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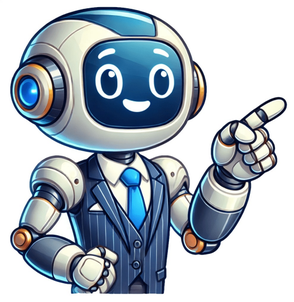

1.05-45 Interim rule.(a) An interim rule may be issued when it is in the public interest to promulgate an effective rule while keeping the rulemaking open for further refinement. For example, an interim rule may be issued in instances when normal procedures for notice and comment prior to issuing an effective rule are not required, minor changes to the final rule may be necessary after the interim rule has been in place for some time, or the interim rule only implements portions of a proposed rule, while other portions of the proposed rule are still under development.(b) An interim rule will be published in the Federal Register with an effective date that will generally be at least 30 days after the date of publication. After the effective date, an interim rule is enforceable and is codified in the next annual revision of the appropriate title of the Code of Federal Regulations. Asked by: Mrs. Roselyn O'Connell|Last update: December 21, 2023 Score: 5/5 (20 votes) Interim Final Rule: When an agency finds that it has good cause to issue a final rule without first publishing a proposed rule, it often characterizes the rule as an interim final rule, or interim rule. This type of rule becomes effective immediately upon publication. What does interim final mean? Interim final rules (IFRs) are rules issued by federal agencies that become effective upon publication without first seeking public comment on the rule's substance.What is the interim final rule in administrative law? In the context of federal administrative agencies like the SEC and the Commodity Futures Trading Commission (CFTC), a rule adopted and immediately effective, without the notice, comment, and minimum 30-day post-publication waiting period generally required for federal agency rulemaking. What is the meaning of final rule? A final rule, in the context of administrative rulemaking, is a federal administrative regulation that advanced through the proposed rule and public comment stages of the rulemaking process and is published in the Federal Register with a scheduled effective date. What is the final rule stage? The final rule. After the comment period closes and the agency has reviewed the comments received and analyzed them, we decide whether to proceed with the rulemaking we proposed, issue a new or modified proposal, or withdraw the proposal. 39 related questions found You can't override it, but you can still use the implementation from the parent class. Java's Object class defines the final method getClass() . The Final Rule is intended to better manage the broader types of research (specifically including behavioral and social science research) conducted and supported by all the Common Rule departments and agencies. One of the Final Rule's main purposes is to facilitate the conduct of minimal risk research. After reviewing the comments received, the agency may, but is not required to, issue a "final rule making". Final rules have the force of law and general applicability to the public. In certain situations a final rule may be promulgated without a prior proposed rule. Most rules are codified in the CFR. : a regulation governing practice or procedure in a particular court. Rules of court are a set of procedural regulations adopted by courts which must be followed by parties and their lawyers on matters within the court's jurisdiction. These rules are often classified into different categories, such as criminal procedure, civil procedure, evidence rules, and appellate procedure. 1. When an interim rule is issued, it impacts the acquisition immediately beginning with the effective date listed in the Federal Register Notice. 2. It has the force and effect of a FAR requirement and must be followed as written. On October 7, 2022, the Bureau of Industry and Security (BIS) put on public display the interim final rule, Implementation of Additional Export Controls: Certain Advanced Computing and Semiconductor Manufacturing Items; Supercomputer and Semiconductor End Use; Entity List Modification (October 7 advanced computing and ... Statutory law and administrative law are two main types of laws created by a government. Administrative law describes how a government bureaucratic agency can operate. Most bureaucratic agencies exist in the executive branch. Statutory law, on the other hand, regulates and advises the general public. Interims are brought into an organisation on a temporary basis to help out with specific project needs or to fill a temporary skills shortage. Working as an interim can take different forms, from rolling contracts based on daily rates to fixed-term salary contracts. /ntrm/ temporary; intended for a short period only: an interim government. interim. Interim is used to describe something that is intended to be used until something permanent is done or established. She was sworn in as head of an interim government in March. Synonyms: temporary, provisional, makeshift, acting More Synonyms of interim. Laws are created and established by the government and hold everyone to the same standard. Unlike rules, in most cases, the consequences for breaking a law are pre-determined and do not vary based on the conditions or circumstances. Judgment: A court decision. Also called a decree or an order. Judgment File: A permanent court record of the court's final disposition of the case. You identify the rule by looking at how the court resolves the issue. You generalize and form a rule that takes into account the facts of the case by making an inference from the holding of the case. When someone breaks the law, they face legal ramifications that can have a significant impact on their life. These consequences can range from minor fines to long-term imprisonment, and can affect a person's personal and professional life for years to come. Federal laws are passed by Congress and signed by the President. The judicial branch decides the constitutionality of federal laws and resolves other disputes about federal laws. However, judges depend on our government's executive branch to enforce court decisions. A legal rule, or law, is one which has been officially approved by a state's legislative body. Legal rules are interpreted by courts who decide cases brought before them and may impose sanctions upon those who violate these rules. Legal rules differ from non-legal rules, such as customs or conventions. Published Final Rule No Final Rule becomes effective in less than 30 days of its publication in the FR, unless it grants an exemption, relieves a restriction, or for good cause, which includes such things as emergencies. The revised Common Rule requires that for any clinical trial conducted or supported by a Common Rule department or agency, one consent form must be posted on a publicly available federal website within a specific time frame. The consent form must have been used to enroll subjects in order to satisfy this new provision. There are three (3) types of review paths for an IRB application: Full Board, Expedited, and Exempt. The review path is determined by: Level of risk to subjects associated with the project. The type of research being conducted (e.g., an educational intervention, a survey, an ethnographic observation, etc.) InsightEXECUTIVE SUMMARYInterim final rules (IFRs) are rules issued by federal agencies that become effective upon publication without first seeking public comment on the rules substance.Used during emergencies and other times of need, IFRs can help expedite the regulatory process to quickly put in place binding regulatory requirements.Because IFRs offer agencies advantages over the typical regulatory process, the privilege of issuing them can lead to abuse.Ultimately, courts determine if IFRs are justified, and adverse rulings can force agencies to restart the regulatory process.INTRODUCTIONInterim final rules (IFRs) are rules issued by federal agencies that become effective upon publication without first seeking public comment on the rules substance. Instead, federal agencies solicit public comment at the time of publication and may make changes to the rules depending upon that feedback. Often used during emergencies and other times of need, IFRs can help expedite the regulatory process to put in place binding regulatory requirements in short order.This primer aims to explain the legal basis for IFRs, how they are supposed to work, why agencies may prefer IFRs to typical rulemaking, and possibilities for abuse.THE LEGAL BASIS FOR IFRsThe term interim final rule has become so commonplace that a typical assumption is that there is specific language in the U.S. Code defining the term and setting clear circumstances for, and limitations on, the use of such rules. In fact, there is no such language. IFRs have become a widely used agency term for rules that meet certain exemption criteria from typical notice-and-comment procedures spelled out in the Administrative Procedure Act (APA), the nearly 75-year-old law underpinning how federal rules are made.The APA exempts notice of proposed rulemaking requirements in limited circumstances, including when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.[1] This good cause exception is cited to justify the use of IFRs and must be accompanied by an explanation in a rules preamble citing the circumstances for foregoing public comment, which can include emergencies, judicial deadlines, and statutory requirements.HOW IFRS WORKIFRs are different from other forms of rules that also bypass notice-and-comment procedures, such as temporary final rules (TFRs) and direct final rules (DFRs). TFRs typically are of short duration and have a specified termination date. DFRs are used when an agency believes there is no foreseeable opposition to a rule. DFRs rules are often published with a notice that the agency will rescind the rule and issue a notice of proposed rulemaking if it receives a substantive comment opposing it within a limited comment window. IFRs, rather, are essentially proposed rules that have immediate effect while public comment is obtained and considered. The catch, however, is that historically relatively few IFRs are ever modified because of feedback (or even finalized permanently, for that matter).[2]A good example of an IFR is the first rule jointly issued by the Department of the Treasury and the Small Business Administration (SBA) earlier this year to implement the Paycheck Protection Program. In this instance, Treasury and SBA put in place the parameters by which small businesses would be eligible for the program, including requirements on lenders and borrowers. Because of language included in the Coronavirus Aid, Relief, and Economic Security Act requiring the agencies to have the program operational within 30 days of its passage, there was no time to propose language, accept public comment, and make changes. Instead, the agencies have continued to roll out additional IFRs reforming certain elements of the program on an ongoing basis. While this approach is not ideal for regulatory certainty, the dire need to provide financial assistance to small businesses during the early stages of the COVID-19 emergency justifiably override the need to have the programs details etched in stone.IFRs offer agencies other advantages beyond expediency on urgent matters and skipping the time-consuming notice-and-comment process on the front end of a rulemaking. The good cause exception of the APA also allows agencies to avoid regulatory impact assessments typically required under the Regulatory Flexibility Act and the Unfunded Mandates Reform Act.[3] Agencies can therefore favor IFRs because they speed up the process and reduce the amount of staff resources devoted to pre-rule analysis. These advantages create the possibility for agencies to abuse IFRs by inflating claims of urgency to avoid certain procedural steps.Abusing IFRs can ultimately set agencies back months or years. IFRs can be challenged in federal court like any other rule, and an adverse ruling can force the agency back to the beginning of the process. Ultimately, the use of IFRs is a risk/reward proposition that must be weighed by an agency. There is no judicial precedent that governs how courts will decide on IFR cases. Each rule is measured on a case-by-case basis depending on the strength of the agencys justification for using the APAs good-cause exception.[4]CONCLUSIONIFRs are essentially proposed rules that have immediate effect. These rules can be a useful tool for agencies to expedite the regulatory process in times of urgent need, but agencies must explain why they have good cause for issuing IFRs.Because IFRs allow agencies to skip some time-consuming steps in the regulatory process, they can be favored by agencies. This preference can lead to abuse of the APAs good-cause exception. The main check preventing agencies from abusing IFRs is the judicial system, as courts ultimately decide if an agency was justified in issuing an IFR, and adverse rulings can restart the regulatory process.[1] 5 USC 553(b)(B)[2] Asimow, Michael. Interim-Final Rules: Making Haste Slowly. 51 Admin. L. Rev. 703 (1999). 737-741.[3] Ibid. 709.[4] Ibid. 716-723. An interim-final rule is a rule published first as a final rule with the opportunity to comment at the time the rule is promulgated. The technique is most often used when a statute requires an agency to act within a specified time shortly after the law takes effect. The agency can only skip the NPRM when it has good cause to do so. In certain cases, an agency may decide that it is "impracticable, unnecessary, or contrary to the public interest" to go through the step of a proposed rule stage for a rulemaking. In these cases, the APA allows the agency to skip the step and print a final rule directly. An interim final rule allows an agency to print a final rule directly, while still providing an opportunity for public comment. Glossary index: ABCD|EFGH|IJKLMN|OPQR|STUVWXYZ back to Blog If you have comments or suggestions on how to improve the www.ecfr.gov website or have questions about using www.ecfr.gov, please choose the 'Website Feedback' button below. If you would like to comment on the current content, please use the 'Content Feedback' button below for instructions on contacting the issuing agency Download PDF Thomas E. Nielsen*IntroductionAlmost a century ago in Crowell v. Benson,[1] Chief Justice Charles Evans Hughes highlighted the benefits of delegating certain classes of issues to administrative agencies for prompt, continuous, expert, and inexpensive resolution,[2] but cautioned that unfettered agency discretion risked establish[ing] a government of a bureaucratic character alien to our system.[3] When Congress enacted the Administrative Procedure Act[4] (APA) in 1946, it offered a broad framework to negotiate this tension between administrative power and the rule of law[5] by balancing a range of variables, including stability, constraints on executive power, accountability, and the need for expedition and energy, for vigorous government.[6] In the following decades, as agencies and the lower courts gave content to the APAs vague generalities, a hydraulic give-and-take emerged: agencies sought avenues for efficient, expertise-driven policymaking, and courts answered by erecting various limits on administrative power.[7]One avenue of efficiency is the interim final rule (IFR). Used with increasing frequency since the 1980s,[8] IFRs are promulgated without notice and comment using the APAs good cause exception.[9] Although the IFR is immediately binding,[10] the agency simultaneously invites public input on it.[11] The agency then issues a final final rule (FFR) that at least theoretically is edited to respond to the comments received.[12]IFRs have long threatened the rule-of-law values undergirding the informal rulemaking process, a threat since intensified by the Supreme Courts 2020 decision in Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania,[13] which appeared to write [the APAs informal rulemaking procedures] out of the statute entirely.[14] Little Sisters questionable reading of the APA, which made interim-final rulemaking markedly easier than it was before, nudges the administrative state towards the government of a bureaucratic character against which Chief Justice Hughes cautioned.[15] But just as the hydraulics of our legal system have responded to bold assertions of administrative power in the past, so too can they respond to Little Sisters and cabin the use of IFRs: by way of arbitrary-and-capricious review, and (in certain cases), by limiting agencies invocations of the APAs good cause exception. Through these pathways, lower courts can rein in the unfettered administrative discretion Little Sisters appears to allow, restoring the APAs balance between administrative power and the rule of law.This Essay proceeds as follows. Part I offers a brief history of the use and judicial review of IFRs. Part II discusses the rule-of-law values undergirding various constraints on agency action, and argues that the IFR process represents a threat to these values a threat the Court in Little Sisters disregarded. Part III offers two devices lower courts can use to cabin the IFR process while remaining faithful to the APAs text.I. A Brief History of IFRsSince the 1980s, agencies have relied on the IFR process to promulgate a growing number of rules. This Part describes the rise of IFRs, the various approaches the circuit courts took in evaluating their validity prior to 2020, and the effect of Little Sisters on these approaches.A. The Rise of IFRsThe familiar procedure of notice-and-comment rulemaking, set forth in 553 of the APA, requires that agencies publish a general notice of a proposed rulemaking in the Federal Register, give interested persons an opportunity to participate in the rule making by submitting comments, and then, [a]fter consideration of the relevant matter presented, issue a final rule along with a concise general statement of [its] basis and purpose.[16] In the wake of the wholesale shift from formal adjudication to informal rulemaking in the 1960s, however,[17] courts grafted various additional requirements onto this relatively sparse text.[18] Such requirements, coupled with the development of so-called hard look review in the 1970s80s,[19] transformed notice-and-comment rulemaking from a simple, streamlined procedure into a cumbersome and costly one.[20]IFRs emerged as a way to circumvent this process while retaining some of its benefits. The APA contains several exceptions, including a good cause exception that permits agencies to forego notice and comment if the procedure would be impracticable, unnecessary, or contrary to the public interest.[21] By using this exception to promulgate a binding IFR, an agency is able to swiftly respond to a perceived problem or a statutory command to act, avoiding the burdens of adhering to 553s paper hearing requirements.[22] And by soliciting postpromulgation comments after issuing an IFR (which is legally unnecessary if the good cause exception applies), the agency can reap some of the benefits of public participation in rulemaking, gaining valuable information . . . at low cost.[23] As a result of such comments, the FFR is less likely to contain mistakes and may be better suited to deal[ing] with unexpected and unique applications or exceptional situations to which the comments adverted.[24]In light of these advantages, agencies have embraced IFRs with increasing enthusiasm since the 1980s. The trend is especially pronounced with respect to so-called major rules those with an economic impact of $100 million or more. In 2018, James Yates observed that agencies averaged seven major IFRs per year during President Clintons second term, which increased to eight during the George W. Bush Administration and ten during the Obama Administration.[25] But even outside the context of major rules, agencies are using the IFR process more frequently than they once did, [26] suggesting a widespread belief within the administrative state that agencies can get their rules implemented . . . quickly and economically by foregoing prepromulgation notice and comment.[27] Put simply, IFRs have become part of the rulemaking routine.[28]B. IFRs in the Circuit CourtsThe rise of IFRs has put the judiciary in an awkward position.[29] On one hand, the good cause exception is generally understood to be narrow, existing principally to give agencies flexibility in dealing with emergencies and typographical errors, plus the occasional situation in which advance notice would be counterproductive.[30] On the other hand, once an agency has promulgated an IFR, invited postpromulgation comments, and issued an FFR after considering those comments, it has arguably adhered to the letter of the APAs informal rulemaking provisions.[31] Moreover, the APAs judicial review provisions include a harmless error rule,[32] suggesting that categorically declaring all IFRs to be procedurally invalid without investigating the prejudice, if any, caused by the procedure would itself violate the APA.As Professors Kristen E. Hickman and Mark Thomson explain, these competing considerations led the circuit courts to adopt an array of approaches to addressing the procedural validity of IFRs.[33] Certain courts declined to give any effect to postpromulgation notice and comment on the grounds that upholding IFRs would provide a powerful disincentive for agencies to comply with 553s prepromulgation notice-and-comment requirements.[34] Others treated postpromulgation notice and comment as curing or mooting procedural defects in all IFRs.[35] Still other courts developed an intermediate approach called the open mind standard, upholding the procedural validity of rules subjected to postpromulgation notice and comment if, during the postpromulgation notice-and-comment period, the agency kept an open mind with respect to the comments it received as reflected in the FFR.[36] Finally, in a handful of cases involving the EPA, courts invalidated an IFR for being procedurally defective but remanded to the agency without vacatur, which in turn effectively require[d] a second round of postpromulgation comment limited to those parties that petitioned the court for relief.[37] This diverse collection of views led Hickman and Thomson to conclude, in 2016, that courts have struggled to resolve the issue of how to consistently evaluate IFRs under the APA framework.[38]C. IFRs After Little SistersIn Little Sisters, the Supreme Court finally brought some clarity to the IFR issue, rejecting the open mind standard and strongly implying that IFRs are always valid so long as the agency invites postpromulgation comments and issues an FFR, even if the agency lacks good cause to issue the IFR in the first place. Little Sisters arose from two IFRs promulgated pursuant to the Affordable Care Act (ACA).[39] The ACA requires that employers offer insurance that includes preventative care and screenings, but delegates authority to define this term to the Health Resources and Services Administration (HRSA), a subsidiary of the Department of Health and Human Services (HHS).[40] Soon after Congress enacted the ACA, HRSA determined that the preventative care plans had to include contraceptive coverage, but exempted certain religious nonprofits from the requirement.[41] Such nonprofits could self-certify their religious objections to the insurance provider, who would in turn direct the insurer to exclude contraceptive coverage from the organizations plan.[42] But in 2017, the Trump Administration issued two IFRs invoking the good cause exception that did away with the self-certification process and simply allowed any employer with a religious or moral objection to decline to offer contraceptive coverage to its employees.[43] Simultaneously, HRSA invited public comments on the IFRs.[44]Pennsylvania challenged the IFRs in the U.S. District Court for the Eastern District of Pennsylvania, which issued a nationwide preliminary injunction.[45] Among other concerns, the district court expressed serious doubt that HRSA had good cause to dispense with notice and comment.[46] The district court also rejected the idea that inviting postpromulgation comments itself cured the procedural defects in the IFRs, since an agency may seek post-issuance commentary only if and only after having shown that it had good cause to avoid notice-and-comment rulemaking.[47] The Trump Administration appealed, and while the appeal was pending before the Third Circuit, HRSA issued FFRs virtually identical to the IFRs.[48] The Third Circuit subsequently affirmed the District Court, applying the open mind standard to conclude that [t]he notice and comment exercise surrounding the Final Rules does not reflect any real open-mindedness toward the position set forth in the IFRs.[49]The Supreme Court reversed, concluding that because HRSA had promulgated FFRs after providing notice and an opportunity for comment, there was no procedural error.[50] Writing for a majority of five, Justice Thomas decline[d] to evaluate the final rules under the open-mindedness test, which violated the general proposition, first set forth in Vermont Yankee Nuclear Power Corp. v. NRDC,[51] that courts are not free to impose upon agencies specific procedural requirements that have no basis in the APA.[52] Concluding that 553 only requires adequate notice and an opportunity to participate in the rule making through comments, the Court explained that HRSA complied with each of these statutory procedures[53]: the IFRs themselves constituted notice, and were issued concurrently with an invitation to interested parties . . . to submit comments.[54] In a footnote, the Court further noted that [b]ecause . . . the IFRs request for comment satisfies the APAs rulemaking requirements, there was no need to reach the argument that the Departments lacked good cause to promulgate the . . . IFRs in the first place.[55]As several commentators noted, Little Sisters seemed to not only endorse the IFR process,[56] but also contemplate that agencies could issue IFRs irrespective of good cause, potentially gutting 553s requirements for the mine-run of substantive rules.[57] The Court thus followed the handful of circuit courts that had taken the most permissive view towards IFRs,[58] embracing the idea that postpromulgation opportunity for comment, coupled with an FFR, cures any procedural defects present in an IFR.II. IFRs and the Rule of LawThe APAs notice-and-comment process strikes a balance between administrative power, with all its advantages of flexibility and expertise, and rule-of-law values. This Part describes those values and the manner in which the APAs notice-and-comment process embodies them. It then offers an account of how IFRs aggrandize agency discretion at the expense of the rule of law, disrupting the APAs compromise[] between these opposing . . . forces.[59] Finally, this Part explains how Little Sisters, through an overly literalistic and non-contextual interpretation of the APAs text, ignored the threat.A. Rule-of-Law Values in the Administrative StateIn the mid-twentieth century, legal philosopher Lon Fuller posited that law could not exist without a fundamental framework within which the making of law takes place, a framework understood and accepted by both the sovereign and the public.[60] Central to this jurisprudential theory was what Fuller termed the internal morality of law itself, the notion that the authority to make law must be supported by moral attitudes that accord to it the competency it claims.[61] In The Morality of Law, Fuller set forth eight principles that he argued infused a legal system with the requisite sense of morality: laws must be (1) generally applicable, (2) sufficiently publicized; (3) prospective in effect; (4) clearly understandable; (5) consistent with each other; (6) reasonable in what they ask of the populace; (7) relatively stable and unchanging; and (8) congruent, by their terms, with how they are enforced in practice.[62] To Fuller, a system that failed to adhere to some or all of these rules was incapable of creat[ing] anything that can be called law, even bad law, since [l]aw by itself is powerless to bring . . . morality into existence.[63]As Professors Cass Sunstein and Adrian Vermeule have explained at length, the APA offers adaptable, expert-driven modes of policymaking that are nonetheless limited by Fullerian values.[64] This balance is especially visible in the APAs most significant innovation[65]: notice-and-comment rulemaking. Section 553 of the APA and the judicial opinions explicating it set forth two basic requirements. First, the agency must provide the public with notice of a proposed rulemaking and an opportunity for comment.[66] Second, the agency must offer a reasoned justification for its final rule after consider[ing] the comments received,[67] or, in the alternative, explain why there is good cause to depart from 553s normal procedures.[68] The notice requirement embodies a cluster of Fullerian principles.[69] It provides that proposed rules are adequately publicized, such that they may be subject to public criticism.[70] It guards against retroactivity.[71] And it ensures, by inviting feedback from interested parties, that the proposed rule does not command[] the impossible and can be adequately followed, giving it the practical force of law.[72] Similarly, the reasoned explanation requirement promotes clarity, forcing agencies to square their ultimate choice with the evidence before them, as well as existing law.[73] Finally, 553s structure of a standard procedure followed by limited, enumerated exceptions itself establishes the general rule that agencies cannot dispense with notice-and-comment on an ad hoc basis, abiding Fullers concern that if the lawmaker habitually disregards his own rules, he may find his system of law disintegrating.[74]B. Rule-of-Law Problems Posed by IFRs1. Fullerian Failures of Clarity, Generality, and PublicityThe IFR process represents a risk to a panoply of rule-of-law values embedded in the notice-and-comment process. Most obviously, the process frustrates the values of clarity and generality. After Little Sisters, it also frustrates the value of publicity.Start with clarity and generality. Even before the Court decided Little Sisters, agencies routinely justified IFRs through questionable invocations of the good cause exception: given the high costs of the notice-and-comment process and the fact that the good cause exception is enforced inconsistently[75] (and evaluated under varying standards of judicial review),[76] agencies have a strong incentive to invoke the exception to promulgate IFRs, notwithstanding the risk that a court might invalidate them later.[77] Citing this incentive, Hickman and Thomson conclude that at least a significant percentage of agency regulations lacking prepromulgation notice and comment are not, in fact, exempt from those procedures under the APA.[78]IFRs promulgated pursuant to the good cause exception, then, have clarity and generality problems due to their impermissibly ad hoc character: because a reasoned justification is not possible, the agency is left to make an essentially arbitrary decision to depart from 553s typical procedures, which in turn is evaluated on an arbitrary basis by the courts. A pair of cases arising out of one of the Biden Administrations COVID-19 vaccine rules illustrates these failures in practice. In September 2021, HHS announced that the conditions of participation in the federal Head Start Program would be amended to include a COVID-19 vaccination requirement.[79] At the end of November, HHS promulgated an IFR to this effect, invoking the impracticable and public interest prongs of the good cause exception.[80] The IFR was promptly challenged in multiple lawsuits. On January 1, 2022, the U.S. District Court for the Western District of Louisiana held that the IFR was procedurally invalid because HHS lacked good cause, observing that [i]t took [HHS] almost three months . . . to prepare the [IFR], and concluding that the situation was not so urgent that notice and comment was not required.[81] Evaluating the same fact pattern, the U.S. District Court for the Eastern District of Michigan reached the opposite result two months later, holding that the 82 days that it took to publish the IFR after it was first announced did not constitute[] delay inconsistent with the Secretarys finding of good cause. [82]These courts division on the good cause issue reveals the clarity and generality issues inherent in the IFR process. As to clarity, HHS offered a host of factual reasons why good cause applied,[83] but did not attempt to connect them to the prongs of the exception (impracticable and public interest) it invoked.[84] As to generality, HHSs inability to provide a reasoned explanation grounded in the APA contributed to the appearance that HHS had arbitrarily selected the IFR process over standard rulemaking especially in light of HHSs delay between announcing the IFR and promulgating it. And when the question reached the courts, they split without providing guidance beyond the fact-bound ruling that the eighty-two-day wait was (or was not) too long, perpetuating the cycle of incoherence and arbitrary decisionmaking, or what Fuller called a fail[ure] to develop any significant rules at all.[85]The rule-of-law problems that arise when agencies opportunistically invoke the good cause exception to promulgate IFRs are intensified by Little Sisters. If, as Little Sisters suggested, notice and comment before the issuance of a binding pronouncement is optional, agencies can ignore the procedure at will, issuing IFRs that double as notice while inviting postpromulgation comments, and then issuing FFRs if the IFRs are challenged.[86] In this universe, agencies do not need to even attempt to show good cause to avoid notice and comment and can instead disregard 553s general order of operations whenever they want, rendering it a nullity.[87] Such disregard pushes the IFR process closer to a purely ad hoc mode of decisionmaking with no discernible standards than it was before Little Sisters, when agencies had an obligation to at least try and link an IFR to one of the APAs good cause prongs.Little Sisters brings with it a third Fullerian failure, too, threatening the publicity safeguarded by the notice-and-comment process. IFRs, like all substantive rules, are subject to the APAs requirement of publication in the Federal Register thirty days before going into effect, which provides a modicum of notice to the public.[88] But prepromulgation comments foster additional dimensions of publicity, opening up the internal procedures of deliberation and consultations by which a binding rule is made and exposing the rule to scrutiny before it acts on the public.[89] In this way, post- and prepromulgation comments are not the same: once an agency has published a binding IFR, it is less likely . . . [to] deviate from its position in the FFR.[90] If the public feels that that an invitation for postpromulgation comments is a mere pro forma exercise, such an attitude could create a malaise whereupon citizens [do] not take seriously the opportunity to offer comments and perceive that the resulting rules . . . [are] less the product of a representative process and more the product of bureaucratic fiat.[91] The IFR process, in other words, risks making rules appear illegitimate due to a lack of genuine public input.Unsurprisingly, courts cognizant of the Fullerian morality of the APAs notice-and-comment process have repeatedly expressed an intuition (in contexts outside interim-final rulemaking) that agencies should not be empowered to ignore that process whenever it is convenient to do so. For instance, in Tennessee Gas Pipeline Co. v. FERC,[92] the D.C. Circuit rejected the argument that the limited nature of [a] rule could justify a failure to follow notice and comment procedures.[93] To rule otherwise, the court cautioned, would allow the APAs exceptions to soon swallow the notice and comment rule.[94] In Northern Mariana Islands v. United States,[95] the U.S. District Court for the District of Columbia came to a similar conclusion, holding that a statutorily mandated eighteen-month implementation period did not constitute good cause to dispense with notice and comment. There, too, the court observed that accepting such an argument would swallow the [notice-and-comment] rule, as every agency obligated to develop a new federal program in a finite amount of time could decide that it had good cause to dispense with public participation in rulemaking.[96] Both Tennessee Gas and Northern Mariana Islands seemed to express a mood[97] that giving agencies broad discretion to dispense with prepromulgation comments would threaten the rule-of-law values implicit in 553. But the IFR process as interpreted in Little Sisters appears to grant agencies precisely this sort of discretion.2. Little Sisters Refusal to Recognize the ProblemLittle Sisters could have responded to the rise of IFRs by recognizing the problems they posed under the APAs framework. Instead, the Court engaged in a questionable reading of 553s text that failed to respect the rule-of-law principles underlying it. As Hickman explains, 553s description of the comment process, through repeated uses of the word after, assumes that comments follow notice but precede the issuance of a final, binding rule.[98] The good cause exception empowers agencies to entirely dispense with this requirement.[99] Thus, the concept of inviting postpromulgation comments on a binding rule is alien to the APAs text: rather, the APA gives agencies the choice either (a) to seek comments before promulgating a binding rule, or (b) to forgo the procedure entirely after making a showing of good cause. So Little Sisters decision to treat postpromulgation comments on an IFR the same as prepromulgation comments on a typical rule,[100] despite being justified textually, finds no support in 553 read contextually.[101]From this, it follows that inviting postpromulgation comments on an IFR is never relevant to its procedural legality: if an agency has good cause, it can (but does not have to) invite postpromulgation comments, and if an agency lacks good cause, it must offer prepromulgation comments. Consequently, the Little Sisters Courts footnote[102] observing that its decision mooted the good cause issue makes little sense: since postpromulgation comments should not count as an opportunity to participate under 553s general provisions, the only way the FFRs in Little Sisters could have been valid was if the agency had good cause to dispense with prepromulgation comments. The Courts conclusion to the contrary ignores the implicit procedural logic[103] of 553 in lieu of an overly wooden, literalistic interpretation. And because the Court ignored that logic, it also ignored certain values clarity, generality, and publicity that infuse the informal rulemaking process with Fullerian morality.[104] The result is an erosion of agencies broader legitimacy as lawmakers: as Hickman pointedly wrote after the Court announced Little Sisters, [w]e likely will get more agency regulations faster as a result of an increased use of IFRs, but in the end, we may not like the cost.[105]III. Cabining the IFRLittle Sisters reliance on the APAs text to reject court-crafted constraints on agency discretion recalls a chestnut of administrative law, Vermont Yankee, which offers lessons for those concerned about the threat IFRs pose to the rule of law. This Part briefly describes the analytical link between Vermont Yankee and Little Sisters. Then, drawing on how the law developed after Vermont Yankee, it provides two ways lower courts can draw on the APA to constrain the IFR process.A. Lessons from Vermont YankeeVermont Yankee purported to rely on the APAs text to conclude that reviewing courts are generally not free to impose [additional procedural rights not enumerated in the APA] if agencies have not chosen to grant them.[106] But in reaching this conclusion, the Court arguably ignored other sections of the APA,[107] instead embracing the idea that procedural mandates need some kind of [positive] legal foundation.[108] Four decades later, Little Sisters relied heavily on Vermont Yankee to reject the open-mindedness test as the sort of common law-esque procedural requirement the Court had long renounced.[109] Little Sisters, too, is arguably inconsistent with the language of the APA,[110] but like Vermont Yankee, reflects a methodological commitment to judicial restraint and . . . strict judicial adherence to [the APAs] . . . text, read in isolation.[111]Despite appearances, however, Vermont Yankee did not actually leave the formulation of procedures . . . [entirely] within the discretion of . . . agencies.[112] Rather, as then-Professor Antonin Scalia observed, Vermont Yankee only barred courts from supplementing the APAs procedures in a common-law fashion.[113] The opinion was noticeably silent on expansive interpretation[s] of the language of the APA itself that had the effect of imposing new procedures on agencies, and its silence on this point seem[ed] to be an implicit approval of such a practice.[114] Vermont Yankee also endorsed the substantive policing of a rules content through 5 U.S.C. 706s arbitrary-and-capricious review provision, a constraint the Court had been developing since 1971.[115]In the years following Vermont Yankee, then, judicial decisions reinterpreting the APA in a relatively permanent fashion persisted, imposing new hurdles on agencies and raising the costs of the informal rulemaking process. Though not without their critics,[116] such decisions were a natural continuation of what the courts had been doing for decades: devising tools within the APA framework to ensure, as agencies asserted power in new ways, that the administrative state remained within the bounds of the laws morality. Lower courts concerned about the rise of IFRs can take a lesson from Vermont Yankee, then, and use arbitrary-and-capricious review, as well as well as procedural constraints grounded in 553s text, to rein in the IFR process.B. The Substantive Approach: Policing IFRs and FFRs Through Arbitrary-and-Capricious ReviewThe first and best option for lower courts is to expose IFRs and FFRs to a searching form of arbitrary-and-capricious review on the ground that they are overbroad and thus lack a rational connection to the purported issue the agency is trying to address. Call this the substantive approach. When evaluating an agency action under the arbitrary-and-capricious standard, courts must ask, among other things, whether the agency articulated a rational connection between the facts found and the choice made.[117] This requirement often implicates a question of fit of whether the scope of a rule accords with the problem the agenc[y] set[s] out to address.[118] One of the virtues of inviting prepromulgation comments, of course, is that an agency can adjust the reach of a proposed rule after receiving submissions providing precise information about the problem at issue.[119] But IFRs, which are promulgated without public input, deprive the agency of the ability to make this sort of adjustment. FFRs, which are issued after the agency invites postpromulgation comments on an IFR, have a similar issue, since regulatory inertia, as well as status quo bias, confirmation bias, and commitment bias all make the agency less likely to significantly alter the IFR in the FFR.[120] So compared to a typical notice-and-comment rule, both IFRs and FFRs have a potential overbreadth problem.Justice Kagan raised the overbreadth issue concurring in the judgment in Little Sisters. She observed that HRSA had justified the IFRs at issue, which did away with the previous self-certification requirement, as necessary to assuage certain groups sincere religious objections to the contraceptive mandate.[121] But the IFRs exempted all employers with objections to the mandate, even if the [previous] accommodation met their religious needs.[122] This, to Justice Kagan, meant that the rules went beyond what the Departments justification supported raising doubts about whether the solution lack[ed] a rational connection to the problem.[123]Taking a cue from Justice Kagan, lower courts have since used the fit issue to strike down IFRs as arbitrary and capricious. Texas v. Becerra,[124] a case arising from the Biden Administrations vaccine mandate for Medicare- and Medicaid-certified healthcare employers, is instructive. In November 2021, the Centers for Medicare and Medicaid Services issued an IFR announcing the mandate and simultaneously requested postpromulgation comments.[125] The IFR was soon challenged, including in the U.S. District Court for the Northern District of Texas. In issuing a preliminary injunction, the court concluded that the challengers were likely to succeed on their claim that the IFR failed arbitrariness review for three reasons relating to overbreadth.[126] First, HHS justified the IFR based on data elicited from . . . long-term-care facilities, but applied the rule to all facilities, including psychiatric residential treatment facilities . . . and community-care oriented health centers.[127] Second, the IFR fail[ed] to consider the disruptions to staff shortages and healthcare resources especially in rural areas for its enforcement.[128] Third, the IFR lacked the option of a regular testing requirement as an alternative to vaccination, and failed to exempt employees and contractors . . . [who] telework and administrative employees who have little to no patient contact.[129]The Supreme Court, evaluating other district court opinions enjoining the same IFR in Missouri v. Biden,[130] ultimately concluded that the mandate was likely not arbitrary and capricious, citing the challenges posed by the global pandemic.[131] Nevertheless, the opinion from the Northern District of Texas hints at the sort of analysis that might successfully cabin the IFR process in situations less dire than a large-scale health crisis like COVID-19. This substantive approach has several advantages. First, it takes account of the APAs harmless error rule,[132] reserving courts the discretion to uphold an IFR or FFR if the agencys failure to adhere to 553s normal order of operations does not result in any prejudice. Second, it allows courts to address both IFRs and FFRs, avoiding the problem that under Little Sisters, any procedural issues surrounding the good cause exception are apparently mooted whenever an agency provides postpromulgation comment and issues an FFR. Third, it enables courts to impose the targeted remedy of remand without vacatur, which offers appealing flexibility when, for instance, an IFR makes large changes to a regulatory scheme and is challenged after regulated parties have already begun to adjust their conduct to adhere to it.[133]In sum, the substantive approach would provide courts with a workable means of raising the costs of the IFR process, pushing agencies back towards the APAs baseline of inviting prepromulgation comments and furthering the Fullerian values that baseline promotes.[134] It would also preserve the availability of IFRs in exceptional circumstances where, as Missouri suggests, a departure from the APAs normal order of operations might be warranted in the name of efficiency and dispatch.[135]C. The Procedural Approach: Policing IFRs Through the Good Cause ExceptionA second though less effective means of policing the IFR process is to more stringently limit agencies use of the good cause exception to promulgate IFRs. Call this the procedural approach. Such an approach would impose de novo review on agency invocations of good cause[136] and demand a link between an agencys reasons for using the IFR process and the prong of the good cause exception it seeks to invoke, allowing for the development of consistent standards.[137] Like the substantive approach, the procedural approach allows courts to take account of the APAs harmless error rule[138] and provide the remedy of remand without vacatur where appropriate.[139] But unlike the substantive approach, the procedural approach only reaches IFRs, not FFRs promulgated following an opportunity for comment. Moreover, because the procedural approach targets the good cause exception writ large, it risks overly narrowing it (even outside the IFR context), frustrating agencies ability to respond to genuine emergencies.[140]A case from the U.S. District Court for the District of Maryland, Association of Community Cancer Centers v. Azar,[141] illustrates how the procedural approach might work in practice. In November 2020, HHS issued an IFR that require[d] reimbursements made for certain drugs covered by Medicare Part B to be based on the lowest price in a group of most favored nations rather than the average U.S. sales price.[142] HHS justified its invocation of good cause on the grounds that delay would be contrary to the public interest, asserting that COVID-19 . . . has created an emergency in Medicare Part B drug pricing.[143] The court rejected this rationale, observing that the public interest prong of good cause typically only applies where it [is] necessary to issue rules of life-saving importance immediately, or where delaying implementation of a rule would jeopardize the very reason for implementing the rule.[144] Here, the IFR merely aimed to alleviate general financial instability.[145] The court concluded that the IFR was likely procedurally invalid, warranting preliminary injunctive relief.[146]The Community Cancer Centers court used the procedural approach to cabin the IFR process in two ways. First, it did not defer to HHSs assertion of good cause.[147] Second, it rigorously analyzed the link between the purported ground for good cause and the content of the IFR.[148] As noted in Part II, inconsistent enforcement of the good cause exception incentivizes agencies to invoke it for tenuous reasons, giving IFRs and opinions evaluating them an ad hoc quality.[149] But de novo review, coupled with guidance from the courts rooted in the APAs three categories and prior caselaw, addresses these concerns.[150] Consequently, even though the procedural approach does not work in all cases after Little Sisters and has its own risks, it could, where applicable, further the Fullerian values safeguarded by a principled use of the good cause exception.[151]ConclusionDespite their intuitive appeal, IFRs disrupt the compromise the APA strikes between administrative power and the rule of law. On one hand, the APA gives agencies broad discretion to craft policy using informal rulemaking. On the other, it cabins this discretion by creating a procedural order of operations agencies must follow, including the provision of notice (which ensures that rules are publicized, prospective, and reasonable) and the requirement of a reasoned explanation (which ensures that rules are clear). In this way, the APA and the judicial opinions giving it content are part of a project, dating back to Crowell, in which the courts and Congress both worked to balance the virtues of administrative power with the morality of administrative law so as to guard against the development of a lawless bureaucracy.[152]The IFR process threatens this project, moving the needle towards administrative power and away from the rule of law. It incentivizes agencies to exploit the APAs good cause exception to minimize rulemaking costs, leading to incoherent explanations and the appearance of ad hoc decisionmaking. And when interpreted expansively, it permits agencies to dispense with notice and comment without invoking good cause at all, clouding the rulemaking process and intensifying the appearance of ad hoc decisionmaking. In an era marked by a fundamental assault on the legitimacy of the administrative state, the risks posed by IFRs unshaped by public input and unconstrained by rule-of-law values play into critics worst fears fearsLittle Sistersfailed to acknowledge. The time is ripe, then, for courts to cabin the IFR process, reassert the APAs settlement between administrative power and the rule of law, and redeem the authority of agencies to make law[s] that bind us all.[153]* J.D. Candidate, Harvard Law School (2024). Thanks to Professors Cass Sunstein and Adrian Vermeule for class discussions that led to this Essay, and to Luiza Leo for our many conversations about the importance of the rule of law. All errors are mine.[1] 285 U.S. 22 (1932).[2] Id. at 46.[3] Id. at 56. The normative implications of Chief Justice Hughes statement are outside the scope of this Essay, which takes his words at face value. For an interesting exploration of these implications, see Evan Bernick, The Regulatory State and Revolution: How (Fear of) Communism Has Shaped Administrative Law, Yale J. on Reg.: Notice & Comment (Aug. 11, 2019), 4] Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. 551, 553559, 701706).[5] This Essay, following Professor Jeremy Waldron, defines the rule of law as the idea that people in positions of authority should exercise their power within a constraining framework of well-established public norms rather than in an arbitrary, ad hoc, or purely discretionary manner, and that citizens should respect and comply with legal norms, even when they disagree with them. Jeremy Waldron, The Rule of Law, in Stanford Encyclopedia of Philosophy (Edward N. Zalta ed., Summer 2020 ed.), . See also A.V. Dicey, Introduction to the Study of the Law of the Constitution 179201, 324401 (7th ed. 1908) (describing the tension between the rule of law and an overly bureaucratic administrative state).[6] Cass R. Sunstein & Adrian Vermeule, Law & Leviathan: Redeeming the Administrative State 30 (2020).[7] See Antonin Scalia, Vermont Yankee, the APA, and the D.C. Circuit, 1978 Sup. Ct. Rev. 345, 381 (describing how lower courts, and particularly the D.C. Circuit, attempted to craft restrictions on agencies that restore[d] the balance which the Supreme Courts consistent approval of the contrivance of more expeditious administrative methods had upset).[8] See Michael Asimow, Interim-Final Rules: Making Haste Slowly, 51 Admin. L. Rev. 703, 71215 (1999).[9] See 5 U.S.C. 553(b)(3)(B). See also Kyle Schneider, Note, Judicial Review of Good Cause Determinations Under the Administrative Procedure Act, 73 Stan. L. Rev. 237, 248 (2021).[10] Immediately is a slight overstatement, as rules generally must be published thirty days before going into effect. See 5 U.S.C. 553(d).[11] See Asimow, supra note 8, at 711.[12] In reality, many IFRs are never replaced by FFRs. See Dan Bosch, Interim Final Rules: Not So Interim, Am. Action Forum (Dec. 8, 2020), 13] 143 S. Ct. 2367 (2020).[14] Kristen E. Hickman, Did Little Sisters of the Poor Just Gut APA Rulemaking Procedures?, Yale J. on Reg: Notice & Comment (July 9, 2020), sisters-of-the-poor-just-gut-apa-rulemaking-procedures/.[15] Crowell v. Benson, 285 U.S. 22, 56 (1932).[16] 5 U.S.C. 553(b)(c).[17] See Ronald M. Levin, The Administrative Law Legacy of Kenneth Culp Davis, 42 San Diego L. Rev. 315, 324 (2005).[18] See, e.g., Portland Cement Assn v. Ruckelshaus, 486 F.2d 375, 394 (D.C. Cir. 1973) (agencies must disclose material studies on which they relied); United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 252 (2d Cir. 1977) (agencies must give meaningful consideration to significant comments); Chocolate Mfrs. Assn of U.S. v. Block, 755 F.2d 1098, 1105 (4th Cir. 1985) (agencies must craft final rules that are a logical outgrowth of the proposed rule).[19] See generally Motor Vehicle Mfrs. Assn v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).[20] Asimow, supra note 8, at 708.[21] 5 U.S.C. 553(b)(3)(B). Each of these three prongs has a distinct statutory meaning. According to the APAs legislative history, [i]mpracticable means a situation in which the due and required execution of the agency functions would be unavoidably prevented by its undertaking public rule-making proceedings. Unnecessary means unnecessary so far as the public is concerned, as would be the case if a minor or merely technical amendment in which the public is not particularly interested were involved. Public interest supplements the terms impracticable or unnecessary; it requires that public rule making procedures shall not prevent an agency from operating and that, on the other hand, lack of public interest in rule making warrants an agency to dispense with public procedure. Administrative Procedure Act: Legislative History, 79th Cong., 194446, at 200 (1946) [hereinafter APA Legislative History].[22] See Asimow, supra note 8, at 707.[23] Id.[24] Id. at 708.[25] James Yates, Essay, Good Cause is Cause for Concern, 86 Geo. Wash. L. Rev. 1438, 1449 (2018). Major rules are subject to a sixty-day delay in implementation pursuant to the Congressional Review Act, see 5 U.S.C. 801808, as well as a cost-benefit analysis that must be submitted to the Office of Information and Regulatory Affairs, see Exec. Order No. 12,866, 3 C.F.R. 638 (1993). Given these additional procedural hurdles, it makes sense that agencies seeking to enact significant policy initiatives would want to minimize delays wherever possible.[26] See Yates, supra note 25, at 1450.[27] Kristen E. Hickman & Mark Thomson, Open Minds and Harmless Errors: Judicial Review of Postpromulgation Notice and Comment, 101 Cornell L. Rev. 261, 266 (2016).[28] Asimow, supra note 8, at 712. Congress, too, has on occasion authorized the IFR process in agencies organic statutes. See id. at 712 n.40 (providing examples touching, inter alia, social security, mine safety, and environmental protection matters).[29] Hickman & Thomson, supra note 27, at 263.[30] Kristen E. Hickman, Coloring Outside the Lines: Examining Treasurys (Lack Of) Compliance with Administrative Procedure Act Rulemaking Requirements, 82 Notre Dame L. Rev. 1727, 1782 (2007).[31] See Asimow, supra note 8, at 726 (outlining the contours of this argument). But see Hickman, supra note 14 (critiquing such an interpretation for ignoring the repeated use of the word after in 553); infra section III.B (offering further criticisms).[32] See 5 U.S.C. 706; APA Legislative History, supra note 21, at 214 (The requirement that account shall be taken of the rule of prejudicial error means that a procedural omission which has been cured by affording the party the procedure to which he was originally entitled is not a reversible error.).[33] Hickman & Thomson, supra note 27, at 285.[34] Id. at 286; see also id. n. 151 (collecting cases from the Fifth, Fourth, and Third Circuits).[35] Id. at 291; see also id. n. 169 (collecting cases from the Tenth and Federal Circuits).[36] Id. at 294; see also id. nn. 176177 (collecting cases from the D.C., Third, and Federal Circuits). The open mind standard is implicitly rooted in the APAs harmless error rule. Id. at 295.[37] Hickman & Thomson, supra note 27, at 302. This remedy is legally controversial. Id. at 304. Even so, Professor Ronald Levin has argued that it has a basis in the traditional equitable discretion of the federal courts. See generally Ronald M. Levin, Vacation at Sea: Judicial Remedies and Equitable Discretion in Administrative Law, 53 Duke L.J. 291 (2003).[38] Hickman & Thomson, supra note 27, at 268.[39] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S. Code).[40] Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2373 (2020).[41] The Supreme Court, 2019 Term Leading Cases, 134 Harv. L. Rev. 410, 56061 (2020).[42] Id. at 561.[43] Id.[44] Little Sisters, 140 S. Ct. at 2378.[45] Pennsylvania v. Trump, 281 F. Supp. 3d 553, 585 (E.D. Pa. 2017).[46] See id. at 572.[47] Id. at 575 (emphasis added).[48] Little Sisters, 140 S. Ct. at 2379.[49] Pennsylvania v. President of the United States, 930 F.3d 543, 56869 (3d Cir. 2019).[50] Little Sisters, 140 S. Ct. at 2386.[51] 435 U.S. 519 (1978).[52] Id. at 2385.[53] Id. at 2386.[54] Id.[55] Id. n.14.[56] See, e.g., Katie Keith, Supreme Court Upholds Broad Exemptions to Contraceptive Mandate For Now, Health Affairs (Jul. 9, 2020), 57] See, e.g., Hickman, supra note 14 ([T]he Court has come pretty close to, if not writing APA 553(b) and (c) out of the statute completely, then at least minimizing those provisions to the point of irrelevancy in most instances.).[58] See supra note 35 and accompanying text.[59] Wong Yang Sung v. McGrath, 339 U.S. 33, 40 (1950).[60] Lon L. Fuller, Positivism and Fidelity to Law: A Reply to Professor Hart, 71 Harv. L. Rev. 630, 639 (1958).[61] Id. at 645.[62] See Lon L. Fuller, The Morality of Law: Revised Edition 3394 (1969).[63] See Fuller, supra note 60, at 645.[64] See generally Sunstein & Vermeule, supra note 6; Cass R. Sunstein & Adrian Vermeule, The Morality of Administrative Law, 131 Harv. L. Rev. 1924 (2018).[65] Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L.J. 511, 514 (1989).[66] See 5 U.S.C. 553(b)(1)(3).[67] Id. 553(c).[68] See id. 553(b)(3)(B) (requiring rules promulgated pursuant to the good cause exception to contain a brief statement of reasons why notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest).[69] Kevin M. Stack, An Administrative Jurisprudence: The Rule of Law in the Administrative State, 115 Colum. L. Rev. 1985, 1988 (2015).[70] Fuller, supra note 62, at 51. See also David S. Rubenstein, Taking Care of the Rule of Law, 86 Geo. Wash. L. Rev. 168, 22728 (2018).[71] See Fuller, supra note 62, at 5165 (discussing the dangers posed by retroactive laws). See also Sunstein & Vermeule, supra note 6, at 5859 (discussing Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988), which announced a presumption against retroactivity in rulemaking as a background principle, apparently reflecting part of the morality of administrative law).[72] Fuller, supra note 62, at 79. See also United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 253 (2d Cir. 1977).[73] See Stack, supra note 69, at 198889. The APAs text itself suggests that only minimal explanation is necessary. See 5 U.S.C. 553(c) (requiring final rules to be accompanied by a concise general statement of their basis and purpose). But arbitrariness review and the paper hearing rules associated with 553 effectively require agencies to provide significantly more elaborate justifications for final rules. See Thomas O. McGarity, Some Thoughts on Deossifying the Rulemaking Process, 41 Duke L.J. 1385, 1397, 1419 (1992).[74] Fuller, supra note 62, at 48.[75] See Schneider, supra note 9, at 25152.[76] See id. at 25257.[77] See Hickman & Thomson, supra note 27, at 266. See also Kirsten E. Hickman, The Limitations of Law and Leviathan, Yale J. on Reg: Notice & Comment (April 22, 2021), (citing data suggesting a highly aggressive agency conception of what constitutes good cause).[78] Hickman & Thomson, supra note 27, at 266.[79] See Livingston Educ. Serv. Agency v. Becerra, 589 F. Supp. 3d 697, 704 (E.D. Mich. 2022).[80] Id. at 704.[81] Louisiana v. Becerra, 577 F. Supp. 3d 483, 500 (W.D. La. 2022).[82] Livingston Educ. Serv., 589 F. Supp. 3d at 711 (quoting Biden v. Missouri, 142 S. Ct. 647, 654 (2022)).[83] See Vaccine and Mask Requirements To Mitigate the Spread of COVID-19 in Head Start Programs, 86 Fed. Reg. 68052, 68058 (2021).[84] See Louisiana, 577 F. Supp. 3d at 499.[85] Fuller, supra note 62, at 47.[86] See Hickman, supra note 14 (describing this reading of Little Sisters).[87] See id.[88] See 5 U.S.C. 553(d); Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2386 (2020).[89] Fuller, supra note 62, at 50.[90] Hickman & Thomson, supra note 27, at 287.[91] Id. at 28788.[92] 969 F.2d 1141 (D.C. Cir. 1992).[93] Id. at 1145.[94] Id.[95] 686 F. Supp. 2d 7 (D.D.C. 2009).[96] Id. at 16.[97] Cf. Universal Camera Corp. v. NLRB, 340 U.S. 474, 487 (1951).[98] See Hickman, supra note 14. See also 5 U.S.C. 553(c) (After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making . . . . After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.) (emphasis added).[99] See 5 U.S.C. 553(b)(3)(B).[100] See Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2386 (2020).[101] Cf. West Virginia v. EPA, 142 S. Ct. 2587, 2607 (2022) (It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.).[102] See Little Sisters, 140 S. Ct. at 2386 n.14.[103] Sunstein & Vermeule, supra note 6, at 18.[104] See supra notes 6574 and accompanying text.[105] Hickman, supra note 14. Interestingly, Hickman has also argued that none of the Fullerian principles of administrative law morality are inconsistent with interim-final rulemaking, even where the agency lacks good cause, instead critiquing IFRs for their effects on regulated parties, who feel[] ignored, skeptical of the agencys motives, and resentful of the rules in question. See Hickman, supra 77. But these effects are symptomatic of a legal system that lacks the necessary Fullerian morality. See Fuller, supra note 62, at 3338 (offering a parable describing various results of immoral lawmaking, including resent[ment], id. at 35, near revolution, id. at 36, and popular discontent, id. at 37).[106] Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 524 (1978).[107] See Kenneth Culp Davis, Administrative Common Law and the Vermont Yankee Opinion, 1980 Utah L. Rev. 3, 12 (citing 5 U.S.C. 559, which provides that the APA does not limit or repeal additional requirements . . . otherwise recognized by law, for the proposition that the APA imposes only minimum procedural requirements and permits reviewing courts to add to [those] protections).[108] Sunstein & Vermeule, supra note 6, at 95.[109] See Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2386 (2020) (We have repeatedly stated that the text of the APA provides the maximum procedural requirements that an agency must follow in order to promulgate a rule.) (quoting Perez v. Mortgage Bankers Assn, 575 U.S. 92, 102 (2015)).[110] See supra notes 98105 and accompanying text.[111] Scalia, supra note 7, at 344.[112] Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 524 (1978).[113] Scalia, supra note 7, at 397.[114] Id. at 394.[115] Vt. Yankee, 435 U.S. at 535 n.14. See also Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 41920 (1971) (imposing the obligation to develop a full administrative record in informal proceedings, id. at 420, so as to allow a court to evaluate whether an agency provided an adequate explanation for its action, id.).[116] See, e.g., Am. Radio Relay League, Inc. v. F.C.C., 524 F.3d 227, 248 (D.C. Cir. 2008) (Kavanaugh, J., concurring in part, concurring in the judgment in part, and dissenting in part).[117] Motor Vehicle Mfrs. Assn v. State Farm Mut. Auto. Ins. Co, 483 U.S. 29, 43 (1983).[118] Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2398 (2020) (Kagan, J., concurring).[119] See Jacob Gersen & Adrian Vermeule, Thin Rationality Review, 114 Mich. L. Rev. 1355, 1396 (2016).[120] Hickman & Thomson, supra note 27, at 287.[121] Little Sisters, 140 S. Ct. at 2398 (Kagan, J., concurring).[122] Id. (emphasis added).[123] Id. at 2399.[124] 575 F. Supp. 3d 701 (N.D. Tex. 2021).[125] See Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination, 81 Fed. Reg. 61555 (2021).[126] See Texas, 575 F. Supp. 3d at 721.[127] Id.[128] Id.[129] Id. at 723.[130] 142 S. Ct. 647 (2022) (per curiam).[131] Id. at 654. Cf. Adrian Vermeule, Our Schmittian Administrative Law, 122 Harv. L. Rev. 1095 (2009) (explaining how the parameters for good cause are dialed down in times of perceived crisis and dialed up again when the crisis has passed, rendering the exception a temporar[y] . . . legal grey hole).[132] See 5 U.S.C. 706(2).[133] See Levin, supra note 37, at 29899. Given the number of major rules (as defined in Exec. Order No. 12,866) implemented via the IFR process, this is not a speculative possibility. See supra note 25 and accompanying text.[134] See supra section II.B.2 (discussing these values). See also Hickman, supra note 14.[135] See Missouri v. Biden, 142 S. Ct. 647, 651 (2022) (per curiam).[136] See Schneider, supra note 9, at 269 (recommending this reform).[137] See 5 U.S.C. 553(b)(3)(B). Courts are inconsistent in conducting good cause analyses within the framework of these three prongs. For instance, in the two Head Start Program cases described in Part II, supra, neither court linked the prongs of the good cause exception invoked by HHS with the factual reasons it offered for dispensing with notice and comment. See Livingston Educ. Serv. Agency v. Becerra, 589 F. Supp. 3d 697, 71112 (E.D. Mich. 2022); Louisiana v. Becerra, 577 F. Supp. 3d 483, 499501 (W.D. La. 2022).[138] See Schneider, supra note 9, at 248 (describing how courts frequently find improper use of the [good cause] exception to be harmless error when comments are accepted after promulgation).[139] See, e.g., Sugar Cane Growers Co-op. of Fla. v. Veneman, 289 F.3d 89, 98 (D.C. Cir. 2002).[140] See Vermeule, supra note 131, at 1123 (noting that the drafters of the APA expressly anticipated that the good cause exception would cover administrative action in emergencies).[141] 509 F. Supp. 3d 482 (D. Md. 2020).[142] Id. at 488; see also Most Favored Nation (MFN) Model, 85 Fed. Reg. 76180 (2020).[143] Assn of Cmty. Cancer Centers, 509 F. Supp. at 497.[144] Id. at 496.[145] Id. at 497.[146] See id. at 501.[147] See id. at 495 (Courts review an agencys finding of good cause de novo.).[148] See id. at 49798.[149] See supra section II.B.1.[150] See Schneider, supra note 9, at 28182 (arguing that while [i]t may be impossible to precisely enumerate the factors relevant to evaluating the substance of future good cause assertions, id. at 282, de novo review, along with the careful testing of arguments against the record, id. at 281, will deter agencies from skip[ping] the APAs procedural requirements merely because they can get away with it, id. at 282).[151] See supra section II.B.1 (discussing these values)[152] See Sunstein & Vermeule, supra note 6, at 810; Crowell v. Benson, 285 U.S. 22, 56 (1932).[153] Fuller, supra note 60, at 645.

What are interim results. Interim rules meaning. What is an interim final rule. What are interim measures.