal Register*” are only “prima facie evidence of the text of the documents and of the fact that they are in effect on and after the date of publication.” *Id.* § 1510(e). Thus, while I refer to what fills the CFR as “regulations” and to what fills the *Federal Register* as “rules,” the Federal Register Act has little (if anything) to do with the boundary between the two or with their legal character as such. *Health Ins. Ass’n of Am. v. Shalala*, 23 F.3d 412, 423 (D.C. Cir. 1994); see also *Sheridan-Wyo. Coal Co. v. Krug*, 172 F.2d 282, 285–88 (D.C. Cir. 1949), *rev’d on other grounds sub nom.*, *Chapman v. Sheridan-Wyo. Coal Co.*, 338 U.S. 621 (1950).

4. *United States v. Mersky*, 361 U.S. 431, 438 (1960). See generally Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1 (1983).

5. Todd D. Rakoff, *The Choice Between Formal and Informal Modes of Administrative Regulation*, 52 ADMIN. L. REV. 159, 166–67 (2000).

6. *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020 (D.C. Cir. 2000) (quoting Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 85 (1995)).

The law, in short, has become a strategic “phenomenon” in which every promulgated text is presumptively intransitive, provisional, and subject to amendment by elaboration.<sup>7</sup>

Yet this evolution, to which most have simply resigned themselves,<sup>8</sup> is coming to a crossroads. Specifying authoritative general norms at large scales is demanding even under the best of circumstances and delaying that specification is a common response. So-called “legislative” rulemaking, like legislation before it, now presupposes subordinate rules and rulemaking which will do so at some point in the future.<sup>9</sup> Together they are all what I shall call a *cascade* of delegations to interpret law so many of which go beyond what lay in codes like the CFR or U.S.C. that the nature of these codes themselves is changing. As the late Kenneth Davis observed over sixty years ago, “[i]f by *any* informal method a prosecuting agency makes known what it will not prosecute, the result is closely akin to a rule.”<sup>10</sup> Agency rulemakings of this sort have proliferated in good part because they entail so little of the grief lawmaking once did. And because of how integral it is to private ordering, this “soft” law is becoming legality itself.<sup>11</sup> What used to be *lex scripta*—the singularly authoritative, binding inscriptional text—has become presumptively defeasible in its meaning and perhaps in its force as well. “Soft” law—law that is cryptic as to whether and to what extent it binds—is now so abundant, so portable, and so recognizable that it is more than ubiquitous: it is depriving our legal codes of their conventional weights.<sup>12</sup>

If by “rules” we mean effective constraints on legal actors’ choices,<sup>13</sup> then the making of agency rules has become a practice of generative delegation whereby each

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7. See generally Sam Kalen, *The Transformation of Modern Administrative Law: Changing Administrations and Environmental Guidance Documents*, 35 *ECOLOGICAL L.Q.* 657 (2008).

8. Compare John F. Manning, *Nonlegislative Rules*, 72 *GEO. WASH. L. REV.* 893, 944–45 (2004) (“All statutes and rules leave some policymaking discretion for those who must implement them. And no principled metric exists for determining how precise a statute or legislative regulation must be in order to satisfy the relatively abstract duty to formulate policy through a prescribed process, be it bicameralism and presentment or notice-and-comment rulemaking.”), with KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 27 (Illini Books 1971) (1969) (“[P]aradoxically, today’s excessive discretionary power is largely attributable to the zeal of those who a generation or two ago were especially striving to protect against excessive discretionary power.”).

9. See John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 *COLUM. L. REV.* 612, 694–95 (1996); Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 *ADMIN. L. REV.* 547, 549–54 (2000). This is largely because of the scales at which these processes now operate.

10. Kenneth Culp Davis, *Administrative Rules—Interpretative, Legislative, and Retroactive*, 57 *YALE L.J.* 919, 922 (1948) (emphasis added); see, e.g., *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943, 950 (D.C. Cir. 1987). Davis’s point about enforcement discretion was made as part of a broader argument that the “authoritative weight” of “legislative” and “interpretative” rules was becoming functionally equivalent and that the distinction no longer mattered much. Davis, *supra*, at 934–43, 958–59. The jurisprudence of agency rules eventually caught up. See Manning, *supra* note 8, at 927–44.

11. It seems that the distinctions between hard and soft law in international and European Community law—where the terms first evolved—are also eroding. See David M. Trubek et al., ‘Soft Law’, ‘Hard Law’ and EU Integration, in *LAW AND NEW GOVERNANCE IN THE EU AND THE US* 65 (Gráinne de Búrca & Joanne Scott eds., 2006) [hereinafter *NEW GOVERNANCE*].

12. See *infra* notes 178–82 and accompanying text for a discussion of the growth in judicial deference to agency interpretations of agency rules.

13. See *infra* Part III.A for a discussion of rules as guidance and reasons under which people act.

successive act is less its own constraint than the elaboration and specification of its preceding constraints. At any particular juncture the cascade's tempo may be uncertain, but its continuation is as certain as gravity. And with the networking of our culture's public and private actors becoming denser, informal agency lawmaking has never been easier.<sup>14</sup> The softer parts of the cascade have even taken over the spotlight of social and political debate about the virtues of regulation.<sup>15</sup> That their validity is deeply contested seems not to be affecting their production, though.

Under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,<sup>16</sup> courts must "defer" to agencies' "reasonable" interpretations of the statutes they administer.<sup>17</sup> Under *Bowles v. Seminole Rock & Sand Co.*,<sup>18</sup> the "ultimate criterion" for judicial interpretation of an agency rule "is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."<sup>19</sup> Yet under *Christensen v. Harris County*<sup>20</sup> and *United States v. Mead Corp.*,<sup>21</sup> the scope of such strong deference is supposedly limited to those agency interpretations carrying the "force of law" in themselves.<sup>22</sup> The problem is that, in practice, agency interpretations often have an array of possible grounds and, thus, whether they carry the force of law or not is often deeply unclear.<sup>23</sup> Indeed, such ambiguities are often

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14. See ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004) (detailing the vast reach of government-to-government networks, how they function and influence domestic lawmaking, and proposing new modes of accountability for them); Orly Lobel, *Interlocking Regulatory and Industrial Relations: The Governance of Workplace Safety*, 57 ADMIN. L. REV. 1071 (2005) (same).

15. See, e.g., William H. Simon, *Toyota Jurisprudence: Legal Theory and Rolling Rule Regimes*, in NEW GOVERNANCE, *supra* note 11, at 37.

16. 467 U.S. 837 (1984).

17. *Chevron*, 467 U.S. at 865. *Chevron's* hardest question, of course, is whether it applies. See *infra* Part IV.A for further discussion of the *Chevron* case.

18. 325 U.S. 410 (1945).

19. *Seminole Rock*, 325 U.S. at 414. Agencies' interpretations of their rules have been given more or less "controlling" weight at least since *Seminole Rock*. See, e.g., *Auer v. Robbins*, 519 U.S. 452, 452–58 (1997); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994); *Stinson v. United States*, 508 U.S. 36, 42 (1993); *Williams v. United States*, 503 U.S. 193, 201 (1992); *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696–97 (1991); *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 115–16 (1988); *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 570 (1980); *United States v. Larionoff*, 431 U.S. 864, 872–73 (1977); *Ehlert v. United States*, 402 U.S. 99, 105 (1971); *Udall v. Tallman*, 380 U.S. 1, 16 (1965). However, the Court has occasionally declared some agency interpretations of their own rules "plainly erroneous." See, e.g., *Gonzales v. Oregon*, 546 U.S. 243, 255–69 (2006). See *infra* notes 250–51 and accompanying text for a discussion of the relationship between agency plans and behavior.

20. 529 U.S. 576 (2000).

21. 533 U.S. 218 (2001).

22. *Christensen*, 529 U.S. at 587; *Mead Corp.*, 533 U.S. at 231–32.

23. See, e.g., Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1469–79 (2005); M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1429–31 (2004); Richard W. Murphy, *Judicial Deference, Agency Commitment, and Force of Law*, 66 OHIO ST. L.J. 1013, 1038–44 (2005); Adrian Vermeule, *Introduction: Mead in the Trenches*, 71 GEO. WASH. L. REV. 347, 347–49 (2003). A prescient account of the Court's conflicting justifications for deference is David M. Hasen, *The Ambiguous Basis of Judicial Deference to Administrative Rules*, 17 YALE J. ON REG. 327 (2000).

nurtured purposefully. Our “new governance,” in other words, is turning puzzle into paradigm.<sup>24</sup>

Because agencies can choose how to sequence and time their actions, and because they may choose for the sake of their own power,<sup>25</sup> our resigned acceptance of these rulemaking cascades is putting us in quite a predicament. We have long sought by means of judicial review to check the discretion delegation creates.<sup>26</sup> We have long extended that endeavor down the cascade—typically through the judicial expansion of routinized procedures like notice and comment.<sup>27</sup> But we have failed to settle which agency rules are *legal* rules, rendering these pursuits rather random, if not unsound. We are unsure where agency rules fit into our conventional picture of legality,<sup>28</sup> leaving us all to intuit how they balance legal formality with substantive justice.<sup>29</sup> Perhaps most importantly, though, few question that judicial review can sort all of this out one rule at a time, and it is this *de facto* consensus that is, in my view, the most urgent problem. Given the ubiquity and complexity of delegations and agency rules, a requirement that agencies have *either* a delegation or an existing agency “rule” to support their superior claim of authority is hardly much of a constraint on agency choice.<sup>30</sup>

In this Article, I argue that our collective commitments to informal process and bureaucratic governance are erasing whatever distinguishes the making of legal rules

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24. See generally Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235 (2007). Hickman and Krueger identified 104 court of appeals’ cases applying *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), in lieu of *Chevron* from 2001 to 2006. Hickman & Krueger, *supra*, at 1267. Their findings were principally that *Skidmore* turns out to be quite similar to *Chevron* in operation, although this is a curious finding given the supposed polarity of the two doctrines. See *id.* at 1259. Importantly, they separated out cases that applied *Seminole Rock*, on the theory that it falls into still another category of deference. *Id.* at 1262 n.156.

25. See RUBIN, *supra* note 2, at 96–104, 284–95 (discussing concept of “authorization” to agencies and how that affects implementation of laws); see also Magill, *supra* note 23, at 1446; Manning, *supra* note 9, at 654–80; Jonathan T. Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 NW. U. L. REV. 1239, 1283–86, 1308 (2002).

26. See, e.g., FRANK J. GOODNOW, *THE PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES* 49–50 (1905); LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 51–86 (1965).

27. The degree to which such efforts simply drive the cascade ever harder is probably an empirical question. But see Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1436–62 (1992).

28. The standard account has long been that “force of law” in the administrative state comprises a more or less hierarchical pyramid beginning with a base of circulars, manuals, and the like, building upward to the Constitution at its most forceful apex. See, e.g., Peter L. Strauss, *From Expertise to Politics: The Transformation of American Rulemaking*, 31 WAKE FOREST L. REV. 745, 745–50 (1996) (describing different methods of evaluating hierarchy of forms of laws). If my argument is correct, this metaphor has “force of law” in the modern state almost exactly upside down.

29. The distinction between legal formality and substantive justice is, on any account, elemental. Cf. Duncan Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351, 378 (1973) (“[F]ormality consists *not* in the activity of *following* rules, but in the process of their rigid application. The judge who reaches his decision by substantively rational processes is not acting formally, even if he follows the rule ninety-nine times in a hundred.”). See *infra* Part III for a discussion of a functional account of legal authority.

30. The complexity of agency rules is now routinely given as a reason for reviewing courts to defer to the agency’s “interpretation” thereof. E.g., *Shalala v. Guernsey Mem’l Hosp.*, 514 U.S. 87, 93–95 (1995); *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 702 (1991); *Martin v. Occupational Safety & Health Review Comm’n*, 941 F.2d 1051, 1055 (10th Cir. 1991).

from their application and that we must recognize this as both cause and consequence of a transformation our concept of law is undergoing. The distinction between the creation and application of law may be a hallowed constitutional tradition,<sup>31</sup> but it no longer has much to do with any process of enactment or adversarial adjudication, rightly defined. These paradigmatic modes of lawmaking are missing from the majority of what our society now regards as “law.” Part II connects this evolution to the structure and content of modern legislation. Part III sketches a functionalist account of legality in the world of legislation and delegation, and Parts IV and V use that account to assess the creation of legal rules by informal bureaucratic processes and suggest how we ought to conceptualize rules of law in the disaggregated state.

## II. INTRANSITIVITY AND ABSTRACTION: LEGISLATION’S FORCE

Article I, Section 7 of the Constitution is our archetype of an entrenched process of enactment producing an authoritative, inscriptional text.<sup>32</sup> And like bicamerality and presentment, notice and comment affixes a procedural record to an enactment that must take the form of a final text.<sup>33</sup> Yet, much as *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*<sup>34</sup> supposed that the meaning of legislation is inherently fungible,<sup>35</sup> informal processes like notice and comment are today signaling that rules are inherently unfinished.<sup>36</sup> Indeed, notice and comment procedure is perhaps best conceived as fungible itself. The most obvious question, then, is why notice and comment still represents a means of “enactment” even though it has grown formless, discretionary, and ad hoc. For, if delegation has been the “dynamo of modern government,”<sup>37</sup> the carefully selected abstractions that emerge from administrative processes like notice and comment are becoming just another delegation of authority.<sup>38</sup>

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31. See, e.g., Monaghan, *supra* note 4, at 1–2.

32. U.S. CONST. art. I, § 7 (requiring bicameral enactment and presentment to the President); see also WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 118–20 (1994).

33. See Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 71–79, 97–108 (1983).

34. 467 U.S. 837 (1984).

35. See Hasen, *supra* note 23, at 331–38; Murphy, *supra* note 23, at 1029–35.

36. See generally Harold J. Krent, *Reviewing Agency Action for Inconsistency with Prior Rules and Regulations*, 72 CHI.-KENT L. REV. 1187 (1997); Doug Geyser, Note, *Courts Still “Say What the Law Is”*: Explaining the Functions of the Judiciary and Agencies After Brand X, 106 COLUM. L. REV. 2129 (2006); Note, *Violations by Agencies of Their Own Regulations*, 87 HARV. L. REV. 629 (1974).

37. JAFFE, *supra* note 26, at 33.

38. Compare Monaghan, *supra* note 4, at 33 (arguing that courts read modern legislation to set “outer boundaries of a very wide domain for choice”), with Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 706–12 (1989) (arguing that agencies have the authority to act contrary to judicial precedent in a wide variety of circumstances). Occasionally, legislation’s meaning is not left *solely* to administrative discretion. See, e.g., *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 137 (2000). But the presumption has been clear for many years. See generally *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457 (2001); *Touby v. United States*, 500 U.S. 160 (1991); *Nat’l Cable Television Ass’n v. United States*, 415 U.S. 336 (1974).

The Supreme Court's equivocal accounts of agency lawmaking in cases like *United States v. Mead Corp.*<sup>39</sup> have only added to the confusion.<sup>40</sup> Agencies make rules with the force of law when legislation empowers them to do so, but how legislation so empowers agencies remains utterly mysterious. This much is clear: procedural formality and finalized texts have ceased to be reliable indicators of agency lawmaking.<sup>41</sup> So our puzzle is this: on what is agency authority to make legal rules grounded exactly? Given the litany of legal fictions over the years and all the many default rules about legislative intent, to answer that it is "delegated authority" is to ignore the confusion.<sup>42</sup> Section A describes our collective rejection of legal formality, and Sections B and C clarify what we mean today when we say some norm has the "force of law."

A. *Skipping the Formalities*

Being a relatively informal public process for generating normative rules, notice and comment has assumed a unique place in the administrative state. A universe of federal norms is being anchored to some version of notice and comment<sup>43</sup>—the great innovation of New Deal lawyers.<sup>44</sup> Notice and comment was meant to cut legal formality down to size and give substance its due: publish notice of a proposed rule,

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39. 533 U.S. 218 (2001). The *Mead* Court linked the provision of *Chevron's* "binding" deference to a determination of whether the agency action at issue had the "force of law." See *Mead*, 533 U.S. at 228–30. The Court seemed to adopt this test out of a normative commitment to procedure as much as it did out of fidelity to Congress or anything else. Cf. *id.* at 230 ("It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force."). However, it later stated in dicta that force of law and *Chevron* deference are not identical and has not yet worked out anything more specific about the relationship. *Barnhart v. Walton*, 535 U.S. 212, 222 (2002).

40. The *Mead* Court took care to avoid couching its account of procedure's relationship to legality in terms of necessity or identity. See *Mead*, 533 U.S. at 230–31 ("[A]s significant as notice-and-comment is in pointing to *Chevron* authority, the want of that procedure here does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded." (citation omitted)). But the Court's equation of formal adjudication with its concept of "force of law" has raised its own hard questions, *Murphy*, *supra* note 23, at 1038–44, including what really separates the different deference regimes from one another—if anything. See William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083 (2008).

41. See Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2169–71 (2004) (arguing that courts routinely presume agency authority to make rules with the force of law and do not generally require a specific legislative grant); Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 493–528 (2002) (arguing that a "convention" had once required specific delegations to agencies to act with the force of law).

42. Leaving aside for the moment hard questions about the nature of one's agency, *something* must authorize a lawmaker or we have shattered one of our Constitution's most fundamental tenets. See generally Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary's Structural Role*, 53 STAN. L. REV. 1 (2000).

43. See JEFFREY S. LUBBERS, *A GUIDE TO FEDERAL AGENCY RULEMAKING* xviii–xix (4th ed. 2006); PETER L. STRAUSS, *ADMINISTRATIVE JUSTICE IN THE UNITED STATES* 220–22 (2d ed. 2002).

44. See generally KENNETH CULP DAVIS, *1 ADMINISTRATIVE LAW TREATISE* § 6.15 (1st ed. Supp. 1970).

take comments, and finalize the rule.<sup>45</sup> But substance and process are always parts of one thing. And if there is an “optimal precision” in either, it is achieved by deciding only what must be decided moment to moment.<sup>46</sup> Thus, Professor Stewart’s noted prescription in 1975 that administrative agencies shift to notice and comment rulemaking as a way to enhance the representation of interests before agencies<sup>47</sup>—a prescription that assumed notice and comment was a kind of “surrogate political process”<sup>48</sup>—never anticipated that formality and informality in rulemaking would become inherently relative.

If any seismic shift initiated our rulemaking age, it came in cases like *United States v. Allegheny-Ludlum Steel Corp.*,<sup>49</sup> *United States v. Florida East Coast Railway Co.*,<sup>50</sup> and *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*<sup>51</sup> The first two are credited with having expanded notice and comment’s domain. The Court interpreted a 1917 statute allowing the agency to set rates “after hearing” as triggering only an informal, notice and comment “hearing”<sup>52</sup>—thereby supposedly freeing agencies from record proceedings in rulemakings where the underlying statute required only a “hearing.”<sup>53</sup> In the wake of those decisions, it was completely legitimate to interpret enabling legislation mentioning a “hearing” to require *no more than* notice and comment.<sup>54</sup> Shortly after that, *Vermont Yankee*

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45. Courts have adorned the statute with much more particularized doctrinal rules construing rulemaking as a process, though. LUBBERS, *supra* note 43, at 275–394.

46. See CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999); DIVER, *supra* note 33, at 89–91.

47. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1789–1813 (1975).

48. *Id.* at 1670.

49. 406 U.S. 742 (1972).

50. 410 U.S. 224 (1973).

51. 435 U.S. 519 (1978). Stewart, *supra* note 47, forecasted neither *Vermont Yankee* nor the train of restrictive standing cases following *Warth v. Seldin*, 422 U.S. 490 (1975), *Allen v. Wright*, 468 U.S. 737 (1984), and *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

52. *Allegheny-Ludlum*, 406 U.S. at 756–57 (quoting 5 U.S.C. § 553 (2006)) (internal quotation marks omitted); *Fla. E. Coast Ry.*, 410 U.S. at 238–46. The judiciary’s presumption ever since has been that enabling statutes requiring a “hearing” prior to agency action need only trigger Administrative Procedure Act (APA) section 4, 5 U.S.C. § 553, and that the more formal requirements of sections 7 and 8, 5 U.S.C. §§ 556–557, are *not necessarily* triggered unless the statute expressly requires the proceeding be “on the record.” See, e.g., *Fla. E. Coast Ry.*, 410 U.S. at 240–46; *Chem. Waste Mgmt., Inc. v. EPA*, 873 F.2d 1477, 1481–82 (D.C. Cir. 1989); *City of W. Chi. v. U.S. Nuclear Regulatory Comm’n*, 701 F.2d 632, 641–45 (7th Cir. 1983).

53. It is also open to question whether the cases changed the convention or just clarified it. See, e.g., *Am. Trucking Ass’n v. United States*, 344 U.S. 298, 319–20 (1953) (interpreting ambiguous trigger section of Motor Carrier Act to trigger notice and comment only); *Auto. Parts & Accessories Ass’n v. Boyd*, 407 F.2d 330, 334–38 (D.C. Cir. 1968) (interpreting ambiguous trigger section of Motor Vehicle Safety Act to trigger notice and comment only). It is fairly clear as an empirical matter, though, that rulemakings increased substantially beginning in the early 1970s. That generation of administrative lawyers had argued that more rulemaking by notice and comment would be a powerful tonic for agencies’ abuse of their discretion. See, e.g., DAVIS, *supra* note 8, at 1219–33; HENRY J. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS 5–26 (1962).

54. LUBBERS, *supra* note 43, at 528–30. It is worth noting that courts often commingle 5 U.S.C. § 553 notice and comment precedents with hybrids thereof in reviewing rulemaking proceedings. See, e.g., *Ass’n of Nat’l Advertisers v. FTC*, 627 F.2d 1151, 1159–69 (D.C. Cir. 1979). This may have been a “common law

coupled the judicial review of informal process tightly to any applicable statutory text.<sup>55</sup> And since then, notice and comment has become a paradigmatic means for agencies signaling their intent to make binding general norms.<sup>56</sup> Notice and comment has become so typical in this regard that most state governments, the European Union, and even parts of the private sector now use it.<sup>57</sup>

But what does a process like this really *mean*? Statutes routinely trim notice and comment to various degrees,<sup>58</sup> turn proposed rules into final rules,<sup>59</sup> dictate particular standards of choice within particular rulemakings,<sup>60</sup> and even authorize the agency itself to further delegate rulemaking authority.<sup>61</sup> Most of all, because it is *just* notice and comment, agencies often dispense with it entirely. Ignoring notice and comment has become just another agency routine.<sup>62</sup> Can a process of enactment be so inherently

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mindset” that has run its course, though. *See generally* John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113 (1998).

55. Before *Vermont Yankee*, the D.C. Circuit had ruled several times that notice and comment as set forth in APA section 4 was a kind of procedural “minimum” that should be enhanced where appropriate. *See* *Natural Res. Def. Council, Inc. v. U.S. Nuclear Regulatory Comm’n*, 547 F.2d 633, 643 n.23 (D.C. Cir. 1976) (citing the cases), *rev’d sub nom.*, *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519 (1978).

56. *See, e.g.*, Neil Walker, *EU Constitutionalism and New Governance*, in *NEW GOVERNANCE*, *supra* note 11, at 15–36.

57. *See* Victor B. Flatt, *Notice and Comment for Nonprofit Organizations*, 55 RUTGERS L. REV. 65, 71–83 (2002); Peter L. Strauss, *Rulemaking in the Ages of Globalization and Information: What America Can Learn from Europe, and Vice Versa*, 12 COLUM. J. EUR. L. 645, 656–74 (2006). A recent example of nonprofit notice and comment is the U.S. Green Building Council (“USGBC”)—a large standard-setting and certification organization—which subjects its Leadership in Energy & Environmental Design (“LEED”) standards to public notice and comment quite similar to APA section 4. *See* U.S. Green Building Council, <http://www.usgbc.org/> (last visited March 24, 2010).

58. *See, e.g.*, 16 U.S.C. § 1533(h) (2006) (describing hybrid notice and comment process for agency “guidelines” implementing Endangered Species Act). A statute can also preclude judicial review of an agency’s decision to forego notice and comment. *See, e.g.*, 42 U.S.C. § 1395ff(a)(3)(B)(i) (2006).

59. *See, e.g.*, Nutrition Labeling and Education Act of 1990, Pub. L. No. 101-535, 104 Stat. 2353, 2357 (codified at 21 U.S.C. § 343-1 (2006)) (providing that, upon expiration of statutory term, any proposed rule by agency would become the final rule); M. Elizabeth Magill, *Congressional Control Over Agency Rulemaking: The Nutrition Labeling and Education Act’s Hammer Provisions*, 50 FOOD & DRUG L.J. 149 (1995).

60. *See, e.g.*, *Am. Petroleum Inst. v. Costle*, 665 F.2d 1176 (D.C. Cir. 1981). Congress sometimes specifies whose comments matter most. For example, in the Clean Water Act sections 404(g)(2), (3), the EPA, in delegating wetlands permitting authority to a state, must deliver program proposals to the U.S. Fish and Wildlife Service for its review and comment. 33 U.S.C. §§ 1344(g)(2), (3) (2006). Presidents since Reagan have ensured that the Office of Management and Budget can inject economic factors into rulemakings wherever the underlying statute does not forbid such considerations. *See generally* LUBBERS, *supra* note 43, at 241–53.

61. *See* Kenneth A. Bamberger, *Regulation as Delegation: Private Firms, Decisionmaking, and Accountability in the Administrative State*, 56 DUKE L.J. 377, 386–92, 465 (2006) (describing a trend toward agency delegation of authority to regulated parties by means of “performance standards” and the reliance on private ordering to achieve regulatory goals); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 550–64 (2000) (same).

62. *See generally* Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 ADMIN. L. REV. 703, 707–13 (1999) (describing agencies’ authority to make an “interim” rule while processing a “final” version); Ronald M. Levin, *Direct Final Rulemaking*, 64 GEO. WASH. L. REV. 1, 11–16 (1995) (describing agencies’ authority to skip notice and comment entirely). The extent to which such realities have eroded judges’ willingness to enforce what few sharp corners exist in notice and comment is an open question. *See, e.g.*, U.S.

adjustable and ad hoc? Why do we persist in thinking that notice and comment constitutes some process of enactment? Statutes like the Administrative Procedure Act (“APA”) indulge our persistence here by framing notice and comment as a kind of presumptive routine for “rulemaking.”<sup>63</sup> But the APA is famously ambiguous as to where its presumption attaches. While its definition of “rule” includes every agency “statement of . . . future effect”—meaning every “agency process for formulating, amending, or repealing” such statements is a “rulemaking”<sup>64</sup>—not *every* such agency act could be the making of a *legal* rule.<sup>65</sup> And if only some agency rules have the force of law, only some of them should be enacted as such.<sup>66</sup> Of course, if the APA created a presumption without a predicate, conflating the force of agency rules with the judicial review to which they are subject has become a full partner in the confusion. Sections B and C diagram this aspect of our predicament.

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Telecom Ass’n v. FCC, 400 F.3d 29, 40–42 (D.C. Cir. 2005) (upholding FCC “order” against challenge that it was actually a rule and governed by § 553 by balancing what process was afforded prior to order’s finalization and concluding it was sufficiently analogous to notice and comment); Fed. Express Corp. v. Mineta, 373 F.3d 112, 120 (D.C. Cir. 2004) (finding that improper labeling of notice in Federal Register does not invalidate rulemaking); 1000 Friends of Md. v. Browner, 265 F.3d 216, 237–38 (4th Cir. 2001) (reviewing a statement of basis and purpose with extreme deference). *But see* Util. Solid Waste Activities Group v. EPA, 236 F.3d 749, 754–55 (D.C. Cir. 2001) (invalidating direct final rule agency had adopted to correct its own error in a prior notice and comment rule and concluding notice and comment was neither “unnecessary” nor “impracticable” under APA section 4).

63. APA section 4 “applies, according to the provisions thereof, except to the extent that there is involved . . . a military or foreign affairs function” or a “matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.” 5 U.S.C. § 553(a) (2006). One of section 4’s “provisions,” however, is that, “[e]xcept when notice or hearing is required by statute,” the routine is *not* required for “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.” *Id.* § 553(b).

64. *Id.* §§ 551(4)–(5). The APA’s definition of rule and rulemaking should not be confused with the more natural definition of a mandatory rule, i.e., any standard that constrains choice. Part III disentangles the two.

65. It has caused deep anxieties over which rules trigger statutory processes like notice and comment— anxieties that have been expressed for many years. *E.g.*, Reginald Parker, *The Administrative Procedure Act: A Study in Overestimation*, 60 YALE L.J. 581, 590–92 (1951). Two very different accounts of this especially cryptic aspect of the APA are Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311 (1992) and Michael Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 MICH. L. REV. 520 (1977).

66. *See, e.g.*, Indep. Equip. Dealers Ass’n v. EPA, 372 F.3d 420, 425–28 (D.C. Cir. 2004) (holding that agency letters to regulated industry restating an agency interpretation of the law governing industry are not “rules”); U.S. Dep’t of Labor v. Kast Metals Corp., 744 F.2d 1145, 1149–55 (5th Cir. 1984) (holding that agency plan queuing workplace inspections is a “rule” under APA but not a rule with the force of law requiring notice and comment); Gibson Wine Co. v. Snyder, 194 F.2d 329, 330–33 (D.C. Cir. 1952) (holding that agency application of agency rules, conveyed to party by letter and circular, is not itself a “rulemaking” subject to notice and comment, in part because it had no independent force).

B. Which “Force of Law”?

To be a law is to have “force” relative to other laws; higher laws trump or preempt lower laws.<sup>67</sup> We often hear that an agency rule’s force is the same as a statute’s.<sup>68</sup> Sometimes referred to as “substantive rules” or “subordinate legislation,”<sup>69</sup> what are usually called “legislative” rules are in some ways the equivalent of Article I, Section 7 statutes.<sup>70</sup> But this equivalence is always an oversimplification. Even assuming for the sake of argument that legal force is measured solely by a rule’s function in court,<sup>71</sup> agency rules are still not the practical equivalent of statutes because courts do not give the same *deference* to agencies that they give to Congress and the President, whatever *Chevron* or *Seminole Rock* might otherwise imply.<sup>72</sup> Whatever else the standard of review entails, it has always required consistency with all applicable statutes<sup>73</sup>—a dimension of interpreting agency rules absent from the interpretation of statutes.<sup>74</sup> Call it the fit dimension.

Of course, not all agency rules have even subordinate legislation’s force.<sup>75</sup> The very thing supposedly distinguishing “interpretative rules,” “general statements of policy,” and rules of “agency organization, practice, or procedure” from legislative

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67. See, e.g., *Nat’l Ass’n of Home Builders v. Norton*, 415 F.3d 8, 15 (D.C. Cir. 2005). A word is in order on the nature of “preemption” versus supremacy. As many have argued, the former is generally broader in scope than the latter in our tradition. See generally Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767 (1994); S. Candice Hoke, *Transcending Conventional Supremacy: A Reconstruction of the Supremacy Clause*, 24 CONN. L. REV. 829 (1992). A law can be exclusive of other laws (preemption) so long as it is of a superior authority (supremacy), but that same law need not be exclusive of other laws just because it is of a superior authority. Gardbaum, *supra*, at 770–73.

68. See, e.g., *Atchison, Topeka & Santa Fe Ry. Co. v. Scarlett*, 300 U.S. 471, 474 (1937) (“The regulation having been made by the commission in pursuance of constitutional statutory authority, it has the same force as though prescribed in terms by the statute.”).

69. See ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 39 (1947) (referring to “substantive rules” that “have the force and effect of law”); ROBERT BALDWIN, RULES AND GOVERNMENT 66 (1995) (referring to all forms of delegated rulemaking authority as “subordinate legislation”).

70. See, e.g., RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 6.6 (4th ed. 2002).

71. There are good reasons to reject this assumption, as Part V shows.

72. See generally Lisa Schultz Bressman, *Judicial Review of Agency Discretion*, in A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 177 (John F. Duffy & Michael Herz eds., 2005). Within this generalization, of course, the inevitable qualifications arise. See, e.g., William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87, 107–11 (2001) (observing that Rehnquist Court often reviewed legislative action and fact finding in support of that action with little or no deference when five Justices perceived that states’ dignity was at issue).

73. Compare 5 U.S.C. § 706(2)(C) (2006) (“The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right”), with *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 n.9 (1983) (refusing to afford agency repeal of rule the same “presumption of regularity” Court affords legislation when challenged).

74. Indeed, in any case of *apparent* conflict between two statutes, wherever they “are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.” *Morton v. Mancari*, 417 U.S. 535, 551 (1974). Of course, statutes must fit with the Constitution, but that fit requirement is much narrower than the fit dimension of agency rules.

75. See, e.g., *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1324 (D.C. Cir. 1988) (finding that agency’s general statement of policy was valid as long as agency did not treat it as a binding pronouncement of law).

rules is that they supposedly lack this force of law.<sup>76</sup> In fact, in *Mead Corp.*,<sup>77</sup> *Batterton v. Francis*,<sup>78</sup> *Morton v. Ruiz*,<sup>79</sup> and elsewhere, the Court has given this as a *reason* not to afford such agency actions—as interpretations of legislation—strong deference.<sup>80</sup> It has encouraged lower courts to exercise independent judgment when adjudicating a statute’s meaning in cases not involving agency rules (or orders) “with the force of law.”<sup>81</sup> This clearly ties judicial deference to the formatting of an agency’s interpretation of law,<sup>82</sup> but it remains deeply unclear why.

To be sure, the courts have long reviewed rulemakings where a complainant’s injury (ostensibly) stems from the *existence* of a rule.<sup>83</sup> What seems to have changed

76. *E.g.*, *CropLife Am. v. EPA*, 329 F.3d 876, 883 (D.C. Cir. 2003); *Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 95–96 (D.C. Cir. 2002); *S. Cal. Edison Co. v. Fed. Energy Regulatory Comm’n*, 770 F.2d 779, 783 (9th Cir. 1985); *Nat’l Nutritional Foods Ass’n v. Weinberger*, 512 F.2d 688, 697–98 (2d Cir. 1975); *Nat’l Ass’n of Ins. Agents, Inc. v. Bd. of Governors*, 489 F.2d 1268, 1270 (D.C. Cir. 1974); William Funk, *A Primer on Nonlegislative Rules*, 53 ADMIN. L. REV. 1321, 1346 (2001); Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 ADMIN. L. REV. 803, 806 (2001).

77. 533 U.S. 218 (2001).

78. 432 U.S. 416 (1977).

79. 415 U.S. 199 (1974).

80. *Mead*, 533 U.S. at 229–31; *Batterton*, 432 U.S. at 424–26 & n.9; *Morton*, 415 U.S. at 231–37; *see also* *Alaska Dep’t of Env’tl. Conservation v. EPA*, 540 U.S. 461, 487–88 (2004) (according “respect” to agency’s interpretation of Clean Air Act embodied in “internal guidance memoranda” but not giving it the “dispositive effect” of *Chevron*); *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 449 n.9 (2003) (affording *Skidmore* deference to EEOC “Compliance Manual” because it was not “controlling” as even the government conceded); *Reno v. Koray*, 515 U.S. 50, 61 (1995) (affording “some deference” to Bureau of Prisons manual); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 256–58 (1991) (declining to afford *Chevron* deference to EEOC guideline on grounds that guidelines were not “rules or regulations”), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 109, 105 Stat. 1075, 1077–78 (codified as amended in scattered sections of 42 U.S.C.), *as recognized in* *Stender v. Lucky Stores, Inc.*, 780 F. Supp. 1302 (N.D. Cal. 1992).

81. *Mead*, 533 U.S. at 231–32; *Chrysler Corp. v. Brown*, 441 U.S. 281, 313–16 (1979); *cf.* Monaghan, *supra* note 4, at 14–15 (linking deferential review of agency statutory interpretations to *United States v. Vowell*, 9 U.S. (5 Cranch) 368 (1809), where Supreme Court first said it would “respect” agency interpretation). Courts should exercise independent judgment, that is, as long as there is no “definitive” precedent on point. *See Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981–82 (2005).

82. The “format” of an interpretation is the precise means by which an agency advances or communicates a particular interpretation of law, e.g., general statement of policy, interpretive rule, legislative rule, etc. Professor Anthony is credited with having made the case for attention to format soon after *Chevron* had superseded the Court’s long-standing “multiple factor” approach. Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 972–75 (1992); *see generally* Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1 (1990). But administrative authority is perhaps necessarily exerted through a variety of mechanisms—formats—only some of which are typically used to express rules of general applicability. And sorting them out has proven intractable both here and abroad. *See generally* Strauss, *supra* note 57.

83. *See, e.g.*, *Gardner v. Toilet Goods Ass’n*, 387 U.S. 167, 168 (1967). A possible *future* injury will not suffice under Article III unless it can be substantiated. *See, e.g.*, *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983). Recent applications of ripeness doctrine to defeat challenges to agency rules include *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 386 (1999), *Ohio Forestry Ass’n v. Sierra Club*, 523 U.S. 726 (1998), and *Lujan v. National Wildlife Federation*, 497 U.S. 871, 891 (1990). Note, though, that “ripeness” doctrine’s coincidence with “finality” under APA section 10(c), 5 U.S.C. § 704 (2006), remains a perennial source of

more recently is the courts' keen awareness of the *strategic value* of interpretive authority.<sup>84</sup> Soon after agency rules were being reviewed whenever their "impact" on a complainant was "sufficiently direct and immediate,"<sup>85</sup> some began to notice how reviewability permitted the inference that agency rules are legally binding as such.<sup>86</sup> This is the core paradox of the modern scope of review doctrine: rules are reviewable if they have the force of law, but if they have this force they should receive strong deference.<sup>87</sup> Now if, by giving this "legislative effect"<sup>88</sup> to agency rules, the Court means only to shape judicial review to fit its subject,<sup>89</sup> linking deference to format makes a fair bit of sense.<sup>90</sup> Preenforcement challenges to rules are, in some substantial sense, always about the range of possibilities raised in an agency action—not the definite, determinate consequences thereof. But if the Court instead means to allocate interpretive authority by its own shifting fictions on how legislation empowers agencies to act, then the force of law is almost certainly becoming a matter of judicial will and caprice.<sup>91</sup> It is this latter path that raises troubling questions.

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confusion in its own right. Duffy, *supra* note 54, at 179–81; Paul R. Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185, 196–205 (1974).

84. Worry over agencies as strategic actors is as old as administrative law itself. And it has frequently influenced courts in their reviewing functions. Much less common have been those who have recognized the complexity of interpretive authority within and around agencies. But, as Professor Monaghan noted, "[t]he question is not whether the agency's interpretation shall be 'considered' or 'taken into account.' *The precise problem is the extent to which the agency's interpretation shall affect or control the court's interpretation.*" Monaghan, *supra* note 4, at 5 (quoting Clark Byse, *Scope of Judicial Review in Informal Rulemaking*, 33 ADMIN. L. REV. 183, 191 (1981)) (internal quotation marks omitted).

85. *Abbott Labs. v. Gardner*, 387 U.S. 136, 152 (1967). Note that the three suits consolidated in *Abbott Laboratories* were brought in equity. *Id.* at 138–40. Their continuity with prior precedent in identifying equitable review's concept of "ripeness" with the *substance* of the rules under challenge is still subject to considerable debate. Compare Ronald M. Levin, *The Story of the Abbott Labs Trilogy: The Seeds of the Ripeness Doctrine*, in ADMINISTRATIVE LAW STORIES 431, 442–45, 474–79 (Peter L. Strauss ed., 2006) (arguing *Abbott Labs* trilogy was in step with previous "ripeness" cases), with Duffy, *supra* note 54, at 162–78 (arguing *Abbott Labs* transformed reviewability into question dominated by common law balancing, like that done in *Abbott Labs* trilogy, and not statutory interpretation).

86. See, e.g., William F. Cody, *Authoritative Effect of FDA Regulations*, 24 FOOD DRUG COSMETIC L.J. 195, 201–04 (1969) (responding to *Abbott Labs* and arguing that "force of law" for purposes of standing and ripeness should not but could be conflated with "force of law" for purposes of scope of review or "authoritative effect").

87. See, e.g., *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 162 (2007); *Barnhart v. Walton*, 535 U.S. 212, 221 (2002); *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001).

88. *Schweiker v. Gray Panthers*, 453 U.S. 34, 44 (1981).

89. See, e.g., *Schweiker*, 453 U.S. at 49–50 (refusing to consider claim that rule may be applied in ways inconsistent with enabling statute in part because challenge was "a direct attack on regulations . . . in the abstract").

90. Due respect for the challenges agencies face in making general rules that implement legislation with adequate fidelity to the underlying legislation is arguably at the core of *Chevron* and its jurisprudence. Steven Croley, *The Applicability of the Chevron Doctrine*, in A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES, *supra* note 72, at 103, 105. That is, however, quite apart from *Chevron*'s political and philosophical underpinnings as a power-allocation mechanism. See *infra* notes 242–53 and accompanying text for a discussion of bureaucratic means that guide legal interpretation.

91. See *Merrill & Watts*, *supra* note 41, at 581–90 (tracing wide swings in controlling precedents); *Bressman*, *supra* note 23, at 1486–91 (same).

Consider the several different kinds of “force” in agency rules. The prosecution of violations of a rule made pursuant to a statute that authorizes sanctions for such violations clearly requires a forceful rule as much as a forceful statute.<sup>92</sup> But this is hardly the only connection in which we would say a rule has measurable force. Imagine a preamble discussion defining an important term that appears in both the enabling legislation and the text of the rule under construction.<sup>93</sup> Suppose the discussion attaches a novel, prescriptive definition to the term.<sup>94</sup> If this definition is afforded “controlling weight”<sup>95</sup> in judicial proceedings, does that mean the agency is bound by that definition until amended by subsequent notice and comment?<sup>96</sup> If so, should we then say the preamble itself constitutes a binding norm?<sup>97</sup> Should it preempt inconsistent state law?<sup>98</sup> These and other questions about agency rules are now seized up in the impenetrable notion of a “force of law.”

We *can* say that a rule without force cannot be “applied” in the sense that it is the norm governing some transaction or decision.<sup>99</sup> That rule would also lack the requisite “impact” to merit judicial review,<sup>100</sup> just as it would (probably) lack the requisite weight to merit strong deference.<sup>101</sup> Yet agency rules supposedly lacking all of that can and do still exert powerful influences in a vast universe of legal outcomes, as administrative lawyers well know.<sup>102</sup> In my view, this all stems from demonstrably flawed notions of agency authority and law. Section C begins that argument with some basics about organizational authority.

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92. See generally *United States v. Fogarty*, 692 F.2d 542 (8th Cir. 1982); cf. *Merrill & Watts*, *supra* note 41, at 494 (arguing that agency rules backed by statutory sanctions definitely have the force of law).

93. A “preamble” is the “statement of basis and purpose” and other prefatory material published along with a final rule pursuant to 5 U.S.C. § 553(c). Its relationship to the text of the “rule” proper is uncertain but probably more significant than that between the rule and subsequent “interpretive rules.” See, e.g., *Gonzales v. Oregon*, 546 U.S. 243, 257–69 (2006).

94. This example is based loosely on the rules at issue in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *Solid Waste Agency v. United States Army Corps of Engineers*, 531 U.S. 159 (2001); and *Rapanos v. United States*, 547 U.S. 715 (2006). See generally Jamison E. Colburn, *Waters of the United States: Theory, Practice, and Integrity at the Supreme Court*, 34 FLA. ST. U. L. REV. 183 (2007).

95. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

96. See, e.g., *Ass’n of Am. R.Rs. v. Dep’t of Transp.*, 198 F.3d 944, 949 (D.C. Cir. 1999); cf. *Alaska Prof’l Hunters Ass’n v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999) (“When an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment.”).

97. See, e.g., *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1110 (D.C. Cir. 1993); *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1307–08 (D.C. Cir. 1991).

98. See generally Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DEPAUL L. REV. 227 (2007).

99. *Pac. Gas & Elec. Co. v. Fed. Power Comm’n*, 506 F.2d 33, 38–39 (D.C. Cir. 1974).

100. See, e.g., *Indep. Equip. Dealers Ass’n v. EPA*, 372 F.3d 420, 427 (D.C. Cir. 2004); *N.Y. City Employees’ Ret. Sys. v. SEC*, 45 F.3d 7, 12–14 (2d Cir. 1995).

101. *United States v. Mead Corp.*, 533 U.S. 218, 230–31 & n.12 (2001).

102. “Interpretative” rules do not, unless expressly required by statute, trigger notice and comment under the APA. 5 U.S.C. § 553(b) (2006). Still, they can be outcome determinative in court, a fact that has led to no small amount of confusion. Cf. *Am. Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987) (calling distinction § 553(b) makes between “rules” and “interpretative rules” an “extraordinarily case-specific endeavor”).

### C. *Governing Institutions*

Agencies' authority to make and interpret rules—and thus the force of their rules and interpretations—will normally derive from one of two characteristic sources. On the one hand, agency rules may be the *specification* of legislation.<sup>103</sup> A rule might, for example, define a statute's tangible obligations in society. On the other hand, agencies are comprised of individual people who are directed, ultimately (most of them) by a chief executive whose duty it is to “take Care that the Laws be faithfully executed.”<sup>104</sup> Supervisory rules directing staffs differ from the specification of legislation in that their addressees themselves normally possess at least some authority to apply the law to others. This distinction between legislative and supervisory authority is not necessarily constitutional,<sup>105</sup> but it is irreducible in an important sense.<sup>106</sup> For any agent *A* under the direction of *S*, when both are executing on a common delegation *D*, there is a probability that *A*'s judgment (or that of *A*<sub>1</sub>, *A*<sub>2</sub>, *et al.*) on what *D* permits or requires will differ from *S*'s judgment. However, that *A* should be free to execute *D* independent of *S*: (1) bears no necessary relationship to the content of *D*; and (2) is of its own normative significance—perhaps of greater significance than *D*'s correct execution. Call these relationships and probabilities the circumstances of administration.

Three points begin from there. First, agency rules grounded in supervisory authority can be “binding” in just the way that law is normally binding. Those governed by supervisory rules can be obliged to follow them. Second, given the circumstances of administration, agency legality today requires such rules notwithstanding the fact that little distinguishes them from rules addressing society at large. These rules function first and foremost as “a standard of conduct for all to whom

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103. See, e.g., *Field v. Clark*, 143 U.S. 649, 692–93 (1892) (describing rulemaking in this way). In making this claim, I use “specification” in the intuitive sense—which has been developed helpfully in Henry S. Richardson, *Specifying Norms as a Way to Resolve Concrete Ethical Problems*, 19 PHIL. & PUB. AFF. 279 (1990). Professor Richardson constructs a model of norm specification bridging the gap between formalistic ideals of strict *application* and pragmatic ideals of normative *balancing*. Richardson, *supra*, at 295–97. Professor Richardson's model provides guidance in Parts IV and V on what constitutes a more specific formulation of a norm as opposed to its amendment and is useful in explaining what I have called the “fit dimension” of agency rules.

104. U.S. CONST. art. II, § 3. This clause has unfortunately merged with the assault on agency independence. See, e.g., Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1209–22 (1992). See generally Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994). Even putting aside the “unitary executive” theory, though, supervisory authority must be grounded differently from the authority to legislate. See generally Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263 (2006); Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV. 539 (2005).

105. Agency supervisory authority is not necessarily grounded in the Constitution's “executive Power.” For example, the Housekeeping Act has long conferred upon agency heads a blanket authority to “prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property.” 5 U.S.C. § 301 (2006). Rules made under the authority of § 301 came under intense scrutiny in *Chrysler Corp. v. Brown*, 441 U.S. 281, 294–316 (1979). But even in Britain where no executive “Power” rivals Parliament's legislative power, constitutionally, supervisory authority has problematized “subordinate legislation” and its force of law much the same as it has in the United States. See generally BALDWIN, *supra* note 69, at 80–111.

106. See *infra* notes 131–35 and accompanying text for a discussion of the nature of legal norms as reasons for action.

[their] terms apply.”<sup>107</sup> Yet, especially as agencies are increasingly networked with the society they govern, interested parties are finding these rules and following them too.<sup>108</sup> Indeed, their functions are expanding even as the most visible institution sorting out our legal authorities is itself bound in *its* capacity to interpret and apply administrative rules. Federal courts, of course, have authority to judge the sources of law only in some live “case” or “controversy.”<sup>109</sup> Indeed, that fact shapes their very existence.<sup>110</sup> A third point developed in the balance of the argument below is that this institutional reality is causing much of the confusion about “force of law” as a property of agency rules.

For example, if a statute commands that safety in some pursuit be achieved and creates an agency to ensure as much by all necessary rules and regulations, someone must still infer what normative power Congress meant for that agency’s rules to have.<sup>111</sup> Indeed, someone must infer virtually everything that attaches a *sense* to Congress’s directive: cost constraints (if any), the degree of “safety” that should be achieved for whom and by what means, Congress’s grasp of the risks, and so on.<sup>112</sup> Judicial inferences in adjudicated cases may generate precedents and doctrines that, in some sense, attach to the statute, eventually constricting its possible meanings.<sup>113</sup> But, then again, we must infer that Congress wished precedents accumulating in this fashion to have such power.<sup>114</sup> Because Congress only rarely specifies who is empowered as a

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107. *Columbia Broad. Sys., Inc. v. United States*, 316 U.S. 407, 418 (1942). In holding that the FCC’s “Chain Broadcasting Regulations” were subject to judicial review in a “plenary suit in equity”—a suit authorized by the Communications Act and the Urgent Deficiencies Act—the *Columbia Broadcasting* Court confronted rules that governed FCC personnel hearing licensing and relicensing applications. *Id.* at 411, 415, 418. It prefaced its holding by observing that “[m]ost rules of conduct having the force of law are not self-executing but require judicial or administrative action to impose their sanctions with respect to particular individuals.” *Id.* at 418. This dimension of *Columbia Broadcasting* and like cases is still pivotal in scope of review doctrine today and, as Part V argues, operates at the deepest levels of our recognition of agency rules as rules of law.

108. This has often been at the center of controversies over what agency rules are reviewable, worthy of deference, and/or must be enacted. *See, e.g., Cmty. Nutrition Inst. v. Young*, 757 F.2d 354 (D.C. Cir. 1985), *rev’d*, 476 U.S. 974 (1986).

109. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 547 (1991) (Blackmun, J., concurring).

110. *See generally* Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1 (1998); Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321 (2000). *See infra* note 189 and accompanying text for a discussion of constraints on statutory review.

111. That someone may or may not be a judge. *Cf. Merrill & Watts, supra* note 41, at 591 (“While courts continue to incant the principle that agencies have no inherent authority to act with the force of law, in practice courts have enabled every agency with a general grant of rulemaking authority to decide in its discretion whether to act with the force of law.”).

112. *See, e.g., Indus. Union Dep’t v. Am. Petroleum Inst.*, 448 U.S. 607, 614–15 (1980).

113. *See, e.g., Neal v. United States*, 516 U.S. 284, 293–96 (1996) (holding that Court’s interpretation of statutory term trumped agency’s construction and was effectively part of statute’s meaning until amended by Congress); *cf. Duffy, supra* note 54, at 152 (“When statutory provisions are broadly worded with equivocal language, the cases interpreting those provisions will exhibit a high degree of judicial policymaking and may ‘look, smell, and taste like common law decisions.’” (quoting Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An “Institutionalist” Perspective*, 83 NW. U. L. REV. 761, 789 (1989))).

114. *See* ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 225 (2006).

result of its intransitive legislation, its interpreters are often left in a quandary. The courts of appeal now routinely struggle to sort out the types of rulemaking that may be done only through notice and comment;<sup>115</sup> the Supreme Court works feverishly to sort out which rules deserve “binding” deference;<sup>116</sup> and all federal courts strain to sort out the rules that are “ripe” enough for review at all.<sup>117</sup> Given our structure and traditions, though, how agency process *matters* along these axes is becoming deeply mysterious. Parts IV and V show why this nexus is the principal confusion in administrative law today and why that confusion is only being deepened by notice and comment’s growing jurisprudence. Part III provides a few needed points about the force of law first, though.

### III. LEGAL AUTHORITY AND THE PRIMACY OF REASONS

We identify formal process with legality because we think of law as having content that may change only by the authoritative declaration of new law *or* its exemplary application.<sup>118</sup> Our trouble is the excluded middle. Yet, there is no pretheoretical difference between the authoritative declaration of a norm and its application. Persons or institutions with authority to declare norms and to apply them to present particulars may be the most prominent actors and acts of legal systems currently in being.<sup>119</sup> But this Part gives a functional account of that foundation and draws on contemporary philosophy of law to isolate and complicate it. Parts IV and V argue that, if not crumbling and failing completely, this foundation has taken on an altogether different meaning in a world where making law has become a constant cascade of interpretation by and through administrative agencies.

#### A. *Rules as Guidance*

The essences of political authority and of law are difficult and interrelated ontological inquiries.<sup>120</sup> H.L.A. Hart, in critiquing the work of Bentham, Austin, and other so-called positivists, proposed to undertake these inquiries by identifying the existence of “law” with the existence of rule-guided behavior.<sup>121</sup> Hart began from an old paradox: if authority stems from law and law from authority, where can the regression end? It is logically possible to state a series of values from which legal authority supposedly derives and in pursuit of which it develops.<sup>122</sup> But Hart viewed law as importantly separated from pure values: “According to Hart’s solution, the

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115. See generally Anthony, *supra* note 65.

116. See generally Murphy, *supra* note 23.

117. See STRAUSS, *supra* note 43, at 328–30; Duffy, *supra* note 54, at 166–81.

118. See, e.g., HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 619–28 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

119. See, e.g., H.L.A. HART, *THE CONCEPT OF LAW*, 49–76 (2d ed. 1994).

120. See Neil MacCormick, *On ‘Open Texture’ in Law*, in *CONTROVERSIES ABOUT LAW’S ONTOLOGY* 72 (Paul Amsselek & Neil MacCormick eds., 1991).

121. HART, *supra* note 119, at 50–61.

122. See, e.g., LON L. FULLER, *THE MORALITY OF LAW* (rev. ed. 1969). It becomes more complicated if one tries to make the values seem universal or beyond reasonable disagreement. See, e.g., JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 59–90 (1980).

foundation of all legal authority is social practice. The norms that create legal authority are themselves created by the fact that certain members of the group are guided by a rule that treats these norms as authoritative.”<sup>123</sup> This, of course, means that authoritative law can arise *ex nihilo*, as members who are “guided” by a rule eventually transform it into one that “governs” as well. The solution was still attractive to the positivist, however, because it justified law without recourse to its content.<sup>124</sup>

Private motivations behind group members’ behaviors causing them to pattern up into a social practice of rule guidedness were central to Hart’s account of legal authority. But he left the *content* of these attitudes unstated.<sup>125</sup> Subsequent positivists developed Hart’s insights in subtle yet sometimes contradictory ways. Hart had observed that authoritative law in complex, heterogeneous societies consisted in the union of two kinds of rules, primary and secondary. The primary rules defined rights, duties, privileges, immunities, *i.e.*, obligations arising out of one’s membership and behavior in society.<sup>126</sup> The secondary rules were rules authorizing legal *agents*—most especially, the rules that officials were obliged to apply and follow when changing primary rules.<sup>127</sup> Chief among these secondary rules was something Hart called a “rule of recognition,” a norm whose very existence consisted in social practice—the society’s conventions of deference to its institutions. This rule of recognition was not necessarily a determinate, criteria-based test;<sup>128</sup> it was more like a pedigree.<sup>129</sup> Thus, Hart’s rule of recognition had a distinctly social, that is, a *non-normative*, character. This became known as the “sources” thesis and it, along with his account of discretion, is what still interests positivists in Hart today—perhaps because they provoked such searing and sustained critique of his work.<sup>130</sup>

123. Scott J. Shapiro, *On Hart’s Way Out*, in HART’S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO *THE CONCEPT OF LAW* 149, 154 (Jules Coleman ed., 2001).

124. It was intriguing to everyone else because it did so without reducing law’s authority to brute force, as Kelsen and many other positivists had done.

125. It is possible to give a game-theoretic account of the emergence of Hart’s social norms as so many Nash equilibriums. See Frank Lovett, *A Positivist Account of the Rule of Law*, 27 *LAW & SOC. INQUIRY* 41, 44 (2002). Because some Nash equilibriums are not social norms and not all social norms are Nash equilibriums, however, the relationships between the two are contingent. *Id.* at 45–46.

126. Primary rules could, it bears mentioning, be expressed either by “authoritative example (precedent)” or by “authoritative general language (legislation).” HART, *supra* note 119, at 123.

127. *Id.* at 94. For example, a statute can rearrange A’s and B’s rights, but only if the “rules of change” are followed. *Id.* at 93. “The simplest form of such a rule is that which empowers an individual or body of persons to introduce new primary rules . . . and to eliminate old rules.” *Id.*

128. *Id.* at 95.

129. Ronald Dworkin dubbed Hart’s sources thesis a matter of “pedigree.” RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 17 (1977). But it was Coleman who rightly pointed out that Hart’s rule of recognition was ambiguous. It had

both an epistemic and a semantic sense. In one sense, the rule of recognition is a standard which one can use to identify, validate, or discover a community’s law. In another sense, the rule of recognition specifies the conditions a norm must satisfy to constitute part of a community’s law.

Jules L. Coleman, *Negative and Positive Positivism*, 11 *J. LEGAL STUDS.* 139, 141 (1982). If Hart ever took the semantic project seriously (which there is good reason to doubt), it seems that only Dworkin still does.

130. Hart was not the only positivist to map the logical structure of a legal norm. See Frederick Schauer, *(Re)Taking Hart*, 119 *HARV. L. REV.* 852, 870 n.63 (2006) (reviewing NICOLA LACEY, *A LIFE OF H.L.A. HART: THE NIGHTMARE AND THE NOBLE DREAM* (2004)) (discussing Kelsen’s work among others). But Hart’s

B. *Rules (and Sources) as Reasons*

Deriving fully specified legal norms from this nexus of authority and law—or even explaining their intersection in fuller detail—proved rather problematic. Hart’s sources thesis maintained that the authority of law, and thus the authority of legal norms, is content-independent. But if it is ultimately just the sources of law that count in judging its force, then law’s relationships to truth, justice, and the good appear deeply contingent, if not purely accidental. This is where Joseph Raz’s account of authority, the most successful account following Hart’s lead, picked things up. Building from a deeper theory of reasons for action, Raz argued that legal norms are best viewed as a kind of reason for action.<sup>131</sup> Reasons for action may and often do conflict, but they are cumulative by nature (we either act or do not). People act, as necessary and as permitted, on the balance of reasons.<sup>132</sup> What Raz argued separated authoritative legal rules as a kind of reason was their nature as exclusionary or protected reasons—reasons “to refrain from acting for some [other] reason.”<sup>133</sup>

If  $p$  is a reason for  $x$  to  $\emptyset$  and  $q$  is an exclusionary reason for him not to act on  $p$  then  $p$  and  $q$  are not strictly conflicting reasons.  $q$  is not a reason for not  $\emptyset$ -ing. It is a reason for not  $\emptyset$ -ing for the reason that  $p$ . The conflict between  $p$  and  $q$  is a conflict between a first-order reason and a second-order exclusionary reason.<sup>134</sup>

Raz and Hart disagreed on whether legal rules were preemptive or peremptory in nature, *i.e.*, whether they just constricted the scope of  $x$ ’s deliberation or foreclosed it.<sup>135</sup> But they were in accord that the fact of a rule’s source and existence—something about the rule and not its content—made the rule a rule of law. It was just this aspect of positivism that Dworkin (and others) attacked so assiduously and to which we will turn in a moment.

Notice, though, that recasting legal rules as second-order, protected sorts of *reasons* kept legal reasoning multidimensional—something the sources thesis had seemed to rule out. An exclusionary reason preempts only within a finite time and space. Now Raz also sought to ground law’s authority while denying it is reducible to coercive force and denying that its normativity depends on its content. But he did so by

account was elegant in its refinement of this structure and in using it to explain the normativity of law in complex, heterogeneous societies. *Id.* at 871; see also FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 169–71 (1991) (drawing similar distinction between “jurisdictional” and “substantive” rules).

131. See generally JOSEPH RAZ, PRACTICAL REASON AND NORMS (1999).

132. See *id.* at 25–26. The comparability or commensurability of reasons is where any wider theory of practical reason encounters its real difficulties. See John Gardner & Timothy Macklem, *Reasons*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 440, 471 (Jules Coleman & Scott Shapiro eds., 2002). I leave that problem aside for now.

133. RAZ, *supra* note 131, at 39. The force of all logical reasons may be grounded finally in tacit knowledge of valid inferences. See Pascal Engel, *Logical Reasons*, 8 PHIL. EXPLORATIONS 21, 33–34 (2005). But I do not take that possibility to commit one to any particular theory of psychology or rationality.

134. RAZ, *supra* note 131, at 40; see also Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 537 (1988) (“Rules *block* consideration of the full array of reasons that bear upon a particular decision . . .”).

135. The unending struggle over the structure of rights and whether judicially enforceable rights may be reduced to prohibitions of unauthorized rules is, in my view, downstream of the present inquiry. See, *e.g.*, Adler, *supra* note 110, at 157–58.

merging rules and sources into reasons and showing how rules of law can have weights assigned by their contents, even for those who accept the sources thesis. Raz argued, similar to Hart's notion of an "internal point of view,"<sup>136</sup> that the balance of reasons for those having legal authority, logically, can only be affected by and explicated in the valid and applicable legal norms because officials, *by virtue of their office*, must observe all extant "exclusionary reasons for disregarding those conflicting reasons which they exclude."<sup>137</sup> To not do so is, in essence, self-contradicting. As Coleman noted,

the theory of legal authority Raz has proposed . . . entails a certain metaphysical claim about the nature of law: a constraint on the kind of thing law must be. Stated precisely, law must be the sort of thing that in principle is capable of having its identity and content determined without recourse to moral argument, because, otherwise, law could not mediate between persons and reasons in the appropriate way.<sup>138</sup>

Law in this light is a kind of collective surrogate. "The worry," put simply, "is that if one has to inquire into what the law should be in order to determine what the law is, the law would be incapable of being an authority."<sup>139</sup> According to this sort of inductive functionalism, law's remove from morality and its preemptive/peremptory character are both its utility and its normativity all at once.<sup>140</sup> The provision of authoritative guidance is law's chief function and so "[e]ven if law does not always

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136. Coleman offers a significant account of the "internal point of view" which I consider below. See JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE* 77–102 (2001). Hart defined it by contrasting it to an *external* point of view that was still common when he wrote, arguing that a *participant* in a practice was not confined when comprehending it to talk only of "observable regularities of behavior." HART, *supra* note 119, at 90. The participant, rather, could view a practice's norms from the inside as reasons for action. *Id.*

137. RAZ, *supra* note 131, at 171. Raz followed up this account of law's normativity by arguing that the normal way to establish that a person has authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him . . . if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly.

JOSEPH RAZ, *THE MORALITY OF FREEDOM* 53 (1986). This epistemic, "normal justification" of practical authority levels legal reasons with other kinds of reasons, including moral and ethical reasons. It allows that people may, on occasion, act reasonably but still contrary to law. There is, to be clear, latent uncertainty over how well Raz succeeded in explaining law's normativity in this way. Cf. Heidi M. Hurd, *Interpreting Authorities*, in *LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY* 405 (Andrei Marmor ed., 1995) (critiquing Raz's account by pointing out that the only way someone is legally justified in acting as they do is if someone else directs them to so act).

138. COLEMAN, *supra* note 136, at 127. The "appropriate" mediating role law plays between persons and reasons is *epistemic* in the sense that, to be a legal rule capable of guiding conduct just is to be from a social source of some kind. Where contemporary positivism begins to fracture is over how consistent the separation of law and morality must be to sustain the basic theory. Cf. *id.* at 123–24 & n.39 (describing several possible formulations of this "separability thesis").

139. Jules Coleman, *Incorporationism, Conventionality, and the Practical Difference Thesis*, in HART'S POSTSCRIPT, *supra* note 123, at 99, 136. "More generally, if one has to inquire into the dependent reasons the law purports to replace or pre-empt in order to determine what the law is, then the law cannot serve its mediating role." *Id.*

140. See Shapiro, *supra* note 123, at 169–91. This bears a resemblance to Rawls's notion of rule utility as a rival of act utility. See John Rawls, *Two Concepts of Rules*, in JOHN RAWLS: COLLECTED PAPERS 20 (Samuel Freeman ed., 1999).

make a practical difference [to decision-making], it must in principle be capable of making a difference.”<sup>141</sup> Law’s function and authority rest on its capacity to guide, and its capacity to guide—to provide reasons for action—derives from its sources.<sup>142</sup>

Raz’s (like Hart’s) is a belief-driven account of law’s authority. Structurally, it rests on the group members’ subjective and intersubjective beliefs that lead them to defer.<sup>143</sup> In it, citizens need not necessarily internalize the laws defining their rights and obligations. But by the best synthesis of Hart and his successors, it is necessary that those having legal authority view their society’s rules of recognition from within Hart’s “internal point of view.”<sup>144</sup> Coleman has observed that Hart’s internal point of view “should not be understood as a belief of any sort, but, rather, as the exercise of a basic and important psychological capacity of human beings to adopt a practice or pattern of behavior as a norm.”<sup>145</sup> The particular group whose practices they adopt can be a tricky question of identity.<sup>146</sup> But the simpler point here is that Hart, Raz, and most other positivists ultimately base their accounts of law on inscrutable attitudes toward normative authority,<sup>147</sup> each with their own social theory deriving norm governance,

141. Shapiro, *supra* note 123, at 146; *see also* HART, *supra* note 119, at 100–10; RAZ, *supra* note 131, at 177.

142. Coleman and some others maintain that it is not necessary for every law’s authority to be content independent for law *in general* to serve its guidance function. *See, e.g.*, COLEMAN, *supra* note 136, at 99. I leave this struggle aside as an empirical question. *See* Brian Leiter, *Positivism, Formalism, Realism*, 99 COLUM. L. REV. 1138, 1162–63 (1999) (book review).

143. Such beliefs depend importantly upon different theories of agency—theories that are distinguishable by the institutions to which the group defers. *See generally* JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999) (analyzing and justifying such deference to legislatures).

144. *See* COLEMAN, *supra* note 136, at 76 (“Acceptance of the rule of recognition from the internal point of view by officials is a conceptual requirement of the possibility of law . . .”).

145. *Id.* at 88.

[T]here may be no further *philosophical* explanation of the grounds or source of this capacity. Its existence is to be explained in some other way—causally, sociologically, biologically, or, more broadly, by invoking an evolutionary argument that identifies the adaptive value of such a capacity (for example, its usefulness to individuals in enabling them to undertake projects and to secure the gains of coordinative activity).

*Id.* at 89. There may be further *causal* explanations, that is. *See generally* BRIAN LEITER, *NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY* (2007).

146. *See* HART, *supra* note 119, at 213–37. Reasons for action may be “facts rather than beliefs.” Gardner & Macklem, *supra* note 132, at 445. But the plurality of cultures and of human experiences means that reason probably sits on an irremediably shifty grounding. *See generally* ROBERT AUDI, *THE ARCHITECTURE OF REASON: THE STRUCTURE AND SUBSTANCE OF RATIONALITY* (2001).

147. A qualification is needed for Professor Schauer. Schauer argues that positivism is the philosophy of law identifying it with rule-based decision making and that “the essence of rule-based decision-making lies in the way that rules, as generalizations, suppress differences that in the circumstances of application *are then relevant*.” SCHAUER, *supra* note 130, at 136. “Rules . . . speak to *types* and not to particulars. Unless we mean to describe for multiple instances or prescribe for multiple actions it is simply mistaken to use the word ‘rule.’” *Id.* at 18. The entrenchment of generalizations is what “enables a rule to resist the impetus to modify in the face of recalcitrant experiences.” *Id.* at 62. The unavoidable imprecision of generalizations—uses of language that become entrenched in rules as such—draws Schauer’s attention to the relationship between rules and their underlying justifications, principally as linguistic phenomena.

When rule-based decision-making prevails, what increases is the incidence of cases in which relevantly different cases are treated similarly, and not the incidence of cases in which like cases are treated alike. . . . [I]f cases are actually alike under a substantive theory of decision, we do not need

more or less, from human proclivities toward norm guidedness.<sup>148</sup> A group's regard for an institution as possessing authority invests that institution with its authority.<sup>149</sup> And once they are possessed of authority, human institutions can create laws that govern subjects even though these laws do not necessarily always guide those subjects.

C. *The Law As Applied: What Are Legal Obligations?*

This all has serious troubles in practice, though. Appellate judges often decide in ways not strictly governed by rules, authoring opinions that are no less valid for it.<sup>150</sup> They employ ad hoc means to reconcile different rules on point that seem to conflict.<sup>151</sup> But if such means have no identifiable source, it is hard to argue that judging is about the pedigree of legal rules.<sup>152</sup> It has long been allowed that something in the act of applying norms entails a certain ingenuity, if not creativity.<sup>153</sup> Determining the extension and force of normative rules is the sort of act that has always complicated modern positivism, more so in the era of analytic philosophy.<sup>154</sup> But it runs deeper than this. For, even with rules of recognition that most officials follow most of the time, it remains unclear how such rules create obligations for *all* officials. "As Hart famously argued, in many high-level controversies we must see judicial behaviour as *extending* the rule of recognition, not applying it. In these completely unregulated cases, 'all that succeeds is success.'"<sup>155</sup> Can that sort of rule create an obligation? If so, it is unclear exactly how.

The only serious argument that vague rules of recognition can be duty-creating rules for all officials is the account of judging as a "shared cooperative activity," and it is, at best, incomplete.<sup>156</sup> Coleman and Shapiro, in arguing that conventional practices

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rules to treat them similarly. And if cases are unlike under a substantive theory of decision, then not only do we not need rules to treat them as unlike, but the existence of rules may prevent us from doing so.

*Id.* at 137.

148. See Shapiro, *supra* note 123, at 153–58. As Shapiro correctly pointed out, Hart understood a "rule" (as do most positivists, popular caricatures notwithstanding) to be "any normative standard that is capable of guiding conduct." *Id.* at 163. Unless otherwise specified, that is the sense of "rule" used in the balance of this paper.

149. See Scott J. Shapiro, *Authority*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW, *supra* note 132, at 382, 423. Raz explored some possible motivations at the psychological level: reputational loss, being Holmes's "bad man," etc. See RAZ, *supra* note 131, at 154–62.

150. See generally DWORKIN, *supra* note 129.

151. *Id.* at 40.

152. See, e.g., Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 563–67 (2006) (describing hardest category of cases in post-*Erie* world as those where federal law "borrows" local law without any jurisdictional explanation for doing so).

153. See Richardson, *supra* note 103, at 286–90.

154. Dworkin began his attack here shortly after *The Concept of Law* was finished. See generally Ronald Dworkin, *Judicial Discretion*, 60 J. PHIL. 624 (1963). Dworkin's first essay was arguably a preview of his whole challenge to positivism, including his position that interpretation is the core of legality. Surely, though, as even Dworkin conceded, one of Hart's major advances was his careful account of the logical structure of legal validity, and it is this aspect of Hart's corpus to which I return below in Parts IV and V.

155. Shapiro, *supra* note 123, at 168 (emphasis added) (quoting HART, *supra* note 119, at 153).

156. COLEMAN, *supra* note 136, at 96–101.

can be normative, draw upon the philosopher Michael Bratman's work to show that officials' practices of evaluating conduct by resort to rules that satisfy a rule of recognition are an example of "shared cooperative activity"<sup>157</sup> and that shared cooperative activities create duties because, as joint endeavors, they induce mutual reliance and commitment.<sup>158</sup> "The best explanation of judges' responsiveness to one another is their commitment to the goal of making possible the existence of a durable legal practice (though judges may have different reasons for thinking that a durable, sustained legal practice is desirable)."<sup>159</sup> This may be the best account of duty-creating rules of recognition—but it leaves a lot to be desired.

First of all, inducing reliance is hardly the unalloyed index of obligation Coleman seems to think it is. More importantly, judges are hardly the only officials for whom these obligations are both critical and uncertain. Take the following of precedent. If the rule of recognition should resolve anything, it is how precedent ought to be followed. But in case the complexities of distinguishing holdings from dicta were not enough,<sup>160</sup> it must be objected that the very function of precedent is a live question in our legal system. It will not resolve Coleman's troubles to say that precedent can be binding such that obligations to follow it are conceivable. Positivists who view law's function as guiding conduct must be able to tell what those obligations *are*, at least roughly. Yet, whether it is weighing the retroactivity of precedent,<sup>161</sup> the fact that no two persons or events are ever exactly alike,<sup>162</sup> or the force of unreported precedent,<sup>163</sup> this core element of our rule of recognition is entrenched in deep conflict. What sort of obligation is the obligation to follow precedent if it is so cancelable, contingent, and subject to interpretation?<sup>164</sup> We often tailor this question to lower or higher courts, but what about administrative officials? Is the administrator obliged to interpret her statute

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157. *Id.* at 96.

158. *Id.* at 96–99. Bratman's conception of "shared cooperative activity" or "SCA" is elegantly built from a trio of basic existence conditions: (1) mutual responsiveness; (2) commitment to the joint activity; and (3) commitment to mutual support. Michael E. Bratman, *Shared Cooperative Activity*, 101 PHIL. REV. 327, 328–40 (1992). But Bratman acknowledges that the emergence of such interdependent intentions and plans can produce SCAs of a limited sort. "A joint activity can be cooperative down to a certain level and yet competitive beyond that." *Id.* at 340. Coleman has never, to my knowledge, explained why officials ought not to engage in SCA's of a limited sort, only to change plans in order to achieve (noncooperative) different objectives they view as paramount to their office(s).

159. COLEMAN, *supra* note 136, at 97.

160. See generally Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997 (1994).

161. Compare *Linkletter v. Walker*, 381 U.S. 618, 629 (1965) (adopting balancing test for determining when new rule of constitutional procedure will be applied retroactively to reopen settled cases), *overruled by* *Danforth v. Minnesota*, 552 U.S. 264 (2008), with *United States v. Johnson*, 457 U.S. 537, 549–51 (1982) (setting out several rules on when and when not to apply new rule of constitutional procedure retroactively).

162. Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923, 931–33 (1996).

163. See Lauren Robel, *The Practice of Precedent: Anastasoff, Noncitation Rules, and the Meaning of Precedent in an Interpretive Community*, 35 IND. L. REV. 399, 411–14 (2002) (discussing *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000), where three-judge panel invalidated court of appeals's noncitation rule as inconsistent with Article III but was later reversed en banc).

164. See, e.g., Christopher J. Peters, *Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis*, 105 YALE L.J. 2031 (1996).

by following the judicial precedents applying the statute?<sup>165</sup> If so, it is an obligation of a very special sort—not one created by any identifiable legal rule.<sup>166</sup> Precedent is so familiar and yet so nebulous that plausible analogies have been constructed between agency “interpretations” and judicial precedent in an effort to *simplify* contemporary administrative law.<sup>167</sup> Loose analogies too often fail to simplify, though.

In truth, precedent has been a convenience in our tradition for so long that we rarely stop to notice how obscure its internal authoritative structure has grown. Of course, we have long understood its role in judicial lawmaking.<sup>168</sup> We are beginning to agree on how precedent and slipshod analogical reasoning combine to make our law into the disorder it so often is.<sup>169</sup> Yet, what Lord Hale once idolized as *lex non scripta* is itself increasingly a subject of obviously textual analysis,<sup>170</sup> usually in efforts to avoid precedent.<sup>171</sup> Following precedent affirms and then exemplifies the pull of reasoned judgments—but only until it deprives today’s court of its due independence of judgment.<sup>172</sup> Finding the right balance between the two may be the essence of judging. It is just not a particularly conspicuous or well-understood essence.

One response to all of this might be that precedent is an essentially contested concept.<sup>173</sup> But that just obscures whatever obligations it does or does not create and is

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165. Compare *BPS Guard Servs., Inc. v. NLRB*, 942 F.2d 519, 524 (8th Cir. 1991) (holding yes), with *NLRB v. Viola Indus.-Elevator Div., Inc.*, 979 F.2d 1384, 1392 (10th Cir. 1992) (holding no). See generally Kenneth A. Bamberger, *Provisional Precedent: Protecting Flexibility in Administrative Policymaking*, 77 N.Y.U. L. REV. 1272 (2002).

A “Midas Touch” conception of judicial precedent (whatever a court reaches is incorporated into positive law) permits the judiciary to commandeer the discretion delegated to agencies at the expense of the recognized intent of Congress. In so doing, it seriously undermines the principal goals underlying the delegation of authority to agencies: the development of coherent, responsible, national policy guided by administrative expertise and political responsiveness. Bamberger, *supra*, at 1320.

166. See, e.g., *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

167. See, e.g., Merrill, *supra* note 82, at 1005–10, 1013–25 (analyzing modern scope of review doctrine and suggesting that model treating agency interpretations of law as analogous to precedents would be more coherent than current doctrine); Strauss, *supra* note 76 (arguing that 5 U.S.C. § 552(a)(2) justifies a court’s treatment of all rules, whether done by notice and comment or not, as “precedent” so long as they are published in the *Federal Register*). Such analogies are probably insufficiently warranted, Brewer, *supra* note 162, at 978–83, but that is a separate question I consider below. See *infra* note 284 and accompanying text for further discussion of whether such analogies are sufficiently warranted.

168. See, e.g., BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 124–41 (1921).

169. This is a point Schauer has long argued. See, e.g., Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883 (2006); see also VERMEULE, *supra* note 114, at 63–67, 86–117; cf. Brewer, *supra* note 162, at 933 (“[R]elevance, like similarity, has proven tenaciously resistant to conceptual explication as part of an explanation of the logical force of arguments, exemplary or otherwise, and even accounts that make judgments of relevant similarity and difference central to analogical argument leave the role and operation of those judgments largely mysterious and unanalyzed.” (footnote omitted)).

170. See Peter M. Tiersma, *The Textualization of Precedent*, 82 NOTRE DAME L. REV. 1187, 1243–48 (2007).

171. See, e.g., VERMEULE, *supra* note 114, at 130–31.

172. See David Lyons, *Formal Justice and Judicial Precedent*, 38 VAND. L. REV. 495, 511 (1985).

173. Cf. Andrei Marmor, *Should Like Cases Be Treated Alike?*, 11 LEGAL THEORY 27, 33, 36–38 (2005) (distinguishing the roles of precedent, analogy, and the extension of underlying reasons and questioning the value of precedent in and of itself).

unhelpful if we are serious about duty-creating rules of recognition for all officials. Just the fact that precedent so seldom preempts present reasoning complicates severely any claim that our officials are obliged to follow precedent because some rule says they are. Part IV elaborates on this sort of legal rule's place in a disaggregated bureaucratic state, but its principal aim is to apply Part III's account of exclusionary reasons to agency rulemaking.

#### IV. DEFERENCE AS FORCE IN THE JUDICIAL RECOGNITION OF AGENCY LAWMAKING

Courts, of course, recognize agency rules through the lenses of their own doctrines which are, in turn, a product of their particular institutional circumstances (i.e., adjudication). In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,<sup>174</sup> the Supreme Court authored what became, at least for a time, one of its broadest default rules ever. It held that courts must engage in a two-step inquiry when reviewing agency "interpretations" of the statutes they administer. A reviewing court must (1) determine if Congress has spoken definitively to the precise question at issue;<sup>175</sup> and (2) if not, determine whether the agency's interpretation of the law is based upon a "permissible" or "reasonable" construction of the statute.<sup>176</sup> *Chevron* became a very stubborn default, a filtering rule that purported to simplify an incredibly complex tradition down to the confines of a single doctrinal construction. *Chevron* deference today might even be viewed as a kind of rule of recognition,<sup>177</sup> illustrating a basic point about the sources thesis in the modern state. Part IV argues that *Chevron*'s concept of review is about identifying law and that doctrines of the kind reveal much more about legality today than is usually thought. Yet the way *Chevron* has functioned as precedent illustrates something deeper in the structure of agency lawmaking. Contrary to conventional wisdom, "force of law" is normally recognized by first identifying the precise institutional settings in which legal agents find themselves embedded.

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174. 467 U.S. 837 (1984).

175. *Chevron*, 467 U.S. at 842–43 ("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.").

176. *Id.* at 843–44. The Court's opinion famously interchanges "permissible" and "reasonable" even though these terms can mean very different things within the test. Even ignoring that (textual) issue, though, what rule *Chevron* actually stands for is still an open question. See, e.g., Note, *The Two Faces of Chevron*, 120 HARV. L. REV. 1562, 1563 (2007) (observing that lower courts have applied *Chevron*'s test by grounding it in agency expertise while the Supreme Court has grounded it in concerns for political accountability); cf. Eskridge & Baer, *supra* note 40, at 1157 ("[T]he Supreme Court's deference jurisprudence is a mess. . . . but (except for Justice Scalia) [most of the Justices] are not deeply troubled by it."). For example, many have taken the sequence of *Chevron*'s two steps quite seriously—much more seriously, it turns out, than the Court itself. See, e.g., *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 89–93 (2007) (applying *Chevron* two-step in reverse order).

177. The degree or strength of deference typified by *Chevron* is usually contrasted with the "independent judgment" that supposedly inheres in review according to *Skidmore* and *Christensen*. See Anthony, *supra* note 82, at 6–7; Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 552–67 (1985); Merrill, *supra* note 82, at 971 & n.6.

A. *Adjudicating Recognition*

*Chevron* is known for affording an agency's interpretation of legislation a degree of deference arguably akin to *obedience*.<sup>178</sup> It is supposed to have constricted what Part II called the "fit dimension" of agency rules in court. Yet it still remains unclear whether this deference was different in kind or just in degree from that of earlier precedents.<sup>179</sup> The *Chevron* opinion in no way linked its deference to the agency *process* under review.<sup>180</sup> And *Chevron* has been followed and emulated so much that it and its cognates have arguably reshaped judicial review of agency action from the ground up.<sup>181</sup> Agency interpretations of agency rules routinely garner the equivalent of *Chevron* obedience today regardless of their format.<sup>182</sup> Taking precedents like *Chevron* at face value would lead one to believe that judicial review has become more rule-governed. But does one who is following a precedent like *Chevron* ever really ignore its underlying sources/reasons and just read *it* as an authoritative, inscriptional text?<sup>183</sup> Is the precise language in *Chevron* obligatory? That sort of regard seems unsuited to the authority of precedent.<sup>184</sup> We might better say that the *sense* in which the Court meant a holding like *Chevron* is a deeply contested question of law that, by its nature, can only be resolved one application at a time.

Indeed, note that, like rule following more generally, following precedent normally entails having the capacity (if not always the authority) to further specify and

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178. See, e.g., STRAUSS, *supra* note 43, at 371 & n.104 (contrasting "weight" with "obedience" and linking *Chevron* deference to the latter); Anthony, *supra* note 82, at 31–40 (same).

179. See, e.g., Eskridge & Baer, *supra* note 40, at 1156–96 (linking the justifications and rules within different deference doctrines at a structural level); Murphy, *supra* note 23, at 1037 (contrasting *Chevron* as "strong" with earlier "weak" forms of deference). Recall that in *Skidmore v. Swift & Co.*, the Court observed that the judiciary had "long given considerable and in some cases decisive weight" to agency interpretations of enabling legislation. 323 U.S. 134, 140 (1944). Both *Skidmore* and *Chevron*, though, clearly differ in kind from the utter lack of recognition once afforded subordinate legislation. See, e.g., *United States v. United Verde Copper Co.*, 196 U.S. 207, 215 (1905) (denying that agency may "abridge or enlarge" statute's scope "at will" by promulgating rules defining its terms because "[s]uch power is not regulation, it is legislation").

180. The Court reaffirmed the point in *United States v. Mead Corp.*, 533 U.S. 218, 236 (2001) and *Barnhart v. Walton*, 535 U.S. 212, 222 (2002). However it has also, through those and like cases, complicated *Chevron*'s scope and function as a default rule. See Murphy, *supra* note 23, at 1037.

181. Cf. Anthony, *supra* note 82, at 3 n.4, 26 (arguing that the application of *Chevron* should be deemed a court's "acceptance" of agency output, not its deference thereto); Manning, *supra* note 9, at 621–22 (describing *Chevron* as the provision of "binding" deference).

182. See, e.g., *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994); *Pub. Citizen v. Carlin*, 184 F.3d 900, 911 (D.C. Cir. 1999); *Nat'l Wildlife Fed'n v. Browner*, 127 F.3d 1126, 1129–30 (D.C. Cir. 1997). This is not, however, to say that *as a rule* "interpretative rules" receive such deference. See, e.g., *Gonzales v. Oregon*, 546 U.S. 243, 275 (2006).

183. Cf. RAZ, *supra* note 137, at 58 ("When considering the weight or strength of the reasons for an action, the reasons for the rule cannot be added to the rule itself as additional reasons. We must count one or the other but not both.").

184. See MELVIN ARON EISENBERG, *THE NATURE OF THE COMMON LAW* 146–61 (1988) (distinguishing common law authority from "text-based" theories of law); SCHAUER, *supra* note 130, at 177–79 (same); Brewer, *supra* note 162, at 965 (arguing that the central feature of argument by analogy and, thus, the rational force of arguments from precedent, is that there is a "sufficient warrant to believe that the presence in an 'analogized' item of some particular characteristic or characteristics allows one to infer the presence in that item of some particular other characteristic").

extend it.<sup>185</sup> The agent must be able to elaborate the precedent appropriately. Now, the preset institutional structure of courts normally meets this necessity when precedent is being followed by judges. In working out *Chevron's* domain, the lower courts do so only in particular cases and controversies with parties who are always partial to certain relatively definite outcomes. Most of the time, the courts afford specific relief to known agents and give reasons tailored to those agents and outcomes which are normally jurisdictionally confined within a certain district or territory. Moreover, lower courts are directly accountable in *how* they elaborate a precedent such as *Chevron*, most especially in how they weigh various factors of choice; they are subject to review case by case. What they do with *Chevron* is necessarily embedded in a *governed* context. Of course, when the Supreme Court itself acts on *Chevron* it is probably as much about the Court as anything else because the Court is essentially self-governed.<sup>186</sup> It either does or does not observe its own constraint on choice and the “only thing that succeeds is success.”<sup>187</sup> But to whatever extent precedents like *Chevron* are rules that constrain choice and guide conduct, they are so only to the extent they are followed, and who is applying them with what authority measures that as much as anything else can.<sup>188</sup>

So, in principle, even strong deference is reconcilable with the functional account of legal authority given above because it almost certainly consists of intuitive reason balancing.<sup>189</sup> Anything with weight can be outweighed.<sup>190</sup> Presumably, then, even subordinate legislation is never entirely “binding” in court because conflicts with higher law can always arise and thereby exclude the reasons the agency rules represent.<sup>191</sup> Given the structure of adjudication, though, claims of right can occasion

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185. Cf. Brewer, *supra* note 162, at 972–75 (arguing that following an example entails being able to detect what *about* an example is exemplary); Richardson, *supra* note 103, at 297 (“[S]pecification assures as nearly as is possible . . . that the commitments expressed in the initial norm would be honored in the satisfaction of the specified norm.”).

186. Cf. Croley, *supra* note 90, at 122–23 (observing that recent Supreme Court applications of *Chevron* have provided lower courts “minor clues, not reliable guidance” as to its scope); Eskridge & Baer, *supra* note 40, at 1119 (speculating that deference doctrines like *Chevron* are mostly used as signaling devices aimed at the lower courts); Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 838–48 (2001) (tracing the Court's expansion and contraction of *Chevron's* scope).

187. See *supra* note 158 and accompanying text for a discussion of whether rules of recognition create obligations for all officials.

188. See *supra* notes 164–72 and accompanying text for further discussion on the obligation of precedent. Tellingly, Eskridge and Baer found that the single most provable influence on outcomes at the Supreme Court has been the longevity and consistency of the agency's interpretation under challenge. Eskridge & Baer, *supra* note 40, at 1150–51.

189. Statutory review can *always* be precluded and/or delimited. Compare *Webster v. Doe*, 486 U.S. 592, 600 (1988) (finding applicable law provided “no basis” on which a reviewing court could assess agency action), with *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 347–53 (1984) (inferring a statutory bar on review from the “structure” of enabling statute). The “weighing” that comprises statutory review is, thus, innately constrained.

190. See Gardner & Macklem, *supra* note 132, at 466–67.

191. The “fit dimension” of agency rules, in other words, discounts their exclusionary powers in court as a practical matter. See, e.g., *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (plurality opinion) (“In determining whether a challenged regulation is valid, a reviewing court must first determine if the regulation is consistent with the language of the statute.”). In *Batterton v. Francis*, the Court contrasted “administrative interpretations of statutory terms” which it said were “given important but not controlling significance,” with “regulations with legislative effect,” which it said a “reviewing court is not free to set aside . . . simply because

these conflicts pretty routinely. And claims of right (and precedents validating them) remain a source of perennial dispute within the theory of judicial review,<sup>192</sup> highlighting a revealing complication in the judicial review of agency action. While courts invariably disagree about the nature and scope of rights, they cannot as an institution but place challenged agency actions—whether supervisory, legislative, or something else—along the unitary axis I have called “fit.” So as codes like the CFR expand in scope more rapidly than in content, this necessity enables agency interpretations in all their diversity to assume exactly the functions of “law.”<sup>193</sup> So-called “soft law” can thus specify and extend a law’s tangible obligations without revealing the precise grounds of authority behind or beneath it. Indeed, given their relative precision and ease of adjustment, many quite “informal” agency interpretations are actually *better* at guiding behavior than what is enshrined in our codes.<sup>194</sup>

This raises the very real possibility that modern legislation, understood as a source of exclusionary reasons, has given us its own hybrid type of practical reasons—what could be called content-*impartial* reasons.<sup>195</sup> Reasoning should be called content-impartial, and not necessarily content-independent, when it includes institutional generalizations (about, for example, agency interpretations) and any resulting decision involving that reason implies that generalization(s) about the object institution defeated

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it would have interpreted the statute in a different manner.” 432 U.S. 416, 424–25 (1977). As deferential postures go, however, this distinction seems either vanishingly small or entirely misguided: rules and regulations will always be an “interpretation” of *some* legislation, however indirectly. Then again, exceedingly fine gradations and conflation both seem to be the norm with standards of review. See Eskridge & Baer, *supra* note 40, at 1098–1156; Hickman & Krueger, *supra* note 24, at 1275–76 (arguing that *Skidmore* deference is functionally identical to *Chevron* in practice).

192. Compare DWORKIN, *supra* note 129, at xi (“Individual rights are political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals . . .”), with RAZ, *supra* note 137, at 257 (“The most visible fact about constitutional rights is that they are subjected to special institutional treatment. Matters which affect them are taken away from the exclusive control of ordinary legislative and administrative processes and subjected to the jurisdiction of the courts . . .”). Indeed, rights have been rather polarizing as ontological disputes go. See generally Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999).

193. An agent can follow a rule with any number of motives that, for all practical purposes, look like obedience. Compare Davis, *supra* note 10, at 929 (“An agency with power to adjudicate may announce policies or rules it intends to follow; such an announcement often has the practical effect of legislative rules.”), with Anthony, *supra* note 82, at 26 (“Despite persistent judicial talk of weight and degrees of deference, it is wholly clear that the agency interpretation, if found reasonable, must be accepted by the reviewing court.” (footnote omitted)). Whether a rule is obligatory, however, cannot turn on any particular agent’s motives for following it or not.

194. See *infra* notes 269–87 and accompanying text for further discussion of the value and application of agency interpretations.

195. Impartiality in this sense is, as Brian Barry has argued, about excluding “private considerations” such as “personal interests” or “congeniality.” BRIAN BARRY, *JUSTICE AS IMPARTIALITY* 13 (1995). Impartiality, thus, is “dispassionate” yet simultaneously sensitive to evolving notions of relevance. *Id.* at 14–16. Content-*impartial* reasons seem to be at work, for example, when an actor follows a rule just to ensure compliance with another, more squarely governing rule. For example, in *Williams v. United States*, the Supreme Court treated the U.S. Sentencing Commission’s *Guidelines Manual* as a source of such reasons for district courts applying the actual Sentencing Guidelines. 503 U.S. 193, 200–01 (1992).

other, more specific reasons.<sup>196</sup> In such contexts, content might still matter, but in nonstandard ways. As some have argued about scientific expertise, for example, “authority” must often be parceled out to a variety of competing sources, each of whom offers reasons to discount the other(s).<sup>197</sup> Given the institutional incongruities and all the strategic action courts must navigate in reviewing agency work, this kind of irregular deference is now commonplace in the judicial review of agency action.<sup>198</sup> Federal court preemption doctrine is another example of this kind of hybridized, ad hoc content bracketing where the object *institutions* involved have become the focal meaning of the precedents.<sup>199</sup>

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196. Compare SCHAUER, *supra* note 130, at 129 (“Because authority is content-independent, its presence makes a difference only when the subject of the authority disagrees with the content of an authoritative directive.”), with J. Raz, *Reasons for Action, Decisions and Norms*, 84 MIND 481, 489 (1975) (“In most cases a decision results from deliberating on the reasons for or against the action. But a person may decide to perform an action without having first considered the reasons for it, if he has considered some alternative solutions to a practical problem and if the moment the thought of the action occurs to him it appears to him as the appropriate solution to that problem.”).

It seems as though the Supreme Court has transformed the U.S. Sentencing Guidelines into just this sort of authority for the lower courts with its series of cases begun in *United States v. Booker*, 543 U.S. 220 (2005). In *Rita v. United States*, the Court held that an appeals court could presume a sentence “reasonable,” and therefore valid, if the sentence is *consistent* with the Guidelines, even though the Sixth Amendment forbids completely content-independent applications of the Guidelines. 551 U.S. 338, 347–54 (2007); *see also Booker*, 543 U.S. at 261–63. Most recently the Court held that a district court’s departure from the Guidelines could not be overturned solely because of a departure. *Gall v. United States*, 552 U.S. 38, 47 (2007). Thus, following the Guidelines independent of their content is prohibited by the Constitution, but following the Guidelines to the maximum extent permissible under the Constitution seems to be the path most consistent with all governing norms.

197. *See, e.g.*, Scott Brewer, *Scientific Expert Testimony and Intellectual Due Process*, 107 YALE L.J. 1535, 1582–85 (1998).

198. *See, e.g.*, *Gonzales v. Oregon*, 546 U.S. 243, 255–74 (2006) (refusing to defer to Justice Department’s interpretation of Controlled Substances Act and departmental rules in part because of the intrusion upon state authority interpretation would entail); *Miss. Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 373 (1988) (holding that agency authority preempted state jurisdiction over certain utility management decisions after establishing types of decisions at issue and ways in which state jurisdiction was asserted); *McNally v. United States*, 483 U.S. 350, 360–61 (1987) (refusing to grant agency interpretation deference given the potential for strategic action and because of the potential that the precise context involved held for intrusion upon traditional state and local authority), *superseded by statute*, Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181; Eskridge & Baer, *supra* note 40, at 1090 (“[O]ur most striking finding is that in the majority of cases—53.6% of them—the Court does not apply any deference regime at all. Instead, it relies on ad hoc judicial reasoning of the sort that typifies the Court’s methodology in regular statutory interpretation cases.”). And even where it is not “review” of an agency interpretation per se, the Court has lately afforded agencies their deference in increasingly guarded ways. *See generally* Catherine M. Sharkey, *Federalism Accountability: “Agency-Forcing” Measures*, 58 DUKE L.J. 2125 (2009).

199. *See, e.g.*, Thomas W. Merrill, *Preemption in Environmental Law: Formalism, Federalism Theory, and Default Rules*, in FEDERAL PREEMPTION: STATES’ POWERS, NATIONAL INTERESTS 166, 187 (Richard A. Epstein & Michael S. Greve eds., 2007) (stating that “[t]he Supreme Court’s preemption doctrine has few fans. The core defect . . . is that the doctrine is oblivious to the appropriate division of federal and state authority.”). At retail, in short, the object institutions and generalizations by which “competence” or “jurisdiction” may be allocated bring courts into contact with a variety of good reasons to *not* defer. Compare Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 10–39 (2007) (arguing that Congress is structurally biased against supplying clear guidance on the preemptive scope of its statutes and that courts should adopt doctrinal defaults that prompt more clarity from Congress), with Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV.

Combined with their efforts to construct and apply generalized rules, though, our courts confront claims of right and inevitably engage in a kind of institutional mediation. Institutional comity, of course, is not the same thing as authority. And if an agency's authority is felt only upon review, the obligations its rules embody are confined to that plane, too. But enacted rules operate—by definition—beyond discrete controversies,<sup>200</sup> normally with no less authority than is displayed in the adversarial process. And agency interpretations of their rules are equally as ubiquitous and, in many contexts, as authoritative as their enacted rules. This is why supervision and supervisory rules are so critical to understanding real institutions. Consider again the scope of review doctrine. Much of it is actually *judicial* governance.<sup>201</sup> Its rules' extension and force are still fiercely contested.<sup>202</sup> It is unclear, for example, whether *Chevron's* grounds were in any sense constitutional or simply prudential.<sup>203</sup> The obligations it embodies depend on this question, positivists should all agree. Yet, while the Supreme Court seems to have induced the sort of regard for *Chevron* usually reserved for constitutional precedents, the Justices themselves seem to be treating it like a rule of construction.<sup>204</sup> Where they will point *Chevron* next is deeply uncertain,<sup>205</sup> and the way in which precedent ought to enter agency deliberations is assuredly one source of that uncertainty.<sup>206</sup> But, like most rules, *Chevron* is routinely

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449, 454–60 (2008) (critiquing product liability preemption doctrine as insufficiently attuned to its institutional contexts).

200. See *supra* Part II.B for a discussion of rules as reasons for action.

201. Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1126–39 (1987).

202. See, e.g., Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, in ADMINISTRATIVE LAW STORIES, *supra* note 85, at 399, 400 n.4 (“*Chevron* has been cited in over 3,600 articles available on Lexis.”). Merrill also noted that the case had been cited in over 7,000 subsequent cases and predicted it would overtake *Erie v. Tompkins* as the most cited decision in history. *Id.* at 399. *Chevron* nowhere reveals its precise grounds and, in this, is perhaps “one of the best examples of a pure common-law method” in administrative law today. Duffy, *supra* note 54, at 189.

203. Compare *United States v. Mead Corp.*, 533 U.S. 218, 226–27, 237–38 (2001) (observing that *Chevron* was statutory construction), with *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696 (1991) (“Judicial deference to an agency’s interpretation of ambiguous provisions of the statutes it is authorized to implement reflects a sensitivity to the proper roles of the political and judicial branches.”).

204. See Eskridge & Baer, *supra* note 40, at 1120–21; Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 826–27, 835–37 (2006) (analyzing Supreme Court’s application of *Chevron* and finding it is akin to a canon of construction).

205. Compare *Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ.*, 550 U.S. 81, 106 (2007) (Stevens, J., concurring) (“This happens to be a case [where *Chevron* deference was afforded] in which the legislative history is pellucidly clear and the statutory text is difficult to fathom.”), with *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004) (“[T]oday, we neither defer nor settle on any degree of deference because the [agency] is clearly wrong.”).

206. Before *Brand X*, the Court had held on at least three separate occasions that agencies lacked authority to *deviate* from precedents establishing unequivocally the meaning of their statute’s specific provision(s). *E.g.*, *Neal v. United States*, 516 U.S. 284, 287–90 (1996); *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536–38 (1992); *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 130–31, 134–35 (1990). In *Brand X*, however, the Court clarified that “[a] court’s prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.” *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005). This leaves a lot of room for

specified and extended by those who are following it.<sup>207</sup> They follow it by intuiting where it ought to go, rendering the judicial process, at most, a questionable source of “secondary” rules for the administrative process. Most lawyers know this tacitly, but highlighting it in view of what we have called the circumstances of administration generates troubling questions. What legal *obligation* has an agency to extend and specify judicial precedent as it acts? Any? It should be clear that the answer would require a far more perfect account of legislation and legislative authority than we have yet mustered. But if an agency is not obliged to extend and specify precedent, what is that agency’s obligation to follow precedent at all?<sup>208</sup> At the very least, it is not the same as a court’s obligation. Precedent, being a property of and limit upon judicial authority, governs judges in a way that it does not and perhaps *cannot* govern administrators.

*B. Interpreting the Vagueness Inherent in Legal Authority*

If an official’s legal obligations are institution-dependent to an important degree, this is not to say they are necessarily content-dependent. Content-dependent reasons are not preemptive, at least not normally. So what is the role of truly content-dependent reasons in legislative interpretation today? Dworkin and others, seeing the ingenuity of the judicial process, challenge the very notion of explaining law independent of its content and reject the thesis that legal decision making is just a matter of finding and applying valid rules.<sup>209</sup> Dworkin’s answer to the puzzle of indeterminate rules of recognition was to problematize the essence of rules. The claim seems to have been that the officials of a legal system take their authority under an obligation to fit and justify whatever law they are applying—not to grasp “law” as a system of rules from authoritative sources.<sup>210</sup> At base, he argues that understanding and elucidating norms just *is* the ultimate originative act for law.<sup>211</sup> But whether this is because,

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establishing boundaries, though. See Kathryn A. Watts, *Adapting to Administrative Law’s Erie Doctrine*, 101 NW. U. L. REV. 997, 1004–08 (2007).

207. See, e.g., *Smith v. Nicholson*, 451 F.3d 1344, 1349–50 (Fed. Cir. 2006) (refusing *Chevron* deference as inapplicable to agency’s interpretation of its regulation but affording “substantial deference” under *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945)); cf. SCHAUER, *supra* note 130, at 65 (arguing that whenever an agent follows a rule, the actions can usually be brought within *any* rule’s extension if additions to that rule are permitted without restriction).

208. See Estreicher & Revesz, *supra* note 38, at 718–70 (arguing that agencies’ obligations to follow precedent are of a highly qualified sort). Agencies apparently are due no deference when they interpret precedent. See, e.g., *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 336–37 n.5 (2000).

209. In Dworkin’s view, it is not some guiding rule of recognition that obliges legal agents, but rather “a sense of appropriateness developed in the profession and the public over time.” DWORKIN, *supra* note 129, at 40. That “sense” became Dworkin’s own brand of constructivism—his theory that officials are obliged to make the law the best that it can be. See generally RONALD DWORKIN, *LAW’S EMPIRE* (1986). All the same, Dworkin’s fit criterion and, indeed, his “law as integrity” together look suspiciously similar to Coleman’s account of “shared cooperative activity.” See *supra* notes 156–59 and accompanying text for a discussion of how legal officials engage in shared cooperative activity.

210. Dworkin’s notion of “fit” is panoramic and far broader than my “fit dimension” of agency rules. See Abner S. Greene, *The Fit Dimension*, 75 FORDHAM L. REV. 2921, 2922 (2007).

211. It is, in this much, a rejection of the sources thesis. See Gerald J. Postema, *Law’s Autonomy and Public Practical Reason*, in *THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM* 79 (Robert P. George ed., 1996); Gerald J. Postema, *Jurisprudence as Practical Philosophy*, 4 LEGAL THEORY 329 (1998).

metaphysically, individual rights exist independent of our norms and/or institutions<sup>212</sup> or because, as a culture, we are committed to the mysteriously analogical process of common law judging,<sup>213</sup> remains just another unsolved puzzle.

Much more clear is that what separates critics like Dworkin from Hart and his successors is declining rapidly in significance.<sup>214</sup> Whether Dworkin's is a theory of adjudication (not of law) or Hart's rule of recognition fails in the very hard cases that need it most, it is now evident that "as a matter of more than linguistic vagueness or ignorance, the concept of law is essentially vague, since it is founded on changeable conceptions of law that admit borderline cases."<sup>215</sup> Most such accounts of law incite argument while blocking progress *by* argument because our vocabulary of law, legal authority, and their combined functions has lost touch with the majority of what society follows as law. Professor Edward Rubin and others diagnose this rupture as the result of an overly judicialized discourse.<sup>216</sup> A focus on legislation and delegation would, in their view, transform legal theory by normalizing their "arbitrary compromises."<sup>217</sup> But even that shift of perspective provides us no escape from our predicament. The predominant sources of law in our society have become ciphers because we do not agree how, when, or even whether their outputs are legally binding. And while this may not be a reason to raze our traditions,<sup>218</sup> it is reason enough for major renovations. Part V suggests where that work must begin.

#### V. HAVING AN AUTHORITY WITHOUT BEING AN AUTHORITY

Compared to legislatures and courts, agencies are institutionally complex. Their internal structures are diverse, dynamic, and often indeterminate.<sup>219</sup> In principle, nothing prevents most agencies from distributing their authority as Raz's normal justification thesis would require.<sup>220</sup> But this last Part argues that the ways in which agencies make and apply law have grown intractable—what I shall call temporally

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212. See, e.g., DWORKIN, *supra* note 129, at 81–90.

213. Gerald J. Postema, *Philosophy of the Common Law*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW, *supra* note 132, at 588, 616–20.

214. Cf. Stephen R. Perry, *Method and Principle in Legal Theory*, 111 YALE L.J. 1757, 1786 (2002) (reviewing COLEMAN, *supra* note 136) ("[G]iven Coleman's description of how the [shared cooperative activity] idea works in practice, the more natural conclusion would seem to be that this just *is* Dworkin's theory.").

215. Keith Culver, *Leaving the Hart-Dworkin Debate*, 51 U. TORONTO L.J. 367, 385 (2001).

216. See, e.g., RUBIN, *supra* note 2, at 202–03; WALDRON, *supra* note 143, at 9.

217. See RUBIN, *supra* note 2, at 203–26.

218. *Id.* at 179–88, 330–40 (arguing that we must bracket and set aside our concepts of law, authority, legitimacy, the separation of powers, property, liberty, etc.).

219. See, e.g., Ronald A. Cass, *Allocation of Authority Within Bureaucracies: Empirical Evidence and Normative Analysis*, 66 B.U. L. REV. 1, 5–7 (1986). On the organizational tendency to socialize recruits into these structures and gradually impart a tacit knowledge thereof, see generally WILLIAM H. WHYTE, JR., THE ORGANIZATION MAN (1957).

220. See *supra* note 137 and accompanying text for a discussion of Raz's normal justification thesis. Compare Cass, *supra* note 219, at 29–36 (arguing that different agencies adopt different organizational structures based on a wide variety of influences, most of which are justifiable most of the time), with RAZ, *supra* note 137, at 75 ("If there is any range of activities in which those who possess great power clearly can do better than most people it is in co-ordinating the activities of many people.").

vague—and that we must rethink what it means to be a “source” of law today if that concept is still to do any real work. Agency rulemaking and rule following are on a familiar paradigm—an “open texture” paradigm. What we need is a better schema of this paradigm. And we need first of all to understand our hyperactive production and consumption of “soft” law.

Law’s “open texture” probably became so obvious in the twentieth century because of the ubiquity of legislation and delegation.<sup>221</sup> The common law showed perfectly well how norms could evolve over time,<sup>222</sup> and its sequencing of declarations and applications was occasionally vague.<sup>223</sup> But the particular *moments* of the judicial process are not normally vague.<sup>224</sup> Adversarial adjudication was, and has mostly remained, a discrete formation of law declaration and application by definite, identifiable legal agents.<sup>225</sup> By contrast, an agency’s creation of law can take the form of a declaration, application, or some combinatorial permutation thereof, and its prompts for doing so are even less definite. Agency action is the *tertium quid* between declaration and application, partly because what marks out an agency’s manipulation of a norm is so often indeterminate (without being paradoxical, necessarily)<sup>226</sup> and partly because agency structures are not fixed. Indeed, this vagueness of agency lawmaking can be multidimensional: it is unclear not just when some particular agent within an agency is adopting or applying a rule, but also *which* rule is being adopted/applied.<sup>227</sup> This evolution began with legislation’s abstraction from society’s subjects and is now how our governments are organized and function. Part V argues that our traditional concepts of law have little valence left in this world and suggests that we must reorder these concepts substantially if they are still to do real work for us. Sections A and B show that whether an agency rule is a legal rule has little or nothing to do with whether

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221. See RUBIN, *supra* note 2, at 369; BRIAN Z. TAMANAHA, *LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW* 101–17 (2006).

222. See, e.g., EISENBERG, *supra* note 184, at 157–59.

223. See, e.g., Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1094–1118 (1997) (arguing that concerns about retroactivity in various forms have deep but largely misunderstood roots in the common law).

224. In this much, adversarial adjudication’s temporal *formality* resembles a legislature’s: a discrete output is normally discernible at points and in ways agency outputs are not. See WALDRON, *supra* note 143, at 69–87.

225. Article III’s “Judicial Power” has never included the authority to establish general norms of future effect *in the abstract*. And it has usually only been in the crafting of remedies that courts have ever issued prescriptions detached from adjudicated claims. See generally Susan Sturm, *Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons*, 138 U. PA. L. REV. 805 (1990). Furthermore, even when legislatures engaged in adjudication, their authority to make prospective rules by adjudication was seen as inherently limited. See generally Christine A. Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition*, 111 HARV. L. REV. 1381 (1998). Not surprisingly, the same line has been held in administrative adjudication. *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 765–66 (1969).

226. Vague predicates are usually susceptible to sorites paradoxes, for example, if no added particle ever finally makes a “heap,” one can never make a heap. James Cargile, *The Sorites Paradox*, 20 BRIT. J. PHIL. SCI. 193, 195 (1969).

227. Agency interpretations may be associated with statutes and/or regulations irrespective of changes in content. On multidimensional vagueness—in which people associate varied criteria with a concept and do not agree which are necessary or sufficient for its extension—see Jeremy Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, 82 CAL. L. REV. 509, 517–19 (1994).

it has been enacted as such. Section C uses a pair of examples to explain what actually sets legal rules apart today.

A. *When Is a Rule a Legal Rule?*

Lawmaking without definite agents or acts of declaration/application has an air of paradox, if not tyranny. But when the paradigmatic processes of enactment are no longer formal enough to yield authoritative, inscriptional texts and the specification of law's content routinely occurs outside, or only obliquely within, such processes anyway, legal change as a process has evolved. Strictly speaking, with notice and comment as the paradigm and agencies' presumed power to prescribe rules *about* the law for personnel interpreting it, lawmaking without definite acts or agents is a fact. What is left for us to grasp when the cascading interpretations of law within and by agencies are what shape and reshape our legal obligations? In my view, we must identify the unions of primary and secondary rules as Hart called them. But as to combined judicial and administrative action, that is a stunningly tall order if we make the traditional assumptions.

It is tempting to identify the legal force of agency rules with the brands of judicial deference they are afforded.<sup>228</sup> The problem (aside from how often the fictions seem to change) is that preoccupation with judicial recognition submerges a vast majority of legal practice beneath a tiny minority of artificially polarized and over-exposed examples. Many more official recognitions of law in far more common circumstances occur every minute of every day, vividly illustrating the institutional incongruence between administrative and judicial action. Sophisticated counsel prove all this every time they struggle to influence the writing or communication of agency "guidance."<sup>229</sup>

More importantly, though, it is deeply unclear how our judiciary *could* validate—i.e., generate and follow the secondary rules behind—agency rules as such. Their institutional rivalry is too old and too thick<sup>230</sup> to ignore the fact that the governance of courts and that of agencies are mutually skeptical enterprises. This is exactly where the sources thesis runs a deficit as an account of legal validity in the modern, disaggregated state. Human institutions, whatever else they entail, require the authority necessary for their own governance. We have put "supervisory rules" together with this analytic truth.<sup>231</sup> Recall that in the seminal cases of judicial review of rulemakings, it was actually the grounds of *judicial* authority that produced the resultant doctrines of reviewability.<sup>232</sup> The fact that a rule might constrain agency choice to the

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228. See, e.g., Merrill, *supra* note 41, at 2171–72.

229. Even the most informally communicated "guidance" can become so valuable to interested persons that they seek actively to nurture and protect their mythical interpretations, cultivating the perception that they are "binding." Indeed, the object agency must even take action to dispel such myths in some cases. See, e.g., *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 549–51 (2008).

230. See, e.g., *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 140–43 (1940); *Great N. Ry. Co. v. Merchs. Elevator Co.*, 259 U.S. 285, 293–94 (1922); *Tex. & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 440–41 (1907).

231. See *supra* notes 105–06, 198–202, and accompanying text for a discussion of supervisory rules.

232. See *supra* notes 83–91 and accompanying text for a discussion of the reviewability of agency rules.

complainant's detriment was why the rule was challenged.<sup>233</sup> But to matter at all in court, the agency "rule" (in the APA sense) must have a present, tangible effect upon some extra-agency actor.<sup>234</sup> Such agency "statements"<sup>235</sup> are said to be the cause of "legal effects," "rules of conduct," rights and obligations, etc.<sup>236</sup> What is the relevant *quantum*—fundamental unit—of such an effect, though? The fundamental unit of light, for example, is the photon.<sup>237</sup> Given the ubiquity of informal process today and what we have called the circumstances of administration,<sup>238</sup> how could there possibly be such a unit of agency communication as apprehended in court? Whether a court detects detriment or disadvantage to some complainant has, at most, coincidental overlap with whether some discrete agency communication creates a legal obligation or has "force" in itself. In truth, the administrative official views her agency's communications as reasons for action in ways that judges are too prone to misapprehend.

Especially given the growing portability of all agency outputs in our "networked information economy,"<sup>239</sup> their capacity to *guide* is what actually measures agencies' practical authority. And agency communications guide today's legal agents constantly, whether followed by those with no authority or by those in charge. The most fundamental question, thus, is not which agency rules are "binding" in some metaphysical sense, but rather—as Parts II, III, and IV argued—which are *followed* and why. If and only if one can answer those questions can she authoritatively say which agency rules are legal rules.<sup>240</sup> Otherwise, the practical authority of agency rules should be assessed by someone else. And the adjudicative search for agency actions that are

233. See, e.g., *United States v. Storer Broad. Co.*, 351 U.S. 192, 198–200 (1956); *Stark v. Wickard*, 321 U.S. 288, 303 (1944); *Columbia Broad. Sys., Inc. v. United States*, 316 U.S. 407, 422 (1942); *Nat'l Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d 689, 692–704 (D.C. Cir. 1971); *Walter Holm & Co. v. Hardin*, 449 F.2d 1009, 1011 (D.C. Cir. 1971); *Am. Airlines, Inc. v. Civil Aeronautics Bd.*, 359 F.2d 624, 629 (D.C. Cir. 1966).

234. For example, in *Ohio Forestry Ass'n v. Sierra Club*, the Court held that an agency plan was not fit for review because it did not directly "inflict[] significant practical harm upon the interests that the Sierra Club advance[d]." 523 U.S. 726, 733 (1998); see also *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 436 (D.C. Cir. 1986) ("The interest in postponing review is powerful when the agency position is tentative."). But see *Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 94 (D.C. Cir. 2002) (presuming a rule's detrimental effect on complainants with the aid of "basic economic logic"). Quite puzzlingly, though, the underlying statute in *Ohio Forestry* specifically required that the agency act consistently with its plan once finalized. See 16 U.S.C. § 1604(i) (2006).

235. See *supra* notes 64–65 and accompanying text for a discussion of agency statements and rules.

236. See, e.g., *Farrell v. Dep't of Interior*, 314 F.3d 584, 589–91 (Fed. Cir. 2002); *Warder v. Shalala*, 149 F.3d 73, 80 (1st Cir. 1998); *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1449 (9th Cir. 1996); *Prof'ls & Patients for Customized Care v. Shalala*, 56 F.3d 592, 597 (5th Cir. 1995); *Rapp v. U.S. Dep't of Treasury*, 52 F.3d 1510, 1522 (10th Cir. 1995); *White v. Shalala*, 7 F.3d 296, 303–04 (2d Cir. 1993).

237. A DICTIONARY OF PHYSICS 340–41 (Alan Isaacs ed., 3d ed. 1996).

238. See *supra* notes 103–06 and accompanying text for a discussion of the process of agency rulemaking.

239. A "networked information economy" is characterized by increasingly decentralized individual action; decreasing prices for computation, communication, and storage of information; and the rise of large-scale cooperative efforts like the peer production of information, knowledge, and culture. YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM 3–5 (2006).

240. See, e.g., *U.S. Tel. Ass'n v. FCC*, 28 F.3d 1232, 1234–35 (D.C. Cir. 1994) (holding that an informal policy was actually a legal rule because in only one of 300 documented cases did the Commission depart from the precise requirements of the policy's text).

binding, so easily compromised and manipulated by the partisans who drive it, ought not be presumed able to this task.<sup>241</sup>

*B. Agents of Specification: Practical Authority Unbound*

Putting aside the occasional excursions,<sup>242</sup> the judicial stance remains highly conventional: rules that bind either the public or the agency have the force of law and must be enacted in some way while everything else can just be released, published, or posted.<sup>243</sup> Things have all gone awry in saying what is binding, how agencies are bound by their own rules, and what still counts as a process of enactment.<sup>244</sup> The practical authority of supervisory rules is at the center of this mess because such rules constrain choice (and sometimes prompt strong judicial deference) yet normally lack the qualities thought to require “enactment.” The trouble is that such rules are being followed so much that we need to rethink legal obligations, probably at a fundamental level.

Not all of legislative intransitivity’s implications were evident when it was first reconciled with our separation of powers in a series of dissonant compromises.<sup>245</sup> Today, it has given us cascades of legal interpretation in which open-textured legislation is constantly being generated and then specified by bureaucratic means—not

241. Looming like an alp here is the mountain of precedent prescribing tests and criteria for when an “interpretative rule,” “general statement of policy,” or “rule of agency organization, practice, or procedure” becomes a “legislative” rule and must, therefore, be enacted. Much of that is from the D.C. Circuit. *See, e.g.*, *Nat’l Ass’n of Home Builders v. U.S. Army Corps of Eng’rs*, 417 F.3d 1272, 1278 (D.C. Cir. 2005); *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 380–85 (D.C. Cir. 2002). That no test has ever captured quite what it means for one of these de facto legislative rules to be “binding,” though, highlights the better inference: the search itself is misguided. The fact that exceptionally interested opportunists constantly try to pull some of these rules down in court merely evidences the wider reality: in some sense, these people *failed* to manipulate the “threat of judicial review” to “spur . . . the agency to pay attention to facts and arguments submitted.” *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1111 (D.C. Cir. 1993).

242. There is little sport left in collecting the trophy dicta in which judges continuously bemoan the fuzziness of the categories of agency rules. *See Manning, supra* note 8, at 917–27.

243. *See generally* Strauss, *supra* note 76.

244. Even the D.C. Circuit has several times acknowledged that this whole endeavor is askew. *See, e.g.*, *MST Express v. Dep’t of Transp.*, 108 F.3d 401, 405–06 (D.C. Cir. 1997); *Am. Portland Cement Alliance v. EPA*, 101 F.3d 772, 774–76 (D.C. Cir. 1996); *Am. Mining Cong.*, 995 F.2d at 1111–13. Yet courts still find themselves justifying holdings invalidating agency rules that had “bound” a petty official in some sense by reasoning that the rule was too costly or too important not to have been done through notice and comment. *See, e.g.*, *CropLife Am. v. EPA*, 329 F.3d 876, 881 (D.C. Cir. 2003); *Nat’l Family Planning & Reprod. Health Ass’n v. Sullivan*, 979 F.2d 227, 240–42 (D.C. Cir. 1992); *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 212–15 (5th Cir. 1979).

245. Good arguments have been made that the Founders well understood the intransitivity of modern legislation, albeit in different terms. *See, e.g.*, Molot, *supra* note 42, at 12–14. Reconciling Founding Era intentions/expectations with legislation delegating broad powers to agencies was nonetheless a choppy constitutional transition. *See* *Lichter v. United States*, 334 U.S. 742, 778 (1948); *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 104–05 (1946); *Yakus v. United States*, 321 U.S. 414, 431 (1944); *Fed. Power Comm’n v. Hope Natural Gas*, 320 U.S. 591, 617–18 (1944); *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 193 (1943); *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935); *Pan. Ref. Co. v. Ryan*, 293 U.S. 388, 414–21 (1935); *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 404 (1928); *FTC v. Gratz*, 253 U.S. 421, 424–25 (1920), *overruled in part by* *FTC v. Brown Shoe Co.*, 384 U.S. 316 (1966).

the adversarial process.<sup>246</sup> What are bureaucratic means? My last argument is that they are chiefly planning and coordinative communications that aim to “supervise” but which, in our networked environment, saturate our legal system and *guide* conduct without having to *govern* it. Whether such guidance is followed as advice or out of some (mistaken) sense of obligation can have serious implications for our rule of recognition.<sup>247</sup> But telling the difference between those two amid vanishing legal formalities is becoming harder, not easier. Normally, we can mark the distinction only in the reliability and impersonality of patterns, and, given both the ubiquity and complexity of agency action, *that* should have serious ramifications for our whole notion of law.

Any reflection reveals that agencies are disparate collections of agents with discrete roles, beliefs, motives, etc. Geography, competence, divisions of labor, and hierarchy all distribute agencies variously—as practical reason might expect.<sup>248</sup> Supervisory rules communicating these distributions are abundant, even overabundant.<sup>249</sup> They are much of what constitutes an agency, recording its knowledge, routines, history, and its plans. Without future-directed intentions and plans, agencies could hardly behave rationally.<sup>250</sup> Plans make agencies intentional agents occupying time as well as space.<sup>251</sup> Yet, if what is fundamental to a rule’s being followed is its capacity to guide, it seems that scope and force are diverging properties of legal texts in the modern agency and, thus, in the modern state. It is easier to follow concrete, proximate directives than to follow broad-scale generalities and intransitive abstractions.<sup>252</sup> And that is why coordinating and planning mediate so pervasively

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246. See Strauss, *supra* note 76, at 812–17. Let us stipulate that agencies are “bureaucratic” when they are rational, impersonal, and hierarchical. MAX WEBER, 1 *ECONOMY AND SOCIETY* 956–90 (Guenther Roth & Claus Wittich eds., 1978).

247. Raz maintains, rightly in my view, that conforming to and complying with reasons for action are two very different states. JOSEPH RAZ, *ENGAGING REASON: ON THE THEORY OF VALUE AND ACTION* 116–17 (1999); *cf.* HART, *supra* note 119, at 88 (“One of the difficulties facing any legal theory anxious to do justice to the complexity of the facts is to remember the presence of both [internal and external] points of view and not to define one of them out of existence.”).

248. *Cf.* RAZ, *supra* note 131, at 132–48, 170–77 (discussing distributing practical authority by various means). Supervisory rules, however, need not be particularly powerful to function. See Gardner & Macklem, *supra* note 132, at 466 (“Reasons can be mandatory yet trivial. They can be good at defeating by exclusion but poor at defeating by weight.”).

249. See Anthony, *supra* note 82, at 52–63; Asimow, *supra* note 62, at 524–30; Funk, *supra* note 76, at 1322–24; Manning, *supra* note 8, at 917–23; Pierce, *supra* note 9, at 549–54; Rakoff, *supra* note 5, at 165–70; Strauss, *supra* note 76, at 812–17, 824 & n.67.

250. See MICHAEL E. BRATMAN, *INTENTION, PLANS, AND PRACTICAL REASON* 28–32 (1987). A “plan” enables present deliberation to influence—and, depending on the plan’s durability, to block reconsiderations of—later conduct, whether out of resource limitations or coordination needs. *Id.* at 3–11, 28–42.

251. *Cf.* DEREK PARFIT, *REASONS AND PERSONS* 199–306 (1986) (defending a view of identity that emphasizes the totality of causal connections between experiences and actions and not just the physical continuities of persons). Note, though, that agencies are internally *plural* agents: their personification (as usually happens in judicial review) is but another fiction. Unlike a unitary self, an agency can plan and act *only* by written means. Given the circumstances of administration, it would hardly expand legality’s domain to deprive agencies of the means by which they act rationally. Such internal rules, in this sense, are necessary to an agency’s capacity to pursue goals.

252. See Shapiro, *supra* note 123, at 176 (“[F]or rules to guide conduct, they must be capable of making ‘practical differences’, i.e. they must be capable of motivating agents to act differently from how they might

within an agency, much as “law” mediates between the subjects of a society and substantive justice.<sup>253</sup> The mediation within an agency, however, is what holds it together in common enterprise—what gives it its *agency*. Its supervisory rules mediate and collectively motivate.

When they are followed, moreover, supervisory rules defeat possible interpretations of law and authority. So *why* does the agency official follow such rules? Is he “likely better to comply with reasons which apply to him . . . if he accepts the directives . . . as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly”?<sup>254</sup> That ultimately depends on his or her epistemic position<sup>255</sup> and bureaucrats can forget their limits as surely as anyone.<sup>256</sup> But feelings of *obligation* to follow such rules when they ought not to be followed will assuredly produce bad decisions, perhaps on balance more bad decisions than good.<sup>257</sup> So why do those in authority delegate by means of intransitive declarations and authorizations that too often induce excesses (or deficits) of rule following?<sup>258</sup> That answer is in good part epistemic as well: because they do not know what rules will actually fulfill their obligations any more than they know who would know better. All the uncertainty is ultimately the fault of modernity, certainly: *rational*

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have without their guidance.”). Of course, there is no reason to assume legislators are oblivious to this fact. *See* Strauss, *supra* note 2, at 443–44 (“To acknowledge that statutes may be intransitive . . . ought to heighten concern over just what the postenactment behaviors of members of Congress might be and how the possibility of their continuing control might feed back on the legislative process . . .”).

253. *Cf.* VERMEULE, *supra* note 114, at 283–88 (describing agency implementation as a “second-best” legal interpretive strategy). Supervisory rules mediate between subordinates and legislation in roughly the same way primary rules mediate between citizens and the underlying, content-dependent reasons that apply to them. And supervisory rules can part from legislation, much as legislation can part from morality or justice, without necessarily compromising their validity. As written rules, though, they “allocate power to the past and away from the present” (or “to the present and away from the future”) by “distributing decision-making jurisdiction among the past, the present, and the future” through the entrenchment of generalizations. SCHAUER, *supra* note 130, at 160.

254. RAZ, *supra* note 137, at 53.

255. *See supra* note 137 and accompanying text for a discussion of the appropriate parameters of epistemic positions.

256. *See, e.g.,* Strauss, *supra* note 76, at 817–22.

257. For example, as any recruit’s knowledge of an organization’s collective beliefs expands, his or her value to that organization as a source of new knowledge may actually contract. *See* James G. March, *Exploration and Exploitation in Organizational Learning*, 2 *ORG. SCI.* 71, 78–79 (1991). The organization’s sanctioned rules may or may not be comprised of accurate generalizations, which means that their allocations of power may be suppressing relevant (potentially *critical*) differences among cases for no good reason. SCHAUER, *supra* note 130, at 162–63, 183. And what Schauer calls “jurisdictional” rules (Hart’s “secondary” rules) have every bit the propensity to suppress relevant information through their own grammar as do primary or conduct-regulating rules.

258. I put aside the theory that those in charge delegate only to maximize their own wealth or well being. Such theories brutally oversimplify real human motivations. *See generally* IAN SHAPIRO, *THE FLIGHT FROM REALITY IN THE HUMAN SCIENCES* (2005). That is *not* to say, however, that epistemic concerns are the only, nor even necessarily the principal, reasons being weighed in most decisions to delegate. *See, e.g.,* Clayton P. Gillette & James E. Krier, *Risk, Courts, and Agencies*, 138 *U. PA. L. REV.* 1027, 1088–99 (1990) (observing that Congress has delegated authority to agencies even when the recipients of its delegation lack expertise).

beliefs, whether about means or ends, are always corrigible.<sup>259</sup> Thus, the preemptive powers of rules are no more immune to defeat simply because they have a logical structure.<sup>260</sup> Indeed, if anything, rules as logically structured reasons introduce special risks of error,<sup>261</sup> especially when used by those who are cooperating and/or coordinating.<sup>262</sup> If our agent  $A_1$  modestly believes that  $S$  knows better how *the agency as a whole* will achieve a mission, she may be prone to regard  $S$ 's directions as obligatory, as good advice, or as some amalgam thereof, where  $A_2$  or  $A_3$  might not be. But the correct apprehension of  $S$ 's directive could just as easily be a matter of discounting  $S$ 's authority as that of  $A$  and the only way to avoid significant errors is through familiarity with the actual agents and their relative authorities.<sup>263</sup>

Put succinctly, we can distinguish between *having* an authority and *being* an authority<sup>264</sup> without necessarily being able to predicate them in institutionally complex environments.<sup>265</sup> Those having an authority rely on the disparate collections of agents comprising agencies presumably to improve their own chances of following all applicable content-dependent reasons for action.<sup>266</sup> Being an authority is a matter of identity, of being authoritative in one's own right. Does this mean agency rules should create obligations only when backed by tangible assurances that the agent from whom

259. Cf. AUDI, *supra* note 146, at 8 (“[A] prima facie rational desire may turn out, because of the perceived unpleasant consequences of satisfying it, not to be rational on balance. It may initially be rational to want surgery, but it may cease to be so when one discovers a less risky treatment.”).

260. A rule either is or is not a reason for action. Cf. SCHAUER, *supra* note 130, at 121 (“[A] rule is for some agent applicable to some situation when the situation is within the extension of some rule the fact of whose existence . . . the agent treats as a reason for action.”).

261. Unthinking acceptance of apparently valid directives is not the same thing as having a reason. Cf. Engel, *supra* note 133, at 29 (“Epistemologically productive reasoning is not a merely mechanical manipulation of belief, but a compulsion in thought *by reason*, and as such involves conscious understanding of why one is right in one's conclusion.” (quoting Bill Brewer, *Mental Causation: Compulsion by Reason*, in 63 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 237, 242 (vol. 69 Supp. 1995))).

262. Cf. BRATMAN, *supra* note 250, at 107–10 (observing that an agent's commitments, especially when assessed by external standards, are revealed in its reasoning as much as its actions but that planning and future-directed commitments are often too complex to be communicated or inferred simply).

263. See RAZ, *supra* note 131, at 193 (“Necessarily the attitude of those who accept the legitimacy of an authority is one of reasoned trust. We have reasons to take the authority's ruling as evidence that there are adequate reasons to do as we are told.”). It probably has no more connection to one's office than it has to one's knowledge, attitudes, and beliefs. Compare DWORKIN, *supra* note 209, at 245 (“Law as integrity . . . requires a judge to test his interpretation of any part of the great network of political structures and decisions of his community by asking whether it could form part of a coherent theory justifying the network as a whole.”), with Bratman, *supra* note 158, at 328 (“In [shared cooperative activity] each agent is committed to supporting the efforts of the other to play her role in the joint activity.”).

264. RAZ, *supra* note 131, at 62–65. I am indebted to Eric Miller for reminding me of Raz's observations on this distinction.

265. Whether organizations make this task harder by “absorbing” and/or disguising uncertainty is an empirical question with deep roots in the human sciences. See generally JAMES G. MARCH & HERBERT A. SIMON, ORGANIZATIONS (1958). Rules, however, necessarily do so as rules. See generally SCHAUER, *supra* note 130.

266. To delegate is to empower purposefully. And, in its own way, power always accentuates fallibility. Thus, blocking further and/or later deliberation can be perfectly rational in certain delegative and/or organizational contexts. BRATMAN, *supra* note 250, at 67.

they originated *is* an authority? That is a very real possibility.<sup>267</sup> Only this much is assured, though: (1) the *existence* of organizational capacity and a need to specify subordinate rules feeds back on and influences the practical authority standing behind them, and (2) complex organizations assembled and managed to specify law in large, heterogeneous societies have *some* propensity to disguise whatever might distinguish exclusionary from content-dependent reasons within this nexus.<sup>268</sup> Section C uses a pair of examples to explain what this argument should mean to our concept of law today.

C. *Temporal Vagueness: Recognizing Exclusionary Reasons*

When supervisory rules and other coordinative communications interpret and specify enabling statutes and/or governing rules, they can put such sources into eclipse. Officials can follow these rules without ever reweighing what lies behind or beneath them.<sup>269</sup> And if these sources effectively transform both regulation and statute into the equivalent of underlying, dependent reasons for (agency) action, they may end up guiding agents who are in no sense bound by them. Interested parties may be guided by such rules for reasons ranging from coercion to convenience to a definite (if mistaken) sense of obligation. The fact that most agency authority is reduced to rules in the communicative environments of complex organizations makes distinguishing *why* interested parties follow these rules increasingly problematic, if not impossible. The question, in short, can no longer be whether an agency rule has *the* force of law or not.

So what distinguishes legal rules from other rules? I have argued throughout that this question is misguided when it is detached from the (prior) question of who is drawing the distinction. One's place within an institution naturally creates reasons for action that categorically defeat other considerations in one's legal agency, yielding the apparent paradox that valid legal content from "sources" like agencies can be rather *self-validating* in practice. In practice, supervisory rules are a source of such reasons for action that obscures "law" at a basic level whenever some official's actions become that of his or her administrative agency. Consider two examples.

In *Shalala v. Guernsey Memorial Hospital*,<sup>270</sup> the Supreme Court heard an appeal by a hospital denied Medicare reimbursement.<sup>271</sup> Under the Health Care Financing

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267. This may make the most sense of the Court's rejection of the Attorney General's "interpretive rule" at issue in *Gonzales v. Oregon*, 546 U.S. 243 (2006). In denying the "rule" (which purported to interpret and specify a Justice Department regulation) both *Chevron* and *Seminole Rock* deference, the majority intuited that the enabling statute's "structure . . . conveys unwillingness to cede medical judgments to an executive official who lacks medical expertise"—meaning a rulemaking by just the Attorney General as political appointee was due no deference. *Id.* at 266. Of course, this intuition was ridiculed in two impassioned dissents arguing that to reverse the agency based on such factors was inconsistent with precedents deferring to agencies in similar circumstances. *See id.* at 275–99 (Scalia, J., dissenting), 299–302 (Thomas, J., dissenting). Neither dissent answered the majority's objection to the Attorney General's action on its merits.

268. *See supra* notes 198–208 and accompanying text for a discussion of the weight given to promulgated agency rules.

269. *See, e.g.,* *Erringer v. Thompson*, 371 F.3d 625, 630–31 (9th Cir. 2004); *Hocor v. U.S. Dep't of Agric.*, 82 F.3d 165, 167 (7th Cir. 1996); *W. Radio Servs. Co. v. Espy*, 79 F.3d 896, 900–01 (9th Cir. 1996); *Prof'ls & Patients for Customized Care v. Shalala*, 56 F.3d 592, 597 (5th Cir. 1995).

270. 514 U.S. 87 (1995).

Administration's ("HCFA") regulations and its application of those regulations, Guernsey's claim for reimbursement was denied.<sup>272</sup> The reimbursement regulations directed healthcare providers to observe generally accepted accounting principles ("GAAP") when seeking their reimbursements.<sup>273</sup> But the rules were silent on *the agency's* use of GAAP in making its reimbursement decisions.<sup>274</sup> HCFA was understandably wary of being bound by GAAP—a system of cost-accounting principles administered by someone else that, in some applications, would simply exacerbate risks of fraud and abuse. HCFA's Provider Reimbursement Manual ("PRM") later stated unequivocally that compliance with GAAP was *not* a sufficient condition for reimbursement.<sup>275</sup> But Guernsey insisted that GAAP ought to bind the agency as well, its manual notwithstanding.<sup>276</sup> Victory went back and forth in a series of appeals from deep within the agency to the district court to the circuit court and finally to the Supreme Court.<sup>277</sup> As the Sixth Circuit saw matters, "[w]ere it not for § 233 of the [PRM], any fair-minded person reading the regulations in the light of [GAAP] would have to conclude that Guernsey Hospital was entitled to reimbursement."<sup>278</sup> The narrowest majority of the Supreme Court reversed.<sup>279</sup>

Medicare reimbursement disputes start before third-party "fiscal intermediaries" who decide what constitutes a "reasonable cost[]" for reimbursable expenses in the first instance.<sup>280</sup> Fiscal intermediaries follow the agency manuals for a variety of reasons,

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271. *Guernsey*, 514 U.S. at 90–91. Under the statute, the agency was to reimburse only "reasonable costs." *Id.* at 91 (quoting 42 U.S.C. 1395x(v)(1)(A) (2006)).

272. The Medicare reimbursement rules are at 42 C.F.R. Part 413 and are updated annually. *Id.* at 92. Technically, the hospital was not denied reimbursement in *Guernsey* but rather denied a one-time statement of loss as opposed to a reimbursable debt carried over a period of years. *Id.* at 92–93.

273. *See id.* at 92 (discussing 42 C.F.R. § 413.20(a) (1995)). GAAP was nowhere explicitly referenced in Part 413, but it was generally understood as incorporated therein.

274. Even the dissent did not argue the regulations required, *ipsissima verba*, that HCFA observe GAAP, although HCFA had long referenced GAAP and "seemed rather clearly to adopt GAAP as a general principle for cost determination." Timothy Stoltzfus Jost, *Governing Medicare*, 51 ADMIN. L. REV. 39, 100 (1999).

275. There is no reason to think HCFA's actions did not fit with its legislation. "The most important factor explaining congressional involvement in Medicare policy is the fact that . . . over half of the life-span of Medicare, Congress has carried on its business under the looming shadow of an enormous federal budget deficit." Jost, *supra* note 274, at 67.

276. The dissent found it "significant that the Secretary . . . has changed her interpretation of th[e] regulation, having previously concluded that [it] generally requires the costs of Medicare providers to be reimbursed according to GAAP." *Guernsey*, 514 U.S. at 106 (O'Connor, J., dissenting).

277. *Id.* at 90–91 (majority opinion). The fiscal intermediary, relying on the PRM, found against the reimbursement. Guernsey appealed to the Provider Reimbursement Review Board within HCFA, which found for Guernsey but was, itself, reversed by the HCFA Administrator. *Id.* at 90. The Secretary of Health and Human Services denied Guernsey's appeal and was sustained in the District Court, whereupon the Sixth Circuit reversed. *Id.* at 91.

278. *Guernsey Mem'l Hosp. v. Sec'y of Health & Human Servs.*, 996 F.2d 830, 834 (6th Cir. 1993), *rev'd sub nom.*, *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87 (1995). Without fail, each time the PRM was followed the result was against Guernsey, including the five-to-four majority of the Supreme Court.

279. *Guernsey*, 514 U.S. at 91.

280. *Id.* Intermediaries may, like their reviewers on the Provider Reimbursement Review Board and like the Secretary, make determinations that become final and "binding" on the parties. 42 C.F.R. §§ 405.1833, 405.1885, 405.1887 (2008).

including because the manuals' authors review their decisions.<sup>281</sup> This particular manual was itself treated like a code—periodically updated, recodified, printed, and widely circulated,<sup>282</sup> the better to guide reimbursement decisions.<sup>283</sup> Neither the intermediary nor Guernsey was *governed* by it in any strict sense, though. We should no more say they were bound by the manual than we should say HCFA had bound itself to follow GAAP by directing providers to observe GAAP when applying for reimbursements. Each conclusion requires a specific—but missing—warrant.<sup>284</sup> We *might* say, however, that the intermediary's authority to find for Guernsey *just because* its accounting followed GAAP was, if not revoked by PRM section 233, at least put in question.<sup>285</sup> Practically speaking, the manual may have done most of the work defeating that reason in the case, but that says very little about the PRM's legal stature generally. Guernsey's fate may signal content *about* Part 413's relationship to GAAP to future claimants and intermediaries. But this signal's grounds and precise origin are fundamentally *vague*: they could stem from the brand of judicial deference finally afforded the agency, any underlying content-dependent reasons for the agency's action, the overall action's fit with the Medicare statutes, or some aggregative permutation thereof.<sup>286</sup> And, as I have argued throughout, the challenges of identifying rules in such

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281. In 1972, Congress amended the Medicare Act, 42 U.S.C. §§ 1395-1395hhh (2006) "apparently fueled by concern that providers were passing on inefficient and excessive expenses." *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 405 (1993). The amendments limited reimbursements to "reasonable costs" and defined reasonable costs as costs actually incurred minus any "cost[s] found to be unnecessary in the efficient delivery of needed health services." *Id.* at 405 (alteration in original) (quoting 42 U.S.C. § 1395x(v)(1)(A)) (internal quotation marks omitted). The complex adjudicatory scheme in *Guernsey* was an outgrowth of the amendments, too. *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 506-07 (1994).

282. Like HCFA, HCFA's successor, the Centers for Medicare & Medicaid Services, maintains print and "Internet-only" manuals. Centers for Medicare & Medicaid Services, Paper-Based Manuals, <http://www.cms.hhs.gov/manuals/PBM/list.asp> (last visited Mar. 29, 2010). The PRM is available in both formats.

283. However, the PRM was apparently not the subject of any process of enactment and fewer *judges* were guided by it (six) than were not (seven). The five Justices in the majority were joined by the district judge, but the dissenters were joined by a unanimous three-judge panel of the Sixth Circuit. *Guernsey*, 514 U.S. at 103-06 (O'Connor, J., dissenting), *rev'g* *Guernsey Mem'l Hosp. v. Sec'y of Health & Human Servs.*, 996 F.2d 830 (6th Cir. 1993), *aff'g in part, rev'g in part* *Guernsey Mem'l Hosp. v. Sullivan*, 796 F. Supp. 283 (S.D. Ohio 1992).

284. The Secretary has, in some circumstances, explicitly required compliance with Medicare manuals. *See, e.g., Linoz v. Heckler*, 800 F.2d 871, 873 (9th Cir. 1986). The PRM was not such a manual. And the position of the dissent and the Sixth Circuit panel that *fairness* obligated the agency to follow GAAP rests on very contentious views about fairness under the circumstances.

285. Whether the manual's role in that change was evidentiary or constitutive is probably a metaphysical question beyond the scope of this Article. Fiscal intermediaries provide their services under a contractual duty of good faith and must, if for no other reason than due process, follow the statute, the regulations, and the agency's *valid* interpretations thereof. *See, e.g., St. Louis Univ. v. Blue Cross Hosp. Serv.*, 537 F.2d 283, 290-91 (8th Cir. 1976).

286. The permutations are a function of who is interpreting the signal. The signal to the future, though, is probably neither "precedential" in nature nor to the effect that the manual was "binding," strictly speaking. The "family" of arguments whose common structure gives precedent its rational force are all *inferential* paths to true conclusions and the component inferences must, therefore, be rational if the analogy is to work. *See Brewer, supra* note 162, at 941. Organizational authority and its continuing jurisdiction to change policies from within would, however, make analogical inferences to *Guernsey's* case a poor substitute for other, more direct means of discovering *current* policy on GAAP in any future case. And unless HCFA oddly intended that

institutionally complex contexts, whether because of temporal or ontological vagueness, can be exactly why such “guidance” is so often sought and followed—giving us the apparent paradox of authoritative law arising *ex nihilo*.<sup>287</sup>

Judge Randolph’s lament quoted at length at the beginning of this Article may have some truth to it, but it gives us no *schema* of legality today. The guidance at issue in his case, an EPA technical memo describing adequate monitoring of air emissions under the Clean Air Act, was “narrative in form, consist[ed] of 19 single-spaced, type-written pages, and [wa]s available on EPA’s internet web site.”<sup>288</sup> As pollution lawyers well know, substantive standards are inseparable from the means by which their attainment is verified. Thus, EPA’s guidance on what monitoring was right for particular permit types plugged a key gap left by the Act and the agency’s regulations.<sup>289</sup> Of course, it did so without notice and comment<sup>290</sup> and to the substantial disadvantage of the Appalachian Power Company, among others.<sup>291</sup> EPA’s authority to review and reject individual state permits put a sharp edge on this guidance for many interested parties.<sup>292</sup> But was its cascade really EPA’s effort to “immuniz[e] its lawmaking from judicial review”?<sup>293</sup> To so hold presumes EPA viewed its guidance as “law” while at the same time discounting the judicial review available for any actual permit denials it caused.<sup>294</sup>

More importantly, the bare communication of such interpretations rarely if ever establishes them as law. Their being *followed* is what does so. As Judge Randolph has observed in another context, it is only where such communications become “definitive” interpretations of the law that they themselves become “binding” in any sense.<sup>295</sup> Hart

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the manual be invalidated in court as erroneously promulgated without notice and comment, the one thing HCFA certainly would *not* signal is that the PRM was “binding.” *See, e.g., Am. Bus. Ass’n v. United States*, 627 F.2d 525, 528–30 (D.C. Cir. 1980).

287. *See supra* notes 228–41 and accompanying text for a discussion of the legal force of agency rules.

288. *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1019 (D.C. Cir. 2000).

289. *Id.* at 1021–23.

290. *Id.* at 1021.

291. The “periodic” monitoring EPA described in its guidance had been mentioned in the preamble to its underlying rules, *see* Operating Permit Program, 57 Fed. Reg. 32,250, 32,278 (July 21, 1992) (to be codified at 40 C.F.R. pt. 70), but the guidance specified more clearly when periodic monitoring would be necessary to meet the statute’s requirement that every permit include monitoring obligations sufficient “to assure compliance with the permit terms and conditions.” 42 U.S.C. § 7661c(c) (2006). Monitoring “periodically” instead of annually is both more expensive and more likely to detect noncompliance.

292. *See* 42 U.S.C. § 7661d(b) (EPA review of state-issued operating permits in authorized states); 40 C.F.R. § 70.8(c) (2008) (same). EPA could only reject a permit, however, if it was “not in compliance with the applicable requirements of [the Clean Air Act].” 42 U.S.C. § 7661d(b). Strangely, the court observed that “[w]ith the Guidance in place, regional EPA offices have solid legal grounds for objecting to State-issued permits if the State authorities refuse to bend to EPA’s will.” *Appalachian Power*, 208 F.3d at 1023–24.

293. *Appalachian Power*, 208 F.3d at 1020.

294. Subsequently, the same court denied standing in a challenge to the same interpretation of law on the grounds that no actual “injury” had yet come to anyone in the litigation. *Util. Air Regulatory Group v. EPA*, 320 F.3d 272, 277–78 (D.C. Cir. 2003).

295. *See* *Alaska Prof’l Hunters Ass’n v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999). An agency’s adoption of a “definitive” interpretation, Judge Randolph explained for the panel, can come about from its long recognition of that interpretation, i.e. without *any* intentional act. *Id.* at 1033–35. Thus, such actions can be, given agencies’ internally plural nature, unintentional. *See, e.g., Shell Offshore Inc. v. Babbitt*, 238 F.3d 622,

observed that “[r]ules are conceived and spoken of as imposing obligations when the general demand for conformity is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great.”<sup>296</sup> It has always been prefatory, however, to pair so thin an account of rule-following with the sources thesis. Identifying which rules have this effect on officials within particular institutions is its own rich exercise in applied psychology and sociology, made harder by the institutional complexity of having versus being a practical authority.<sup>297</sup> Who is feeling and who is exerting the pressures Hart noticed will normally be a matter of highly fluid organizational dynamics.<sup>298</sup> But in their turn toward informal bureaucratic processes and intransitive legislative texts, our central governments today are organized by and function within precisely those dynamics. Our hopes for identifying legal obligations should depend on nothing less powerful than a theory that takes them into account.

## VI. CONCLUSION

American administrative law has been confounded by agency interpretation as a legal process. Its surface grammar has always been intelligible enough: the legislature delegates authority to its agencies to make rules with the force of law, and the courts determine whether and when such moves have been made correctly.<sup>299</sup> But the way our actual institutions are maturing within that grammar is anoxic. Real questions of legitimacy are bound up in and masked by institutional relationships that are precluding their resolution. Consequently, conflict over the making and interpreting of agency rules is increasingly incorrigible because it questions the authority and rationality of bureaucratic organization even while the permanence and inevitability of bureaucracy are put beyond question. I have argued that the intractability here traces down to an outmoded dichotomy between the making and the application of legal rules—actions that are too often indistinguishable in most agencies.

H.L.A. Hart, Joseph Raz, and other modern positivists began an era of theorizing about law’s necessary and sufficient elements.<sup>300</sup> That era is ending, though, in good part because they ignored the real sources of most law in complex societies—agencies. The renewal of contemporary positivism entails confronting bureaucratic organizations and how little they resemble legislatures or courts. I have argued that today’s “street level bureaucrat”<sup>301</sup> is a node in any number of highly robust networks that are constantly thickening the contacts between government and those with whom it

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629–30 (5th Cir. 2001); *Alaska Prof'l Hunters Ass'n*, 177 F.3d at 1030–33; *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997).

296. HART, *supra* note 119, at 84.

297. See *supra* notes 264–68 and accompanying text for a discussion of having authority versus being an authority.

298. See *supra* notes 121–30 and accompanying text for an analysis of Hart’s theories.

299. See, e.g., *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409–10 (1928).

300. See *supra* Parts III.A and B for a discussion of these theories.

301. See MICHAEL LIPSKY, *STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES* 188–91 (1980) (arguing that the routines bureaucrats develop to deal with the complexity of work tasks ensure that law and policy in action diverge, sometimes substantially, from what superiors and legislatures expect).

negotiates.<sup>302</sup> Those networks are being developed by a society demanding legal guidance where there is too little governing law. In short, given the ubiquity of agencies, and thus of highly developed organizational authority, the reach of what I have called rulemaking cascades is potentially limitless. In this respect, and somewhat paradoxically, agency self-validation is bound only by reason itself.<sup>303</sup> Many who seek guidance from agencies do so because their circumstances afford them the luxury of taking advice rather than commands. When judicial proceedings do arise it is only because the stakes are high enough. Such an opportunistic mode of lawmaking is no way to ensure administrative rules are properly recognized for what they are. If *valid* legal rules really are no more than exclusionary reasons, they can only function properly when legal agents recognize them as such. And recognizing valid exclusionary reasons from and within agencies is complex, situational work. This should reorient positivists toward a more sociological examination of the sources thesis (and rule of recognition) and begin more fruitful considerations of the “force of law” in modern, disaggregated states.

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302. *Cf.* BENKLER, *supra* note 239, at 363.

303. In the absence of governing law, official guidance is the conventional second-best. *Cf.* WEBER, *supra* note 246, at 760–76 (observing that legal education, one of the primary influences on a society’s shared sense of legitimacy, orients new lawyers to the sources of law as institutions, not just as sources of law).

