SYMMETRY'S MANDATE: CONSTRAINING THE POLITICIZATION OF AMERICAN ADMINISTRATIVE LAW

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Recent years have seen the rise of pointed and influential critiques of deference doctrines in administrative law. What many of these critiques have in common is a view that judges, not agencies, should resolve interpretive disputes over the meaning of statutes—disputes the critics take to be purely legal and almost always resolvable using lawyerly tools of statutory construction. In this Article, I take these critiques, and the relatively formalist assumptions behind them, seriously and show that the critics have not acknowledged or advocated the full reform vision implied by their theoretical premises. Specifically, critics have extended their critique of judicial abdication only to what I call Type I statutory errors (that is, agency interpretations that regulate more conduct than the best reading of the statute would allow the agency to regulate) and do not appear to accept or anticipate that their theory of interpretation would also extend to what I call Type II statutory errors (that is, agency failures to regulate as much conduct as the best reading of the statute would require). As a consequence, critics have been more than willing to entertain an end to Chevron *deference, an administrative law doctrine that is mostly invoked to justify Type I error, but have not shown any interest in adjusting administrative law doctrine to remedy agencies' commission of Type II error. The result is a vision of administrative law's future that is precariously slanted against legislative and regulatory action.*

I critique this asymmetry in administrative law and address potential justifications of systemic asymmetries in the doctrine, such as concern about the remedial implications of addressing Type II error, finding them all wanting from a legal and theoretical perspective. I also lay out the positive case for

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adhering to symmetry in administrative law doctrine. In a time of deep political conflict over regulation and administration, symmetry plays, or at the very least could play, an important role in depoliticizing administrative law, clarifying what is at stake in debates about the proper level of deference to agency legal interpretations, and disciplining partisan gamesmanship. I suggest that when the conversation is so disciplined, an administrative law without deference to both Type I and Type II error is hard to imagine due to the high judicial costs of minimizing Type II error, but if we collectively choose to discard deference notwithstanding these costs, it would be a more sustainable political choice for administrative law than embracing the current, one-sided critique of deference.

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INTRODUCTION

When Congress passes a statute that presupposes some further elaboration and implementation by administrative agencies, eventually questions are bound to arise both about whether the responsible administrative agencies have overstepped their authority under the statute and about whether they have lived up to the expectations of the enacting Congress.[1] Under every mainstream theory of legislation, Congress, by the very act of legislating, expresses some preference about how the world should and should not change.[2] By giving some responsibility to agencies to see to it that these preferences are realized, though, Congress necessarily introduces some risk of slippage between Congress's meaning and the end product.[3] However, under (currently) prevailing theories of administrative law, this problem is assumed away. The act of leaving meaning underspecified is construed as an implied delegation that justifies deference on the part of Article III courts who otherwise would stand at the ready to enforce what they find to be the statute's meaning.[4]

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1. *See* William W. Buzbee, *Agency Statutory Abnegation in the Deregulatory Playbook*, 68 DUKE L.J. 1509, 1564 (2019) ("*Any deviation* from Congress's statutory delegation—whether that deviation cuts in a regulatory or deregulatory direction—ultimately involves an agency seeking to define the extent of its own power."). The Administrative Procedure Act therefore gives courts the power to review agency action to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." *See* 5 U.S.C. § 706.

2. *See, e.g.*, Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 374 (1989) ("Legislation can be characterized as a set of public policy directives that the legislature issues to government implementation mechanisms."); VICTORIA NOURSE, MISREADING LAW, MISREADING DEMOCRACY (2016) (describing statutes as congressional "decisions" about how policy should be made). Of course, that is not to say that all agree on how to decipher those directives. Textualists view the text of statutes as encoding the preferences of Congress, whereas intentionalists and purposivists consult extratextual data to augment their understanding of what Congress wanted legislative implementers to do. *See, e.g.*, John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70 (2006) (identifying core differences across interpretive methodologies); Richard H. Fallon, Jr., *Three Symmetries Between Textualist and Purposivist Theories of Statutory Interpretation—And the Irreducible Roles of Values and Judgment Within Both*, 99 CORNELL L. REV. 685 (2014) (identifying similarities across interpretive methodologies). These are simply methodological divergences that do not cast doubt on the overall function of legislation, which I take to be, uncontroversially, the direction of policymaking. *See infra* Section I.

3. George A. Krause, *Legislative Delegation of Authority to Bureaucratic Agencies*, *in* THE OXFORD HANDBOOK OF AMERICAN BUREAUCRACY 521 (Robert F. Durant ed., 2010).

4. *See* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833 (2001) (describing the view that deference doctrines stem from Congress's implied delegation

Agencies, not surprisingly, make use of the discretion afforded by deference. They can take aggressive positions on the reach of unclear or outdated statutory language, potentially expanding the law's practical reach to the limits of the congressional delegation—although, if they go too far and regulate beyond their powers, they may commit a kind of analog to a false positive, or Type I error, in empirical research.[5] For instance, critics point out that agencies sometimes stretch aging statutory language to address new problems, such as the threat of climate change, that were probably not anticipated by the enacting Congress,[6] and of course arguments that agencies exceeded their statutory authority are the daily bread of administrative law.[7] At the same time, though, deference also gives agencies considerable discretion to limit the impact or scope of regulation compared to what the statute might be interpreted by a court to require. Here, as well, there is a risk of error should the agency go too far. As much as commentators fixate on alleged cases of agency overreach, agencies can also err through interpretive underreach, whether by indefinitely declining to take action prescribed, by disclaiming their authority altogether, or by simply refusing to undertake action in cases where the statutory language is clearly applicable.[8] We might call

of lawmaking authority); Evan J. Criddle, Chevron*'s Consensus*, 88 B.U. L. REV. 1271, 1284 (2008) (same).

5. The idea of a Type I error is a technical one in empirical research: it is the error that occurs when one falsely rejects a null hypothesis that is true. *See generally* Amitav Banerjee, U.B. Chitnis, S.L. Jadhav, J.S. Bhawalkar & S. Chaudhury, *Hypothesis Testing, Type I and Type II Errors*, 18 INDUS. PSYCHIATRY J. 127 (2009). This concept is analogous to overinclusivity in statutory interpretation in the sense that an agency committing Type I statutory error falsely finds authority to take an action that does not exist.

6. *See* Jonathan H. Adler & Christopher J. Walker, *Delegation and Time*, 105 IOWA L. REV. 1931 (2020) (describing how judicial acceptance of broad delegations of "legislative" authority to agencies at an earlier time grows an agency's discretion at a later time, as the real-world context bears less and less of a resemblance to the context in which a delegation was initially contemplated); Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 5 (2014) (acknowledging the risk that agencies would use delegated authority to stretch the meaning of the law, especially as new, unanticipated problems emerge without any new action by the sitting Congress).

7. *E.g.*, New York v. U.S. Dep't of Health & Hum. Servs., 414 F. Supp. 3d 475, 562 (S.D.N.Y. 2019) (vacating HHS's "conscience rule" as exceeding the agency's power and noting that the "agency . . . must exercise its delegated spending authority consistent with the specific congressional grant," and that "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred" (quoting Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 475 (2001))).

8. Sidney A. Shapiro, *Rulemaking Inaction and the Failure of Administrative Law*, 68 DUKE L.J. 1805, 1816–23 (2019) (describing several ways that agencies can refuse to take action); Michael D. Sant'Ambrogio, *Agency Delays: How a Principal-Agent Approach Can Inform Judicial and Executive Branch Review of Agency Foot-Dragging*, 79 GEO. WASH. L. REV. 1381, 1387–88 (2011) (focusing on agency delays and suggesting that they present and "shirk a congressional mandate" without taking on the burden of proving that the agency "has no duty to act"); Cass R. Sunstein & Adrian Vermeule, *The Law of "Not Now": When Agencies Defer Decisions*, 103 GEO. L.J. 157, 159 (2014) (noting that agencies push action off both by formally de-

this kind of error, analogous to a false negative, Type II error.[9] For instance, a statute might direct an agency to regulate a particular actor or activity to a particular standard, but the implementing agency's interpretation might narrow the scope or impact of the regulation in practice, as was the case with the Department of Health and Human Services' (HHS) implementation of the Affordable Care Act's keystone "essential health benefits" mandate.[10]

For decades, administrative law has been predicated on the theory that judicially remediable errors exist only on the periphery of wide delegations of statutory authority from Congress.[11] The price of Congress's imprecision is the inevitable introduction of what judges, exercising something like de novo review, might consider to be both Type I and Type II errors in the execution and implementation of law. But under the deferential paradigm of administrative law, courts respect Congress's own risk tolerances and willingness to leave matters for explication by implementing agents.

What happens, though, when courts begin to see the minimization of interpretive errors as quintessentially a judicial task, or when they begin to see the entire concept of delegation as suspect, and under either theory begin to reconsider the propriety of deference to agency interpretations of law? As many will note, that is increasingly the world that we live in.[12] One might

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ciding not to decide at a particular time (either publicly or not) and, other times, by simply not making any kind of decision at all).

9. The idea of a Type II error in empirical research is also technical: it is the error that occurs when one falsely accepts a null hypothesis that is false. *See generally* Banerjee et al., *supra* note 5. Here the analogy is perhaps more strained, but the basic idea is that an agency commits Type II statutory error when it interprets a statute as not requiring action when the statute actually does require action.

10. *See* Nicholas Bagley, *Legal Limits and the Implementation of the Affordable Care Act*, 164 U. PA. L. REV. 1715, 1716–1720 (2016) (describing HHS's decision to base "essential health benefits" not on the ten delineated, uniform requirements in the statute, but rather on state-by-state determinations made by state actors—a decision that Bagley describes as "generat[ing] some statutory surplusage"). HHS's decision has led to substantial departure from Congress's request for an identical set of benefits across states. *See* Amy B. Monahan, *The Regulatory Failure to Define Essential Health Benefits*, 44 AM. J.L. & MED. 529 (2018); NAMRATA K. UBEROI, CONG. RSCH. SERV., R44163, THE PATIENT PROTECTION AND AFFORDABLE CARE ACT'S ESSENTIAL HEALTH BENEFITS (EHB) (2015). For instance, although the statute required certain plans to cover "mental health and substance use disorder services, including behavioral health treatment," 42 U.S.C. § 18022(b)(1)(E), few states meaningfully cover these services, and the specifics vary substantially from jurisdiction to jurisdiction. *See* Stacey A. Tovino, *Substance Use Disorder Insurance Benefits: A Survey of State Benchmark Plans*, 52 CREIGHTON L. REV. 401, 406–10 (2019).

11. *See infra* Section I (describing the contours of the historically deferential paradigm in administrative law).

12. *See, e.g.*, Linda Jellum, Chevron*'s Demise: A Survey of* Chevron *from Infancy to Senescence*, 59 ADMIN. L. REV. 725, 727 (2007) (concluding that *Chevron*'s importance is waning); Michael Herz, Chevron *Is Dead; Long Live* Chevron, 115 COLUM. L. REV. 1867, 1868–69 (2015) (noting several Supreme Court decisions that suggested a "watershed moment, a fundamental shift from a regime of meaningful deference to a reassertion of judicial supremacy"); Christopher J. Walker, *Attacking* Auer *and* Chevron *Deference: A Literature Review*, 16 GEO. J.L. & PUB. POL'Y 103, 104 (2018) (noting that recent years "have seen a growing call from the

expect that both Type I and Type II errors would be of equal concern for any such reform program that seeks more precisely to capture the enacted meaning of law—that is, that courts would be at least as concerned about the pernicious effects of lax administrative law doctrines on agency overreach as they are about the pernicious effects of lax administrative law doctrines on agency underreach. If, as Justice Thomas put it in *Michigan v. EPA*, deference "wrests from [the] Courts the ultimate interpretative authority to 'say what the law is,' and hands it over to the Executive" in violation of the Constitution,[13] then that concern would seem to apply with equal force when executive agencies exploit statutory imprecision to avoid taking actions consistent with the judiciary's best understanding of the statute's directive. Operating on these formalist foundations,[14] the meaning of a statute just is what it is (even if that meaning can sometimes be hard to discover); it is not conventionally understood to be only a ceiling, under which any and all exercise of discretion is permitted, and it certainly cannot be viewed that way consistent with the more generalized suspicion of delegation of legislative authority that animates much of the trend away from deference.[15]

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federal bench, on the Hill, and within the legal academy to rethink administrative law's deference doctrines to federal agency interpretations of law"); Jeffrey A. Pojanowski, *Without Deference*, 81 MO. L. REV. 1075, 1075 (2016) (suggesting that "[t]he prospect of rejecting *Chevron* is . . . more plausible than abandoning the administrative state"); Jonathan H. Adler, *Restoring* Chevron*'s Domain*, 81 MO. L. REV. 983, 983 (2016) (noting that "*Chevron*'s domain is under siege" (footnote omitted)).

13. Michigan v. EPA, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

14. This Article frequently refers to "formalist" approaches to statutory interpretation as a constellation of approaches that "stress that law contains a good many rules, and that in many contexts, the application of those rules requires little more than a grasp of English usage." Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533, 543 (1992). While few formalists appear to believe that genuinely ambiguous statutory language does not exist, they make an empirical claim that such instances are relatively isolated and rare. *See, e.g.*, *id.* at 544. The formalist approach was recently encapsulated by Jeffrey Pojanowski as a critical component of an insurgent "neoclassical" mood in administrative law: "[T]he neoclassicist will not accept the more generalized presumption of implicit congressional delegation of interpretive authority that many *Chevron* advocates deploy. Rather, the neoclassicist sees this explanation as a legal fiction delicately veiling a functionalism that dare not show its face." Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852, 886 (2020).

15. Two summers ago, the Supreme Court split on whether to put teeth in the nondelegation doctrine, but Justice Gorsuch's view seems to have nearly captured a majority of the Justices. *See* Mila Sohoni, *Opinion Analysis: Court Refuses to Resurrect Nondelegation Doctrine*, SCOTUSBLOG (June 20, 2019, 10:32 PM), https://www.scotusblog.com/2019/06/opinion-analysis-court-refuses-to-resurrect-nondelegation-doctrine/ [https://perma.cc/H5DF-BF3B] ("For the nondelegation doctrine, the significance of *Gundy* lies not in what the Supreme Court did today, but in what the dissent and the concurrence portend for tomorrow."). Justice Gorsuch's view would seemingly be hostile to the idea that agencies have unfettered discretion up to a ceiling, as his critique of current doctrine is more open-ended than that. For instance, Justice Gorsuch writes that a proper understanding of the nondelegation principle would require that Congress "set forth standards 'sufficiently definite and precise to enable Congress, the courts, and the public to ascertain' whether Congress's guidance has been followed." Gun-

In fact, though, the growing formalist skepticism of judicial deference to agency interpretations of law has been characterized by concern only about what I am terming Type I errors. Both in rhetoric and in practice, the movement against deference and delegation demonstrates no serious concern with Type II error. A cacophony of calls for eradicating *Chevron* deference[16] in cases where agencies offer expansive interpretations of an ambiguous statute to undertake aggressive regulation of private conduct contrasts with near radio silence where we might expect to hear calls for reconsideration of precedents like *Norton v. Southern Utah Wilderness Alliance*[17] and *Heckler v. Chaney*,[18] both of which practically vest executive agencies with unreviewable discretion to eviscerate statutory meaning through concerted inaction with no justification at all. Moreover, *Chevron* itself has not been attacked with such zeal when agencies use it to undershoot statutory meaning.[19] In effect, this asymmetry imports a libertarian default rule into administrative law, preventing judges from holding agencies to Congress's expectation of policy implementation while simultaneously empowering courts to stop agencies whenever the latter's activities move beyond what Congress has mandated.[20]

My purpose in this Article is to identify and question this asymmetrical treatment of interpretive error in contemporary trends in administrative law theory and practice. I want to suggest that there is in fact a strong legal case to be made for symmetrical treatment of agencies' statutory errors in administrative law: systemic asymmetry runs against consensus notions of what it is that statutes do; it cannot be justified by resorting to other principles or legal authorities that would supersede Congress's clear command in the Administrative Procedure Act (APA) that agency failures to act are identical to agency actions; and in the long run it will threaten the legitimacy of administrative law by tilting the scale toward a substantive vision of public law that stifles government's ability to respond to social demands for policy. This

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dy v. United States, 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting) (quoting Yakus v. United States, 321 U.S. 414, 426 (1944)). This framing seems implicitly to suggest that delegation is only proper if it is possible to say that an agency has failed to implement the task assigned to it.

16. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 840–43 (1984) (outlining a two-step analysis under which courts defer to reasonable agency interpretations of unclear statutory text).

17. 542 U.S. 55 (2004).

18. 470 U.S. 821 (1985).

19. *See infra* Section II.A.

20. In some ways, this account of asymmetry builds on Cass Sunstein and Adrian Vermuele's insight that administrative law has increasingly been engrafted with libertarian values that prize governmental restraint and disdain intervention in private conduct. *See* Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393 (2015). It also connects with a broader literature expressing skepticism about the use and abuse of normative or substantive canons in statutory interpretation. *See, e.g.*, Stephen F. Ross, *Where Have You Gone, Karl Llewelyn? Should Congress Turn Its Lonely Eyes to You?*, 45 VAND. L. REV. 561 (1992).

last consideration deserves special attention in a hyperpartisan regulatory environment. The two types of interpretive errors that agencies can commit have distinct distributive consequences.[21] Insisting on symmetry, however, minimizes the skew of the distributive consequences of administrative law rules, and this in turn keeps us honest as we consider alternative visions of administrative law. In this sense, symmetry norms in administrative law play an important depoliticizing role in an area of law that is otherwise at risk, due to the partisan polarization of our times, of being co-opted by politics.[22] Symmetry in administrative law, as I understand it, is formally neutral as to the substantive standards and overall valence of judicial review (i.e., it would theoretically be consistent with either an across-the-board deferential approach or with the systematic eradication of deference, or with something in between, which may well be what we have had for decades now). What it does not allow, however, is judges' use of recalibrated deference doctrines to put a thumb on the scale in favor of the kinds of errors that they most prefer as a policy matter. If courts do decide to curtail deference when agencies overreach, they should feel obliged to do the same in cases where litigants argue that the agency should have gone further.

Despite its agnosticism toward the overall valence of judicial review of agency interpretations of statutes, I do also end the Article by arguing that carrying symmetry's mandate to its logical endpoint in fact helps to illustrate and explain why administrative law does and should bend toward deference in the long run.[23] Considering the symmetry of interpretive errors brings into relief that deference, by blessing both Type II and Type I errors in certain circumstances, accounts for similar sorts of remedial problems for courts that get zero credence when judges take on full responsibility for elucidating statutory meaning.[24] Administrative law scholars and judges have implicitly understood that judicial correction of Type II errors interferes with sensible priority setting and resource allocation; they have not generally recognized

21. Generally speaking, Type II error would seem to disadvantage regulatory beneficiaries and to benefit regulated entities, and the converse would be true of Type I error. This is, of course, a simplification, and it will not always hold in concrete settings. Still, the distributive consequences are systemic enough to make the general assumption that Type II error harms regulatory beneficiaries, especially in fields like environmental, health, safety, and consumer protection. *Cf.* Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 348 (2019) (making a similar argument that the political "left" undermines its own goals by buying into a "procedure fetish" that unduly hampers agencies from taking positive regulator action that would further its aims).

22. *See, e.g.*, Cass R. Sunstein & Thomas J. Miles, *Depoliticizing Administrative Law*, 58 DUKE L.J. 2193, 2194–97 (2009) (amassing evidence that demonstrates that court of appeals panels are behaving "in a way that fits uncomfortably well with ideological stereotypes"). *But see* Kent Barnett, Christina L. Boyd & Christopher J. Walker, *Administrative Law's Political Dynamics*, 71 VAND. L. REV. 1463 (2018) (finding that administrative law doctrine pretty well constrains partisan voting in the circuit courts of appeals, at least).

23. *See infra* Section III.

24. *See infra* Section II.B.

that these problems are not unique to Type II errors.[25] One goal of this Article is to underscore that the symmetry between error types means that the well-accepted justifications for judicial deference to agency obstinance, delay, and nonenforcement provide an independent, and heretofore unrecognized, justification for deference more generally. In short, something close to *Chevron* deference is a practical inevitability so long as we continue to be willing to tolerate errors that stem from remedial concerns, and the project of unraveling it should not advance any further until we reckon with the far-reaching consequences of involving federal judges in every agency decision not to fully implement the law.

The Article unfolds in three parts. Part I unpacks the premise underlying all that follows: when an agency adopts an interpretation of a statute that is overinclusive relative to the judicially determined meaning of the statute, that overextension is equivalent in all pertinent respects to an agency's failure to implement the full meaning anticipated by the enacting Congress. This premise is grounded analytically rather than normatively, which is to say that I proceed from what I take to be an overlapping consensus that unites interpretive theorists of different stripes: statutes have a meaning with legal effect, even if how we discover that meaning is subject to debate. I argue that if statutes are instructions or directives to agencies or people in this sense, then a failure to follow them can take the form of either type of error, including Type II error—the failure, as implemented, to include cases that should be included. I show that this Type II error is ubiquitous in regulatory practice, and that, consistent with symmetry, courts have for decades generally treated these errors deferentially, much as they have Type I error.[26]

Part II then turns to contemporary developments in administrative law, which display a growing willingness to reallocate interpretive authority from agencies to courts, at least with respect to Type I error, most notably by campaigning to overturn *Chevron* deference and replace it with something closer to de novo review of statutory questions. My main task in this Part is to demonstrate the asymmetry of the critique—that is, how it in practice avoids the necessary conclusion that Type II error raises all of the same concerns that Type I errors might. This asymmetric critique, at least as it has

25. *But see* Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 ADMIN. L. REV. 1, 23 (2008) (recognizing that "[a]ny time a court reviews an agency decision, the court is in some way interfering with agency resource allocation, and not just where a court compels an agency to take a particular action").

26. Of course, courts' approaches to deference have not been entirely uniform, and deference as a whole has slowly fallen into some degree of disfavor, at least on the Supreme Court. *See* Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 3, 6 (2017) ("Many of these findings suggest, with some caveats, that there may be a *Chevron* Supreme and a *Chevron* Regular: whereas the choice to apply *Chevron* deference may not matter that much at the Supreme Court, it seems to matter in the circuit courts."). My historical claim is a modest one: generally, courts have, since roughly the early 1980s, operated under a deferential paradigm, and to the extent that they have modulated deference, they have tended to make roughly symmetrical adjustments to the permissible levels of both Type I and Type II error. *See infra* Section I.

proceeded so far, is most apparent in the dogs that have not barked. For example, despite authorizing high levels of agency abdication of congressionally assigned responsibilities, *Norton*, *Heckler*, and related cases have come in for little criticism, and certainly none that is directly connected to the concerted theoretical assault on *Chevron* deference. After walking through these recent trends in decided cases, I turn to the question of whether there are any justifications for asymmetry, but I find none convincing.[27] If statutes are binding directives, and if Congress has a definite, judicially determinable meaning when it speaks through legislation,[28] there is no value-neutral reason to believe that errors of addition are more or less excusable than errors of omission, at least unless Congress indicates a sort of metapreference as to how statutes are interpreted that would systematically distinguish error types.[29] My purpose in this Part is not to suggest bad faith on the part of proponents of reformed judicial review of agency action,[30] but rather to take

27. *See infra* Section II.

28. I am personally skeptical that this is the case, as it seems to conflict with a wealth of experience in statutory cases, *see* ROBERT A. KATZMANN, JUDGING STATUTES 4–5 (2014) (collecting examples that tend to show that "the interpretive task is not obvious" in many cases), and also seems to rest on what Kenneth Culp Davis called the "extravagant version of the rule of law," which unrealistically "declares that legal rights may be finally determined only by regularly constituted courts or that legal rights may be finally determined only through application of previously established rules." KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 30 (1969). Nevertheless, this formalistic assumption is in ascendance both on the Court and in the academy. *See infra* Section I.

29. If anything, Congress has positively expressed a default rule in favor of symmetry of treatment in error types by equating action and failures to act under the Administrative Procedure Act. *See infra* Section I.

30. The proponents sometimes make that case for themselves. For example, the jurists most committed to eradicating deference could have established credibility by rejecting the Trump Administration's invitation to deem its action unreviewable in the Deferred Action for Childhood Arrivals (DACA) case, even though that decision would have cut against their presumptive policy preferences. In *Department of Homeland Security v. Regents of the University of California*, several of the justices in the vanguard of criticisms of deference instead either hinted or declared outright that the Department of Homeland Security's choice as to nonenforcement policy was committed to agency discretion by law and therefore unreviewable in court. *See* 140 S. Ct. 1891, 1927 n.8 (2020) (Thomas, J., concurring in the judgment in part and dissenting in part) (implying that the majority would "have to accept that DACA was nothing more than a policy of prosecutorial discretion, which would make its rescission unreviewable," if it wanted to avoid the conclusion that the original policy was an unlawful substantive rulemaking and therefore presumptively revocable without justification); *id.* at 1932 (Alito, J., concurring in the judgment in part and dissenting in part) (concluding that the policy change was unreviewable); *id.* at 1935 n.1 (Kavanaugh, J., concurring in the judgment in part and dissenting in part) (implying that the policy change was unreviewable but declining to reach the question). Notably, several of the same justices apparently voted to affirm the Fifth Circuit's ruling that DAPA, a very similar Obama-era policy, was invalid, presumably sidestepping any conclusion that its forbearance of removal features made it unreviewable under 5 U.S.C. § 701(a)(2). *See* United States v. Texas, 136 S. Ct. 2271, 2272 (2016) (mem.). In *Regents*, only Chief Justice Roberts appeared to act consistently with his prior calls for greater judicial scrutiny of agency error by holding that the forbearance of removal policy was reviewable under 5 U.S.C. § 701(a)(2). *See id.* at 1905. For discussion of why § 701(a)(2) does not justify asymmetry, see

their critiques seriously and trace out the logical consequences of that position in light of the principle of symmetry outlined in Part I and the larger landscape of the administrative state. When we do that, the current critiques of deference look decidedly myopic and incomplete, if not misguided.

Finally, Part III turns to the social functions of symmetry in administrative law and the lessons we might learn about deference were we to take symmetry seriously. The reason that administrative law, despite its prosaic name, elicits such interest is because of its distributive consequences. As Nicholas Bagley recently put it, "[a]dministrative law may be about good governance, but it is also about power: the power to maintain the existing state of affairs, and the power to change it."[31] But this connection to political power makes administrative law's legitimacy tenuous. Today's challenge for administrative law is much like constitutional law's challenge in the current moment of hyperpartisanship—it needs a mooring that bears no obvious relationship to partisan or ideological goals. Adhering to symmetry provides that mooring, as symmetry by definition minimizes the sum of the residual distributive effects of administrative law rules.[32] It also disciplines impulses about the ideal design of administrative law, forcing advocates of heightened judicial scrutiny to imagine a world where judges aggressively review agencies' failures to fully implement statutes in addition to reviewing agencies' overplays.

The takeaway of this thought experiment is by no means preordained—indeed, symmetry is theoretically perfectly consistent with either a world of significant deference or one without any at all, so long as one type of error is not systematically scrutinized more than the other. But there is a simpler answer for anyone who gives serious consideration to practical consequences associated with administrative law doctrine. Some degree of deference strikes a healthy balance between the minimization of interpretive error and the high institutional and social costs of eliminating both Type I and Type II error. While the costs of eliminating Type I errors alone are generally lower than the costs of eliminating Type II errors—giving the false impression that eradicating deference would be worthwhile—the costs of eliminating both types of error together are prohibitive. When we take symmetry seriously, as we must if administrative law is to be a sustainably legitimate system of law,

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infra Part II. Another example from the Court's past term bears mentioning as well. In *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, Justice Thomas wrote for the Court (including several justices critical of deference) in upholding the Health Resources and Services Administration's decision to create certain exceptions to its contraceptive mandate, employing sweeping rhetoric about the applicable statute's delegation of "unbridled discretion" to the agency to carve out categories from coverage—all without even citing *Chevron*, let alone acknowledging his prior critiques of the doctrine. *See* 140 S. Ct. 2367, 2380 (2020). Justice Kagan's concurring opinion more transparently, and symmetrically, relied on *Chevron* to uphold the agency's action despite her presumptive policy preferences against such an exemption. *See id.* at 2397 (Kagan, J., concurring in the judgment).

31. Nicholas Bagley, *The Procedure Fetish*, LAW & POL. ECON. PROJECT (Mar. 7, 2019), https://lpeproject.org/blog/the-procedure-fetish/ [https://perma.cc/TL6Y-VBXG].

32. *See infra* Part III.

the true costs of judicial review of agency decisionmaking to the judicial system cannot be casually downplayed, especially when compared to the alternative of deference.

I. STATUTORY MEANING AND THE SYMMETRY OF ERRORS

Imagine the following scenario: Congress delegates authority to the Bureau of Land Management (BLM) to preserve and protect certain land that might eventually be designated as a federally protected wilderness under the Wilderness Act. Specifically, under the Federal Land Policy and Management Act (FLPMA), for certain wilderness study areas, the BLM must "continue to manage such lands . . . in a manner so as not to impair the suitability of such areas for preservation as wilderness."[33] The BLM in turn promulgates a regulation that interprets the word *impair* to include any use of off-road vehicles (ORVs) and prohibits any and all use of ORVs within wilderness study areas. Perturbed by this, recreational enthusiasts sue the BLM. They argue that the BLM's interpretation cannot possibly stand, citing evidence that ORVs have long been permitted in wilderness study areas and that the statutory framework as a whole suggests a concern primarily about maintaining the roadlessness of wilderness study areas—not a concern with *off-road* vehicles. The BLM in turn argues that the definition of *impair* is ambiguous as to the use of ORVs, that the agency should benefit from *Chevron* deference, and that the interpretation of *impair* offered by the agency should be upheld as reasonable.

The scenario is common enough to seem almost banal, but keen readers will note that it bears some similarity to the facts in *Norton v. Southern Utah Wilderness Alliance*,[34] a landmark case concerning litigants' ability to challenge agency action. The difference is just that, in the scenario above, the BLM promulgated a rule that encapsulated precisely what the petitioners in *Norton* wanted but did not get from the agency. Courts applying *Chevron* deference to the BLM's interpretation of *impair* would be likely to conclude that the statute is ambiguous and to further conclude that BLM's interpretation of the term as including any use of off-road vehicles was a reasonable one, even if it differed from what the court thought was the best reading of the statute.[35] Courts applying a less deferential form of review, however, would be more likely to disturb the BLM's interpretation and replace it with their own first-best understanding of the statutory meaning. Following through on their Article III duties to interpret the law, judges would simply exhaust their tools for determining statutory meaning and make an independent decision, vacating the agency's different take even if it was a reasonable one.

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33. 43 U.S.C. § 1782(c).

34. 542 U.S. 55 (2004).

35. *Cf.* Mont. Wilderness Ass'n v. Connell, 725 F.3d 988, 995–97, 995 n.4 (9th Cir. 2013) (citing *Chevron* to defer to BLM's definition of impairment in relation to road construction).

Now return to the actual facts of *Norton*. If it was possible for the Supreme Court to determine the true meaning of *impair* and to determine that it was different than what the agency thought it was in the hypothetical case, where the BLM took a positive action, that would presumably be true as well when the petitioners in the real case asked the courts to force the BLM to take action consistent with the statute—that is, to enact a policy different from the agency's preferred policy (i.e., no policy at all), but consistent with the nonimpairment obligation as determined by the Court. Instead, the Supreme Court denied that courts had any role to play in policing the BLM's decision not to enact a policy consistent with that meaning (that is, to interpret the statute as not requiring off-road vehicles to be banned), at least insofar as the statutory duty was less than discrete.[36] Assuming that the Court meant what it said in *Norton*, then the interpretive gap that would cause critics of *Chevron* to cringe was simply irrelevant when the agency underimplemented the statue by failing to promulgate a policy at all.

This counterfactual is just one indicator that there is something uncomfortably asymmetric about current reform programs being advanced for administrative law's treatment of matters of statutory interpretation. In this Part, I argue that the source of this discomfort is a well-settled understanding of statutory interpretation's purposes that straddles otherwise deep methodological divisions but runs up against administrative law reformers' implicit efforts to systematically distinguish interpretive error types.

A. *The Overlapping Consensus on the Function of Statutes*

The starting point for the analysis is a simple observation about what it is that statutes do—essentially, they tell agencies or private individuals which sets of facts are consistent with Congress's decision on a legislative matter and which sets of facts are not. As students of statutory interpretation know well, there are long-standing disagreements among adherents of different methodologies, including purposivism, intentionalism, textualism, and more, about the best ways to discern the precise meaning of statutes.[37] Alt-

36. *Norton*, 542 U.S. at 64 (holding that a challenge of an agency's failure to act "can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*").

37. For just a sampling of the voluminous scholarship on the methods of statutory interpretation, see WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994); KATZMANN, *supra* note 28; ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (new ed. 2018); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986). In recent years there has been a groundswell of empirical research on statutory interpretation that has shed light on how well these prescriptive theories match practice. *See, e.g.*, James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1 (2005); Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons* (pts. 1 & 2), 65 STAN. L. REV. 901 (2013), 66 STAN. L. REV. 725 (2014); Abbe R.

hough Justice Kagan declared that "we're all textualists now,"[38] disagreements about how to deploy textualism in concrete cases still remain, and hints of the other methodologies still seem to operate at the margins.[39] But as much as disagreement about the proper way to interpret statutes persists, it is easy to overlook the "overlapping consensus"[40] that unites almost everyone: statutes have a communicative meaning with binding legal effect. That is to say, statutes express a coded instruction about how the world should or should not change as a result of the enactment of the statute.[41] While it is not always very easy to pinpoint what this legally binding communicative meaning is or what amounts to the best way to find it, almost all agree that statutes' function is to assign outcomes to real-life configurations of facts, or to guide agencies in doing so through their legislative rule-writing authority,[42] and that this communicative meaning is what everybody—from agencies, to courts, to legal academics—looks for in different ways.[43] The major fault

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Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298 (2018); Anita S. Krishnakumar, *Reconsidering Substantive Canons*, 84 U. CHI. L. REV. 825 (2017); Nina A. Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court's First Decade*, 117 MICH. L. REV. 71 (2018).

38. Harvard L. Sch., *The 2015 Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015), https://youtu.be/dpEtszFT0Tg?t=508.

39. *See, e.g.*, KATZMANN, *supra* note 28 (arguing for a pluralistic approach to statutory interpretation); Gluck & Posner, *supra* note 37 (finding that none of the surveyed judges identified as an unqualified textualist or purposivist); Victoria Nourse, *Picking and Choosing Text: Lessons for Statutory Interpretation from the Philosophy of Language*, 69 FLA. L. REV. 1409 (2017) (arguing that textualists frequently depart from strict adherence to the written text of statutes).

40. CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 4 (2d ed. 2018) (introducing the idea of "overlapping consensus," which might otherwise be attributable to Rawls, to the law and arguing that law should diffuse political conflict by embodying rules that are capable of widespread endorsement).

41. *See* Rubin, *supra* note 2, at 374 ("Legislation can be characterized as a set of public policy directives that the legislature issues to government implementation mechanisms.").

42. *See* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1082 (2017) ("People often assume, usually without realizing it, that a judge's job is to 'read the [text] and do what it says.' They may disagree violently about *how* the text should be read; but if only we could accurately read the authors' minds, or discern their purposes, or compile the ideal legal dictionary for their time and place, or whatnot, then we'd know what to do. The law the text enacts *just is* whatever the text says it is." (alteration in original) (footnotes omitted) (quoting DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 88 (1991))); Ryan D. Doerfler, *Can A Statute Have More than One Meaning?*, 94 N.Y.U. L. REV. 213, 223 (2019) (asserting that the "one-meaning rule" is fundamental to most interpretive methodologies). *But see* Doerfler, *supra* (critiquing the consensus position from a linguistic theory perspective); Jonathan R. Siegel, *The Polymorphic Principle and the Judicial Role in Statutory Interpretation*, 84 TEX. L. REV. 339 (2005) (offering a somewhat heterodox take on this consensus position).

43. *See* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2121 (2016) (book review) ("[C]ourts should seek the *best reading* of the statute . . . ."); Aaron Saiger, *Agencies' Obligation to Interpret the Statute*, 69 VAND. L. REV. 1231 (2016) (arguing that

lines within this overlapping consensus are empirical and methodological, not ontological. For instance, commentators disagree on the degree to which statutes in practice achieve clarity and specificity,[44] but they do not generally argue that statutes are so vague as to be meaningless parchment.

This overlapping consensus is so fundamental that it almost does not require any further elaboration, but it can help to construct a simple "statute-space" model to clarify how deeply settled this overlapping consensus is.[45] There are an infinite number of potential permutations of relevant facts in the world. Take five of them—x_1, x_2, x_3, x_4, and x_5—in a two-dimensional fact space.[46] The statute's job, much like that of a judge crafting a common law rule, is to articulate a rule or a standard (or to give an implementing agent the task of developing a rule or a standard) that is calculated to divide hypothetical configurations of facts into "covered" and "not covered" categories. By "covered" and "not covered," I mean that the statute has a legal effect on that instance. This legal effect could be a prohibition, a benefit, or any number of other functions of statutes. Depending on how the statute is written, x_1 and x_2 might be covered by the statute or implementing regulation, but x_3, x_4, and x_5 might not be. The meaning of the statute simply is the way that it carves up this fact space. Consequently, almost nobody believes that any one of these hypothetical configurations of real-world facts could admit of different conclusions in different circumstances. For instance, if it is clear that x_1 is always consistent with the statute, considering all of the facts made relevant by the statute and whatever interpretive methodologies one wishes to employ, no judge should independently engraft an extra criterion that x_1 is

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agencies, too, have a duty to adopt what they deem to be the best reading of the statute even when a statute is ambiguous).

44. *See generally* Richard M. Re, *Clarity Doctrines*, 86 U. CHI. L. REV. 1497 (2019) (discussing disagreements about when statutory language is clear).

45. Here I borrow and extend to statutory drafting the "case-space" framework developed by Jeffrey Lax and Dimitri Landa for court-made common law rules. *See* Dimitri Landa & Jeffrey R. Lax, *Disagreements on Collegial Courts: A Case-Space Approach*, 10 U. PA. J. CONST. L. 305 (2008).

46. There could, and likely would, be more dimensions in any real-life statutory setting. Consider, for instance, the Federal Power Act's provisions governing hydroelectric power plant licensing by the Federal Energy Regulatory Commission (FERC). The statute requires approved projects to be

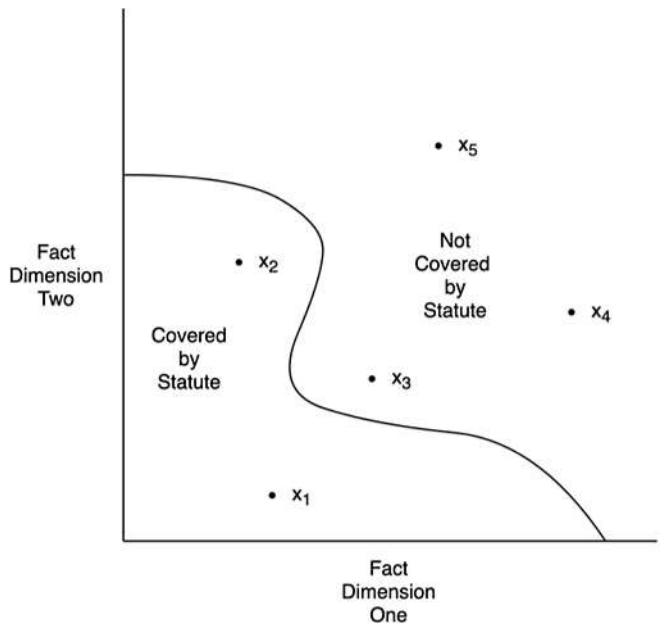
> best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes.

16 U.S.C. § 803(a)(1). The law is more or less a list of factual dimensions, and an approvable project would combine scores on these dimensions in some particular way—undoubtedly a difficult task, but one which a court could, in theory, determine that FERC failed to do correctly in an actual licensing proceeding.

consistent on Monday, but not on Tuesday. The point here is just that statutory instructions, conventionally understood, aim to prescribe (or to direct an agency to prescribe) outcomes for any one actual configuration of relevant facts. Departing from that assumption arguably renders statutory interpretation rudderless, as there would be no fixed meaning which could serve as a reference point.[47]

This statute-space model is, of course, an oversimplification insofar as it envisions clear lines cutting through every relevant dimension and neatly assigning outcomes to distinct factual configurations. In the real world, statutes might not definitively resolve each case. Rather than drawing a line bebetween covered and uncovered factual scenarios, statutes might draw a band of possible lines that a faithful agency implementing the statute through rulemaking or case-by-case adjudication could literally choose from on any basis that is otherwise consistent with the statute.[48] Of course, one of the common justifications for deference doctrines, borrowed straight from

FIGURE 1: THE STATUTE-SPACE MODEL



47. Clark v. Martinez, 543 U.S. 371, 386 (2005) (rejecting the "dangerous principle that judges can give the same statutory text different meanings in different cases").

48. The literature identifies numerous reasons why Congress would choose to leave it to agencies to determine a rule within delegated bounds, including that it would be impractical for Congress to assume the duty of specifying rules itself. *See* Margaret H. Lemos, *The Consequences of Congress's Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 VAND. L. REV. 363, 364–65 (2010) (collecting theories and citations).

the pages of legal realist theory, is that Congress often leaves irreconcilable ambiguities and lacunae that cannot be addressed by the application of neutral legal reasoning, effectively leaving implementing agencies with a discretionary choice.[49] If this is true as an empirical matter, which seems likely, it is difficult to imagine a world without deference at least as to questions about which of many permissible interpretations within the bounds of the statute to adopt.[50] One way to understand *Chevron* deference, for instance, is as simply respecting Congress's allocation of "space" for the agency to choose within this band of possible meanings of a given statutory provision.[51] But as Jeffrey Pojanowski has recently described, there is an emerging "mood" of formalism that rejects this empirical hypothesis about statutory ambiguity, at least to some degree, and would closely approximate the neat line in Figure 1.[52] As Pojanowski writes, judges and scholars are increasingly articulating a "faith in the autonomy and determinacy of law [that] is closer to the interpretive formalist perspective of classical common lawyers."[53] A number of prominent critics of deference doctrines have opined that true irreconcilable statutory ambiguities are few and far between (if they exist at all),[54] and that judges are simply too ready to find ambiguity when a closer examination

49. See Nicholas R. Bednar & Kristin E. Hickman, Chevron*'s Inevitability*, 85 GEO. WASH. L. REV. 1392, 1446–53 (2017) ("[E]ven if one pursues a robust, de novo-like analysis of statutory text, history, and purpose, some statutory questions simply do not have answers that can be derived through traditional common law reasoning.").

50. *See id.* at 1398 ("[U]nless Congress chooses to assume substantially more responsibility for making policy choices itself or the courts decide to seriously reinvigorate the nondelegation doctrine—neither of which seems remotely likely—at least some variant of *Chevron* deference will be essential to guide and assist courts from intruding too deeply into a policy sphere for which they are ill-suited.").

51. *See* Peter L. Strauss, Essay, *"Deference" Is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight*," 112 COLUM. L. REV. 1143, 1145 (2012) (noting that the "whole point of the empowering legislation is to allocate authority to the agency," in which case the court's "natural role" is, "like that of referees in a sports match, . . . to see that the ball stays within the bounds of the playing field and that the game is played according to its rules").

52. Pojanowski, *supra* note 14, at 903.

53. *Id.* at 896; *see also* Baude & Sachs, *supra* note 42, at 1082–83 (arguing that the law of interpretation usually provides a meaning even when meaning cannot be discerned in the written text). Even in the wake of *Chevron*, some prominent scholars expressed discomfort with the move away from the "independent judgment" model, wherein judges take on responsibility for definitively interpreting imperfect statutes, to *Chevron*'s "deferential" model. *See* Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 453–56 (1989).

54. Raymond M. Kethledge, *Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench*, 70 VAND. L. REV. EN BANC 315, 320 (2017) (suggesting that "statutory ambiguities are less like dandelions on an unmowed lawn than they are like manufacturing defects in a modern automobile: they happen, but they are pretty rare, given the number of parts involved"); *see also* Kavanaugh, *supra* note 43, at 2137 ("I tend to be a judge who finds clarity more readily than some of my colleagues but perhaps a little less readily than others."). Of course, even though Justice Scalia was a noted proponent of *Chevron* deference, he self-consciously erred on the side of resolving cases at *Chevron*'s first step. *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521.

would reveal sharper lines (i.e., the "best" reading of the statute) dividing up the fact space.[55]

It is not necessary to accept either of these empirical claims about the determinacy of statutes over the other in order to accept the more general premise that statutes aim to affect the legal status of various permutations of relevant facts. Under both theories, some set of real-world factual scenarios must be covered by any faithful interpretation of the statute, and some set must not be covered—if statutes have some fixed meaning, it cannot be that anything goes. Neither the formalist nor the realist understanding departs from the overlapping consensus that the function of statutes is to prescribe outcomes (or to ask agencies to prescribe outcomes as surrogates for Congress) for all of the potential permutations of relevant facts in the world, and that the statutory interpreter's task is to use some set of legal tools to identify an interpretation that fits with how the statute carves up the relevant fact space. Each factual situation that might arise and implicate the statute (and its attendant regulations) should fall into one, and only one, of three possible assignable outcomes—that is, it could be mandatorily covered by the statute, mandatorily *not* covered by the statute, or potentially left to the discretion of the agency. The debate between formalists and realists boils down to whether we believe lawyerly tools often eliminate the third category entirely, and if so, what that means for deference doctrines like *Chevron*. These latter questions can be bracketed for now, as I only rely on the premise that statutes aim, if sometimes imperfectly, to communicate to the general public or to agencies some information about which real-world situations should never be covered by a statute and which should always be covered by the statute. Accepting that premise leads to straightforward, if not particularly well understood, implications for administrative law, which I detail in the next subsection.

B. *The Symmetry of Errors*

The premise above has implications for how we conceive of the errors that agencies and judges might make. Take a simple toy example: imagine a statute that says "A shall do x_1 and x_2." The meaning of this statute is crystal clear, if only because we have abstracted away the details. Under the prevailing consensus about statutes having only one meaning, the statute just means that A (who could be either an agency or an individual regulated party) has to do two tasks, and only those two tasks.

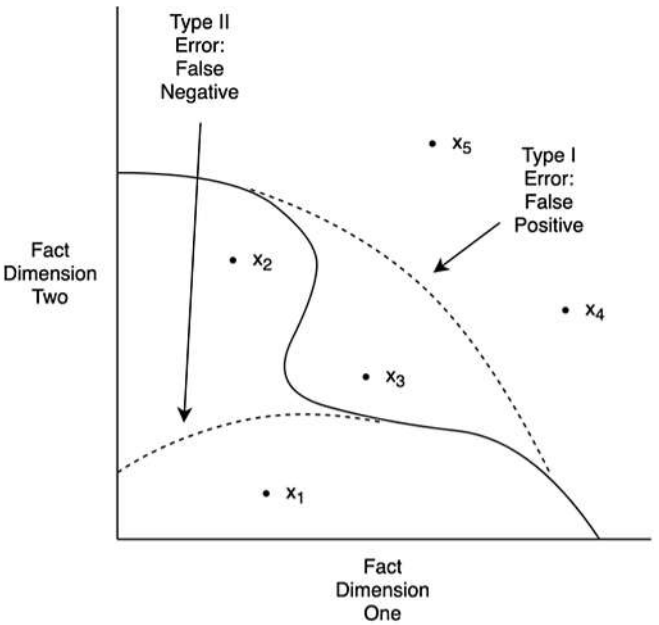
In this example, most would agree that A cannot point to this statute and argue that it gives them discretionary authority to do x_3. Reading the statute this way does violence to the clear meaning of the statute. But so too would A's claim that it does not have to do x_1 along with x_2, and for precisely the same reasons as it would be wrong to read the statute to authorize x_3. In both instances, A fails to adhere to the statute, in one instance because A has de facto added to the statute and in the other because A has de facto sub-

55. *See* Kethledge, *supra* note 54, at 320.

tracted from the statute. Whether A offers an interpretation of a statute that covers a case that, in the judge's wisdom, it should not, or A offers an interpretation of a statute that excludes a case that it should not, the result is the same: A changes what the statute means.[56]

This simple toy example highlights that, when it comes to erroneously interpreting statutes, the interpreter can err both ways. While the analogy to empirical methods is not perfect, we might say that interpretive errors can be one of two types. They can be Type I errors if they are false positives—that is, when the agency finds authority in the statute to do something positive that the judge would not approve.[57] But they can also be Type II errors if they are false negatives—that is, when the agency erroneously fails to find a congressional expectation of implementation that a judge can find.[58] Figure 2

FIGURE 2: TYPES OF ERROR IN STATUTORY INTERPRETATION



56. The Supreme Court, in an overlooked opinion, expressed precisely this principle in invalidating EPA's substitution of a lower statutory threshold for the triggering of emission regulations. *See* Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 325–26 (2014). The EPA had adopted what it called a "tailoring rule" to avoid having to apply stringent statutory standards to newly regulated sources of greenhouse gas emissions. *Id.* at 312. As the Court put it, "[a]n agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms." *Id.* at 325. This decision is one of the few recent decisions where the treatment of Type II error matches the mood with regard to Type I error.

57. *See supra* note 5 and accompanying text.

58. *See supra* note 9 and accompanying text.

demonstrates how these error types arise in the same two-dimensional statute space from Figure 1. As in Figure 1, this figure envisions a statute that, under perfect information, would be read to require a single line dividing x_1 and x_2, which are "covered," from x_3, x_4, and x_5, which are not.[59] An agency interpreting this statute could, in turn, promulgate a rule that draws different lines (the dashed lines in Figure 2) that are either underinclusive or overinclusive.

These erroneous interpretations are equally wrong. In fact, the symmetry of errors for the purposes of judicial review of agency interpretations might be best illustrated by *Chevron v. NRDC* itself. In that case, the U.S. Environmental Protection Agency (EPA) adopted a so-called bubble policy interpretation of a particular Clean Air Act provision.[60] The upshot of this policy was to take a provision that arguably required a source-by-source accounting of polluting emissions, which would have by all accounts resulted in more emissions being regulated, and transform it into one that would have potentially left sources of emission unregulated so long as plant-wide emissions fell below an EPA-mandated cap.[61] Assuming that the Court had not afforded deference to this interpretation and had instead adopted the best reading of the statute in its judgment (potentially the source-by-source approach), EPA's rule would have probably been an example of Type II error. Instead, the Court adopted a deferential approach that was at least formally blind to the directionality of the error, and the rest is history.

C. *The Pervasiveness of Type II Error in the Interpretation of Statutes*

Despite the fact that *Chevron* itself concerned a Type II error, in the lawyerly imagination deferential administrative law doctrines are primarily applied to bless mostly Type I errors. That is, we have an archetypal and skewed understanding about what it is that permissive statutory interpretation enables—namely, an activist administrative state that seeks at all turns to augment its authority. In his dissent in *City of Arlington v. FCC*, for instance, Chief Justice Roberts's reflection on deference doctrines showed a preoccupation not only with the fact that *Chevron* permits error in statutory interpretation but also with the directionality of that error.[62] The Chief wrote

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59. If the statute permitted more than one best reading, there could still be errors of both types. Imagine a more robust set of factual scenarios (e.g., x_1, x_2, x_3, x_4, x_5, x_6, and x_7) and a statute with a band of possible interpretations that give the agency discretion to choose whether any or all x_3, x_4, and x_5 are covered. If the statute said nothing about x_6, and x_7, the agency would commit Type I error by including them, whatever it decides to do with the other discretionary cases. Likewise, if the statute gave no discretion as to cases x_1 and x_2, then not covering them would be Type II error. The addition of statutory ambiguity, in other words, does not change the model.

60. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 840 (1984).

61. *See* Thomas W. Merrill, *The Story of* Chevron*: The Making of an Accidental Landmark*, 66 ADMIN. L. REV. 253, 267 (2014) ("The bubble controversy presented another example of a[] [Reagan] Administration deregulation initiative invalidated by the D.C. Circuit.").

62. 569 U.S. 290, 312–28 (2013) (Roberts, C.J., dissenting).

that "[w]hen it applies, *Chevron* is a powerful weapon in an agency's regulatory arsenal," and he lamented the "growing power of the administrative state" to "pok[e] into every nook and cranny of daily life" that *Chevron* had in part enabled.[63] Before his elevation to the Supreme Court, Justice Kavanaugh critiqued the fact that "the *Chevron* doctrine encourages agency aggressiveness on a large scale," allowing agencies to "stretch the meaning of statutes."[64] Statements like these are typical of discussions of deference doctrines.[65] Yet, were we to undertake a concerted effort to look for Type II error in the work product of the administrative state, we would find it nearly everywhere. Indeed, it seems likely that Type II error is far more pervasive than Type I error. In this section, I describe several different types of agency action that have the potential to create Type II errors.

To start, EPA's rule in *Chevron* is not the only instance of agencies adopting rules and associated statutory interpretations that have the ultimate effect, if not the purpose, of undershooting what many would consider to be the "best" constructions of statutes. Many of the Trump Administration's proposed rules have the express aim of drawing a less "inclusive" line, in terms of regulatory impact, than predecessor rules from the Obama Administration.[66] Deregulatory programs often exploit *Chevron* deference to justify what might well be a Type II error measured against the best judgment of a panel of federal judges.[67] For instance, when the Federal Communications Commission (FCC) reversed course on net neutrality in 2018, adopting a "light-touch" and "market-based" approach, the government defended the deregulatory move (which at least potentially introduced the possibility of Type II error) by invoking *Chevron*. The D.C. Circuit, having previously deferred to the Obama-era net-neutrality rule at *Chevron*'s step two,[68] rather symmetrically applied *Chevron* to hold that the Trump-era rule, too, largely operated within the delegated discretion of the Telecommunications Act.[69]

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63. *City of Arlington*, 569 U.S. at 314–15 (2013) (Roberts, C.J., dissenting).

64. Brett M. Kavanaugh, *Keynote Address: Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 NOTRE DAME L. REV. 1907, 1911 (2017).

65. *See* Buzbee, *supra* note 1, at 1511, 1564–65 (noting that many commentators "focus on an agency claiming new or expanded turf, or regulating risks in a way more stringent or onerous than Congress allegedly intended in its statutory delegation" at the expense of any focus on what the author calls "statutory abnegation").

66. *See id.* at 1518–37 (suggesting that, between 2017 and 2018, the Trump Administration repeatedly invoked narrowed interpretations of statutory authority to support a host of deregulatory actions, and collecting numerous examples of this phenomenon across the administrative state).

67. *See id.* at 1514 (noting that *Chevron* often gives agencies room to support deregulatory moves, insofar as the statutory text leaves multiple options open).

68. *See* U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 705–07 (D.C. Cir. 2016).

69. *See* Mozilla Corp. v. FCC, 940 F.3d 1, 20 (D.C. Cir. 2019) ("Applying these principles here, we hold that classifying broadband Internet access as an 'information service' based on the functionalities of DNS and caching is '"a reasonable policy choice for the [Commission] to make" at *Chevron*'s second step.'" (alteration in original) (quoting Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 997 (2005))).

Another example: after an Obama-era midnight proposed rulemaking to impose financial responsibility requirements on hardrock mining operations under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the Trump EPA took a different tack and abandoned the rulemaking.[70] Environmental organizations brought suit, alleging that CERCLA required EPA to promulgate at least some kind of financial responsibility requirement for the industry.[71] A panel of the D.C. Circuit, Judge Henderson writing for Judges Griffith and Sentelle, disagreed, noting that "[a]lthough the provision directs that the EPA 'shall' promulgate financial responsibility requirements for certain 'classes of facilities,' the provision does not specify which classes of facilities," leaving EPA with carte blanche discretion to determine which classes would be regulated.[72] Now, obviously one might say that these narrowed interpretations were simply right, such that there was no error here, whether of the Type I or Type II variety. The point, though, is that if a hypothetical judge disagreed, then each of these actions would have committed a Type II error, and that error should be as troubling as error in the other direction.

Agencies also frequently risk introduction of Type II error by lifting obligations that otherwise apply to particular groups or individuals. As I have shown with Cary Coglianese and Gabe Scheffler, agencies issue significant numbers of exemptions, exceptions, exclusions, waivers, and variances that have the purpose of limiting the scope of otherwise applicable rules.[73] For instance, during the Trump Administration, EPA has ramped up its use of hardship waivers from the requirements of the Renewable Fuel Standard, pleasing certain oil-refining operations but drawing the ire of representatives of agricultural interests (who expected EPA to continue requiring refineries to blend their fuels with biofuels like ethanol) and competitors who did not

70. Financial Responsibility Requirements Under CERCLA Section 108(b) for Classes of Facilities in the Hardrock Mining Industry, 83 Fed. Reg. 7556, 7556 (Feb. 21, 2018) (to be codified at 40 C.F.R. pt. 320).

71. Idaho Conservation League v. Wheeler, 930 F.3d 494, 499 (D.C. Cir. 2019).

72. *Id.* at 504.

73. Cary Coglianese, Gabriel Scheffler & Daniel E. Walters, *Unrules*, 73 STAN. L. REV. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3701841 [https://perma.cc/P7X7-GVL7]; *see also* AARON L. NIELSON, WAIVERS EXEMPTIONS, AND PROSECUTORIAL DISCRETION: AN EXAMINATION OF AGENCY NONENFORCEMENT PRACTICES 39–40 (2017), https://www.acus.gov/sites/default/files/documents/ACUS%20Waiver%20Report%209.11.17%20Draft.pdf [https://perma.cc/7C4Q-7TFB] (draft report for approval by the Administrative Conference of the United States). Most other treatments of what we call unrules defend them on roughly the same grounds that deference might be defended: namely, that they give agencies the flexibility they need to make sound policy decisions which they otherwise might not feel empowered to make were statutory language fastidiously adhered to. *See, e.g.*, Alfred C. Aman, Jr., *Administrative Equity: An Analysis of Exceptions to Administrative Rules*, 1982 DUKE L.J. 277, 280 (describing the mechanisms, such as case-by-case exceptions, by which agencies achieve equitable results in the administration of regulatory programs).

receive waivers.[74] The D.C. Circuit held that competitors who did not receive the waivers could not obtain review of EPA's newfound willingness to undermine the Renewable Fuel Standard through case-by-case cancelation of its requirements.[75] This is but one example of how easy it is for agencies to evade judicial scrutiny by carving out certain groups or activities for special treatment or by dispensing with requirements altogether in individual cases.[76] And, assuming that many of the rules from which these "unrules," as we call them, are developed are otherwise consistent with the true meaning of the statute that authorizes them, then many (if not most) of these unrules create Type II errors in regulatory administration. The issues surrounding "big waiver" somewhat similarly suggest that there may be massive pockets of regulatory practice where congressionally specified directions are in effect canceled.[77]

It drastically increases the pervasiveness of Type II error if we count, as we should, agency decisions not to act on issues within their authority[78] or to delay action that they could otherwise take.[79] In instances where agencies fail to take action, their inaction is, for all practical purposes, an interpretation that the statute *does not* require that action, and courts treat them as such in cases where statutory language cannot be reconciled with the inaction—for instance, courts normally hold agencies to deadlines, since these deadlines are not subject to reasonable disagreement.[80] More generally, though, agen-

74. *See* Eric Wolff, *Biofuel Backers Pressuring EPA to Rewrite Latest RFS Rule*, POLITICO (Oct. 18, 2019, 3:40 PM), https://www.politico.com/news/2019/10/18/biofuel-backers-pressuring-trump-to-rewrite-latest-rfs-rule-051175 [https://perma.cc/9NUX-5XMJ].

75. Advanced Biofuels Ass'n v. EPA, 792 Fed. App'x 1 (D.C. Cir. 2019).

76. *See* Coglianese et al., *supra* note 73.

77. David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 270 (2013); Daniel T. Deacon, *Administrative Forbearance*, 125 YALE L.J. 1548, 1596 (2016). This example is complicated, however, by the fact that Congress, by implanting a "big waiver" provision, seems to have blessed the negation of law. In that sense, this is not really error of any kind. Still, if an agency abuses its big-waiver authority, making questionable arguments about its scope, that could be troubling from an error minimization perspective.

78. Sunstein & Vermeule, *supra* note 8.

79. Sant'Ambrogio, *supra* note 8; *see also* Bethany Davis Noll & Richard L. Revesz, *Regulatory Rollbacks Have Changed the Nature of Presidential Power*, REGUL. REV. (Mar. 16, 2020), https://www.theregreview.org/2020/03/16/davis-noll-revesz-regulatory-rollbacks-changed-nature-presidential-power/ [https://perma.cc/8GBJ-RJJ7] (noting the Trump Administration's aggressive use of regulatory "suspensions"—i.e., indefinite moratoria on enforcing a rule previously promulgated by a prior administration—and the ways that these indefinite suspensions can be abused).

80. *See* Telecomms. Rsch. & Action Ctr. v. FCC, 750 F.2d 70 (D.C. Cir. 1984) (holding that agency action could be compelled when so-called "TRAC factors" (named for this case) favor it, one of which is when Congress has supplied a timeline for action). During the Trump Administration, EPA has been repeatedly rebuked for delaying the implementation dates of already-promulgated rules through informal processes that cannot legally change rules under the Administrative Procedure Act. *See generally* Lisa Heinzerling, *Unreasonable Delays: The Legal Problems (So Far) of Trump's Deregulatory Binge*, 12 HARV. L. & POL'Y REV. 13 (2018).

cies make countless decisions not to act in the twilight between explicit congressional requests for regulation and outright delegation. A good example is the *Norton* case, where BLM simply decided that a new policy was not necessary to comply with the nonimpairment mandate in the statute, [81] but there are many others. Indeed, the available empirical evidence suggests that agencies routinely fail to follow through on congressional requests for regulation.[82] Rachel Potter has recently shown that many of these decisions to delay action requested by Congress, potentially indefinitely, can be traced to political disagreement with statutory priorities, not to any good-faith legal interpretation.[83]

Finally, perhaps the most ubiquitous potential source of Type II error is nonenforcement in individual cases. Simple nonenforcement decisions by agencies, which may be entirely informal and undocumented, are the bread and butter of regulatory practice.[84] As a practical matter, probable violations of statutory standards far outnumber enforcement actions that agencies can pursue. This is probably most apparent in the domain of immigration: for example, in 2011 there were about 11.2 million *potential* removal proceedings that could be brought, but resources at the Immigration and Customs Enforcement (ICE) to pursue only a small fraction (about 4 percent) of those potential actions.[85] Similar dynamics are present across the regulatory state. For instance, nonenforcement of environmental laws has been far more successful in the Trump Administration than the attempted rollback of Obama-era regulations.[86] Intermixed with resource-based decisions not to enforce,

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However, these examples mostly involve the interpretation of deadlines in rules rather than in statutes, and they are therefore beyond the purview of this article.

81. *See* Norton v. S. Utah Wilderness All., 542 U.S. 55 (2004).

82. Jason Webb Yackee & Susan Webb Yackee, *From Legislation to Regulation: An Empirical Examination of Agency Responsiveness to Congressional Delegations of Regulatory Authority*, 68 ADMIN. L. REV. 395 (2016) (finding that agencies promulgate regulations for only 41 percent of statutory authorizations for rules); Simon F. Haeder & Susan Webb Yackee, *Handmaidens of the Legislature? Understanding Regulatory Timing* (2019) (unpublished manuscript) (on file with the *Michigan Law Review*) (finding significant time lags in the production of rules, but also finding that even many narrow delegations (e.g., mandatory calls for rules) never resulted in a rule during the observation period).

83. RACHEL AUGUSTINE POTTER, BENDING THE RULES: PROCEDURAL POLITICKING IN THE BUREAUCRACY (2019).

84. For a good overview, see Urska Velikonja, *Accountability for Nonenforcement*, 93 NOTRE DAME L. REV. 1549, 1558–60 (2018).

85. SHOBA SIVAPRASAD WADHIA, BANNED: IMMIGRATION ENFORCEMENT IN THE TIME OF TRUMP 9 (2019).

86. *See* Alex Leary, *Trump Administration Pushes to Deregulate with Less Enforcement*, WALL ST. J. (June 23, 2019, 7:12 PM), https://www.wsj.com/articles/trump-administration-pushes-to-deregulate-with-less-enforcement-11561291201 (on file with the *Michigan Law Review*). This most recent episode is consistent with a long history of Republican administrations using nonenforcement as part of a deregulatory political strategy. *See* Daniel T. Deacon, Note, *Deregulation Through Nonenforcement*, 85 N.Y.U. L. REV. 795, 807–21 (2010) (providing numerous examples of deregulatory nonenforcement programs during the George W. Bush Administration); Zachary S. Price, *Politics of Nonenforcement*, 65 CASE W. RSRV. L. REV. 1119,

which the agencies do not really "choose," are conscious decisions to change policy through concerted nonenforcement. Presidents of both parties have encouraged agencies to adopt these nonenforcement policies on issues running the gamut, from issuing moratoria on immigration enforcement against "dreamers" to refusing to enforce the Johnson Amendment, which normally "bars 501(C)(3) non-profits, including houses of worship, from participating in political campaigns for, or against, a candidate."[87]

All of the agency decisions catalogued in this section have the potential to create Type II errors, or underinclusiveness, relative to the statutory meaning. We would not know for sure whether they created Type II errors until judges tell us what the best reading of the relevant statutes is, and it could very well be that some of these deregulatory efforts could track the statute's meaning or even be overinclusive relative to that meaning once judges find it. Yet, as this short tour through the various forms of agency inaction suggests, there is good reason to believe not only that Type II error is theoretically possible but also that it is rampant in the administration of statutory programs. Tamping down on error of this kind would involve enormous effort on the part of the courts and would have major implications for regulatory policy.[88] As the next Section demonstrates, consistent with their general accommodation of deference on Type I error through doctrines like *Chevron*, courts have historically tended to treat Type II error as a problem that need not be entirely addressed by law.

D. *Symmetry in the Doctrine*

The symmetry of errors suggests that interpretive doctrine designed to minimize those errors (to whatever degree the courts and society deem optimal) would be symmetrical as well.[89] This notion of interpretive symmetry finds support in the charter of the modern administrative state: the APA creates a cause of action for parties aggrieved when an agency "unlawfully with-

1123–33 (2015) (providing examples of nonenforcement polices across the Reagan, George W. Bush, and Obama Administrations).

87. Howard Gleckman, *President Trump's Situational Enforcement of Tax and Immigration Laws*, FORBES (June 20, 2018, 8:26 AM), https://www.forbes.com/sites/howardgleckman/2018/06/20/president-trumps-situational-enforcement-of-tax-and-immigration-laws/#2c979f1e2999 [https://perma.cc/3EPT-DMA3].

88. *See supra* Section II.B.3; *see also* Daniel E. Walters, *The Judicial Role in Constraining Presidential Nonenforcement Discretion: The Virtues of an APA Approach*, 164 U. PA. L. REV. 1911, 1921–25 (2016); Sunstein & Vermeule, *supra* note 8.

89. In Section II.B, I will address the few potential arguments I have identified for why doctrine might be asymmetrical with respect to error types, and in Part III, I will highlight the strong prudential and normative concerns that further bolster the case for symmetry of doctrine. For now, I think it is sufficient to say that the account I have offered of the two symmetrical types of error in statutory interpretation creates a strong presumption against systemically different approaches to statutory error types in the doctrine of administrative law.

held or unreasonably delayed" action,[90] with "action" defined to include a "failure to act."[91] These provisions for judicial review of Type II error co-occur with the judicial-review provisions that litigants rely on to challenge Type I error. As Eric Biber has demonstrated, there is no fundamental difference under the APA between a failure to act and an action that is *ultra vires*.[92] These two forms of reviewable unlawfulness are really "two sides of the same coin."[93] This is also to say nothing about Type II error that emerges from the positive, but ultimately erroneous, action of an agency. For instance, an agency might consciously choose to act under its rulemaking authority but adopt an interpretation that would exempt regulated entities from regulation that the statute anticipated. There, it seems self-evident that the same doctrinal framework would be used to determine acceptable levels of both types of error.[94]

Moreover, this idea that administrative law doctrine should reflect the symmetry of error types has an identifiable basis in actual practice to date. The story of symmetry starts in the lead-up to the passage of the APA. As Reuel Schiller describes it, "by the early 1940s, judicial review of administrative action had coalesced into a single doctrine. What was once a confusing and incoherent area of the law had been simplified through the application of a cardinal [principle] of prescriptive administrative law: courts were to defer to administrative agencies."[95] That settlement eventually gave way to a less coherent (but equally symmetrically incoherent!) approach in the post-war period,[96] as courts responded proactively to concerns about capture affecting agency decisionmaking.[97] During this period, running up to the early 1980s, courts vacillated between deferential and probing review no matter the directionality of the error.[98] The Supreme Court's intervention in two

90. 5 U.S.C. § 706(1) ("[T]he reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed . . . .").

91. 5 U.S.C. § 551(13) (" '[A]gency action' includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act . . . .").

92. Eric Biber, *Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and Inaction*, 26 VA. ENV'T L.J. 461, 461–62 (2008) ("[T]here is no fundamental difference between judicial review of agency inaction or action under the APA.").

93. *Id.*; *see also* Eric Biber, *supra* note 25, at 10–11 (noting that, although the APA separates the authorization of judicial review of agency inaction (section 706(1)) from the authorization of judicial review of agency action (section 706(2)), the courts have struggled to develop reliable criteria to distinguish action from inaction).

94. *See supra* Section I.B.

95. Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 439 (2007).

96. *See id.* at 440–41.

97. *See generally* Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039, 1039 (1997).

98. 3 KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 19.7 (6th ed. 2019) (discussing how, until *Heckler v. Chaney*, litigants attempted and often succeeded in arguing that the presumption of reviewability extended to claims arising from agency failures to act); Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpreta-*

cases—*Chevron* in 1984 and *Heckler v. Chaney* in 1985—mostly ended this stochastic approach and reinstituted a more uniform, and uniformly deferential, approach to judicial review.[99] In *Chevron*, the Court replaced the jumbled, ad hoc, and frequently probing approach to review of agency interpretations of statutory law with a hard rule of deference whenever Congress left ambiguities for agencies to resolve.[100] Some empirical studies of lower court decisionmaking after *Chevron* showed a fairly immediate and pronounced increase in agency win rates.[101] More recent studies confirm the lasting effect of these changes, especially in the lower courts.[102] At roughly the same time, the Court began to articulate limits to the muscular presumption of reviewability in *Heckler v. Chaney*.[103] Years before in *Dunlop v. Bachowski*, the Court had relied on the presumption of reviewability to justify a fairly high level of scrutiny of agency enforcement discretion.[104] In *Heckler*, the Court reversed course and held that enforcement discretion is presumptively unreviewable.[105] Not long after *Chevron* and *Heckler*, the Supreme Court decided *Lujan v. National Wildlife Federation*, foreclosing any remedy for what a challenger thought to be "rampant" violation of the law through nonimplementation of statutory programs.[106] The decision presaged

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tion, 126 YALE L.J. 908, 915 (2017) ("Courts and commentators tend to agree on at least one issue: prior to *Chevron*, there was widespread confusion over the proper scope of review."); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 972 (1992) ("Prior to 1984, the Supreme Court had no unifying theory for determining when to defer to agency interpretations of statutes.").

99. David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135 (2010) (reviewing the empirical literature on the application of deference doctrines and finding remarkable consistency across doctrinal categories).

100. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

101. *See* Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1042. *But see* Joseph L. Smith & Emerson H. Tiller, *The Strategy of Judging: Evidence from Administrative Law*, 31 J. LEGAL STUD. 61, 78 (2002) ("Overall, the courts in our study were no more likely to defer to the EPA after Chevron than before it.").

102. *See* Barnett & Walker, *supra* note 26.

103. 470 U.S. 821 (1985).

104. 421 U.S. 560 (1975).

105. 470 U.S. at 837–38. The Court did note that this presumption of unreviewability was rebuttable where "the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." *Heckler*, 470 U.S. at 832–33. It also indicated that a complete abdication of statutory responsibilities could overcome the presumption. *Id.* at 833 n.4 (citing Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973)). For a recent overview of these cases and application to recent controversies, see Walters, *supra* note 88.

106. Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 891 (1990). Justice Scalia's language is worth quoting at length, as it grants that there might be technical violations of the law but still finds reasons to insulate agency decisions:

> Respondent alleges that violation of the law is rampant within this program—failure to revise land use plans in proper fashion, failure to submit certain recommendations to Congress, failure to consider multiple use, inordinate focus upon mineral exploitation, failure to provide required public notice, failure to provide adequate environmental impact statements. Perhaps so. But respondent cannot seek *wholesale* improvement of this

the later, and more sweeping, declaration in *Norton* that courts can never hear "broad programmatic attack[s]," even under the APA's authorization for challenges of "agency action unlawfully withheld."[107] Only when a statute achieves a high degree of specificity and imposes a "discrete" duty is the potentially problematic underimplementation remediable.[108]

These moves—the introduction of a uniformly deferential interpretive posture of review in *Chevron* and the narrowing of reviewability of agency inaction in *Heckler* and *Lujan* (and eventually *Norton*)—which are often analyzed in isolation, are actually deeply related.[109] Indeed, it is no accident that several of these decisions occurred in quick succession. In all cases, the Court found practical reasons to put agencies in the driver's seat as a default rule to be overcome only by evidence that Congress spoke clearly and mandatorily. Indeed, if one steps away from the immediate context, the rationale the Court offered for deference sounds remarkably similar across the cases. In *Chevron*, the Court justified a rule of deference by noting that there are situations when the "meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations."[110] In *Heckler*, the Court similarly opined that "[t]he agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities."[111] Indeed, the opinion in *Heckler* cites some of the Court's proto-

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> program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made.

Id.

107. Norton v. S. Utah Wilderness All., 542 U.S. 55, 64–65 (2004) (quoting 5 U.S.C. § 706(1)).

108. *Id.* at 64 ("[A] claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*.").

109. The rearticulation reflected a shift in how lawyers, judges, and academics conceptualized accountability. In the hard-look era, courts were thought to play a representation reinforcing role. *See* Reuel E. Schiller, *Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 ADMIN. L. REV. 1139, 1154 (2001); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975). In the early 1980s, positive political theory pointed instead to politics as a source of accountability. *See* David B. Spence, *Administrative Law and Agency Policy-Making: Rethinking the Positive Theory of Political Control*, 14 YALE J. ON REGUL. 407 (1997). The shift toward a political-accountability model was, to be sure, incomplete, *see* Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 DUKE L.J. 1811 (2012) (arguing that reason giving remains important); Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2 (2009) (urging the Court to fully recognize political reasons to justify policy changes and showing that courts have resisted), but it nevertheless remains true that deference was consistent with a burgeoning theory that the administrative state would derive legitimacy not from adherence to statutory law but from consistency with the preferences of current political principals who were themselves accountable to the electorate.

110. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) (citations omitted).

111. *Heckler*, 470 U.S. at 831–32.

Chevron deference opinions as a justification for a presumption against judicial review of agency nonenforcement.[112]

The claim that administrative law has basically been deferential since the 1980s should not be mistaken for a claim that it has been uniformly deferential. As many scholars have recently noted, *Chevron* deference in the last two decades became more "muddled,"[113] reflecting a pragmatic compromise between the imperative of deference and the imperative of judicial duty.[114] The Court has tinkered with deference at the margins without fundamentally discarding it.[115] Occasionally, the Court even intervenes to remedy gross abdications of authority, notwithstanding *Lujan*'s and *Norton*'s language about "programmatic" improvements to regulatory programs. In *Massachusetts v. EPA*, for instance, the Supreme Court clarified that agency denials of petitions for rulemaking were in fact "subject to review,"[116] and then used that

112. *Id.* at 832 ("Similar concerns animate the principles of administrative law that courts generally will defer to an agency's construction of the statute it is charged with implementing, and to the procedures it adopts for implementing that statute." (citing Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 543 (1978), and Train v. Nat. Res. Def. Council, Inc., 421 U.S. 60, 87 (1975))).

113. For many, this muddling was a negative development. *See* Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443 (2005); Kristin E. Hickman, *The Three Phases of* Mead, 83 FORDHAM L. REV. 527, 528 (2014) (noting that "for many courts and commentators, *Mead* has proven just as confusing and controversial as *Chevron*" and collecting citations from prominent scholars to that effect).

114. *See* Pojanowski, *supra* note 14, at 875 ("In fact, one could do reasonably well on an administrative law exam by using the pragmatist doctrinal approach as the skeleton of a study outline."); Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Seige*, 131 HARV. L. REV. 1, 35–36 (2017) (noting that, despite the blustery constitutional rhetoric, the Supreme Court has consistently stepped back when presented with opportunities to eliminate deference).

115. One of the most recent examples of this pattern came in *Kisor v. Wilkie*, where the Supreme Court granted a petition for writ of certiorari to overturn *Auer v. Robbins* and *Seminole Rock*—cases standing for the principle that courts should defer to agency interpretations of their own ambiguous regulations—and then refused to do so on stare decisis grounds. *See* Kisor v. Wilkie, 139 S. Ct. 2400 (2019). While some have interpreted *Kisor*'s recrafting of *Auer* deference as a significant change to the doctrine, *see* Christopher J. Walker, *What* Kisor *Means for the Future of* Auer *Deference: The New Five-Step* Kisor *Deference Doctrine*, YALE J. ON REGUL.: NOTICE & COMMENT (June 26, 2019), https://www.yalejreg.com/nc/what-kisor-means-for-the-future-of-auer-deference-the-new-five-step-kisor-deference-doctrine/ [https://perma.cc/A994-V5TW], others view the failure to overturn *Auer* deference under these circumstances as a major blow to the larger movement against deference in administrative law. *See* Ronald Levin, *Symposium:* Auer *Deference—Supreme Court Chooses Evolution, Not Revolution*, SCOTUSBLOG (June 27, 2019, 11:36 AM), https://www.scotusblog.com/2019/06/symposium-auer-deference-supreme-court-chooses-evolution-not-revolution/ [https://perma.cc/55MW-J7WX]; Daniel Walters, *Symposium: Laying Bare the Realpolitik of Administrative Deconstruction*, SCOTUSBLOG (June 27, 2019, 7:09 AM), https://www.scotusblog.com/2019/06/symposium-laying-bare-the-realpolitik-of-administrative-deconstruction/ [https://perma.cc/YYG7-MAAT].

116. *See* Kathryn A. Watts & Amy J. Wildermuth, Colloquy Essay, Massachusetts v. EPA*: Breaking New Ground on Issues Other than Global Warming*, 102 NW. U. L. REV. 1029, 1040–41 (2008). Although the Court claimed that such review is to be "highly deferential," *see* Mas-

hook to engage in one of the most consequential judicially driven "programmatic" improvements in recent memory by prodding EPA to take up climate regulation. The Court refused to give credence to EPA's appeals to extrastatutory considerations that counseled against using the Clean Air Act's authority to address mobile greenhouse gas emissions.[117] In order to justify a nonuse of the Clean Air Act's authority, EPA would have to offer reasons made relevant by the statute itself.[118]

Notwithstanding the inevitable aberrational cases and murmurs of discontent in individual cases, a broader historical perspective reveals that administrative law doctrine has tended to follow similar patterns at any given point in time, whether legal errors are categorized as Type I or Type II errors. The overall level of deference in a particular era is variable, but the overall trends *between* error types are highly correlated, reflecting the overlapping consensus that the judge's task is to identify acceptable levels of interpretive errors that can arise from either underinclusiveness or overinclusiveness in agencies' implementation of statutory programs. It is possible, indeed desirable, to have discussions from time to time about whether administrative law doctrine as a whole is calibrated properly to balance the minimization of statutory error against other social and legal goods. The story of administrative law is nothing less than the story of negotiations over precisely this balance. But these negotiations have seemingly always been disciplined by a commitment to a roughly symmetrical treatment of all interpretive error. In the next Part, I argue that current negotiations, at least as they are currently playing out, appear to have lost the concern over symmetry.

II. THE ASYMMETRICAL ASSAULT ON DEFERENCE

It has become clear in recent years that we are in the process of renegotiating administrative law. However, this round of negotiation is different from previous historical iterations in a variety of ways[119]—most importantly, for the purposes of this Article, in the way that symmetry does not appear to be disciplining the conversation. In this Part, I first identify the ways that scholarly and judicial critiques of deference implicitly and sometimes explicitly differentiate error types in terms of the need for judicial remediation. I show that rhetoric and, ultimately, practice suggest that there is a preoccupa-

sachusetts v. EPA, 549 U.S. 497, 528 (2007), the actual tenor of the review seemed far more demanding. *See* Jody Freeman & Adrian Vermeule, Massachusetts v. EPA*: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 97 ("The second crucial point is that agency decisions not to decide are (presumptively) subject to 'hard look' review. At least absent a clear statutory command to the contrary, the reviewing court will require the agency to offer a nonarbitrary reason for the decision not to decide." (emphasis omitted)).

117. *Massachusetts*, 549 U.S. at 532.

118. Freeman & Vermeule, *supra* note 116, at 80.

119. Although there are interesting historical analogues to the negotiations in the 1930s. *See generally* Metzger, *supra* note 114 (drawing parallels between the two periods).

tion with agencies overextending beyond what judges would read statutes to allow and little to no concern with agencies committing errors by failing to operationalize statutes to comply with the discernible meaning of those statutes. These trends effectively negate the fundamental symmetry of error types. Then, in Section II.B, I address potential arguments for permitting asymmetry to permeate the new doctrinal settlement, and I find each lacking. I leave it for Part III to make the positive case for insisting on symmetry as a disciplining convention or norm in the elaboration of administrative law.

A. *The Failure to Target Type II Error*

The broad contours of the upstart movement against deference in administrative law have been ably traced by other scholars. Gillian Metzger, for instance, has identified what she calls "anti-administrativist" strands in contemporary thought about administrative law.[120] Adrian Vermeule and Cass Sunstein dub roughly the same trends the "New Coke," perhaps hoping that these currents will meet the same fate as the real New Coke.[121] Jeffrey Pojanowski likewise sees the landscape of administrative law theory as increasingly divided into warring "administrative supremacist," "administrative skeptical," and "administrative pragmatist" camps, although he attempts to carve out an emerging fourth perspective—that of "neoclassical administrative law"—that borrows features of several of the other perspectives, notably including the formalism on questions of law characteristic of administrative skepticism.[122] All of these accounts see major change on the horizon for administrative law, particularly for the deference to interpretations of law that agencies have enjoyed for roughly the last forty years.[123]

In terms of constitutional first principles, the arguments for this renegotiation of the appropriate level of deference on questions of statutory inter-

120. *See id.* Metzger's article spurred two other ruminations on the rise of a more activist posture toward administrative law. *See* Aaron L. Nielson, Response, *Confessions of an "Anti-Administrativist*," 131 HARV. L. REV. F. 1 (2017); Mila Sohoni, Response, *A Bureaucracy—If You Can Keep It*, 131 HARV. L. REV. F. 13 (2017).

121. Cass R. Sunstein & Adrian Vermeule, *The New Coke: On the Plural Aims of Administrative Law*, 2015 SUP. CT. REV. 41. The real "New Coke" was an attempt by Coca-Cola to reformulate its product—a failure so infuriating to the public that it "drew a nationwide backlash in 1985." John Koblin, *New Coke Was a Debacle. It's Coming Back. Blame 'Stranger Things.,'* N.Y. TIMES (May 21, 2019), https://www.nytimes.com/2019/05/21/business/media/new-coke-netflix-stranger-things.html [https://perma.cc/H8RX-HSM2].

122. Pojanowski, *supra* note 14.

123. As Pojanowski's account makes clear, there are major divisions on the right about the appropriate role of judges vis-à-vis agencies on questions of policy and perhaps also on procedure. What unites neoclassical administrative law and administrative skepticism, in his account, is a belief that judges should give less deference to agencies' interpretations of law and instead use their legal judgment to find the best meaning of relevant statutory law. *See id.* at 883.

pretation mostly sound in Article III and Article I concerns.[124] On the Article III side, critics of deference see an abdication of tandem judicial duties to "say what the law is" and to remain neutral between parties litigating before the court.[125] On the Article I side, critics of deference see it as enabling Congress to abdicate its duties to promulgate statutes that do not run afoul of the spirit of the nondelegation doctrine.[126] In other words, the argument is that *Chevron* deference creates "perverse incentives" to "pass vague laws and leave it to agencies to fill in the gaps, rather than undertaking the difficult work of reaching consensus on divisive issues."[127] In addition to the constitutional arguments, there is also an APA originalist argument against deference that centers on the text of section 706 of the APA, which states that "the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."[128] This language, some have suggested, might be read to mandate de novo review of agency interpretations of statutes.[129]

Each of these legal arguments against deference could well be applied symmetrically to require judges to decide not only when agencies exceed statutory authorizations but also when they have failed to take action that satisfies statutory expectations. In this sense, these moves *could* be consistent with administrative law's long history of symmetrical renegotiation of the appropriate posture of judicial review.[130] Were that the way the arguments were being leveraged, they would at least be consistent with settled conventions, if perhaps otherwise objectionable on policy grounds.[131]

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124. Walker, *supra* note 12, at 110 (noting that "predominant arguments against *Chevron* deference fall into two main categories: Article III and Article I concerns").

125. Philip Hamburger, Chevron *Bias*, 84 GEO. WASH. L. REV. 1187 (2016). Although it predates the recent upsurge in interest in *Chevron*'s impact on Article III duties, Cynthia Farina's account presaged many of the arguments that are now in vogue. Farina, *supra* note 53.

126. *See* Walker, *supra* note 12, at 112. As of yet, the Court has refused to resuscitate the nondelegation doctrine, but in *Gundy v. United States*, the Court showed that it is close to doing so. *See* Adler & Walker, *supra* note 6, at 3 ("*Gundy*, however, is also noteworthy because only four Justices were willing to continue to embrace a toothless nondelegation doctrine.").

127. Egan v. Del. River Port Auth., 851 F.3d 263, 279 (3d Cir. 2017) (Jordan, J., concurring in the judgment).

128. 5 U.S.C. § 706; *see also* Evan D. Bernick, *Envisioning Administrative Procedure Act Originalism*, 70 ADMIN. L. REV. 807, 849–54 (2018) (discussing arguments that section 706 of the APA compels courts to exercise nondeferential review).

129. *See, e.g.*, Kavanaugh, *supra* note 64, at 1912 ("I should note, parenthetically, that there is a separate concern about *Chevron* as famously expressed by Judge Gorsuch. He said the doctrine is flawed ab initio because the Administrative Procedure Act says that courts should decide questions of law in administrative law cases [where there is ambiguity.]").

130. *See supra* Section I.D.

131. For instance, Nicholas Bagley has recently led the charge in pointing out the practical problems with aggressive judicial review of agency decisions. *See* Bagley, *supra* note 21; Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285 (2014);

At any rate, though, this is not how the arguments are being leveraged. Proponents of these theories do not tend to acknowledge—let alone advocate—the systematic reforms to administrative law that would be necessary to see this vision through with respect to both Type I and Type II error. While it could be that these critics simply have not gotten around to fleshing out the full implications of their muscular vision of the judicial role in reviewing agency interpretations of law, it is more likely that this telling silence means that the whole project of rethinking deference is operationally biased toward remedying only one kind of error in the implementation of statutes, at least in practice. This operational bias can be seen in several doctrinal strands where Type II error could be minimized, but where the critics of Type I error are curiously silent.

1. *Norton* as Super Deference for Negative Delegations

One of the telltale signs of a growing asymmetry is the complete absence of any concern from critics of deference about how courts use *Norton v. Southern Utah Wilderness Alliance* to rubber-stamp agency refusals to promulgate rules to implement under-determined statutory goals. As discussed previously, in *Norton* the Supreme Court refused to hear a lawsuit under section 706(1) of the APA to compel the BLM to take action consistent with a statutory nonimpairment mandate for federal wilderness areas.[132] The statute stated that the "Secretary shall continue to manage such lands . . . in a manner so as not to impair the suitability of such areas for preservation as wilderness."[133] According to the Court, the statute was "mandatory as to the object to be achieved" but left BLM "a great deal of discretion in deciding how to achieve it," which precluded a finding of a discrete, mandatory duty which BLM failed to act on.[134] Responding to this, the plaintiffs asked the court simply to order the BLM to take *some* action rather than some specific action so as to respect the traditional boundaries of mandamus.[135] Had BLM issued a legislative rule restating this general nonimpairment obligation, it would certainly count as final agency action, but for some reason the Court held that it lacked the "specificity requisite for agency action."[136] The Court's reasoning here betrays the nonstatutory basis of the discrete-duty test—indeed, lines later, the Court went on to explain the extrastatutory concerns about "judicial entanglement in abstract policy disagreements" that really drove the Court's hands-off approach to agency

Nicholas Bagley, *Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. 253 (2017) [hereinafter Bagley, *Remedial Restraint*].

132. *See supra* notes 33–36 and accompanying text.

133. 43 U.S.C. § 1782(c).

134. Norton v. S. Utah Wilderness All., 542 U.S. 55, 66 (2004).

135. *Id.*

136. *Id.*

inaction.[137] It would be hard to imagine Congress being any clearer about what it wanted BLM to do in a complex policy space, or to imagine that the enacting Congress really would have approved of BLM's refusal to implement the statute, but as far as the Court was concerned, it was the agency's duty to "say what the law is."

Courts to this day continue to rely on *Norton*'s discrete-duty requirement to rubber-stamp agency inaction even when it is fairly easy to discern that Congress wanted the agency to act in some way. For instance, in *City of New York v. United States Department of Defense*, the plaintiffs asked the courts to compel the Department of Defense to comply with a clear statutory mandate to provide certain information about former service members to the Attorney General to help populate the National Instant Criminal Background Check System for firearms.[138] According to the court, this requirement to report quarterly—which the Department of Defense admitted it was not complying with—is "exactly the sort of 'broad programmatic' undertaking for which the APA has foreclosed judicial review."[139] Amazingly, the court somehow turned evidence that Congress cared about the Department's noncompliance enough to pass additional incentives for compliance into a reason for not requiring the Department to comply.[140] It is a challenge to imagine what Congress would have had to say before the court would have found the discrete-duty test to have been met. Likewise, in *Murray Energy Corporation v. EPA*, the plaintiff coal company brought an action to force the EPA to adhere to a portion of the Clean Air Act stating that the EPA Administrator "shall conduct continuing evaluations of potential loss or shifts of employment which may result from the administration or enforcement of the provision of this chapter and applicable implementation plans, including where appropriate, investigating threatened plant closures or reductions in employment allegedly resulting from such administration or en-

137. *Id.* at 66–67 ("If courts were empowered to enter general orders compelling compliance with broad statutory mandates, they would necessarily be empowered, as well, to determine whether compliance was achieved—which would mean that it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management.").

138. 34 U.S.C. § 40901(e)(1)(C) ("If a Federal department or agency under subparagraph (A) has any record of any person demonstrating that the person falls within one of the categories described in subsection (g) or (n) of section 922 of title 18, the head of such department or agency shall, not less frequently than quarterly, provide the pertinent information contained in such record to the Attorney General."); City of New York v. U.S. Dep't of Def., 913 F.3d 423, 426–27 (4th Cir. 2019).

139. *City of New York*, 913 F.3d at 433.

140. *Id.* ("These measures signal that Congress sees this problem as one ripe for legislative oversight and in need of attention by experts in the executive branch. At no point, however, has Congress invited the federal courts into the process. Perhaps cognizant of the judiciary's inability to oversee and manage a complex scheme of inter-agency collaboration, we have appropriately been left on the sideline.").

forcement."[141] EPA completely failed to undertake any of these activities, but according to the court, this provision was not mandatory because it "call[ed] for *evaluations* of the potential employment impact of regulatory and enforcement activities—a duty which demands the exercise of agency judgment."[142] Again, because Congress did not spell out in painstaking detail each step it wanted EPA to take in producing the employment reports, under *Norton* the statutory mandate was as good as nil.

As these cases suggest, courts applying *Norton* often effectively read away statutory language bearing on agencies' legal obligations. Unless Congress provides an "inexorable command" that admits of no other interpretation, agencies possess unfettered discretion to depart from the best reading of a statute by refusing to act.[143] The upshot is that Congress routinely "asks" for regulation and other action in other less painstakingly direct ways that are likely to be ignored under the *Norton* standard.[144] A statute could plainly exhort the agency to action by using words like "shall," but unless Congress has spelled out precise steps in exacting detail, the agency can ignore those exhortations with impunity. This pattern should be troubling to those who believe that courts should not infer from an ambiguity that Congress has delegated authority to the agency to decide how or whether to enforce the full extent of the law, but instead should decide for themselves how to resolve the ambiguity. There should be no mistaking that, with a statute imposing a duty that fails to rise to the level of a discrete duty under the *Norton* test, the court is accepting a delegation that intrudes on the court's prerogative to say what the law is. *Norton* is in some sense the *Chevron* deference for negative delegations.[145] Were *Chevron* overturned tomorrow, *Norton* would still be a powerful tool for the government to defend its discretionary decisions about whether to effectuate statutory law.

Yet even those judges who have been vocal about judicial abdication in the *Chevron* context seem unperturbed by potential statutory errors permitted by *Norton*. For instance, in *Montanans for Multiple Use v. Barbouletos*, then-Judge Kavanaugh wrote for the D.C. Circuit in rejecting a failure-to-act claim arising from the Forest Service's alleged nonimplementation of provisions of the National Forest Management Act and the Service's 1986 Forest

141. Murray Energy Corp. v. Adm'r of EPA, 861 F.3d 529, 532–33 (4th Cir. 2017) (quoting 42 U.S.C. § 7621(a)). Technically, this suit was brought under 42 U.S.C. § 7604(a)(2), which permits suit when "there is alleged a failure of the Administrator to perform any act or duty under [the CAA] which is not discretionary with the Administrator." *Id.* at 533 (alteration in original).

142. *Id.* at 536.

143. Pub. Citizen, Inc. v. FERC, 839 F.3d 1165, 1173 (D.C. Cir. 2016).

144. *See* Yackee & Yackee, *supra* note 82, at 395–96 (finding that many calls for rulemaking are framed in "permissive" terms); Haeder & Yackee, *supra* note 82 (same).

145. Some court opinions prior to *Norton* involving suits to compel agency action in similar circumstances explicitly relied on *Chevron* to conduct a very similar analysis. *See* Biodiversity Legal Found. v. Babbitt, 146 F.3d 1249, 1251–53 (10th Cir. 1998). This underscores how tightly bound review of Type I and Type II errors has been, historically speaking.

Plan for the Flathead National Forest.[146] Rather than analyzing any of the provisions cited by the plaintiffs—organizations and citizens wanting more of the forest to be opened for timbering and recreational activities—Judge Kavanaugh offered only a conclusory statement that the "complaint does not identify a legally required, discrete act that the Forest Service has failed to perform."[147] Even in *In re Aiken County*, where Kavanaugh wrote for a panel of the D.C. Circuit in holding that the Nuclear Regulatory Commission could not ignore a congressionally mandated schedule for licensing the Yucca Mountain nuclear waste-storage project, Kavanaugh was reluctant to exercise judicial power.[148] He noted that it was only after previously having "repeatedly gone out of [its] way over the last several years to defer a mandamus order" that the court was finally forced to act by the Commission's failure to act.[149] Indeed, the opinion does not even cite the *Norton* standard, let alone find systemic fault in it.

Finally, even where *Norton* is not invoked by name, judges have developed a host of doctrines that often give agencies carte blanche authority to decline to exercise regulatory power. For instance, there is the D.C. Circuit's "longtime recognition that agencies have 'implied *de minimis* authority to create even certain categorical exceptions to a statute "when the burdens of regulation yield a gain of trivial or no value."'"[150] Likewise, courts generally defer to agencies when they fail to take all of the steps required by a statute in a particular action under the so-called "one-step-at-a-time doctrine."[151] This doctrine "rests on the notion that since agencies have great discretion to treat a problem partially, the court of appeals should not strike down a regulation if it is a first step toward a complete solution."[152] It is obviously fairly easy for agencies to play fast and loose with these doctrines, effectively immunizing Type II error from judicial scrutiny by kicking the can down the road, but judges seem fairly untroubled by this casual end run around statutory commands.

2. *Heckler* as Talisman for Abdication

A key feature of the deferential paradigm in administrative law is the hands-off approach that courts have, since *Heckler v. Chaney* in 1985, employed when challengers allege that agencies failed to enforce legal requirements—a form of Type II error. As deference is pared back, critics might be

146. 568 F.3d 225 (D.C. Cir. 2009).

147. *Montanans*, 568 F.3d at 227.

148. 725 F.3d 255, 266 (D.C. Cir. 2013).

149. *In re Aiken County*, 725 F.3d at 266.

150. Waterkeeper All. v. EPA, 853 F.3d 527, 530 (D.C. Cir. 2017) (quoting Pub. Citizen v. FTC, 869 F.2d 1541, 1556 (D.C. Cir. 1989)).

151. *See, e.g.*, Ctr. for Biological Diversity v. EPA, 722 F.3d 401, 410 (D.C. Cir. 2013).

152. 2 AM. JUR. 2D *Administrative Law* § 131, Westlaw (database updated Feb. 2020). For a discussion of resource allocation concerns in administrative law, see *infra* Section II.B.3 and Biber, *supra* note 25.

expected to argue for a narrowing of *Heckler*'s domain, or for the aggressive use of existing exceptions to its presumption against reviewability to limit agency abdication of statutory duties. However, critics of deference have shown no interest in this project.

The presumption of unreviewability for agency enforcement decisions announced in *Heckler v. Chaney* has always posed a risk of allowing agencies to undermine the law by simply declining to pursue enforcement of disfavored provisions,[153] but from a prodeference perspective, these costs are justified by the policy benefits of allowing agencies to structure their enforcement programs and allocate resources as they see fit with few legal fetters.[154] The *Heckler* standard has in turn allowed sometimes violent swings in national policy to occur through changes in agencies' patterns of enforcement. For a recent example, one need look no further back than shift from the Obama Administration to the Trump Administration, where changes on hot-button policy issues like immigration and healthcare have been administered through enforcement decisions.[155] Other examples can be found in previous administrations.[156] A close reading of *Heckler v. Chaney* and its progeny reveals that there are in fact statutory limits to the presumption, perhaps reflecting some judicial uneasiness with a complete abdication of judicial authority over an important form of agency action.[157] The Supreme Court has occasionally paid lip service to its duty to "careful[ly] examin[e]" the statute "on which [a] claim of agency illegality is based"[158] to ensure that none of these exceptions apply.

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153. *See* Velikonja, *supra* note 84.

154. Biber, *supra* note 25.

155. *E.g.*, Simone Hussussian, *Will the Affordable Care Act Die by Non-enforcement?*, REGUL. REV. (June 20, 2019), https://www.theregreview.org/2019/06/20/hussussian-will-affordable-care-act-die-non-enforcement/ [https://perma.cc/4NV2-T9DA]; Robert Barnes, *Trump Administration Defends Ending DACA, and Supreme Court's Conservatives Seemed Receptive*, WASH. POST (Nov. 12, 2019, 7:10 PM), https://www.washingtonpost.com/politics/courts_law/trump-administration-tells-supreme-court-it-owns-termination-of-daca-program/2019/11/12/2ac4f4ea-0545-11ea-b17d-8b867891d39d_story.html (on file with the *Michigan Law Review*).

156. *See* Price, *supra* note 86; Deacon, *supra* note 86.

157. Heckler v. Chaney, 470 U.S. 821, 832–33 (1985) (noting that the presumption "may be rebutted when the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers"); *id.* at 833 n.4 (noting that the presumption may be rebutted when the agency adopts a "general policy[] that is so extreme as to amount to an abdication of its statutory responsibilities").

158. Webster v. Doe, 486 U.S. 592, 600 (1988). More recently, the Court noted in the dusky gopher frog case that, "[t]o give effect to § 706(2)(A) and to honor the presumption of review, we have read the exception in § 701(a)(2) quite narrowly, restricting it to 'those rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv., 139 S. Ct. 361, 370 (2018) (quoting Lincoln v. Vigil, 508 U.S. 182, 191 (1993)). In *Weyerhaeuser*, the U.S. Fish and Wildlife Service designated a particular plot of land as critical habitat, and a company challenged that action in part on an argument that the Secretary of the Interior did not explain why he did not choose to exercise his authority to "ex-

However, this careful examination rarely occurs. For instance, in *Citizens for Responsibility and Ethics in Washington v. FEC*, now-Justice Kavanaugh joined Judge Randolph in holding that a suit brought against the Federal Election Commission for failing to undertake an enforcement action in response to election law violations was presumptively unreviewable under the APA, citing *Heckler*.[159] FEC had split 3–3 down partisan lines on whether to initiate an enforcement action, and the court followed circuit precedent holding that the stated reasons of the commissioners voting against taking action controls.[160] The three unwilling commissioners in effect invoked the agency's "prosecutorial discretion."[161] As Judge Pillard noted in dissent, the majority took an incredibly cramped view of the matter, ignoring evidence that the Commission had made a legal interpretation of its authority in order to strengthen the inference that FEC had merely exercised its prosecutorial discretion.[162] In doing so, the majority arguably undercut Congress's purpose to prevent the partisan-balance requirement on the FEC from devolving into partisan licensure of violations of the Federal Election Campaign Act.[163] In *West v. Lynch*, the D.C. Circuit likewise swatted away a challenge of the Department of Justice's Obama-era nonenforcement policy for cannabis on standing grounds, holding that *Heckler*'s presumption against review of enforcement decisions rendered the plaintiff's injury unredressable.[164] The panel did not engage in any analysis of whether there was any statutory material that would curtail the Department of Justice's discretion and rebut *Heckler*'s presumption. Instead, as in so many cases, the court treated *Heckler* as a talisman for judicial restraint.

A similarly cursory treatment of a challenge to agency action came in the D.C. Circuit's decision in *Sierra Club v. Jackson*.[165] At issue was EPA's decision not to intervene to stop the construction of several "major emitting facilities" in an attainment area.[166] The statutory language that the Sierra Club cited left no discretion to the agency, stating in no uncertain terms that "'the Administrator shall . . . take such measures, including issuance of an order, or seeking injunctive relief, as necessary to prevent the construction or modification of a major emitting facility . . . proposed to be constructed'

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clude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of [designation]." *Id.* at 365 (alteration in original) (quoting 16 U.S.C. § 1533(b)(2)).

159. 892 F.3d 434 (D.C. Cir. 2018).

160. *Citizens for Resp. & Ethics in Wash.*, 892 F.3d at 437–38 (citing Common Cause v. FEC, 842 F.2d 436, 449 (D.C. Cir. 1988)).

161. *Id.* at 438 (Pillard, J., dissenting).

162. *Id.* at 444–45.

163. *Id.* at 442.

164. West v. Lynch, 845 F.3d 1228 (D.C. Cir. 2017).

165. Sierra Club v. Jackson, 648 F.3d 848 (D.C. Cir. 2011).

166. *Id.* at 851.

[with]in an attainment area."[167] Nevertheless, the D.C. Circuit, with Judge Sentelle writing for two other conservative judges and frequent critics of deference,[168] declined to find *Heckler*'s presumption of unreviewability overcome. Despite noting that "[t]he Sierra Club's textual argument carries conconsiderable weight," the panel engaged in a tortuous analysis to find that "the Administrator . . . had sufficient discretion to render her decision not to act nonjusticiable."[169] Much as with the Supreme Court in *Norton*, the panel drew the questionable inference that the court's inability to say precisely what action would be necessary to stop the construction prevented the court from ordering the agency to take some action that is necessary.[170]

The point here is not that courts *never* find the presumption rebutted.[171] Rather, the point is that *Heckler*'s presumption has real bite, and that it often causes judges to clip their wings and ignore probative evidence that a violation of law occurred.[172] As with *Norton*, there has been no indication that those who are troubled by judicial abdication on questions of law on the agency action side are troubled with *Heckler*'s thumb on the scale when it comes to agency nonenforcement decisions.

3. Judicial Refusals to Review Agency Denials of Rulemaking Petitions

Another place where agencies could be, but so far have not been, held to account for Type II error is in judicial review of denials of rulemaking petitions. By filing a rulemaking petition and having their request denied, interested parties make agencies' refusals to act discrete and final, and courts could in theory use these instances as a vehicle to interpret statutes and wrest discretion from agencies. Despite a signal in *Massachusetts v. EPA* that courts might meaningfully take up this task, deferential review persists.

When *Massachusetts* was decided in 2007, it was panned by many prominent administrative law scholars for departing from settled principles of administrative law—and rightly so. Read broadly, the majority opinion in

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167. *Id.* (second alteration in original) (quoting 42 U.S.C. § 7477).

168. The other two judges were Judge Douglas H. Ginsburg and Judge Janice Rogers Brown. Judge Ginsburg is on record as having doubts about *Chevron* deference. *See* Douglas H. Ginsburg & Steven Menashi, *Our Illiberal Administrative Law*, 10 N.Y.U. J.L. & LIBERTY 475, 478 (2016) ("[D]eference to agencies under *Chevron* inappropriately extends beyond policy-laden judgments that are properly reserved to agencies to include legal questions that should be decided by courts."). Judge Janice Rogers Brown, likewise, has offered stern words regarding *Chevron* deference and has suggested that "[a]n Article III renaissance is emerging against the judicial abdication performed in *Chevron*'s name." Waterkeeper All. v. EPA, 853 F.3d 527, 539 (D.C. Cir. 2017) (Brown, J., concurring).

169. *Jackson*, 648 F.3d at 856.

170. *Id.* at 856.

171. For another recent example—beyond the *Weyerhaeuser* case—of a court finding the presumption rebutted, see Texas v. EPA, 829 F.3d 405 (5th Cir. 2016).

172. *See* Sunstein & Vermeule, *supra* note 8, at 170 ("Yet in the ordinary case, in which statutes are silent or unclear on such questions, agencies will not have to justify their decisions not to undertake enforcement.").

Massachusetts not only clarified that there is no *Heckler*-like presumption against reviewability when it comes to challenges of denials of rulemaking petitions,[173] but also seemed to hold that agencies could ground the denial of such petitions only in the factors identified in the relevant statutory authority.[174] Cass Sunstein and Adrian Vermeule interpret this as "collaps[ing] the decision whether to decide into the underlying decision on the merits"—a move that they deem "absurd" and "impossibly confused" because it would rule out extrastatutory considerations like the need for rational resource allocation.[175]

This holding might indeed qualify as absurd under the deferential paradigm that was only beginning to unravel in 2007, but it could be read as entirely consistent with the project of eradicating *Chevron* deference, for instance. Permitting agencies to cite resource-allocation concerns or any other extrastatutory factors would in effect be to read into every statute a permanent ambiguity delegating discretion to agencies to define the reach of the law. However, the courts have not actually followed through on *Massachusetts*'s ambitious project. Instead, as in other areas of inaction review, courts have tended to treat inaction as a special case not subject to the general move toward more judicial responsibility for administration of the law. For instance, in *WildEarth Guardians v. EPA*, the D.C. Circuit brushed aside arguments that *Massachusetts* had rendered resource allocations and other extrastatutory considerations irrelevant,[176] and in *Natural Resources Defense Council v. U.S. Food & Drug Administration*, the Second Circuit likewise upheld the FDA's refusal to initiate rulemaking to withdraw approval of the subtherapeutic uses of antibiotics in animal agriculture that it had previously deemed "unsafe."[177] Citing the "ordinary understandings of administrative and judicial litigation processes,"[178] Judge Lynch's majority opinion noted that

> the traditional model of enforcement action . . . contemplates considerable discretion on the part of an agency to decide, for prudential reasons, whether to initiate action or not, and whether to desist from proceeding be-

173. Massachusetts v. EPA, 549 U.S. 497, 527–28 (2007) (holding that a denial of a rulemaking petition is presumptively reviewable, but that the standard of review is "extremely limited" and "highly *deferential*" (emphasis added) (quoting Nat'l Customs Brokers & Forwarders Ass'n of Am. v. United States, 883 F.2d 93, 96 (D.C. Cir. 1989))).

174. *Id.* at 532–33; *see also* Sunstein & Vermeule, *supra* note 8, at 175 ("On this interpretation, the Court's reasoning is that, at least in a (formal and public) response to a petition for rulemaking, *the legally relevant factors, on the question whether to make a judgment, are the same factors that the statute makes substantively relevant when the judgment itself is made*.").

175. Sunstein & Vermeule, *supra* note 8, at 175.

176. 751 F.3d 649, 651 (D.C. Cir. 2014); *see also* Defs. of Wildlife v. Gutierrez, 532 F.3d 913 (D.C. Cir. 2008) (declining to order the National Marine Fisheries Service to grant a rulemaking petition for marine vehicle speed restrictions and accepting the agency's argument that it planned to pursue a more comprehensive rule in the future).

177. Nat. Res. Def. Council, Inc. v. FDA, 760 F.3d 151 (2d Cir. 2014).

178. *Id.* at 166.

> fore a final conclusion is reached. Such discretion is a typical and often necessary feature of the administrative process.[179]

Chief Judge Katzmann rightly noted that the majority opinion's apparent credit for the agency's invocation of resource-allocation concerns could not be squared with *Massachusetts*.[180]

Decisions like these underscore that *Massachusetts v. EPA* was an exceptional case.[181] Although its insistence on the primacy of the statutory language in petition-denial cases appears at first to align with the growing emphasis on the primacy of statutory language in agency-action cases, courts have largely ignored this feature of the opinion. Instead, they have fallen back on extrastatutory considerations about agency resource allocation and the limits of judicial capacity to carve out a thoroughly deferential approach to review of agency denials of rulemaking petitions.

4. Uneven Scorn for *Chevron*

An asymmetry in courts' interpretive approach to the two types of error is also apparent in the ways that some critics of *Chevron* deference deploy it. Formally speaking, tightening *Chevron* deference could serve to minimize both Type I and Type II error, but much depends on how the standard is deployed in concrete cases. And, indeed, it is not difficult to find cases where critics of *Chevron* seem skeptical that it applies with as much force when agencies commit Type II error.

Of particular note is Justice Thomas, who has become one of the most vocal critics of deference. In this regard, his opinion for the Court in *National Cable & Telecommunications Ass'n v. Brand X Internet Services* is a puzzle. The agency action at issue in *Brand X* was a Federal Communications Commission (FCC) exemption from mandatory Title II common-carrier regulations for companies selling broadband internet service.[182] Justice Thomas rejected arguments that *Chevron* should not apply because of the alleged inconsistency of the FCC's regulatory position, stating that "[u]nexplained inconsistency is, at most, a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act."[183] In other words, to Justice Thomas, the

179. *Id.* at 170.

180. *Id.* at 191 (Katzmann, J., dissenting) ("The FDA offers reasons for inaction that are eerily similar to those rejected by the Court in *Massachusetts v. EPA*; it complains that withdrawal proceedings 'would take many years and would impose significant resource demands,' and claims that its voluntary compliance approach will work just as well. . . . Even if the agency's reasons were indisputably sound, they are not contemplated by the statute.").

181. *See also* Watts & Wildermuth, *supra* note 116, at 1043 ("Perhaps the Court's willingness to apply such rigorous review is limited to the specifics of this case, namely the immense importance of global warming.").

182. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 974 (2005).

183. *Id.* at 981.

unexplained inconsistency was not an interpretive problem but a policy problem subject to less stringent arbitrariness review. This stance is at odds with Justice Thomas's criticism of *Chevron*, and, to his credit, in a recent certiorari petition asking the Supreme Court to overturn *Brand X*, Justice Thomas dissented from the denial by, apparently, reconciling his skepticism of *Chevron* generally with *Brand X* and calling for both to be revisited.[184] But one might still reasonably question whether Justice Thomas's new thinking about the limits of interpretive maneuvers by agencies will extend to cases explicitly involving changed interpretations that introduce Type II error.

Indeed, the most recent evidence—the *Encino Motorcars v. Navarro* saga—suggests that Justice Thomas will continue to privilege interpretive maneuvers that arguably create Type II error. There, the Department of Labor had changed a longstanding interpretation of a Fair Labor Standards Act overtime exemption for "service advisors" in automobile dealerships, effectively narrowing the exemption from the obligation to provide overtime pay, but the Court declined to afford the Department of Labor's interpretation any *Chevron* deference in part because of the change of position.[185] Justice Thomas wrote separately to criticize the Court's decision to remand on the ultimate question of the statutory meaning, but did log his "agree[ment] with the majority's conclusion that we owe no *Chevron* deference to the Department's position because 'deference is not warranted where [a] regulation is "procedurally defective."'"[186] This unwillingness to defer to the Department of Labor's constricted interpretation of the statutory exemption is all the more confusing because Justice Thomas later applied some form of deference or respect to the Department of Labor's restored interpretation that more expansively interpreted the exemption. Indeed, when the case came back to the Supreme Court two years later, the question for the Court was whether the statute's exemption, standing by itself, would support the denial of backpay.[187] In upholding the denial of backpay and interpreting service advisors as included in the exemption, Justice Thomas rejected the Ninth Circuit's conclusion that exemptions to the Fair Labor Standards Act should be construed narrowly.[188] Instead, Justice Thomas said that exemptions should be given a "fair (rather than a 'narrow') interpretation."[189] What a "fair" interpretation is and how it differs from the "best" interpretation are

184. Baldwin v. United States, 140 S. Ct. 690, 691 (2020) (Thomas, J., dissenting from the denial of certiorari) (mem.) ("My skepticism of *Brand X* begins at its foundation—*Chevron* deference.").

185. Encino Motorcars, LLC v. Navarro (*Encino Motorcars I*), 136 S. Ct. 2117, 2126 (2016).

186. *Id.* at 2129 (Thomas, J., dissenting).

187. Encino Motorcars, LLC v. Navarro (*Encino Motor Cars II*), 138 S. Ct. 1134 (2018).

188. *Id.* at 1141.

189. *Id.* at 1142 (quoting SCALIA & GARNER, *supra* note 37, at 363).

open questions. Certainly, the dissenters in the case did not agree that the exemption fairly encompassed service advisers.[190]

5. The Roving Ghost of *Overton Park*

There is one doctrinal wrinkle that deserves special scrutiny from critics of deference, but has received little. The Court recognized in *Citizens to Preserve Overton Park v. Volpe* that there might be statutes that are drawn so broadly that they essentially provide "no law to apply," in which case the reviewing court is supposed to dismiss the claims under section 701(a) of the APA.[191] This unreviewability doctrine differs from *Heckler v. Chaney* in how freeform it is. Whereas *Heckler* prospectively deemed an identifiable category of agency action presumptively unreviewable,[192] courts have cited *Overton Park* to deny review in cases challenging agency failures to adhere to statutes on an ad hoc basis whenever they determine that the statutory language runs out—in essence, when the court applies this doctrine, it says that the statute is too vague to admit of a judicial determination as to meaning,[193] which sounds much like *Chevron* step two. Often, the application of this "no law to apply" concept seems pegged more to extrastatutory considerations, such as judicial reluctance to interfere with military functions, representational balance on advisory committees, and other "political" determinations, than it does to any inability of lawyers and judges to squeeze meaning out of indeterminate text.[194]

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190. *Id.* at 1143 (Ginsburg, J., dissenting). It bears mentioning that this disagreement over the "plain" meaning of the statute is itself evidence that the meaning is not so plain. *See* Eric A. Posner & Adrian Vermeule, *The Votes of Other Judges*, 105 GEO. L.J. 159 (2016) (arguing that it is incoherent to say a statute is plain when other judges disagree). *But see* William Baude & Ryan D. Doerfler, *Arguing with Friends*, 117 MICH. L. REV. 319 (2018) (arguing that disagreement between judges that maintain different interpretive methodologies cannot be taken as evidence that the meaning is not plain under a particular methodology).

191. 401 U.S. 402, 410 (1971). There is a longstanding and unresolved tension between this provision of the APA and the nondelegation principle, *see* Thomas W. Merrill, *Delegation and Judicial Review*, 33 HARV. J.L. & PUB. POL'Y 73, 82 (2010) ("Note the tension between the classic non-delegation claim and this unreviewability doctrine."), and it seems fair to say that the "no law to apply" language escapes scrutiny both because the nondelegation principle has never had much legal force, *see* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. (forthcoming 2021) (manuscript at 2–3), and because the "no law to apply" standard in practice mostly blesses Type II error, which is not usually the object of concern for critics of the administrative state.

192. 470 U.S. 821 (1985).

193. *See* Biber, *supra* note 25, at 9 n.22.

194. *See* Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1113–14 (2009) (noting that, after *Overton Park* read the 'no law to apply' language narrowly, the Court subsequently "issued decisions precluding review of statutory and abuse of discretion claims that were very hard to square with the 'no law to apply' test" and seemed "instead to rest on an implicit assessment of the weight of national security interests" (citing Dep't of the Navy v. Egan, 484 U.S. 518 (1988))).

The application of *Overton Park* and section 701(a) may well be the judicial practice most at odds with the trend against deference in other contexts, which may also be why it is the practice most showing the pressure of symmetry's mandate. In two recent cases, the Supreme Court rejected arguments that the statutory framework at issue failed to supply any meaningful standards to guide judicial review, and one of these instances came in a case where the swing justice, Chief Justice Roberts, would have been able to reach a partisan result had he invoked *Overton Park*. Instead, the Chief Justice, unlike four of his colleagues who usually criticize deference, found that difficult statutory text was in fact decipherable. In *Department of Commerce v. New York*, colloquially known as the "Census Case," the government argued that "the Census Act commits to the Secretary's unreviewable discretion decisions about what questions to include on the decennial census questionnaire."[195] Chief Justice Roberts disagreed, noting that, while "the Act confers broad authority on the Secretary," the Act's provisions "do not leave his discretion unbounded."[196] Specifically, on Chief Justice Roberts's reading, "the Act imposes a 'duty to conduct a census that is accurate and that fairly accounts for the crucial representational rights that depend on the census and the apportionment.' "[197] Somewhat similarly—although without the nonpartisan overtones—the Court refused to invoke the ghost of *Overton Park* in the Dusky Gopher Frog case, *Weyerhaeuser*.[198] There, the Court held that "Weyerhaeuser's claim . . . that the agency did not appropriately consider all of the relevant [statutory] factors . . . [meant] to guide the agency in the exercise of its discretion . . . is the sort of claim that federal courts routinely assess when determining whether to set aside an agency decision as an abuse of discretion."[199]

Despite these occasional paeans to symmetry, the future of *Overton Park*'s "no law to apply" approach is an open question, despite its clear tension with larger trends in administrative law. The lower courts continue to invoke the doctrine to avoid the interpretation of difficult statutes with little in the way of a rebuke from the Court or commentators.[200] Likewise, this past term a narrow majority on the Supreme Court decided that the Trump Administration's reversal of policy on the Deferred Action for Childhood Arrivals (DACA) program was reviewable, but several of the most vociferous critics of judicial abdication suggested that they would be more inclined to

195. Dep't of Com. v. New York, 139 S. Ct. 2551, 2567–68 (2019).

196. *Id.* at 2568.

197. *Id.* (quoting Franklin v. Massachusetts, 505 U.S. 788, 820 (1992) (Stevens, J., concurring in part and concurring in the judgment)).

198. Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv., 139 S. Ct. 361 (2018).

199. *Id.* at 371.

200. *See, e.g.*, Cowels v. FBI, 936 F.3d 62, 66 (1st Cir. 2019) (finding that there was no reviewability available under a statute in a case challenging FBI's failure to update its DNA database); Citizens for Resp. & Ethics in Wash. v. FEC, 892 F.3d 434, 440 (D.C. Cir. 2018); Int'l Brotherhood of Teamsters v. U.S. Dep't of Transp., 861 F.3d 944, 955 (9th Cir. 2017); Berry v. U.S. Dep't of Lab., 832 F.3d 627, 634 (6th Cir. 2016).

view the rescission as unreviewable under section 701(a).[201] Moreover, several cases that will almost certainly be heard by the Court will continue to test the Court's conservative justices' commitment to saying what the law is. In *Sierra Club v. Trump*, the litigation over the construction of a border wall, the lower courts rejected arguments that Section 8005 of the Department of Defense Appropriations Act of 2019 was drawn so vaguely as to likely preclude review of whether the Department had the authority to transfer funds to support construction.[202] The Supreme Court indicated that it disagreed by granting the government's application for a stay of the district court's injunction pending litigation in the lower courts.[203] When the case comes back on the merits, the Supreme Court will feel the full press of symmetry's mandate.

6. Summary

As this review of recent cases and academic commentary reveals, there is a stark difference in the level of concern about how current administrative law doctrine permits interpretive error in agencies' statutory implementation. Contemporary criticism of *Chevron* and *Auer* deference urges judges to cease the abdication of their judicial duty and to refrain from further enabling Congress to write imprecise statutes, but these critiques typically only explicitly extend to situations when an agency errs on the side of overinclusiveness (what I have been calling Type I error in statutory interpretation). The critiques are therefore asymmetric insofar as they ignore the full implications of insisting on judicial resolution of legal questions. As I showed in Part I, formalism as to Type I error implies formalism as to Type II error. In this Part, I have shown that there remain pockets of administrative law doctrine—many of them traceable to the same historical moment and intellectual foundations as *Chevron*—that have come in for little criticism by judges and scholars urging reform, even though they too potentially involve real, measurable errors in statutory interpretation. Admittedly, it is difficult to prove a negative, and this reading of the landscape does make an inference from the "dog that didn't bark." At this point, the asymmetry I identify is only incipient.[204] Whether it will continue to develop is certainly an open question. My aim here is simply to bring attention to it and to investigate its implications for administrative law. To that end, the next subsection turns to potential justifications of asymmetry in the deference courts give to Type I and Type II statutory interpretation errors by agencies.

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201. *See supra* note 30 and accompanying text.

202. Sierra Club v. Trump, 929 F.3d 670, 698 (9th Cir. 2019). The case came before the Court of Appeals after the District Court issued an injunction barring use of the funds and the government moved for an emergency stay of enforcement of that injunction.

203. Trump v. Sierra Club, 140 S. Ct. 1 (2019) (mem.).

204. *See supra* Section I.D (showing that administrative law has been characterized by a basically symmetrically deferential posture of review for several decades and is only now showing signs of changing).

B. *Potential Policy Justifications for Asymmetry in Interpretation*

Notwithstanding the formalistic logic behind the symmetry of errors and the probability that Type II errors far outnumber Type I errors because of agencies' deliberate inaction, courts have tended to treat Type II errors—that is, errors born of determinations that the statutory meaning does not capture some subset of cases when the statutory meaning does in fact capture those cases, or alternatively that agencies have been delegated discretion to choose whether to enforce a statute to its limits—differently than Type I errors. Setting aside any historical practice or normative concerns about this asymmetry in administrative law doctrine, can this emerging pattern be squared with the law?

In this subsection, I turn to four potential defenses of permitting asymmetry to permeate administrative law doctrine. Specifically, proponents of asymmetric statutory interpretation might well cite (1) constitutional arguments about executive power; (2) libertarian commitments to limited government; (3) remedial deterrence, given judicial inability to analyze tradeoffs in how resources should be allocated in agency priority setting; and (4) the APA's unreviewability provision. I will argue that each of these arguments for asymmetry turns out to be unfounded if one takes legislative supremacy and judicial duty and capacity to identify statutory meaning seriously.

1. The Executive Power to Decline to Implement the Law

One way of potentially squaring a lighter level of judicial scrutiny for Type II error than for Type I error would be to find an inherent executive authority to decline to implement the law fully. On the standard separation-of-powers account, while Congress has the authority to draft legislation, at some point authority passes to the executive branch to implement statutory law. Concern about judicial interference with core executive functions, such as the textual duty to "take Care that the Laws be faithfully executed," has often been invoked as a reason for courts to refrain from reviewing agency failures to act.[205] More amorphous and extraconstitutional notions of an inherent executive power to exercise "prosecutorial discretion" are also frequently invoked to justify deference to administrative agencies' failure to take action that might be required by statute.[206]

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205. U.S. CONST. art. II, § 3; Cass R. Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, 52 U. CHI. L. REV. 653, 669 (1985) ("Reluctance to review inaction has traditionally been based in part on a set of considerations counseling against judicial usurpation of the executive function.").

206. *See* Heckler v. Chaney, 470 U.S. 821 (1985); United States v. Armstrong, 517 U.S. 456, 464 (1996). To be clear, there are good reasons to defer to decisions about how to prioritize limited enforcement and implementation resources. *See* Biber, *supra* note 25, at 19–20 (collecting policy arguments in favor of prosecutorial discretion, including that some enforcement opportunities carry "higher deterrence value" that economizes government resources); Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243 (2010) (noting that prosecutorial discretion is supported by both monetary

But can a reference to executive power suffice to justify an asymmetry in the deference agencies receive when they offer an interpretation of a statute to the judiciary? I think the answer is no, for two reasons.

First, new scholarship on the nature of the executive power suggests a more limited set of powers than envisioned by unitary-executive theories that would tend to see an inherent executive authority to enforce as much or as little of the law as the president or agencies see fit.[207] Julian Davis Mortensen, for instance, investigated the contemporary usage of the phrase *executive power* at the time of the Constitution's ratification and found that it amounted to little more than a ministerial or clerical power—the power to implement legal norms that were actually created by another authority, namely Congress, which possessed the entirety of the "law-making" power.[208] Likewise, although the "Take Care Clause" of Article II has been read by some as an endowment of discretionary authority on the president, more recent scholarship suggests that the clause has a restrictive meaning as well. Zachary Price, for instance, has shown that the Take Care Clause does not allow the executive to prospectively license whole categories of actors to undercomply with the law, at least where Congress has imposed obligations.[209] In fact, scholars have begun to view the Take Care Clause as imposing a fiduciary duty on the President to ensure faithful implementation of statutory

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and humanitarian rationales). I rely on these kinds of considerations to argue in Part III that eliminating Type II error (along with Type I error) would be intolerable. My point here is that prosecutorial discretion has a weak grounding in Article II of the Constitution.

207. *See* John Yoo, *Unitary, Executive, or Both?*, 76 U. CHI. L. REV. 1935, 1947 (2009) (reviewing STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH (2008)) ("[T]he Constitution makes the president the nation's chief law enforcement officer. It grants perhaps the most significant executive power, that of taking 'Care that the Laws be faithfully executed,' in the president alone. The Take Care Clause makes the president responsible for enforcing federal law, which implies an ancillary authority to interpret it in the course of enforcement. This is especially the case with federal laws that have not reached the stage of judicial interpretation, but even arises in setting law enforcement priorities for scarce executive resources. Because the Constitution makes the president ultimately responsible for executing the laws, he must also have the ability to control inferior executive officers to prevent them from enforcing or interpreting federal law at odds with his views." (footnote omitted) (quoting U.S. CONST. art. II, § 3)).

208. Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1174 (2019) (concluding that the vesting of executive power limited the President to the "implementation of substantive legal requirements and authorities that were created somewhere else"); *see also* Andrew Kent, Ethan J. Leib & Jed Handelsman Shugarman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111 (2019) (arguing that the "Take Care" clause and the presidential oath of office impose some variation on a fiduciary duty in the implementation of statutory law). Ilan Wurman's recent work endorses Mortenson's rejection of the idea that the grant of executive power imbued the President with a residual pool of inherent powers, but nevertheless takes issue with just how "thin" Mortenson's understanding of the executive power is. *See* Ilan Wurman, *In Search of Prerogative*, 70 DUKE L.J. 93 (2020).

209. Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 675 (2014).

and constitutional law.[210] Together, this scholarship shows that, as a matter of theory, at least, presidents do not have an infinite well of inherent constitutional nonenforcement and nonimplementation power that could bless systemic departure from the judicially determined meaning of statutory law, at least insofar as courts tighten the interpretive screws on Type I error.[211] This is all entirely consistent with some of the Court's recent statements in cases where executive power and statutory meaning have come into conflict.[212]

Second, and perhaps more critically, any Article II source of authority to underimplement the law would also likely justify judicial deference more generally. If presidents have the authority to underimplement the law, it is only because Congress's specificity ran out. It is well settled, after all, that in interbranch constitutional relations, the executive power—whatever its inherent bounds—comes to an end in a clear Congressional command.[213] Any space for nonenforcement or nonimplementation comes from an express or implied delegation of negative authority. The imperative for *Chevron* deference follows from the same express or implied delegation, expressed as an ambiguity. If a theory of delegation to the executive justifies judicial restraint in situations of underenforcement of statutory law, why would that same theory of delegation be insufficient when it comes to an ambiguity that an executive agency exploits to regulate more than a court would? If judges express a mood that is far more skeptical about statutes' ambiguities and agencies' associated positive discretion, why would that not translate to constrict agencies' nonimplementation of the best statutory understanding? In sum, it is difficult to reconcile an Article II permission slip for Type II error with the very argument that purportedly justifies the elimination of deference writ large.

At any rate, for at least some influential formalist critics of deference, Article II is completely irrelevant. As Phillip Hamburger frames his critique of judicial abdication in run-of-the-mill *Chevron* cases, the violation of Article III occurs *despite* any justification for *Chevron* in Article II.[214] On Ham-

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210. *See, e.g.*, Evan D. Bernick, *Faithful Execution: Where Administrative Law Meets the Constitution*, 108 GEO. L.J. 1 (2019); Kent et al., *supra* note 208, at 2112.

211. Again, on the account in Part I, judicial tolerance for error in statutory interpretation could theoretically be low or high, so long as it is high or low for both *types* of error together. As a practical matter, though, I argue that substantial deference to both types of error is somewhat inevitable due to remedial concerns that affect judicial review of both error types. *See infra* Section III.B.

212. *See* Util. Air. Regul. Grp. v. EPA, 573 U.S. 302, 327 (2014) ("The power of executing the laws necessarily includes both authority and responsibility to resolve some questions left open by Congress that arise during the law's administration. But it does not include a power to revise clear statutory terms that turn out not to work in practice.").

213. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring).

214. *See* Hamburger, *supra* note 125, at 1191 (noting that "the problem with most discussion of *Chevron* has been an almost exclusive focus on relations among the branches of gov-

burger's account, it is the fact that judges have abdicated their duty to say what the law is that creates the problem with deference. I do not share Hamburger's understanding of judicial duty as requiring unadulterated independent judgment, but his conception has been influential among critics of deference[215] and would stand in the way of those critics' use of Article II to ground asymmetric abdication.

2. Libertarian Commitments to Asymmetry: Administrative *Lochner*-ism

Another argument that might be advanced to defend asymmetry in administrative law is that administrative law does or should exclusively play the normatively asymmetrical role of protecting private liberty and property.[216] If one buys the premise that administrative law is there to protect private actors from regulatory constraints, then it would indeed be easy to think that administrative law's doctrines should be designed to curtail excesses of regulatory authority but turn a blind eye to the presumably liberty-enhancing underutilization of statutory authority.

There may well be threads of this unabashedly libertarian thinking in contemporary currents in administrative law.[217] Indeed, Mila Sohoni traces a line from the current moment in administrative law to the *Lochner* era, when judges invoked classically liberal normative schema to justify restrictions on regulations.[218] Likewise, Daniel Ernst documents the Tea Party movement's embrace of a narrative that the "statebuilders of the early twentieth century abandoned an American tradition of individualism in what amounted to 'the decisive wrong turn in the nation's history.'"[219] These persistent strands of libertarian ideology became fused with legal machinery and a powerful "Constitution in Exile" narrative that emerged in the 1990s.[220] The result has been a flurry of legal developments that limit the power of administrative agencies and "enlist[] principles of administrative law to protect preferred

ernment" and that this fixation "has distracted attention from the more immediate questions about the judges' role—about their office and about their relation to the parties in their cases").

215. *See* Walker, *supra* note 12, at 110–15.

216. *See* Biber, *supra* note 25, at 14 (noting that Justice Scalia privately argued that only the democratic process, not courts, should correct agency failures to act, and that the opening this created for "important legislative purposes, heralded in the halls of Congress, [to] be lost or misdirected in the vast hallways of the federal bureaucracy" was "a good thing" (quoting Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK UNIV. L. REV. 881, 897 (1983))); Ginsburg & Menashi, *supra* note 168, at 477.

217. Sunstein & Vermeule, *supra* note 20, at 398.

218. Mila Sohoni, *The Trump Administration and the Law of the* Lochner *Era*, 107 GEO. L.J. 1323, 1328 (2019).

219. DANIEL R. ERNST, TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940 (2014).

220. Jeremy K. Kessler, *The Struggle for Administrative Legitimacy*, 129 HARV. L. REV. 718, 721–22 (2016) (reviewing ERNST, *supra* note 219).

rights . . . and correct for democratic failures."[221] Chief among these developments is the emerging critique of deference doctrines.[222]

The critiques of this line of libertarian thinking about administrative law have been fairly convincing.[223] I would only add that, if one accepts the idea that judge-made administrative law should anoint any particular substantive or normative value above others and protect and advance those values with priority, then they would be unlikely to accept much concurrent thinking about administrative law today: that is, that the purpose of administrative law is to facilitate the full implementation of Congress's law and to properly incentivize Congress to use its legislative power rather than delegate it to the executive.[224] In other words, there is an inherent tension between a substan-

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221. Sunstein & Vermeule, *supra* note 20, at 395.

222. *See* Joshua Matz, *The Imminent Demise of* Chevron *Deference?*, TAKE CARE BLOG (June 21, 2018), https://takecareblog.com/blog/the-imminent-demise-of-chevron-deference [https://perma.cc/REP3-BAEZ] ("Indeed, it is no coincidence that the assault on *Chevron* is coming from judicial conservatives, with support from the Republican Party and an endless stream of Federalist Society white papers. In the name of a technical change to rules governing administrative law, these groups hope to blast an enduring, expanding hole in federal regulatory power. Think of it as a form of administrative law *Lochner*ism; while the Constitution does not allow judges to review economic policies for consistency with a robust conception of laissez-faire capitalism, the demise of *Chevron* will allow them to review many federal economic policies for consistency with statutes that they will read with a strong *Lochnerian* gloss. That thought might be comforting to those fiercely committed to deregulation, especially since President Trump's wave of judicial appointees can be expected to take a painfully narrow view of permissible agency activity.").

223. Sunstein & Vermeule, *supra* note 20, at 401–02 ("We suggest that, on a suitable occasion, the Court should excise libertarian administrative law root and branch by issuing a modern version of *Vermont Yankee*, requiring the DC Circuit to hew more closely to the APA and Supreme Court precedent, as well as reminding lower courts that administrative law lacks any kind of ideological valence."); Sunstein & Vermeule, *supra* note 121, at 41–42 ("Despite its historical guise, the New Coke is a living-constitutionalist movement, a product of thoroughly contemporary values and fears—clearly prompted by continuing rejection, in some quarters, of the New Deal itself, and perhaps prompted by a reaction, on the part of some of its advocates, to controversial initiatives from more recent presidents. In two important decisions in 2015, however, a supermajority of the Court refused to embrace the New Coke, and properly so. Instead, the Court issued the long-awaited *Vermont Yankee II*, insisting that courts are not authorized to add procedures to those required by the Administrative Procedure Act (APA), and implicitly reaffirmed the validity of *Auer* deference to agency interpretations of their own regulations. The Court's approach promises to honor the multiple goals of administrative and constitutional law without embracing novel, ungrounded claims that betray basic commitments of the public legal order. For now, the center holds." (footnote omitted)). *See also* BLAKE EMERSON, THE PUBLIC'S LAW: ORIGINS AND ARCHITECTURE OF PROGRESSIVE DEMOCRACY (2019) (arguing that the architects of the administrative state envisioned it as protecting a positive conception of liberty centered on enabling expression of the public good in the law); WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA (1996) (similar).

224. *See, e.g.*, Adler & Walker, *supra* note 6, at 6–7 (arguing that Congress "should return to passing laws on a regular basis" in order to "mitigate the democratic deficits that come with broad delegations of lawmaking authority to federal agencies"); Christopher J. Walker, *Restoring Congress's Role in the Modern Administrative State*, 116 MICH. L. REV. 1101, 1105 (2018) (reviewing JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE

tively charged, libertarian-leaning vision of what administrative law should facilitate and a model built around the supremacy of statutory law. After all, Congress is not primarily libertarian. It routinely authorizes and even mandates regulatory encroachments on liberty and property, and some might say that is its job. If we are to take legislative supremacy seriously as an organizing principle in administrative law, there is very little room for any normative thumb on the scale when it comes to judicial review.

3. Remedial Deterrence Affecting the Substance of the Law

A third possible argument for asymmetry sounds in remedial deterrence, by which I mean that asymmetry might be justified as flowing naturally from the remedial difficulties involved with judicial monitoring of Type II error. For instance, ordering an agency to undertake regulatory action leads to the imposition of an opportunity cost for the agency in an environment of scarce resources (it cannot do something else that might need to be done), and courts lack any expertise to navigate these tradeoffs. Moreover, in terms of compliance with a positive injunction, courts may confront intransigence from an inert agency that is practically difficult to track or remedy. Out of avoidance of these strains on judicial capacity and proper role,[225] courts might simply decide to bake asymmetry into the cake of substantive administrative law.

The idea of remedial realities affecting the substance of law is hardly an unfamiliar phenomenon: Daryl Levinson has suggested that this dynamic is at play in the elaboration of constitutional law, where "pure constitutional value[s]" are "inevitably distorted and diluted by the process of putting [them] into operation."[226] A more recent, and irreducibly normative, debate in constitutional theory concerns whether rights are better conceptualized as

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SEPARATION OF POWERS (2017)) ("To restore Congress's place in the modern administrative state, it is not enough for members of Congress and congressional committees to more effectively oversee and influence regulatory lawmaking. The collective Congress must also regularly legislate.").

225. A brief note on standing: some might argue that, whether or not asymmetry in administrative law is eradicated, standing doctrine will likely limit remedies for Type II action. In other words, they may argue that, even if it is inappropriate for courts to asymmetrically change doctrine out of remedial deterrence, courts could accomplish much the same end (insulating Type II cases from effective judicial review) by invoking limits on Article III standing, and in particular on the requirement that Type II error be redressable to be judicially cognizable. However, if part of the reason Type I error needs to be remedied is because of the Article III duty to say what the law is, *see* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), and if Type II error is fundamentally the same as a matter of legal first principles, then asymmetry in the implementation of the redressability inquiry would be just as problematic as it is in the substance of administrative law doctrine.

226. Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 858 (1999); *see also* ANDREW COAN, RATIONING THE CONSTITUTION: HOW JUDICIAL CAPACITY SHAPES SUPREME COURT DECISION-MAKING (2019).

trump cards or as one good to be traded off against other goods.[227] Together, these lines of thought recognize that the law is rarely pristinely implemented in a messy world, and so perhaps it is not so bad to let doctrine reflect that.

Perhaps, then, lax judicial review of Type II error in agency implementation is a bow to the inevitable limits on courts' remedial powers—it is simply too hard for courts to craft remedies to deal with Type II error, at least relative to Type I error, so that in a way justifies asymmetry in the substance of administrative law.[228] This argument has some appeal. It is surely the case that courts are ill-suited to remedy Type II error fully. Courts do not have the requisite expertise to tell agencies what, specifically, to do to comply with the statute and will frequently be confined to ordering agencies to take some underspecified action, and when that is all that courts can do, it is too easy for agencies to take courts for a ride.[229] Moreover, any action that courts require agencies to take to remedy a Type II error commits agencies to a particular allocation of scarce resources that may be suboptimal from a social-cost perspective.[230]

The problem with assuming that practical problems in remedying Type II errors justify judicial doctrine that treats Type II errors differently than Type I errors, however, is that there is nothing unique about the remedial difficulties that courts face in reviewing agencies' commission of Type II error.[231] For instance, simple vacatur of a rule that an agency has spent years developing, while easy for a court to effectuate in some ways, can have a lasting impact on an agency's workflow and resource-allocation decisions.[232] In

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227. Jamal Greene, *The Supreme Court, 2017 Term—Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28 (2018); Alec Stone Sweet & Jud Mathews, *Proportionality Balancing in Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72 (2008).

228. Thank you to Nick Parrillo for bringing this argument, and Daryl Levinson's article, to my attention.

229. An illustrative example of this dynamic can be found in the Ninth Circuit's decade-long involvement in EPA's refusal to decide whether to regulate the pesticide chloropyrifos. In 2007, a petition requested that EPA revoke tolerances for chloropyrifos. *See* League of United Latin Am. Citizens v. Wheeler, 899 F.3d 814 (9th Cir. 2018). EPA delayed for five years and the petitioner sought mandamus in the Ninth Circuit. *Id.* at 818–21. The panel initially dismissed the mandamus petition because EPA indicated it would soon take action, but when EPA failed to adhere to the timeline it represented to the court, the panel granted the renewed petition for mandamus and ordered EPA to respond to the petition. *Id.* EPA again ignored the deadline, and then ignored the deadline again, garnering further rebukes from the court. *Id.* A couple of years later, EPA finally answered the original petition for revocation of tolerances by denying it, prompting further litigation that is, as of yet, not completely resolved. *Id.*

230. Biber, *supra* note 25; *see also* Kirti Datla, Note, *The Tailoring Rule: Mending the Conflict Between Plain Text and Agency Resource Constraints*, 86 N.Y.U. L. REV. 1989 (2011).

231. Biber, *supra* note 25, at 23 ("Resource allocation cannot be the only factor that courts consider in reviewing agency decisionmaking, or judicial review would never take place.").

232. JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY (1990); Thomas O. McGarity, *Some Thoughts on 'Deossifying' the Rulemaking Process*, 41 DUKE L.J. 1385 (1992); Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321 (2010). Bill Jordan's study of ossification, which looked at what agencies did

many cases, the agency will go back to the drawing board and address the error identified and in all likelihood will promulgate a revised rule that will end up before the court again. Thus, even where the agency's error is a Type I error, there is a risk that courts will be pulled into an iterative dialogue with an agency that departs from the archetype of adjudication and resembles policymaking.[233] So although it might seem comparatively easy for courts to employ a negative injunction against a rule or action that commits Type I error,[234] this is largely an illusion created by the fact that affirmative injunctions force judges to observe the consequences in following up on whether the agency complies the positive injunction. But whether or not judges are looking, the consequences of judicial intervention exist.

All of this is to say that the difference in the remedial difficulties across error types, if there is one, is one of degree, not of kind. No matter the error type, courts confront an array of obstacles that can be classified into two basic categories: dangers of noncompliance with judicial orders and dangers of inefficient allocation of scarce executive resources. And while it might be possible to say that remedying Type II error is, on the whole, harder for courts than remedying Type I error,[235] there are almost certainly instances of Type II error that would be less disruptive and more effectively remediable than certain instances of Type I error. If any discrimination in the intrusiveness of review is appropriate, we would want it to be, as Eric Biber has argued, attuned to the actual remedial difficulties in the case, and not pegged imperfectly to blunt distinctions between error types.[236]

More generally, it is difficult to square the argument from remedial deterrence with the formalist theoretical presuppositions supporting the eradication of *Chevron*. Embracing remedial deterrence means embracing the idea that the meaning of the statute is changed by the practical circumstanc-

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on remand after rules were vacated and found that agencies often succeeded in promulgating a replacement rule, acknowledged that these resource-allocation effects were there but difficult to weigh against the benefits of judicial review. William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393, 395 (2000).

233. For the classic piece on the challenges of court adjudication of polycentric disputes (e.g., public policymaking), see Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

234. JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS 6 (1983) (noting the seeming difference between a case only requiring courts to say "stop" to an agency and a case requiring the court to direct agencies to take "affirmative action under statutory language that would then have to be given substantive content," dragging courts "inexorably into further disputes, perhaps into continuous monitoring of administrative activity and ultimately into some broad structural injunction through which the courts would attempt to take over administration").

235. *See* Nicholas R. Parrillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power*, 131 HARV. L. REV. 685, 688 (2018) ("[C]ompliance problems are most common when a court seeks to compel agency action, as often happens in the areas of environmental law, health and safety regulation, natural resource management, benefits programs, freedom of information, and elsewhere.").

236. Biber, *supra* note 92.

es surrounding implementation. That may be a reasonable position to take, given the real-world complexities that make it very difficult for agencies to implement statutory mandates completely, but it raises hard questions about when it is permissible to allow practical considerations to inflect statutory meaning. For many formalists, presumably, the answer is almost never. We would need a theory about why Type II error is so special that it suspends the presumption that a statute's meaning does not change because expediency would so counsel.

4. Unreviewability under the APA

One final potential legal hook for asymmetry in administrative law's approach to statutory error is the APA's prohibition on judicial review to the extent that a particular issue has been "committed to agency discretion by law."[237] This provision, which underlies the presumption of unreviewability of agency enforcement decisions in *Heckler v. Chaney*, has been interpreted as applying whenever a statute is so indeterminate that it supplies "no meaningful standard against which to judge the agency's exercise of discretion."[238] Perhaps, one might suggest, Type II error is, as a practical matter, more often committed to agency discretion by law in the sense that there are no meaningful standards by which to judge the agency's error. In other words, even if courts were to adopt an extremely formalist understanding of statutory interpretation that purports to provide a judicially determinable meaning in most every case, there would still be some cases where that would not be possible and the issue would be deemed "committed to agency discretion by law,"[239] and if these cases were mostly clustered on the side of Type II error, then in practice asymmetry might prevail.

To be persuasive, this argument would have to do more to articulate the special circumstances and characteristics—beyond pragmatic, extrastatutory considerations about resource allocation and rational priority setting in regulation—that make the pure task of statutory interpretation more difficult when an agency undershoots the statutory meaning than when it overshoots the statutory meaning. In other words, there would have to be an argument that there is something uniquely difficult about determining the meaning of a statutory provision when a party argues that an agency has taken less action than it was supposed to than when it has taken more.

As the counterfactual to *Norton* above makes clear,[240] this argument will be a hard one to make. The posture of review should not affect the ability of a court to identify the "true" meaning of a statute, if that is what courts are

237. 5 U.S.C. § 701(a)(2). For a general overview of this provision and its interpretation by the courts, see Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689 (1990).

238. Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv., 139 S. Ct. 361, 370 (2018) (quoting Lincoln v. Vigil, 508 U.S. 182, 191 (1993)).

239. 5 U.S.C. § 701(a)(2).

240. *See supra* Part I.

doing. As a purely analytical task, it should be entirely possible to use traditional tools of statutory construction to identify what it is that Congress meant without regard to whether the agency erred in any particular direction. Moreover, in either case the only thing the court is really doing is saying "not that." The court does not ordinarily have to say exactly what it believes the statute means (although it may want to in order to minimize costs on remand); it simply sends the agency back to the drawing board to do *something else*.[241]

For these reasons, it is hard to imagine that a lack of meaningful standards for determining agency compliance with statutes would be so systematically skewed toward Type II error that it would in practice explain or justify asymmetry in administrative law. The type of error is entirely an artifact of an agency's choice, which, in theory, should not affect the court's exercise of the quintessentially judicial task of identifying what a statute means.

III. BACK TO SYMMETRY

So far, this Article has posited that the symmetry of error types in statutory interpretation implies symmetrical administrative law doctrine, and it has critiqued contemporary moves against deference doctrines like *Chevron* deference, not so much because these doctrines are unassailable on policy grounds but because the critics' case has been incompletely theorized in light of the symmetry of error types. Eradicating or significantly curtailing deference doctrines and increasing the role of judges in eliminating statutory errors that emerge from the administrative process has significant implications that scholars and judges have not transparently grappled with.

In this final Part, I now want to complete the circle and make the positive case for symmetry, focusing on its social functions in legitimizing administrative law in an environment of political conflict. Ideally, administrative law mediates political conflict through neutral principles that all can accept, achieving "sociological legitimacy" in the process.[242] I will argue here that doctrinal symmetry alleviates distributional skews in government policy and leaves everyone partially disappointed—a sure sign of a sustainable political compromise.

But I also want to suggest that there is an inexorable logic to deference across the board that becomes apparent when our thinking is disciplined by a commitment to symmetry. Much as Adrian Vermeule argues in *Law's Abnegation*, the consistency demanded by the symmetry of errors in the inter-

241. Bagley, *Remedial Restraint*, *supra* note 131, at 255 ("With rare exceptions, agency actions that contravene the APA are invalidated and returned to the agency."); Christopher J. Walker, *Referral, Remand, and Dialogue in Administrative Law*, 101 IOWA L. REV. ONLINE 84, 86 (2016) ("When a court concludes that an agency's decision is erroneous, the ordinary rule is to remand to the agency to consider the issue anew—as opposed to the court deciding the issue itself.").

242. *See infra* notes 265–271 and accompanying text.

pretation of law "exert[s] a constant steady pressure that tells over time."[243] In other words, our latent commitment to symmetry helps explain why, as a descriptive matter, administrative law has been essentially deferential across the board for the last thirty to forty years,[244] and why efforts to curtail deference are unlikely to result in lasting change—mainly, abandoning symmetry introduces intolerable instability and inconsistency in an already politically charged environment. Administrative law survives and thrives when it "work[s] itself pure," at least in part by adhering to norms of doctrinal symmetry that can appeal across political divides.[245]

A. *The Social Functions of Symmetry in Administrative Law*

By many accounts, public law aims, or at least ought to aim, at achieving prosocial and recognizably legitimate outcomes in a diverse society.[246] By that standard, administrative law might be thought to be a failure: it is no secret that administrative law historically has been characterized by a "recurrent sense of crisis."[247] This sense is certainly palpable today, and perhaps more than it has ever been. To say that administrative law is currently politically unstable would be to express the mainstream viewpoint, not some fringe critique.[248] There are undoubtedly a great many contributing factors to this political instability, not the least of which has been growing political polarization and acrimony in the polity writ large.[249] Regulation, in particular, has become a flashpoint in our politics, and attitudes about it have become one of the most reliable indicators of partisan identity. We are reminded nearly every day that Americans, and even administrative law scholars, are deeply divided on first-order political questions about the appropriate role of the "state" in addressing social problems. Administrative law inevitably interfaces with value-laden regulatory choices, and because of this it constantly risks losing its foothold of legal legitimacy. Given this backdrop, a central task of academics, practitioners, and judges ought to be to find ways to restabilize and rehabilitate administrative law and to render it

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243. ADRIAN VERMEULE, LAW'S ABNEGATION: FROM LAW'S EMPIRE TO THE ADMINISTRATIVE STATE 2 (2016).

244. *See supra* Section I.D.

245. VERMEULE, *supra* note 243, at 2.

246. *See, e.g.*, SUNSTEIN, *supra* note 40, at 4.

247. JAMES O. FREEDMAN, CRISIS & LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT 4 (1978).

248. *See* Metzger, *supra* note 114; Pojanowski, *supra* note 14, at 855.

249. *See, e.g.*, NOLAN MCCARTY, KEITH T. POOLE & HOWARD ROSENTHAL, POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES (2006) (examining trends toward greater polarization in public opinion and governmental institutions and linking those trends to larger economic shifts). On regulation in particular, see Karlyn Bowman, Opinion, *Where Is the Public on Government Regulation?*, FORBES (Oct. 23, 2017, 10:38 AM), https://www.forbes.com/sites/bowmanmarsico/2017/10/23/where-is-the-public-on-government-regulation [https://perma.cc/K8ES-TDGH] (describing a picture of "deep partisan differences" on the subject of regulation).

a sustainable solution for managing the many value conflicts and political contests that arise in the administration of government programs.

Unfortunately, we are going backward, not forward, on this front. Recent years have seen the rise of a revivalist strand of formalist thinking about the judicial role in administrative law—what some have described as an "Article III renaissance."[250] Of course, there is no overlooking the clear, uncompromising ideological valence of this movement. More demanding review of alleged oversteps by agencies, but not on agency "understeps," has an "identifiably libertarian, anti-statist tilt," insofar as it puts a thumb on the scale against government action and prizes governmental inaction.[251] Overall, this is an ideologically charged and zero-sum vision of administrative law—and in that sense it is fit for our polarized times—but it also stands little chance of sustaining a political balance between all of the relevant constituencies in regulatory politics, including regulatory beneficiaries, over time.

What is needed, and what doctrinal symmetry provides, is an "overlapping consensus" that, by bracketing the deep conflicts that divide us, can sustain administrative law.[252] Symmetry norms in the law are often thought of as a powerful constraint on antisocial, partisan uses of the law, and they can be found in many politically charged pockets of law, such as antidiscrimination law,[253] constitutional law,[254] election law,[255] and even intellectual property.[256] For instance, legal norms that equally advance and constrain the full spectrum of partisan perspectives can imbue public law with greater resilience and greater congruence with fundamental value commitments underlying collective governance.[257] For similar reasons, symmetry norms can also

250. Damon Root, *Federal Judge Says Judicial Deference to Executive Branch Agencies Is 'Judicial Abdication*,' REASON (Apr. 20, 2017, 10:52 AM), https://reason.com/2017/04/20/federal-judge-says-deference-to-executiv/ [https://perma.cc/78MJ-V3CM]; *see also* Pojanowski, *supra* note 14, at 872, 900 (describing a camp of "administrative skeptics" that believe that the administrative state is "root-and-branch" unconstitutional and illegitimate, and that judges should exercise their power to say so).

251. Bagley, *supra* note 21, at 360.

252. SUNSTEIN, *supra* note 40, at 47–48 (discussing the importance of bracketing disagreements to focus on foundational agreements).

253. *See, e.g.*, Bradley A. Areheart, *The Symmetry Principle*, 58 B.C. L. REV. 1085 (2017); Naomi Schoenbaum, *The Case for Symmetry in Antidiscrimination Law*, 2017 WIS. L. REV. 69.

254. *See, e.g.*, Joseph Fishkin & David E. Pozen, Essay, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915 (2018); Zachary S. Price, *Symmetric Constitutionalism: An Essay on* Masterpiece Cakeshop *and the Post-Kennedy Supreme Court*, 70 HASTINGS L.J. 1273 (2019); Richard Primus, *The Republic in Long-Term Perspective*, 117 MICH. L. REV. ONLINE 1 (2018).

255. *See, e.g.*, Andrew Chin, Gregory Herschlag & Jonathan Mattingly, *The Signature of Gerrymandering in* Rucho v. Common Cause, 70 S.C. L. REV. 1241, 1253 (2019).

256. *See, e.g.*, Rebecca Tushnet, *Towards Symmetry in the Law of Branding*, 21 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 971 (2011).

257. The point bears similarity to Zachary Price's observations about constitutional law and some of the hot-button social issues it often addresses. Price notes how an "ethos" of "bipartisan symmetry may give force to notions of mutual toleration and broadly shared equal

reduce the "central political-process risk facing our constitutional order: the danger that tribal factionalism will degrade and destroy institutional structures and shared fundamental commitments."[258] These commitments to cross-partisan or cross-ideological collective governance are fundamentally undermined when advocates for a particular political project succeed in reforming legal frameworks to deliver favorable results and eliminate the risk of unfavorable outcomes, while simultaneously—and transparently—disenfranchising other interests and denying them the opportunity to benefit from the legal framework's protection.[259] While administrative law has at times been subject to criticism for asymmetrically distributing outcomes in favor of regulated entities,[260] a one-sided rethinking of deference (i.e., one that only benefits regulated entities seeking to curtail Type I errors and turns a cold shoulder to regulatory beneficiaries who would like to eliminate Type II errors that prevent the delivery of those benefits) would be a substantial escalation of polarization in regulatory policymaking. When we are already at "blood-sport" levels of political acrimony in regulatory policymaking,[261] this would not be a welcome development.

While such partisan skews in the distribution of political outcomes are arguably a priori undesirable, they are also undesirable because of their effects on the "sociological legitimacy" of law and institutions.[262] As Nicholas Bagley recognizes, the legitimacy of administrative institutions "is not solely—not even primarily—a product of proceduralism" but "arises more gen-

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citizenship that ultimately underlie our system of constitutional self-governance." Price, *supra* note 254, at 1276.

258. *Id.*

259. Again, constitutional theorists have recently worried about just this dynamic. For instance, Aaron Tang identifies a troubling trend toward what he calls "reverse political process theory" in constitutional law, by which he means that courts first bought an "anti-political process theory" that rejected the asymmetrical exaltation of marginalized constituencies in the protection of constitutional rights, but then lost their bearings and went one step too far in the other direction, treating powerful corporate interests as deserving special treatment. Aaron Tang, *Reverse Political Process Theory*, 70 VAND. L. REV. 1427, 1430–31 (2017). Tang argues that judges should reconsider the special treatment accorded powerful corporate interests and adopt a framework for review that treats powerful interests "no better than the powerless." *Id.* at 1433–34.

260. Melissa Wasserman, for instance, finds that asymmetrical deference often cuts in favor of identifiable constituencies—namely, regulated entities—in terms of distributive effects. *See* Melissa F. Wasserman, *Deference Asymmetries: Distortions in the Evolution of Regulatory Law*, 93 TEX. L. REV. 625, 627 (2015) ("[I]n a surprising number of contexts, when an agency's legal interpretation overly favors its regulated entities, the legal interpretation is either less likely to be subjected to judicial reexamination or, if it is subjected to judicial challenge, will be afforded a more deferential standard of review than a construction that overly disfavors its regulated entities.").

261. Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L.J. 1671 (2012).

262. *See* Bagley, *supra* note 21, at 371, 378–89 (drawing on Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005) (drawing a contrast between legal and sociological legitimacy)).

erally from the perception that an agency is capable, informed, prompt, responsive, and fair."[263] Left unaddressed, political inequities have the potential to undermine entire systems that rely on acceptance of common norms of fair play.[264] This is especially the case with asymmetry in judicial review, which imposes a systemic skew that consistently benefits one constituency over another, because repeatedly losing has predictable effects on confidence in the rules of the game. Research in political psychology, for instance, establishes the importance of a perception among participants in a legal or political system that they are winning as often as they are losing. After elections, participants exhibit a "winner-loser gap" in perceptions of legitimacy of the election.[265] This gap is roughly symmetrical—that is, winners gain about as much confidence in the system as losers lose.[266] More importantly, though, social scientists have found that the losses in perceptions of legitimacy are exponential when there is a series of losses.[267] Tom Tyler's work on procedural justice suggests a mechanism: probabilistically speaking, repeat losses are unlikely to be the result of a "fair" set of procedures. Rather, the deck may appear to be stacked, the game rigged. Losers consent to the legitimacy of the institution when they bounce back, or at least when they feel they have a fair shot at bouncing back.[268]

Symmetry works in part because of its tendency to combat zero-sum tactical and partisan thinking. Committing to symmetry makes gamesmanship over doctrine far more difficult. These laudable tendencies are easy to see when the idea of symmetry is applied to administrative law. What is good about deference from the regulated entity or individual's perspective—its permission to agencies to not enforce the full meaning of the law—is forced into the calculus.[269] Without symmetry, the regulated entity can discount these benefits and focus only on the downsides to deference—namely, the

263. *Id.* at 379.

264. *See id.* at 378–79 (drawing out the consequences of a loss of sociological legitimacy of institutions); *see also* Josh Chafetz & David E. Pozen, *How Constitutional Norms Break Down*, 65 UCLA L. REV. 1430 (2018) (offering a taxonomy and theory of how institutional and legal norms "decompose" through superficially compliant but practically hostile interpretations and actions).

265. Betsy Sinclair, Steven S. Smith & Patrick D. Tucker, *'It's Largely a Rigged System': Voter Confidence and the Winner Effect in 2016*, 71 POL. RSCH. Q. 854 (2018).

266. *Id.* at 855–56.

267. CHRISTOPHER J. ANDERSON, ANDRÉ BLAIS, SHAUN BOWLER, TODD DONOVAN & OLA LISTHAUG, LOSERS' CONSENT: ELECTIONS AND DEMOCRATIC LEGITIMACY 4 (2005); *see also* Anna Kern & Ann-Kristin Kölln, *The Consequences of Repeatedly Losing on Legitimacy Beliefs*, UNIV. NOTTINGHAM: EPOP 2017 CONF. (Sept. 2017), https://www.nottingham.ac.uk/conference/fac-socsci/epop-2017/documents/conference-papers/2.4-repeatedlylosing-kern-k%C3%B6lln-epop.pdf [https://perma.cc/ZM4B-68JB].

268. Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283 (2003).

269. Indeed, this benefit is one major reason that deference has been persistent, and why there is reason to doubt that the Justices on the Supreme Court will unequivocally endorse a rollback of deference. *See infra* Section III.B.

way it facilitates aggressive uses of discretionary power. The same is true of the regulatory beneficiary: in a world without symmetry (and without capture), regulatory beneficiaries might prefer deference and discretion across the board.[270] But of course many progressive constituencies worry much about corrosive capture (i.e., the tendency of agencies to capitulate to regulated entities' requests for regulatory relief) and wish judges would constrain it.[271] Under a norm of symmetry, the desire to control agency discretion not to regulate fully would imply limits on deference doctrines in all cases, even if normally progressives tend to support doctrines like *Chevron* and *Auer*. In both cases, symmetry gives and takes, leaving neither opponents nor proponents of government regulation with any opportunity to achieve total victory. Symmetry eliminates the possibility that either regulatory beneficiaries or regulated entities will consistently come out on the winning or losing end of administrative law's bargain. In effect, symmetry has a hydraulic, self-regulating effect on the distribution of power in our regulatory system, and this fair distribution of victories between public interests and private interests helps convince all to accept the institution as a whole. To be clear, I do not suggest that symmetry can alleviate political conflict altogether, but it can shift the locus of conflict to the legislative and larger political arena where it belongs.

In short, an insistence on symmetry produces a laudable self-regulating and depoliticizing ethos in administrative law. The overall level of deference is less important to the acceptance of the system by all relevant parties than assurance that there is no baked-in, systemic bias favoring one adversary or point of view over the other. Generally speaking, agency overreach impacts regulated entities, and agency underreach impacts regulatory beneficiaries. An administrative law that protects only one constituency against harm is liable to become politically unstable. If the judiciary accepts the invitation to abandon the symmetry norm, it will be courting further political breakdown and may ultimately undermine support for the rule of law in administration.

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270. *See* Bagley, *supra* note 21, at 346–47, 363.

271. *See* RENA STEINZOR & SIDNEY SHAPIRO, THE PEOPLE'S AGENTS AND THE BATTLE TO PROTECT THE AMERICAN PUBLIC: SPECIAL INTERESTS, GOVERNMENT, AND THREATS TO HEALTH, SAFETY, AND THE ENVIRONMENT 45–46 (2010); Shapiro, *supra* note 8, at 1829. Recently, progressive scholars have in fact begun to act on this political logic, arguing in a recent American Constitution Society brief for more stringent judicial review of agency inaction as a means of counterbalancing the rightward tendencies of the regulatory reform movement. *See* DANIEL A. FARBER, LISA HEINZERLING & PETER M. SHANE, REFORMING "REGULATORY REFORM": A PROGRESSIVE FRAMEWORK FOR AGENCY RULEMAKING IN THE PUBLIC INTEREST 12–13 (2018), https://www.acslaw.org/wp-content/uploads/2018/10/Oct-2018-APA-Farber-Heinzerling-Shane-issue-brief.pdf [https://perma.cc/4MHS-MV5G]. In fact, these scholars suggest amending section 706(1) to read "compel agency action unlawfully withheld or unreasonably delayed, *under the same standards of review applied to an agency action under subsection (2)*." *Id.* at 13 (emphasis added). I would suggest that this amendment should be unnecessary and only is necessary because of judges' increasing propensity to deploy asymmetrical approaches to statutory interpretation in administrative law.

B. *Inexorable Deference*

Shifting from the prescriptive to the descriptive, I now want to suggest that a commitment to symmetry clarifies what is at stake in the battles over deference in administrative law, and ultimately suggests that deference is likely to win out in the long run as long as symmetry does discipline the calculation.[272] In Section II.B.3, I argued that, from a formalist perspective, a concern about judicial interference with agency resource allocation and about the judicial capacity to take on this role could not justify a departure from the symmetry that shared norms of statutory interpretation imply. Allowing concerns about resource allocation to creep into interpretive decisions and facilitate a departure from the discernible meaning of a statute, but only when we are dealing with Type II error, would be artificial and arbitrary and contrary to the first principles of interpretive formalism. To the extent that resource allocation and judicial capacity are acceptable considerations in calibrating deference, those considerations would have to affect the case for deference generally, as agencies and courts are both institutionally affected by judicial remand or vacatur on the basis of Type I error as well. When an agency's aggressive interpretation of a statute is nixed by a court, the agency must return to the drawing board and displace other agenda items to comply with the terms of a remand. Remedial complications are not entirely unique to Type II error.[273]

But that does not mean that the effect on resource allocation is not a legitimate consideration in calibrating the overall level of deference across review of *both* error types.[274] To the contrary, it would be a grave mistake to underestimate the costs of interpretive formalism, perhaps especially because a symmetric ratcheting up of interpretive scrutiny would not permit courts to simply ignore those costs in a doctrinal fiat. Whatever level of deference courts choose, the costs and benefits will be cumulative across error types, and the problem is optimization *between* error types. While reasonable minds can and do differ, and formalist purists might well argue that the costs be damned, from an efficiency perspective, deference will always win out. Seriously grappling with what it would mean for courts to exercise de novo review of agencies' inaction might incline one to rethink whether the juice is worth the squeeze in the ongoing efforts to eliminate deference. One inherent difference between agency inaction and action is that there are bound to

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272. I do not see this point as in any inherent tension with my contention in Section III.A that symmetry tends to depoliticize and constrain one-sided reform projects. My argument here is that, considering symmetry and its implications, the costs of judicial scrutiny of all error types are likely to be unbearably high. But that does not prevent the relevant constituencies from coming to another compromise. This is simply a prediction about what compromise will likely be reached when full and fair bargaining over administrative law's future is constrained by an adherence to symmetry in the doctrine.

273. *See supra* Section II.B.3.

274. *See* Biber, *supra* note 25; Parrillo, *supra* note 235; Sunstein & Vermeule, *supra* note 8.

be many more instances of inaction than action. There are countless decisions and nondecisions even in a day's work in the federal bureaucracy. Treating each of these instances as potential violations runs up against the limits of judicial capacity. This situation is undoubtedly part of why scholars and judges have shied away from robust enforcement of legal limits on inaction discretion—courts are not institutionally well equipped to do more than police the margins of agency inaction. In short, it is entirely true that the remedial difficulties associated with review of Type II error are high,[275] and when added to the not-insignificant costs of remediation of Type I error, the alternative of deference across the board is a wise decision.

Adrian Vermeule has argued that administrative law and the administrative state have encroached on "law's domain" not so much through conquest but because legal institutions inexorably abnegated their authority over law in the face of "internal" imperatives for consistency.[276] My account of the imperative for doctrinal symmetry in the treatment of different interpretive error types clarifies a key mechanism at play in these dynamics. The practical need to defer to nearly all administrative agencies' decisions undershooting statutory meaning, as determined by a judge, means that courts are essentially bound to some kind of deference when it comes to Type I interpretive error as well, at least insofar as symmetry constrains. Truly de novo review of all agency interpretations of statutes, including agency interpretations that they do not have to act or do not have to go as far as the statute and the judge say they do, would be an institutional impossibility. Like Vermeule, I do not see any of this leading to out-and-out abdication.[277] There will always be *some* role for courts to play in determining the outer bounds of agency discretion to err on either side of statutory meaning. What it does lead to, though, is the prediction that deference will always be with us in some form or another, with respect to both Type I and Type II error.

CONCLUSION

Recent years have seen the emergence of a sustained critique of judicial abdication in administrative law—one that is beginning to pay dividends for its proponents in the shape of the law. This Article suggests that this critique has been selective. Taken to its logical conclusions, the brand of formalism behind many of the critiques of deference doctrines has far more serious implications than critics have acknowledged. By taking this formalist perspective seriously and tracing out its implications for two distinct error profiles associated with statutory interpretation—overinclusive agency interpretations, or Type I error, and underinclusive agency interpretations, or Type II error—I conclude that administrative law doctrine can be deferential or nondeferential, but it needs to be symmetrical as to these error types. Beyond

275. *See* Biber, *supra* note 25.

276. VERMEULE, *supra* note 243, at 2.

277. *Id.* at 17–18, 148.

showing the myopia of current attacks on judicial deference in administrative law, I argue that recognizing administrative law's commitment to symmetry and the virtues that it furthers has the potential to de-escalate the increasingly heated political contests over the future of the administrative state and is therefore desirable in its own right. Finally, I suggest that our commitment to a rough symmetry helps explain the rise of deference and probably foretells a continued trend toward deference despite the current wave of criticism of that approach.