

Rules, Commands, and Principles in the Administrative State

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ABSTRACT. In the theory of the administrative state, a central thread of debate has involved the effect of increasing economic and social complexity on the form of legal instruments. Drawing upon work by Pound, Schmitt and Dworkin, I show that the first two both assumed that the administrative state would increasingly abandon general rules in favor of ad hoc administrative commands – a development that the early Pound welcomed but that Schmitt feared. Ronald Dworkin, by contrast, predicted that the increasing complexity of the modern state would produce ever-greater reliance on relatively abstract legal principles rather than either rules or ad hoc commands. Dworkin’s prediction has largely been borne out in administrative law, particularly the law of judicial review of agency action. That body of law has developed over time by turning to abstract and general principles of rationality and procedural validity to maintain the public edifice of legality.

INTRODUCTION

Since the expansion of the administrative state in the Progressive Era,¹ legal theory has asked how the increasing complexity and interdependence of economy, society, and administrative institutions would affect jurisprudence. I will trace out a central thread of this debate by examining the views of Roscoe Pound, Carl Schmitt, and Ronald Dworkin on the form law takes in the administrative

1. The administrative state, of course, long predates the Progressive Era; indeed, it develops right from the beginning of our constitutional order. *See generally* JERRY MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* (2012) (showing that the U.S. Congress delegated vast discretion and authority to administrative officials during the first century after the Constitution was adopted). As to the crucial topic of delegation to agencies, see Nicholas Bagley & Julian Davis Mortenson, *Delegation in the Founding Era*, 121 *COLUM. L. REV.* (forthcoming 2021).

state. Pound, in his progressive phase, before he did a notorious about-face and became a vehement opponent of the administrative state,² argued that the increasing complexity of the state would result in the widespread replacement of general rules in favor of ad hoc commands, *and* that this was a good thing. Schmitt and others, such as Friedrich Hayek, agreed with Pound's basic prediction, but took the opposite normative view about it, in Schmitt's case because he feared that the proliferation of rapid-fire, ad hoc administrative commands would drive out genuine jurisprudence based on legal principles, in the classical tradition. Dworkin, however, suggested – albeit without clearly focusing on the administrative state – that both sides of the debate were mistaken in their agreed-upon prediction. In Dworkin's view, under conditions of increasing social and economic complexity, law would come to rely *more*, not less, on jurisprudential principles, as opposed to positive sources such as either general rules or ad hoc commands.

I will argue that Dworkin's basic view has been vindicated – after a fashion, anyway. The scale, complexity, and rapidity of lawmaking in the modern state grew to such a point that neither general rules nor ad hoc commands could keep up. Rather, actors in the system, particularly judges, turned to general principles of lawmaking to maintain a supervisory role for legality. Dworkin himself was characteristically oblivious that the administrative state was where the effect he identified would come to fruition. Nonetheless, come to fruition it has. Administrative law, particularly the jurisprudence of judicial review of administrative action, turns out to be pervaded by principles of what used to be called “general” law, unwritten jurisprudence.³

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2. See MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960*, at 219 (1992) (“Pound, who had singlehandedly proclaimed ‘social engineering’ and ‘sociological jurisprudence’ as the twin goals of earlier Progressive reform, was devoting himself to denouncing the dangers flowing from ‘administrative absolutism.’ ‘The reader of Pound’s earlier writings,’ Judge Jerome Frank observed, ‘rubs his eyes’ upon encountering Pound’s recent denunciations and asks: ‘Can this be the same man?’” (footnotes omitted)).
 3. My focus here is on judicial review. I will not discuss law within the executive branch, such as the executive orders governing agency rulemaking, but I believe a parallel argument could be made about the important and arguably increasing role of high-level principles within that body of law as well. Two examples, one from each of the two most recent presidential administrations: (1) In President Obama’s Exec. Order No. 13563, 76 Fed. Reg. 3821 (Jan. 18, 2011), an important provision authorizes agencies “[w]here appropriate and permitted by law . . . [to] consider (and discuss qualitatively) values that are difficult or impossible to quantify, including *equity, human dignity, fairness, and distributive impacts*” (emphasis added); (2) President Trump’s Exec. Order No. 13892, 84 Fed. Reg. 55239 (Oct. 9, 2019), states that “[w]hen an agency takes an administrative enforcement action, engages in adjudication, or otherwise makes a determination that has legal consequence for a person, it may apply only standards of conduct that have been publicly stated in a manner that would not cause *unfair surprise*” (emphasis added). The latter is a prime example of the sort of procedural principles discussed,

Many of these principles are process oriented, attempting not to police the substance of agency decisions but rather to ensure that the administrative state operates through and by means of orderly lawmaking and rational decision-making.⁴ In important cases, these principles seemingly stem from intuitions about natural procedural justice and float free of any enacted source of law; a number predate the enactment of the Administrative Procedure Act (APA). In other cases, they are vaguely attributed to open-ended constitutional texts like “due process of law.” Whatever the details, administrative law has not come to be dominated by ad hoc agency commands, as theorists of the Progressive Era and afterwards anticipated. Rather administrative law features a thick ecology of legal principles that jostle, compete, and develop over time.

I. THREE THEORISTS, THREE VIEWS

Pound and the death of rules. In a famous address on “The Growth of Administrative Jurisprudence” given in 1923 and published a year later,⁵ Pound, in his early incarnation as a leading advocate for progressive legal reform, argued that the classical jurisprudence of the nineteenth century was increasingly obsolete. For Pound, the centerpiece of classical jurisprudence was the general rule, most characteristically generated by the common law. The classical legalists had supposed that the political virtues of legality—equality before the law, restraint of arbitrary decision-making, and legal clarity and certainty—would be guaranteed by the generality and formality of rules.

Pound subverted this view by arguing that in the increasingly complex and integrated social and economic environment of the administrative state, the opposite was true: general common-law rules created debilitating uncertainty, arbitrariness, and unfairness. (In these respects, Pound was adapting for the American case a set of arguments that Jeremy Bentham had made about the English common law in the mid-nineteenth century).⁶ General rules did not necessarily decide concrete cases, and to find out how or whether the general rules applied to a particular case, one would have to speculate on the later decisions of the generalist judges who sat in common-law courts. The proliferating complexity

in judicial review settings, in CASS R. SUNSTEIN & ADRIAN VERMEULE, *LAW AND LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE* (2020).

4. Here and throughout, I draw upon SUNSTEIN & VERMEULE, *supra* note 3.

5. Roscoe Pound, *The Growth of Administrative Justice*, 2 WISC. L. REV. 321 (1924).

6. See generally GERALD J. POSTEMA, *BENTHAM AND THE COMMON LAW TRADITION* (2d ed. 2019) (explaining Bentham’s critique of the English common law).

of the underlying behavior and transactions made these effects increasingly severe and thus exacerbated the uncertainties. For Pound, the consequences were debilitating, not least for business itself:

Especially in the complicated economic organization of today the law cannot say to the business man, well, you guess; you employ a lawyer by the year to give you the best guess that he can, and then as the result of litigation we will tell you five years afterwards whether your guess as to the conduct of your business was the correct one or not.⁷

The consequence was that all parties, emphatically including regulated parties, would actually be better off on the dimensions of legal predictability and certainty by shifting to a regime of specific administrative orders, tailored to their concrete circumstances. And in fact, administrative institutions were already supplying these new forms:

We are in a busy, crowded world, and when we do anything today we must specialize We cannot waste our time and substance on the mere incidents of our life . . . We try to tell men in advance what they may do and what they may not, as far as possible; and our administrative commissions are nothing but traffic officers, as it were, with signals to tell us when to cross and when not to cross, and where to cross.⁸

On this vision, the future of the law lay in a regime of increasingly specific positivism: in the limit, every industry and indeed every firm would act under the specific superintendence of bureaucracies clarifying their legal obligations at every important step. Needless to say, for legal traditionalists, this was a horrifying vision and would eventually become so for Pound himself.

Schmitt and the tyranny of commands. Pound's basic prediction was shared by a number of theorists, American, English, and Continental, who shared the same negative evaluation of these developments as the later Pound. Prominent among these were Lord Hewart, whose book *The New Despotism* was published in 1929,⁹ and, somewhat later, Friedrich von Hayek, author of *The Road to Serfdom* in 1944.¹⁰ I will focus here, however, on what is in my view the most interesting version of this critique, by the German legal theorist Carl Schmitt, writing in the same year as Hayek.

7. Pound, *supra* note 5, at 334.

8. *Id.*

9. LORD HEWART OF BURY, *THE NEW DESPOTISM* (1929).

10. FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* (1944).

In an article entitled “The Plight of European Jurisprudence,”¹¹ Schmitt expressed his fears that genuine jurisprudence was in process of being eliminated by the development of “motorized” lawmaking” in the administrative state – delegated rulemaking and ad hoc orders. Genuine jurisprudence, which Schmitt associated with the *ius commune* – the rich European brew of Roman law, local civil law, and canon law – was a matter of legal principles advanced, contested, argued, and elaborated over time by a community of jurists. These were neither technicians of law nor primary practitioners of other disciplines, neither compilers of regulations nor philosophers, but lawyers in the tradition of the civilian glossators, custodians of legal principles and doctrines understood as embodiments of justice. In this vision, the threat from the acceleration of lawmaking in the administrative state is that delegations of rulemaking power to agencies, and proliferating ad hoc commands, would progressively eliminate any scope for the autonomy of legal principles and their jurisprudential elaboration. As Schmitt put it:

[T]he compulsion for legal regulations to accommodate the tempo of changing conditions was irresistible. . . .

. . . Law became a means of planning . . . by an authorized agency but not publicly announced and often only sent to those immediately concerned. . . .

. . . These developments have created a critical situation for jurisprudence, which cannot enter into a race with the motorized methods of decrees and directives. It cannot keep up. Rather, it must become aware of the fact that it has become the last refuge of law. It must remember its own task and seek to safeguard the unity and consistency of law, which is being lost in the frenzy of legal impositions.¹²

The response Schmitt hoped for, a turn to the nationalist and historicist customary-law vision of Carl Friedrich von Savigny, is of little relevance for our purposes here. What is of interest is that Schmitt went beyond early Pound not only by evaluating the proliferation of administrative commands as a threat, but also by going beyond Pound’s central dichotomy between general rules and ad hoc orders to include legal principles as a crucial jurisprudential category of interest. For Schmitt, the main threat of the administrative state is that it will

11. Carl Schmitt, *The Plight of European Jurisprudence*, 83 *TELOS* 35, 52-54 (G.L. Ulmen trans., 1990) (translating an essay that originally appeared as CARL SCHMITT, *Die Lage der Europäischen Rechtswissenschaft (1943/44)*, in *VERFASSUNGSRECHTLICHE AUFSÄTZE AUS DEN JAHREN 1924-1954: MATERIALIEN ZU EINER VERFASSUNGSLEHRE* 386 (2d ed. 1973)).

12. *Id.* at 52-54 (internal footnotes omitted).

crowd out a true jurisprudence of principle. As Ronald Dworkin's work would later show, however, Schmitt's conclusion is hardly obvious.

Dworkin and principles. The foregoing theorists share a broad consensus, albeit with differences of detail, on the basic prediction that the growth of the administrative state would produce a long-term shift away from general legal rules and to ad hoc commands. Those theorists hold different normative views of the development, but share a common prediction. A very different view of the predictive question comes from Ronald Dworkin.¹³

Dworkin takes aim at the legal positivism of Jeremy Bentham and American derivatives, such as Justice Holmes and his successors. On Dworkin's view, positivism – at least in its earlier, vital form, before it degenerated into a strictly analytic-philosophy thesis – was intended by its champions to bring democratic accountability and transparency, clarity, certainty, and predictability to the law, in place of the (putative) obscurity, legalistic elitism, and arbitrariness of principle-ridden common-law rulemaking. The basic positivist hope was to simplify the law. For Dworkin, however, this view was already obsolete by Bentham's time;¹⁴ the functions of the state were already sufficiently ambitious to make simple appeals for clarity, certainty, and democratic law-creation implausible, especially in "hard cases" where statutes and constitutional provisions are conflicting, ambiguous or silent. Certainly, by the era of Holmes and other political positivists, the increasing complexity of the state and its law made nonsense of the simple picture of a transmission belt from legislative majorities through statutes to courts, promoting accountability, transparency, and certainty. As between legislatures and courts, agencies were increasingly interposed, and this critical increment of complexity raised a myriad of questions about the scope of administrative power, the rationality of its exercise, and the power of judicial review.

What consequences would flow from the infeasibility of simple positivism in a changing environment? In an illuminating passage, Dworkin argued that the result would be an increasing reliance on legal principles on the part of legislators and judges:

Changes in society's expectations of law and judges were well under way, however, even in the 1930s when [leading positivist judges] wrote, and with accelerating velocity in the decades that followed, that made positivism's general conception of legality steadily more implausible and self-defeating. Elaborate statutory schemes became increasingly important

13. RONALD DWORKIN, JUSTICE IN ROBES (2006); see also Holberg Prize, *Holberg Prize Symposium 2007: Justice in Robes: Integrity and the Rule of Law*, YOUTUBE (June 4, 2012), <https://www.youtube.com/watch?v=FL8U5J7vh3o&feature=youtu.be> [<https://perma.cc/6YRP-Q72P>] (providing a discussion between Dworkin and Jeremy Waldron).

14. Holberg Prize, *supra* note 13.

sources of law, but these schemes were not—could not be—detailed codes. They were more and more constructed of general statements of principle and policy that needed to be elaborated in concrete administrative and judicial decisions; if judges had continued to say that law stopped where explicit sovereign discretion ran out, they would have had constantly to declare . . . that legality was either irrelevant to or compromised in their judgments.¹⁵

In a similar vein, Dworkin wrote:

The thesis that a community’s law consists only of the explicit commands of legislative bodies seems natural and convenient when explicit legislative codes can purport to supply all the law that a community needs. When technological change and commercial innovation outdistance the supply of positive law, however—as they increasingly did in the years following the Second World War—judges and other legal officials must turn to more general principles of strategy and fairness to adapt and develop law in response. It then seems artificial and pointless to deny that these principles, too, figure in determining what law requires.¹⁶

Let me offer an interpretation of the last point in the passage. At least since the first real flowering of the administrative state in the years around World War I, judges have wondered and worried about how the administrative state might be kept broadly within the bounds of law.¹⁷ In the nightmare vision common to Hewart, Hayek, and Schmitt, “motorized law” in the form of delegated rulemaking and ad hoc commands would displace legal reason with executive fiat. Although judges could enforce clear statutory limits, under positivist theory they were supposed to exercise “discretion” when statutes were ambiguous or silent, and in the administrative state that discretion would in effect be transferred to agencies. But given circumstances of increasing complexity, a regime of de novo interpretation and discretion, and of judge-made general rules of common law, could not keep up either, for all the reasons Pound gave. The dilemma seemed

15. DWORKIN, *supra* note 13, at 182.

16. *Id.* at 212

17. See generally DAN ERNST, *TOCQUEVILLE’S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900-1940* (2014) (showing that judges came to view the administrative state as acceptable and within the bounds of law as long as agencies followed the fundamentals of due process); Adrian Vermeule, *Portrait of an Equilibrium*, THE NEW RAMBLER (2015), <https://newramblerreview.com/images/files/Vermeul-Review-of-Ernst.pdf> [<https://perma.cc/Q8YU-BJCQ>] (reviewing Ernst’s book). For the regulative ideal of keeping “government, overall and on average, tolerably within the bounds of law,” see Richard H. Fallon Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 311 (1993).

insoluble. Dworkin's insight, however, was that judges could and would preserve a role for legality by other means. Rather than pursue the increasingly futile attempt to formulate first-order, content-laden rules, judges would turn to jurisprudential principles cast at a higher level of generality.

II. THE TRIUMPH OF PRINCIPLE

By and large, Dworkin's view has turned out to be correct, although in a somewhat different way than he imagined. Recall Dworkin's suggestion that the growing importance of "general statements of principle" would occur, in part, through "statutory schemes" that would subsequently be "elaborated in concrete administrative and judicial decisions."¹⁸ There is a central statute, indeed a super-statute, that bears out Dworkin's view by embodying general statements of high principle: the APA. And likewise, there is an evolving body of doctrine and principle, centering on judicial review of administrative action, that fits his account perfectly. I will begin with a few general points about the APA and then offer specific examples.

The later Pound, after his about-face, advocated stridently for legal constraints on the administrative state.¹⁹ The final product that emerged from the push-and-pull of ideological conflict and legislative compromise in the years 1941-1946 is in many respects the opposite of the younger Pound's prediction for the future of administrative law. The centerpiece of the APA is neither general rules nor ad hoc commands. As to the former, the very definition of "rule" is "an agency statement of general *or particular* applicability and future effect";²⁰ the latter, denominated "orders," are permissible under an indefinite range of circumstances but are at least presumptively subject to judicial review, which would defeat Pound's traffic-control rationale for agency commands. Rather the APA, especially in its provisions for judicial review and the grounds of judicial review, is best seen as a charter of general principles. Administrative action must not be "arbitrary" and "capricious";²¹ agencies may make rules without public process so long as "the agency for good cause finds" that compliance would be "impracticable, unnecessary, or contrary to the public interest";²² and so on. Our great

18. See quote *supra* note 15 and accompanying text.

19. See, e.g., ROSCOE POUND, *ADMINISTRATIVE LAW: ITS GROWTH, PROCEDURE, AND SIGNIFICANCE* (1942).

20. 5 U.S.C. § 551(4) (2018) (emphasis added).

21. 5 U.S.C. § 706 (2018) ("The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be – arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.").

22. 5 U.S.C. § 553(b)(3)(B) (2018).

charter of administrative procedure is full of generally stated principles whose application is situational.²³

The view of the APA as, in critical respects, a charter of principles is not at all inconsistent with the critical point—famously made by Justice Jackson in *Wong Yang Sung v. McGrath*²⁴ and then picked up by Jackson’s clerk, William Rehnquist, in the *Vermont Yankee*²⁵ decision—that the APA is a grand compromise, a treaty of peace. What Jackson actually said was that “[t]he Act . . . represents a long period of study and strife; it settles long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest. It contains *many compromises and generalities* and, no doubt, some ambiguities . . .”²⁶ This makes the essential point: treaties and constitutions often contain general principles precisely *because of* their compromise character. One sometimes encounters the strange assumption that contested compromises necessarily yield documents filled with specific provisions. That is possible, but it is also extremely common that parties who have ongoing first-order disagreements, but good second-order reasons for maintaining a long-run relationship, will agree to disagree by enacting general concepts of justice on which they agree, while leaving for the future fights about specific conceptions of those principles.

In truth the APA is a bit of a hodgepodge—it contains rather specific instructions about certain elements of administrative procedures—but in key sections, it falls back on high-level concepts that command widespread agreement. These concepts, however, admit of competing conceptions, so the adoption of the concept does not by itself conclude future questions. Rather it provides a framework for interpretation, arguments, and dueling principles—in short, for administrative jurisprudence. The very complexity and contestation that is endemic to the administrative state produces compromise on abstract principles, which must then be “elaborated in concrete administrative and judicial decisions,” as Dworkin put it.

In an administrative law setting, as elsewhere, the basic Dworkinian enterprise of law as integrity²⁷ is to combine “fit” and “justification,” deploying arguments that fit past legal decisions and that justify those decisions in light of arguments about which conceptions of arbitrariness are most attractive on

23. Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1107 (2009).

24. 339 U.S. 33 (1950).

25. *Vermont Yankee Nuclear Power Corp. v. Nat’l Res. Def. Council, Inc.*, 435 U.S. 519 (1978).

26. *Wong Yang Sung*, 339 U.S. at 40-41 (emphasis added).

27. See RONALD DWORKIN, *LAW’S EMPIRE* 225-75 (1986).

grounds of political morality, attempting to bring those conceptions into coherence with the wider body of law. Administrative law has just this character. I will provide three brief examples.

Arbitrary and capricious review. A fundamental precept of the APA is that the exercise of administrative discretion should not be “arbitrary.” But of course, the whole problem in concrete cases is what counts as arbitrariness; the concept admits of many possible conceptions. This is all grist for the Dworkinian mill. The body of caselaw that the Court has generated under the heading of “arbitrary and capricious” review is only tenuously connected to the positive source of law that gave rise to it. Rather it is best seen as a rich mix of argument about the best conceptions of rationality and legality, with subsidiary principles worked out as interpretations of those conceptions. Is it “arbitrary and capricious” to fail to consider reasonable alternatives and explain why the agency rejects them? The Court has said yes.²⁸ When an agency changes its policy, however, must it show that the new policy is better than the old? Generally speaking, the answer is no, with certain exceptions.²⁹ (The obvious tension between those two principles is itself merely grist for further argument). If the only rationale an agency offers is transparently pretextual, is that valid? No.³⁰ All these questions implicate fundamental issues of rationality and political morality, including institutional morality. The result is some of the most normatively and theoretically saturated jurisprudence to be found anywhere in public law.

Administrative procedure. The triumph of principle is even more apparent in the law of administrative procedure. That body of law is full of principles that courts state confidently and use routinely, but whose source in positive law is often entirely unclear, and that functions free of any positive-law source anyway. Consider a few examples: (1) “agencies must follow their own rules”;³¹ (2) a court can examine an “agency action only on the grounds the agency advanced in the administrative proceedings”;³² (3) the President may not dictate agency decisions in formal adjudication.³³ All of these ultimately stem from caselaw pre-dating the Administrative Procedure Act, and in that caselaw there is little or no

28. See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 51 (1983).

29. See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (finding that an agency must explain its departure from past positions when it contradicts earlier factual findings or when reliance interests are implicated); cf. *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1915 (holding that the agency must assess potential reliance interests when repealing a discretionary non-enforcement policy).

30. See *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2576 (2019).

31. See *Arizona Grocery v. Atchison, Topeka & Santa Fe Ry.*, 284 U.S. 370, 390 (1932).

32. *SEC v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947).

33. See *Portland Audubon Soc’y v. Endangered Species Comm.*, 984 F.2d 1534, 1546 (9th Cir. 1993); cf. *Myers v. United States*, 272 U.S. 52, 135 (1926) (“[T]here may be duties of a quasi-

effort to deduce the principles from enacted legal texts; rather the principles are seen as either already part of the fabric of the law, or extrapolated from and inherent in the nature of courts, agencies, and their relationship.³⁴ In all three cases, although it is possible to argue that the principles are justified by the implicit premises of the APA or by due process, somehow understood, courts spend almost no time worrying about those textual foundations. Rather they announce and apply the principles in common-law fashion.

The omnipresence and importance of these principles in judicial review of agency action is plausibly a consequence of the increasing complexity of the administrative state. Under these conditions, as we have seen, judges have looked for ways to maintain the role of legality. (In Dworkin's words, "if judges had continued to say that law stopped where explicit sovereign decision ran out, they would have had constantly to declare . . . that legality was either irrelevant to or compromised in their judgments.") One way was to proceduralize administrative law—to allow sweeping delegations of authority to administrative agencies, as courts did both before and (especially) after 1935, but to condition agency discretion on procedural regularity.³⁵ The unwritten procedural principles I have mentioned come into prominence in the critical period between World War I

judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President cannot in a particular case properly influence or control.”).

34. In addition to the examples in the text, consider the fundamental principle of *resource allocation*: agencies have discretion to allocate resources across programs and activities in whatever way they deem necessary to promote their missions, and judges will broadly defer. *See, e.g., Massachusetts v. EPA*, 549 U.S. 497, 527 (2007) (“As we have repeated time and again, an agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities.”); *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993) (invoking the resource allocation principle to find nonreviewable an agency’s allocation of funds under a lump-sum grant). There is no enacted text that creates such a principle; it is extrapolated by judges from the political roles and political morality of agencies and their duties. In one of his few direct forays into administrative law, Dworkin addressed the procedural due process calculus of *Mathews v. Eldridge*, 424 U.S. 319 (1976), arguing that the Court’s analysis was flawed by a misconception of the nature of the harm to claimants. *See* Ronald Dworkin, *Principle, Policy, Procedure, in A MATTER OF PRINCIPLE* 99-103 (1985). In Dworkin’s view, claimants erroneously denied benefits would suffer not only the “bare harm” of failure to obtain the benefit but also the conceptually distinct “moral harm” of being denied a rightful entitlement. This is plausible, but only part of the picture, because when there is a fixed share of social resources available for a benefits program, the erroneous grant of a benefit to one claimant means that some other claimant(s) with valid entitlements will have to be denied, threatening *them* with “moral harm.” In these settings, one way of understanding the principle of resource allocation is that it allows agencies to make difficult normative judgments about where the risk of moral harm should fall. The principle of resource allocation, in other words, is no mere managerial privilege; it is itself possessed of important moral significance.
35. *See generally* ERNST, *supra* note 17, at 51-78 (describing this as the basic equilibrium reached by the Hughes Court).

and the enactment of the APA in 1946, and represent an important aspect of the judicial response.

*Reviewability and fundamental principles.*³⁶ One main thread of reviewability doctrine has wrestled with the “committed to agency discretion by law” exception to the presumption of reviewability for agency action.³⁷ And the main thread of interpretation of that provision has focused on the “no law to apply” test.³⁸ That test attempts to tie reviewability to a discrete question of positive law: is there a statute (or constitutional provision, but I will ignore that possibility) that supplies standards against which to examine the agency action? If there is no such statute, if the law has “run out,” then the agency has unreviewable discretion – or so the idea goes.

The “no law to apply” test exemplifies the sort of positivist framework – (1) rules plus (2) zones of unreviewable “discretion,” once rules run out – that Dworkin thinks is inadequate, given the complexity of the administrative state, because it would fail to preserve an adequate role for legality. Hence, in Dworkin’s view, we should observe principles filling the gap. And in actual practice that is what we do see; reviewability doctrine, in practice, goes well beyond the “no law to apply” test. As commentators have observed,³⁹ courts can always ask whether the agency’s exercise of discretion is arbitrary and capricious. As Justice Scalia famously observed, there is always at least one fundamental constraint of legal principle to apply, namely that the agency must act with regard for public rather than private purposes.⁴⁰ So the “no law to apply” test does not obviously capture how reviewability does or should work. What we see instead, as Justice Scalia also argued, is

“the ‘common law’ of judicial review of agency action” – a body of jurisprudence that had marked out, with more or less precision, certain issues and certain areas that were beyond the range of judicial review. That jurisprudence included principles ranging from the “political question” doctrine, to sovereign immunity (including doctrines determining when a suit against an officer would be deemed to be a suit against the sovereign), to official immunity, to prudential limitations upon the courts’ equitable powers, to what can be described no more precisely than a traditional respect for the functions of the other branches

36. For an excellent treatment of these issues, see Peter Karanjia, *Hard Cases and Tough Choices: A Response to Professors Sunstein and Vermeule*, 132 HARV. L. REV. F. 106 (2019).

37. 5 U.S.C. § 701(a)(2) (2018).

38. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971).

39. See Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 708 (1990).

40. *Webster v. Doe*, 486 U.S. 592, 608 (1988) (Scalia, J., dissenting).

All this law, shaped over the course of centuries and still developing in its application to new contexts, cannot possibly be contained within the phrase “no law to apply.”⁴¹

Needless to say, this “body of jurisprudence” is a set of “principles,” as Dworkin predicted, that arise because of the great complexity of the administrative state. The variety of situations in which reviewability questions arise, and institutions with respect to which such questions arise, is so great that no single, simple test can capture the relevant considerations.⁴² The result is a complicated, evolving body of doctrine infused with principled arguments over political morality and the role morality of institutions—precisely the sort of jurisprudence that Schmitt feared would be lost in the administrative state.⁴³

CONCLUSION

The development of the increasingly rich body of administrative law is entirely compatible with Dworkin’s prediction that the increasing complexity and scale of the modern state in the Progressive Era would result in greater reliance on legal principles, not less. In the nature of the case, of course, it is difficult to show cause-and-effect in such matters; the questions are too diffuse, the scale of the problems too large, and timescale too long, and there are too many moving

41. *Id.* at 608-10 (footnotes omitted).

42. *Cf. Withrow v. Larkin* 421 U.S. 35, 51-55 (1975) (declining to establish a per se rule against the combination of prosecutorial and adjudicative functions in agencies as a matter of due process, because “the growth, variety, and complexity of the administrative processes have made any one solution highly unlikely”).

43. A corollary of increasing complexity is that, under some conditions, judicial deference has itself become a legal principle, indeed in some sense the organizing principle around which many doctrines of administrative law are arranged. *See generally* ADRIAN VERMEULE, *LAW’S ABNEGATION: FROM LAW’S EMPIRE TO THE ADMINISTRATIVE STATE* (2016) (explaining how lawyers and judges came, by internal legal argument, to qualify or abandon crucial elements of the classical framework of de novo judicial review). This is not at all to say that courts are always obliged to defer. It is commonplace that legal principles have both scope and weight; they are both limited and, in certain cases, overridable by other considerations. But it does mean that courts doing administrative law always have to consider not only the content of the law, but the question of the institutional allocation of primary authority to determine that content. As the law has evolved over time to make second-order principles of deference increasingly central to our law, courts apply first-order principles with a strong margin of deference for the discretion of public authorities, in what is simultaneously an abnegation and a fulfillment of the legal project. *See generally id.* (detailing how the logical implications of legal principles pointed to qualified abnegation as the judiciary’s wisest course of action). I add here that the omnipresence of deference principles in administrative law results from the increasing complexity of the administrative state; it is thus, itself, an example of the triumph of jurisprudential principle, for basically the reasons Dworkin gave.

parts. At a minimum, however, it does seem clear that the crowding-out of legal principles feared by Schmitt has not occurred, and that the dominance of ad hoc administrative commands anticipated by Pound (and also feared by Schmitt) has not come to pass. Perhaps surprisingly, administrative law, especially judicial review of administrative action, has become, if not a “forum of principle,” at least a battlefield of competing principles. In this way, indeed, one might argue that the fundamental demand Schmitt made upon jurisprudence – that “[i]t must remember its own task and seek to safeguard the unity and consistency of law, which is being lost in the frenzy of legal impositions”⁴⁴ – was indeed accomplished within administrative law, by the development of a jurisprudence of principles.

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44. SCHMITT, *supra* note 11, at 54.