

Symmetry's Mandate: Constraining the Politicization of American Administrative Law

Daniel E. Walters*

Abstract

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 be tasked with resolving interpretive disputes over the meaning of statutes—disputes the critics take to be purely legal and almost always answerable from an objective legal standpoint. 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 which is mostly invoked to justify Type I error, but have not shown any interest in revisiting administrative law cases, including Norton v. Southern Utah Wilderness Alliance and Heckler v. Chaney, that enable Type II error.

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 case for insisting on a norm of 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 de-politicizing administrative law, clarifying what is at stake in debates about the proper level of deference to agency legal interpretations, and disciplining the conversation. I suggest that when the conversation is so disciplined, an administrative law without deference to both Type

* Assistant Professor of Law, Penn State Law—University Park. I benefitted substantially from feedback from the Administrative Law New Scholarship Roundtable at the University of Wisconsin Law School on an earlier draft, and from informal discussions with many colleagues, including Chris Walker, Nick Parrillo, Jack Beermann, Zach Price, Bijal Shah, Michael Sant'Ambrogio, David Noll, Matthew Lawrence, Kristin Hickman, Wendy Wagner, Glen Staszewski, Kati Kovacs, Cary Coglianesi, Gabe Scheffler, Steve Ross, Jud Mathews, Ben Johnson, Mark Storslee, Todd Aagaard, Dave Bridge, Josh Galperin, and many others. As usual, any errors are my own.

I and Type II error is hard to imagine due to the 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 one-sided critiques of deference.

Table of Contents

Introduction

- I. Statutory Meaning and the Symmetry of Errors
 - A. The Overlapping Consensus on the Function of Statutes
 - B. The Symmetry of Errors
 - C. The Pervasiveness of Type II Error in the Interpretation of Statutes
 - D. Symmetry in the Doctrine
- II. The Asymmetrical Assault on Deference
 - A. The Failure to Target Type II Error
 1. *Norton* as Super Deference for Negative Delegations
 2. *Heckler* as Talisman for Abdication
 3. Judicial Refusals to Review Agency Denials of Rulemaking Petitions
 4. Uneven Scorn for *Chevron*
 5. The Roving Ghost of *Overton Park*
 6. Summary
 - B. Candidates for Policy-Driven Asymmetry in Statutory Interpretation
 1. The Executive Power to Decline to Implement the Law
 2. Libertarian Commitments to Asymmetry: Administrative *Lochner*-ism
 3. Remedial Deterrence
 4. Unreviewability under the APA
- III. Back to Symmetry
 - A. The Social Functions of Symmetry in Administrative Law
 - B. Inexorable Deference

Conclusion

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 unspecified 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 Congress's preferences.⁴ In

¹ 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 F. 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 extra-textual 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.

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

⁴ Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833 (2000) (describing the view that deference doctrines stem from Congress’s implied delegation of

practice, deference gives agency implementers considerable discretion in determining the meaning of the law in action. They can take inclusionary positions on the reach of unclear or outdated statutory language, potentially expanding the law's practical reach beyond what was initially contemplated—a kind of analog to a false positive, or Type I error, in empirical research.⁵ But they can also effectively pocket veto statutory requirements by simply refusing to undertake action or at least by indefinitely deferring such action, if not disclaiming authority altogether⁶—similarly analogous to a false negative, or Type II error. The price of Congress's imprecision is the introduction of both Type I and Type II errors in the execution of law, but under a deferential paradigm in 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.⁷ One might 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

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

⁵ Jonathan H. Adler & Christopher J. Walker, *Delegation and Time*, 105 IOWA L. REV. 5-6 (forthcoming 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).

⁶ Sidney A. Shapiro, *Rulemaking Inaction and the Failure of Administrative Law*, 68 DUKE L.J. 1805 (2019); Michael 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 (2011); Cass R. Sunstein & Adrian Vermeule, *The Law of 'Not Now': When Agencies Defer Decisions*, 103 GEO. L.J. 157 (2014).

⁷ See, e.g., Linda Jellum, *Chevron's Demise: A Survey of Chevron from Infancy to Senescence*, 59 ADMIN. L. REV. 725 (2007); Michael Herz, *Chevron Is Dead; Long Live Chevron*, 115 COLUM. L. REV. 1867 (2015); Christopher J. Walker, *Attacking Auer and Chevron Deference: A Literature Review*, 16 GEO. J. L. & PUB. POL'Y 103 (2018); Jeffrey A. Pojanowski, *Without Deference*, 81 MO. L. REV. 1075 (2016); Jonathan H. Adler, *Restoring Chevron's Domain*, 81 MO. L. REV. 983, 983 n.8 (2016).

about the pernicious effects of lax administrative law doctrines on agency underreach. If, as Justice Thomas put it in *Michigan v. EPA*, deference “wrest[s] 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,⁸ 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. 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.⁹

In fact, though, the growing 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 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*¹⁰ and *Heckler v. Chaney*,¹¹ 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

⁸ *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (Thomas, J., concurring) (quoting *Marbury v. Madison*, 5 (1 Cranch) 137, 177 (1803)).

⁹ This past summer, the Supreme Court split on whether to put teeth in the non-delegation 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 (Jun. 20, 2019) (“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 non-delegation 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.” *Gundy v. United States*, 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting). 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.

¹⁰ *Norton v. S. Utah. Wilderness All.*, 542 U.S. 55 (2004).

¹¹ *Heckler v. Chaney*, 470 U.S. 821 (1985).

been attacked with such zeal when agencies use it to undershoot statutory meaning.¹² 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.¹³

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 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 resort 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 last consideration deserves special consideration in a hyper-partisan regulatory environment. The two types of errors that agencies can commit have distinct distributive consequences.¹⁴ 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 de-politicizing role in an area of law that is otherwise at risk, due to the partisan polarization of our times,¹⁵ of being co-opted by politics. Symmetry in

¹² See *infra* Part II.A.4.

¹³ In some ways, this account of asymmetry builds on Cass Sunstein and Adrian Vermeule'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).

¹⁴ 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. 1, 4 (forthcoming 2020) (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).

¹⁵ David B. Spence, *The Effects of Partisan Polarization on the Bureaucracy*, in CAN AMERICA GOVERN ITSELF? (Frances E. Lee & Nolan McCarty, eds., 2019); Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L.J. 1671-1762 (2012); Cass R. Sunstein & Thomas J. Miles, *Depoliticizing Administrative Law*, 58 DUKE L.J.

administrative law, as I envision it, is formally neutral as to the substantive standards and overall valence of judicial review (*i.e.*, it would 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 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 suggest that carrying symmetry's mandate to its logical endpoint in fact helps to illustrate and explain why administrative law bends toward deference in the long run.¹⁶ It does this because it brings into relief that deference, by blessing both Type II and Type I errors, accounts for similar sorts of remedial problems for courts that get zero credence when judges take on full responsibility for elucidating statutory meaning.¹⁷ 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 that these problems are not unique to Type II errors.¹⁸ 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 non-enforcement provide an independent, and heretofore unrecognized, justification for deference more generally.

The article unfolds in three parts. Part I unpacks the premise underlying all that follows: that is that 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: that is, that statutes have a meaning in individual cases, even if how we discover that meaning is subject to debate. I argue that if statutes are instructions or directives in this sense, then a failure

2193 (2009); *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).

¹⁶ *See infra* Part III.B.

¹⁷ *See infra* Part II.B.3.

¹⁸ *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”).

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.

Part II then turns to contemporary developments in administrative law, which display a growing willingness to re-allocate 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 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. The asymmetry of the critique, at least as it has proceeded so far, is most apparent in the dogs that have not barked. 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.¹⁹ If statutes are binding directives, and if Congress has a definite, judicially determinable meaning when it speaks through legislation,²⁰ 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 meta-preference as to how statutes are interpreted that would systematically distinguish error types.²¹ My purpose in this Part is not to suggest bad faith on the part of proponents of reformed judicial review of agency action,²² but rather to take their

¹⁹ See *infra* Part II.B.

²⁰ I am personally skeptical that this is the case, as it seems to conflict with a wealth of experience in statutory cases, see ROBERT 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* 30 (1970). Nevertheless, this formalistic assumption is in ascendance both on the Court and in the academy. See *infra* Part I.D.

²¹ 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* Part II.

²² The jurists most committed to eradicating deference could establish some credibility by declining the Trump Administration’s invitation to deem its action unreviewable in the Deferred Action for Childhood Arrivals (DACA) case. In that case, which the Supreme Court will decide next summer, the government has consistently pushed the courts to accept the argument that

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.

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, administrative law “may be about good governance, but it is also about power: about the power to maintain the existing state of affairs, and the power to change it.”²³ 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 hyper-partisanship—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 residual sum of distributive effects of administrative law rules.²⁴ 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 pre-ordained—indeed, symmetry is perfectly consistent with either a world of significant deference or one without any at all—but I do close the article by arguing that commitment to such a norm of symmetry in statutory cases reveals essential, and underappreciated, reasons that administrative law has steered in the direction of deference over time.²⁵ Namely, while the remedial implications of heightened judicial review of what I call Type I errors are lesser than the remedial consequences of heightened judicial review of Type II errors, the remedial consequences of both together are greater than the remedial consequences of neither (*i.e.*, universal deference). When we take symmetry seriously, as we must if administrative law is to be a sustainably legitimate system of law, the true costs of judicial review of agency decision making to the judicial system cannot be casually downplayed, especially when compared to the alternative of deference.

policy changes on immigration enforcement are unreviewable under the APA. *See* Brief for the Petitioners, *Dep’t of Homeland Sec. v. Regents of the University of California*, Nos. 18-587, 18-588, and 18-589 (Aug. 19, 2019) (arguing that rescission of the Obama Administration’s DACA policy is “committed to agency discretion by law” under 5 U.S.C. § 701(a)(2)). For discussion of why § 701(a)(2) does not justify asymmetry, *see infra* Part II.

²³ Nicholas Bagley, *The Procedure Fetish*, LAW & POL. ECON. BLOG (Mar. 7, 2019), *available at* <https://lpeblog.org/2019/03/07/the-procedure-fetish/>.

²⁴ *See infra* Part III.

²⁵ *See infra* Part III.

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.”²⁶ 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*.²⁷ 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. Courts applying truly *de novo* review or perhaps some variant of *Skidmore* deference, however, would be likely to disturb the BLM’s interpretation and replace it with their own first-best understanding of the statutory meaning. In other words, there would likely be some gap between what the Supreme Court believed the statute meant and what the BLM thought it meant. For critics of deference to agency decisions, letting the Supreme Court’s opinion prevail would help resolve at least two distinct constitutional problems that emerge when judges depart from the premise that statutory language has a definitive meaning that is to be determined by Article III judges, not by agencies.

Now return to the 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—*i.e.*, to enact a policy, different from their preferred policy (*i.e.*, no policy at all), but consistent with the nonimpairment obligation as determined by the Court. Instead,

²⁶ 43 U.S.C. § 1782(c).

²⁷ *Norton v. S. Utah Wilderness All.*, 542 U.S. 55 (2004).

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. 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 under-implemented the statute 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 the purposes of statutory interpretation 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

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 meaning of statutes.²⁸ Although Justice Kagan declared that “we’re all textualists now,”²⁹ disagreements about how to deploy textualism in concrete cases

²⁸ For just a sampling of the voluminous scholarship on the methods of statutory interpretation, see ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW* (2012); KATZMANN, *supra* note 20; WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994); ANTONIN SCALIA, *A MATTER OF INTERPRETATION* (1997); 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., 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); Abbe R. 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); Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901 (2013); Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725 (2014); James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1 (2005).

²⁹ Justice Elena Kagan, *The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes* at 8:09 (Nov. 17, 2015, <http://today.law.harvard.edu/in-salia-lecture-kagan-discusses-statutory-interpretation>).

still remain and hints of the other methodologies still seem to operate at the margins.³⁰ But as much as disagreement about the proper way to interpret statutes persists, it is easy to overlook the “overlapping consensus”³¹ that unites almost everyone: statutes have a meaning that is fixed until Congress changes it. That is to say, statutes express a coded instruction, more or less vague, about how the world should or should not change as a result of the enactment of the statutory text.³² While it is not always very easy to pinpoint what this communicative meaning is or what amounts to the best way to find it, almost all agree that statutes have only one meaning in any given factual situation (or, put another way, that statutes’ job is to assign outcomes to real-life configurations of facts, or to guide agencies in doing so through their legislative rule-writing authority),³³ and that this communicative meaning is what everybody—from agencies, to courts, to legal academics—looks for in different ways.³⁴ The major fault lines within this overlapping consensus are empirical and methodological, not epistemological.

³⁰ See, e.g., Gluck & Posner, *supra* note 28 (finding that none of the surveyed judges identified as an unqualified textualist or purposivist); Katzmann, *supra* note 20 (arguing for a pluralistic approach to statutory interpretation); 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).

³¹ CASS R. SUNSTEIN, LEGAL CONFLICT AND POLITICAL REASONING (2019) (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).

³² 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.”).

³³ See Ryan D. Doerfler, *Can A Statute Have More Than One Meaning?*, 94 N.Y.U. L. REV. ____ (forthcoming 2019) (asserting that the “one-meaning rule” that is fundamental to most interpretive methodologies); 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.”). *But see* 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); Doerfler, *supra* (critiquing the consensus position from a linguistic theory perspective).

³⁴ Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2121 (2016) (“[C]ourts should seek the *best reading* of the statute”); *see also* Aaron Saiger, *Agencies’ Obligation to Interpret the Statute*, 69 VAND. L. REV. 1231 (2016) (arguing that agencies, too, have

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.³⁵ There are an infinite number of permutations of 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.³⁶ 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. 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 consistent with the statute, considering all of the facts made relevant by the statute itself, no judge should independently engraft an extra-textual criterion that x_1 is consistent on Monday, but not on Tuesday. The point here is just that statutory instructions, conventionally understood, prescribe a single outcome 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.³⁷

This statute-space model is, of course, an oversimplification insofar as it envisions clear lines cutting through every relevant dimension. Rather than drawing a line between 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.³⁸ Of course, one of the common justifications for deference doctrines, borrowed straight from the pages of legal realist theory, is that,

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

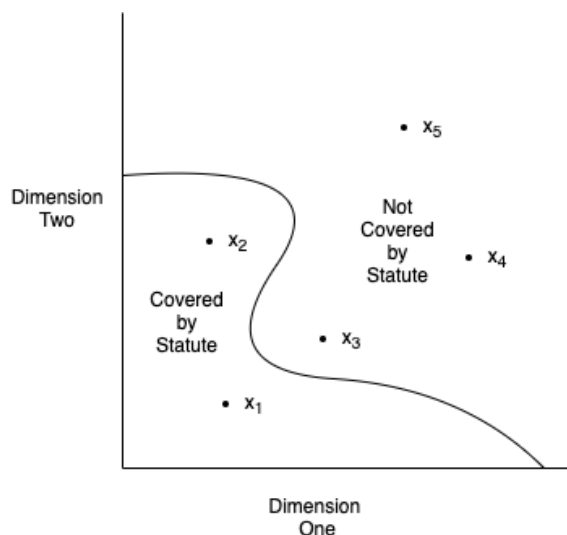
³⁵ Here I borrow and extend to statutory drafting the “case space” framework developed by Jeffrey Lax and Dimitri Landa for court-made common law rules. See Dimitri Landa & Jeffrey R. Lax, *Disagreements on Collegial Courts: A Case-Space Approach*, 10 J. CONST. L. 305 (2008).

³⁶ There could, and likely would, be more dimensions in any real-life setting.

³⁷ *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”).

³⁸ 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. 361, 364-65 (2010) (collecting theories and citations).

Figure 1: The Statute-Space Model



as an empirical matter, Congress often leaves irreconcilable ambiguities and lacunae that cannot be addressed by the application of neutral legal reasoning.³⁹ But as Jeffrey Pojanowski has recently described, there is an emerging “mood” of formalism that rejects this premise, at least to some degree. 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.”⁴⁰ A number of prominent critics of deference doctrines have opined that true

³⁹ See Nicholas R. Bednar & Kristin E. Hickman, *Chevron's Inevitability*, 85 GEO. WASH. L. REV. 1392 (2017). *If* this is true as an empirical matter, it seems difficult to imagine a world without deference at least as to questions of policy judgment. *See id.* at 1398 (noting that, “unless 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”).

⁴⁰ Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. ____ (forthcoming 2019); *see also* Baude & Sachs, *supra* note 33, 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 (1989).

irreconcilable ambiguities are few and far between (if they exist at all).⁴¹ This emergent trend toward greater confidence in the ability of judges to deploy lawyers' tools to determine the single best reading of statutes and regulations goes a long way toward a sociological explanation of the rise of anti-deference arguments.

To be clear, though, my perspective is that neither this brand of formalism nor the more legal realist understanding that statutes are frequently underdetermined and require elaboration 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 relevant permutations of relevant facts in the world, and that the statutory interpreter's task is to use some set of legal tools to identify the interpretation that matches the meaning of the statute. Each situation that might arise and implicate the statute (and its attendant regulations) should have one assignable outcome. The questions that divide us are whether lawyerly tools allow us to find this single assignable outcome, and, if not, who decides in the breach. These latter questions can be bracketed for now, as I only aim to rely on the premise that most players in this debate agree on the idea that statutes aim, if sometimes imperfectly, to communicate proper outcomes in this manner. The question is just what to do once we have determined the meaning of a statute and compared it to some legal action that an agency took.

B. The Symmetry of Errors

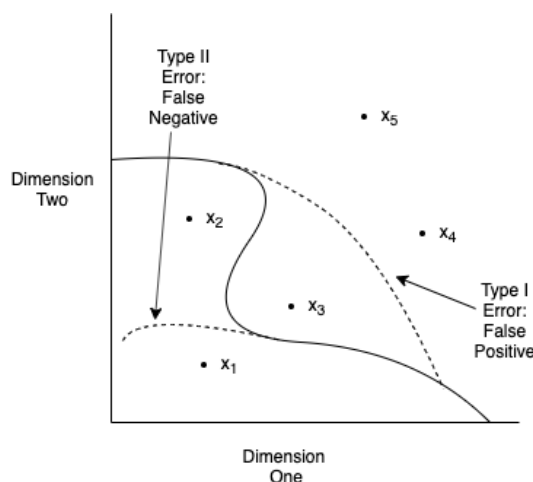
The consensus that statutes have a definitive meaning in a concrete factual setting has implications for how we conceive of the errors that agencies and judges might make. Take a simple toy example: imagine a statute that says "A shall do x_1 and x_2 ." The meaning of this statute is crystal clear, if only because we have abstracted away the details. Under the prevailing consensus about statutes having only one meaning, the statute just means that A 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 the agency 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 subtracted from the statute. Whether an agency offers an interpretation of a statute that covers a case that, in the judge's

⁴¹ Hon. 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"); Kavanaugh; etc. 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.

wisdom, it should not or if it offers an interpretation of a statute that excludes a case that it should not, the result is the same: the agency changes what the statute means.⁴²

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. 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. Figure 2 demonstrates how these error types arise in the same 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. An agency interpreting this statute could, in turn, promulgate a rule that draws different lines that are either underinclusive or overinclusive.

Figure 2: Types of Error in Statutory Interpretation



While I am being meticulous for the sake of clarity, I do not suspect that any of this will be particularly controversial. The idea that an agency’s exercise of interpretive authority could result in both types of errors, and that these error types are logically symmetrical in nature, flows naturally

⁴² 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 Regulatory Grp. v. EPA*, 573 U.S. 302, 325-26 (2014). The EPA adopted what it called a “tailoring rule” to avoid having to apply stringent statutory standards to newly regulated sources of greenhouse gas emissions. 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.

from the premise in Part I.A that statutes intend a particular meaning in each individual imaginable case. The complexity and the ambiguity of the statute may increase in real-world statutes, but in principle there is no reason that the model I am articulating would not apply to those more complicated statutes cutting through multiple dimensions of relevant facts. The only difference would be the effort necessary to identify the errors committed by the agency.

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.⁴³ 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.⁴⁴ 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 is 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. The Chief wrote 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.⁴⁵ Statements like these are typical of discussions of deference doctrines: it somehow escapes us that deference enables just as much under-implementation of

⁴³ *Chevron, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 840 (1984).

⁴⁴ 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.”).

⁴⁵ *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 314-15 (2013) (Roberts, C.J., dissenting).

statutory law as it does over-implementation.⁴⁶ 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.

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 plausible 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.⁴⁷ De-regulatory 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.⁴⁸ 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 de-regulatory 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,⁴⁹ rather symmetrically applied *Chevron* to hold that the Trump-era rule, too, largely operated within the delegated discretion of the Telecommunications Act.⁵⁰ Another example: after an Obama 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.⁵¹ Environmental organizations brought suit, alleging that CERCLA required EPA to promulgate at least some kind of financial responsibility requirement for the industry. A panel of the D.C. Circuit, Judge Henderson writing

⁴⁶ See Buzbee, *supra* note 1, at 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 what he calls "statutory abnegation").

⁴⁷ *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).

⁴⁸ *Id.* at 1514 (noting that *Chevron* often gives agencies room to support deregulatory moves, insofar as the statutory text leaves multiple options open).

⁴⁹ See *United States Telecomms. Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016).

⁵⁰ 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.").

⁵¹ Financial Responsibility Requirements Under CERCLA Section 108(b) for Classes of Facilities in the Hardrock Mining Industry (Final Action), 83 Fed. Reg. 7556, 7556 (Feb. 21, 2018).

for judges Griffith and Sentelle, disagreed, nothing 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.⁵² 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.

Moreover, 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.⁵³ 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 agricultural interests (who expected EPA to continue requiring refineries to blend their fuels with biofuels like ethanol) and competitors who did not receive waivers.⁵⁴ The D.C. Circuit quietly 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.⁵⁵ 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

⁵² Idaho Conservation League v. Wheeler, 930 F.3d 494, 504 (D.C. Cir. 2019).

⁵³ Cary Coglianese, Gabriel Scheffler, & Daniel E. Walters, *Unrules* (working paper 2019); see also Aaron L. Nielson, *Waivers Exemptions, and Prosecutorial Discretion: An Examination of Agency Nonenforcement Practices*, Draft Report to ACUS 39-40 (Sep. 11, 2017), available at <https://www.acus.gov/sites/default/files/documents/ACUS%20Waiver%20Report%2009.11.17%20Draft.pdf>. 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 Jim Rossi, *Waivers, Flexibility, and Reviewability*, 72 CHI.-KENT L. REV. 1359 (1997); Peter H. Schuck, *When the Exception Becomes the Rule: Regulatory Equity and the Formulation of Energy Policy Through and Exceptions Process*, 2 DUKE L.J. 163 (1984); Alfred C. Aman, Jr., *Administrative Equity: An Analysis of Exceptions to Administrative Rules*, 1982 DUKE L.J. 277.

⁵⁴ See Eric Wolff, *Biofuel Backers Pressuring EPA to Rewrite Latest RFS Rule*, Politico (Oct. 18, 2019), available at <https://www.politico.com/news/2019/10/18/biofuel-backers-pressuring-trump-to-rewrite-latest-rfs-rule-051175>.

⁵⁵ Advanced Biofuels Ass’n v. EPA, No. 18-1115 (D.C. Cir., Nov. 12, 2019).

individual cases.⁵⁶ 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.⁵⁷

It drastically increases the pervasiveness of Type II error if we count, as we should, agency decisions not to act on issues within their authority⁵⁸ or to delay action that they could otherwise take.⁵⁹ 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.⁶⁰ More generally, though, agencies 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 non-impairment mandate in the statute,⁶¹ but there are many others. Indeed, the available empirical evidence suggests that agencies routinely fail to follow through on congressional requests for regulation.⁶²

⁵⁶ See Coglianese, Scheffler, Walters, *supra* note 53.

⁵⁷ David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265 (2013). 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.

⁵⁸ Vermeule & Sunstein, *The Law of ‘Not Now,’ supra* note 6.

⁵⁹ Sant’Ambrogio, *supra* note 6.

⁶⁰ See *Telecomms. Res. & 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). Relatedly, 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). 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.

⁶¹ *Norton v. S. Utah Wilderness All.*, 542 U.S. 55 (2004).

⁶² Jason Webb Yackee & Susan Webb Yackee, *From Legislation to Regulation: An Empirical Examination of Agency Responsiveness to Congressional Delegations of Regulatory Authority*, 68

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.⁶³

Finally, perhaps the most ubiquitous potential source of Type II error is non-enforcement in individual cases. Simple non-enforcement decisions by agencies, which may be entirely informal and undocumented, are the bread and butter of regulatory practice.⁶⁴ As a practical matter, probable violations of statutory standards far outnumber the number of enforcement actions that agencies can pursue. This is probably most apparent in the domain of immigration, where there probably are about 11.2 million *potential* removal proceedings that could be brought, but resources at the Department of Homeland Security (DHS) to pursue only a small fraction (about 4 percent) of those potential actions.⁶⁵ Similar dynamics are present across the regulatory state. For instance, non-enforcement of environmental laws has been far more successful in the Trump administration than the attempted roll-back of Obama-era regulations.⁶⁶ Intermixed with resource-based decisions not to enforce, which the agencies do not really “choose,” are conscious decisions to change policy through concerted non-enforcement. Presidents of both parties have encouraged agencies to adopt these non-enforcement policies on issues running the gamut, from issuing moratoria on immigration enforcement against “dreamers” to refusing to enforce the Johnson Amendment, which normally

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*, Paper Presented at the 2019 APPAM Conference (paper on file with author) (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).

⁶³ RACHEL AUGUSTINE POTTER, *BENDING THE RULES: PROCEDURAL POLITICKING IN THE BUREAUCRACY* (2019).

⁶⁴ For a good overview, see Urska Velikojna, *Accountability for Nonenforcement*, 93 NOTRE DAME L. REV. 549 (2018).

⁶⁵ SHOBA SIVAPRASAD WADHIA, *BANNED: IMMIGRATION ENFORCEMENT IN THE TIME OF TRUMP 3* (2019).

⁶⁶ This most recent episode is consistent with a long history of Republican administrations using non-enforcement as part of a de-regulatory political strategy. See Daniel T. Deacon, *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 WESTERN RES. L. REV. 1119, 1123-33 (2015) (providing examples of nonenforcement policies across the Reagan, George W. Bush, and Obama administrations).

“bars 501(C)(3) non-profits, including houses of worship, from participating in political campaigns for, or against, a candidate.”⁶⁷

All of these agency decisions 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 even some of these de-regulatory efforts could target the statute's meaning or even be overinclusive relative to that meaning once judges find it. Yet 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.⁶⁸ As the next section demonstrates, consistent with their accommodation of deference on Type I error, courts have historically treated 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. In Part 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 in the doctrine of administrative law.

This presumption finds support in the charter of the modern administrative state: the APA creates a cause of action for parties aggrieved when an agency “unlawfully withheld or unreasonably delayed” action,⁶⁹ with “action” defined to include a “failure to act.”⁷⁰ These provisions for judicial

⁶⁷ Howard Gleckman, *President Trump's Situational Enforcement of Tax and Immigration Laws*, FORBES (June 20, 2018), available at <https://www.forbes.com/sites/howardgleckman/2018/06/20/president-trumps-situational-enforcement-of-tax-and-immigration-laws/#2c979f1e2999>.

⁶⁸ Daniel E. Walters, *The Judicial Role in Constraining Non-Enforcement Discretion: The Virtues of an APA Approach*, 164 U. PA. L. REV. 1911 (2015); Sunstein & Vermeule, *Law of 'Not Now,'* *supra* note 6.

⁶⁹ 5 U.S.C. § 706(1) (providing that the “reviewing court shall—compel agency action unlawfully withheld or unreasonably delayed”).

⁷⁰ 5 U.S.C. § 551(13) (stating that “‘agency 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”).

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 between a failure to act and an action that is *ultra vires*.⁷¹ Under the APA, these two forms of reviewable unlawfulness are really “two sides of the same coin.”⁷² This is also to say nothing about Type II error that emerges from the positive, but 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.⁷³

Moreover, this idea that administrative law doctrine should reflect the symmetry of error types has an identifiable basis in actual practice to date. Prior to the 1980s, courts vacillated between deferential and probing review no matter the directionality of the error.⁷⁴ The Supreme Court's intervention in two cases—*Chevron* in 1984 and *Heckler v. Chaney* in 1985—mostly ended this stochastic approach and instituted a more uniform, and uniformly deferential, approach to judicial review.⁷⁵ 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.⁷⁶ Empirical studies of lower court decisionmaking after

⁷¹ Eric Biber, *Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and Inaction*, 26 VA. ENVTL. L.J. 461, 461-62 (2008) (“[T]here is no fundamental difference between judicial review of agency inaction or action under the APA.”).

⁷² *Id.*; see also Eric Biber, *Importance of Resource Allocation*, *supra* note 18, 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).

⁷³ See *supra* Part I.B.

⁷⁴ KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 19.7 (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 Interpretation*, 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.”).

⁷⁵ 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).

⁷⁶ *Chevron USA Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

Chevron showed a fairly immediate and pronounced increase in agency win rates.⁷⁷ More recent studies confirm the lasting effect of these changes, especially in the lower courts.⁷⁸ At roughly the same time, the Court began to articulate limits to the muscular presumption of reviewability in *Heckler v. Chaney*.⁷⁹ Years before in *Dunlop v. Bachowski*,⁸⁰ the Court had relied on the presumption of reviewability to justify a fairly high level of scrutiny of agency enforcement discretion. In *Heckler*, the Court reversed course and held that enforcement discretion is presumptively unreviewable.⁸¹

These moves, which are often analyzed in isolation, are actually deeply related.⁸² Indeed, it is no accident that these decisions occurred in quick succession. In both cases, the Court found practical reasons to put agencies in the driver's seat as a default rule to be overcome only by evidence

⁷⁷ See Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984.

⁷⁸ Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1 (2017).

⁷⁹ *Heckler v. Chaney*, 470 U.S. 821 (1985).

⁸⁰ *Dunlop v. Bachowski*, 421 U.S. 560 (1975).

⁸¹ 470 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." *Id.* 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 68.

⁸² The re-articulation 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 Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975); Reuel E. Schiller, *Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 ADMIN. L. REV. 1139 (2001). 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 REG. 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.

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. 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.”⁸³ 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.”⁸⁴ Indeed, the opinion in *Heckler* cites some of the Court’s proto-*Chevron* deference opinions as a justification for a presumption against judicial review of agency nonenforcement.⁸⁵

As many scholars have recently noted, judicial practice in the last two decades has become more “muddled,”⁸⁶ reflecting a pragmatic compromise between the imperative of deference and the imperative of judicial duty.⁸⁷ As I will discuss in Part II, the Court has tinkered with deference at the margins without fundamentally discarding it.⁸⁸ That Jekyll-and-Hyde approach extends to recent

⁸³ *Chevron USA Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

⁸⁴ *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

⁸⁵ *Id.* at 831-32 (“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 *Vermont Yankee Nuclear Power Corp v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 543 (1978) & *Train v. Nat. Res. Def. Council, Inc.*, 421 U.S. 60, 87 (1975))).

⁸⁶ 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 (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).

⁸⁷ Pojanowski, *supra* note 40, at 18 (“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.”); see also Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017) (noting that, despite the blustery constitutional rhetoric, the Supreme Court has consistently stepped back when presented with opportunities to eliminate deference).

⁸⁸ 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 a

cases centering on agency denials of a duty to comply with a statute. In *Norton v. Southern Utah Wilderness Alliance*, for instance, the Court held that Section 706(1) of the APA only supports judicial review to remedy a failure to initiate a rulemaking when the operative statute imposes a discrete duty on the agency to conduct that rulemaking. As the Court explained, “broad programmatic attack[s]” on agency inaction on rules that agencies could but are not discretely obligated to write are beyond the scope of the courts’ power to review.⁸⁹ *Norton* itself walks and talks like it was written by an administrative supremacist. But then there are currents pushing in the other direction. In *Massachusetts v. EPA*, for instance, the Supreme Court clarified that agency denials of petitions for rulemaking were in fact subject to review.⁹⁰ The Court refused to give credence to EPA’s appeals to extra-statutory considerations that counseled not using the Clean Air Act’s authority to address mobile greenhouse gas emissions.⁹¹ In order to justify a non-use of the Clean Air Act’s authority, EPA would have to offer reasons made relevant by the statute itself.⁹²

These and other cases that could be cited suggest not only that the dominant administrative law theory has been inconsistent in terms of deference, but also that there is something of a meta-norm of symmetry, operating in the background of American administrative law, that demands an

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. REG.: NOTICE & COMMENT BLOG (June 26, 2019), available at <https://www.yalejreg.com/nc/what-kisor-means-for-the-future-of-auer-deference-the-new-five-step-kisor-deference-doctrine/>, 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 Daniel E. Walters, *Laying Bare the Realpolitik of Administrative Deconstruction*, SCOTUSblog (June 27, 2019), available at <https://www.scotusblog.com/2019/06/symposium-laying-bare-the-realpolitik-of-administrative-deconstruction/>; Ronald Levin, *Auer Deference—Supreme Court Chooses Evolution, Not Revolution*, SCOTUSblog (June 27, 2019), available at <https://www.scotusblog.com/2019/06/symposium-auer-deference-supreme-court-chooses-evolution-not-revolution/>.

⁸⁹ *Norton v. S. Utah Wilderness All.*, 542 U.S. 55 (2004).

⁹⁰ See Kathryn A. Watts & Amy J. Wildermuth, *Massachusetts v. EPA: Breaking New Ground on Issues other than Global Warming*, 102 NW. U. L. REV. COLLOQUY 1, 11-12 (2007). Although the Court claimed that such review is to be “highly deferential,” see *Massachusetts v. EPA*, 549 U.S. 497, 527 (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.

⁹¹ *Massachusetts v. EPA*, 549 U.S. 497 (2007).

⁹² Freeman & Vermeule, *supra* note 90.

equivalent approach to the minimization of both Type I and Type II errors.⁹³ The precise contours of deference may differ over time or across formal doctrinal categories as we negotiate and re-negotiate a settlement, but the overall trends are highly correlated, reflecting the overlapping consensus that the judge's task is to identify acceptable levels of interpretive errors that can arise either from underinclusiveness or from overinclusiveness. 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 always been disciplined by a commitment to symmetry, such that one period's approach to judicial review of agency compliance with statutes can be called "deferential" as a whole and another can be called "non-deferential" as a whole. 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 ways⁹⁴—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 preoccupation 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 statutes. These trends elide the fundamental symmetry of error types. Then, in Part 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.

⁹³ This principle might be understood as loosely related in form and function to what William Buzbee has called the "principle of 'process parity.'" William Buzbee, *Deregulatory Splintering*, 94 CHI.-KENT L. REV. 439, 445 (2019). The principle of process parity requires "symmetry of required process to make and change policy," so that an interpretive rule could be undone by another interpretive rule, but a notice-and-comment promulgated legislative rule would require notice-and-comment promulgated legislative rule. *Id.*

⁹⁴ Although there are interesting historical analogues to the negotiations in the 1930s. *See generally* Metzger, *supra* note 87 (drawing parallels between the two periods).

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.⁹⁵ Adrian Vermeule and Cass Sunstein dub roughly the same trends the “New Coke,” hoping that these currents will meet the same fate as the real New Coke.⁹⁶ 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.⁹⁷ All of these accounts see major change on the horizon for administrative law, particularly when it comes to the deference to questions of law that agencies have enjoyed for roughly the last forty years.⁹⁸

In terms of constitutional first principles, the arguments for this re-negotiation of the appropriate level of deference on questions of statutory interpretation mostly sound in Article III and Article I concerns.⁹⁹ 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 as between parties litigating before

⁹⁵ See *id.* Metzger’s article spurred two other ruminations on the rise of a more activist posture toward administrative law. See Aaron L. Nielson, *Confessions of an ‘Anti-Administrativist*, 131 HARV. L. REV. F. 1 (2017); Mila Sohoni, *A Bureaucracy—If You Can Keep It*, 131 HARV. L. REV. F. 13 (2017).

⁹⁶ Cass R. Sunstein & Adrian Vermeule, *The New Coke: On the Plural Aims of Administrative Law*, 2015 Sup. Ct. Rev. 41.

⁹⁷ Pojanowski, *supra* note 40.

⁹⁸ 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 and instead use their legal judgment to find the best meaning of relevant statutory law. See *id.*

⁹⁹ Walker, *Attacking Auer and Chevron Deference*, *supra* note 7, at 111 (noting that “predominant arguments against *Chevron* deference fall into two main categories: Article III and Article I concerns”). There is also an APA originalist argument against deference that centers on the text of the APA. See 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 non-deferential review).

the court.¹⁰⁰ 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 non-delegation doctrine.¹⁰¹ 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 consensus on divisive issues.”¹⁰² 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.”¹⁰³ This language, some have suggested, might be read to mandate *de novo* review of agency interpretations of statutes.

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 re-negotiation of the appropriate posture of judicial review. 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.¹⁰⁴

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

¹⁰⁰ Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187 (2016). Although it pre-dates 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 40.

¹⁰¹ *See id.* As of yet, the Court has refused to resuscitate the non-delegation doctrine, but in *Gundy v. United States*, the Court showed that it is close to doing so. *See* Adler & Walker, *supra* note 5, at 3 (“*Gundy*, however, is also noteworthy because only four Justices were willing to continue to embrace a toothless nondelegation doctrine.”).

¹⁰² *Egan v. Del. River Port Auth.*, 851 F.3d 263, 279 (3d Cir. 2017) (Jordan, J., concurring).

¹⁰³ 5 U.S.C. § 706.

¹⁰⁴ For instance, Nicholas Bagley has led the charge in pointing out the practical problems with aggressive judicial review of agency inaction. *See* Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285 (2013); Nicholas Bagley, *Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. 253 (2017); Bagley, *Procedure Fetish*, *supra* note 14.

operationally biased toward remedying only one kind of error in the implementation of statutes, at least in practice.

1. *Norton* as Super Deference for Negative Delegations

One of the tell-tale signs is the complete absence of any concern 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 non-impairment mandate for federal wilderness areas. 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.”¹⁰⁵ 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,”¹⁰⁶ which precluded a finding of a discrete, mandatory duty which BLM failed to act on. 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.¹⁰⁷ Had BLM issued a legislative rule restating this general non-impairment 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.”¹⁰⁸ The Court’s reasoning here betrays the non-statutory basis of the discrete duty test—indeed, lines later, the Court went on to explain the extra-statutory concerns about “judicial entanglement in abstract policy disagreements” that really drove the Court’s hands-off approach to agency inaction.¹⁰⁹ 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

¹⁰⁵ 43 U.S.C. § 1782(c).

¹⁰⁶ *Norton*, 542 U.S. at 66.

¹⁰⁷ *Id.* at 66.

¹⁰⁸ *Id.* at 66.

¹⁰⁹ *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.”).

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.¹¹⁰ 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.”¹¹¹ 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.¹¹² 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. Moreover, the pattern extends to claims that might appeal more to right-leaning critics of deference. 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 enforcement.”¹¹³ 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.”¹¹⁴ 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.

¹¹⁰ 34 U.S.C. § 40901 (“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.”).

¹¹¹ *City of New York v. U.S. Dep’t of Def.*, 913 F.3d 423, 433 (4th Cir. 2019).

¹¹² *Id.* at 433 (“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.”).

¹¹³ *Murray Energy Corporation v. EPA*, 861 F.3d 529, 532 (4th Cir. 2017). 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.

¹¹⁴ *Id.* at 536.

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.¹¹⁵ 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.¹¹⁶ 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.¹¹⁷

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 Plan for the Flathead National Forest. 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."¹¹⁸ 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. He noted that it was only after previously having "repeatedly gone out of [its] way over the last several years to defer

¹¹⁵ *Public Citizen, Inc. v. FERC*, 839 F.3d 1165 (D.C. Cir. 2016).

¹¹⁶ *See Yackee & Yackee*, *supra* note 62, at 395 (finding that many calls for rulemaking are framed in "permissive" terms); *Haeder & Yackee*, *supra* note 62 (same).

¹¹⁷ 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 (10th Cir. 1998). This underscores how tightly bound review of Type I and Type II errors has been, historically speaking.

¹¹⁸ *Montanans for Multiple Use v. Barbouletos*, 568 F.3d 225, 227 (D.C. Cir. 2009).

a mandamus order” that the court was finally forced to act by the Commission’s failure to act.¹¹⁹ 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.’”¹²⁰ 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.”¹²¹ 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.”¹²² 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

From its inception, the presumption of unreviewability for agency enforcement decisions announced in *Heckler v. Chaney* has posed a risk of allowing agencies to undermine the law by simply declining to pursue enforcement of disfavored provisions.¹²³ 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 health care have been administered through enforcement decisions.¹²⁴ Other

¹¹⁹ *In re Aiken County*, 725 F.3d 255, 266 (D.C. Cir. 2013).

¹²⁰ *Waterkeeper All. v. EPA*, 853 F.3d 527, 530 (D.C. Cir. 2017) (quoting *Public Citizen v. FTC*, 869 F.2d 1541, 1556 (D.C. Cir. 1989)).

¹²¹ *See* *Center for Biological Diversity v. EPA*, 722 F.3d 401 (D.C. Cir. 2013).

¹²² 2 AM. JUR. 2D ADMINISTRATIVE LAW § 131

¹²³ *See* Velikonja, *supra* note 64.

¹²⁴ Simone Hussussian, *Will the Affordable Care Act Die by Non-Enforcement?*, REG. REV. (June 20, 2019), available at <https://www.theregreview.org/2019/06/20/hussussian-will-affordable-care-act-die-non-enforcement/>; Robert Barnes, *Trump Administration Defends Ending DACA, and Supreme Court’s Conservatives Seemed Receptive*, WASH. POST (Nov. 12, 2019), available at 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.

examples can be found in previous administrations.¹²⁵ A close reading of *Heckler v. Chaney* and its progeny reveal 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.¹²⁶ 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”¹²⁷ to ensure that none of these exceptions apply.

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*.¹²⁸ 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.¹²⁹ The three unwilling commissioners in effect invoked the agency’s “prosecutorial discretion.”¹³⁰ 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.¹³¹ 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

¹²⁵ See Deacon, *supra* note 66; Price, *Politics of Nonenforcement*, *supra* note 66.

¹²⁶ *Heckler v. Chaney*, 470 U.S. at 832-33 (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”).

¹²⁷ *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). 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 “exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of [designation].” 16 U.S.C. § 1533(b)(2).

¹²⁸ 892 F.3d 434 (D.C. Cir. 2018).

¹²⁹ *Id.* at 437-38 (citing *Common Cause v. FEC*, 842 F.2d 436, 449 (D.C. Cir. 1988)).

¹³⁰ *Id.* at 438.

¹³¹ *Id.* at 444-45.

Election Campaign Act.¹³² In *West v. Lynch*, the D.C. Circuit likewise swatted away a challenge of the Department of Justice's Obama-era non-enforcement policy for cannabis on standing grounds, holding that *Heckler's* presumption against review of enforcement decisions rendered the plaintiff's injury unredressable.¹³³ 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*.¹³⁴ At issue was EPA's decision not to intervene to stop the construction of several "major emitting facilit[ies]" in an attainment area. 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" within an attainment area.¹³⁵ Nevertheless, the D.C. Circuit, with Judge Sentelle writing for two other conservative judges and frequent critics of deference,¹³⁶ declined to find *Heckler's* presumption of unreviewability overcome. Despite noting that the "Sierra Club's textual argument carries considerable weight," the panel engaged in a tortuous analysis to find that the "Administrator . . . had sufficient discretion to render her decision not to act nonjusticiable." 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.¹³⁷

¹³² *Id.*

¹³³ *West v. Lynch*, 845 F.3d 1228 (D.C. Cir. 2017).

¹³⁴ *Sierra Club v. Jackson*, 648 F.3d 848 (D.C. Cir. 2011).

¹³⁵ *Id.* at 856 (citing 42 U.S.C. § 7477).

¹³⁶ 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 Alliance v. EPA*, 853 F.3d 527 (2017) (Brown, J., concurring).

¹³⁷ *Id.* at 856.

The point here is not that courts *never* find the presumption rebutted.¹³⁸ 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.¹³⁹ 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 non-enforcement decisions.

3. Judicial Refusals to Review Agency Denials of Rulemaking Petitions

When *Massachusetts v. EPA* 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 *Massachusetts* not only clarified that there is no *Heckler*-like presumption against reviewability when it comes to challenges of denials of rulemaking petitions,¹⁴⁰ but also seemed to hold that agencies could ground the denial of such petitions only in the factors identified in the relevant statutory authority.¹⁴¹ 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 extra-statutory considerations like the need for rational resource allocation.¹⁴²

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 extra-statutory 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

¹³⁸ 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).

¹³⁹ Sunstein & Vermeule, *The Law of ‘Not Now,’* *supra* note 6, 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.”).

¹⁴⁰ *Massachusetts v. EPA*, 549 U.S. 497, 527-28 (holding that a denial of a rulemaking petition is presumptively reviewable, but that the standard of review is “extremely limited” and “highly deferential”).

¹⁴¹ *Massachusetts v. EPA*, 549 U.S. at 532-33; *see also* Sunstein & Vermeule, *The Law of ‘Not Now,’* *supra* note 6, 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*”).

¹⁴² Sunstein & Vermeule, *Law of ‘Not Now,’* *supra* note 6, at 175.

not actually followed through on *Massachusetts*' 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 extra-statutory considerations irrelevant,¹⁴³ 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."¹⁴⁴ Citing the "ordinary understandings of administrative and judicial litigation processes,"¹⁴⁵ 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 before a final conclusion is reached. Such discretion is a typical and often necessary feature of the administrative process."¹⁴⁶ 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*.¹⁴⁷

Decisions like these underscore that *Massachusetts v. EPA* was an exceptional case.¹⁴⁸ 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 extra-statutory 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.

¹⁴³ 751 F.3d 649, 651 (D.C. Cir. 2014); *see also* *Defenders 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).

¹⁴⁴ *Nat. Res. Def. Council v. U.S. Food & Drug Admin.*, 760 F.3d 151 (2d Cir. 2014).

¹⁴⁵ *Id.* at 166.

¹⁴⁶ *Id.* at 170-71.

¹⁴⁷ *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.").

¹⁴⁸ *See also* *Watts & Wildermuth*, *supra* note 90, at 14 ("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.").

4. Uneven Scorn for *Chevron*

An asymmetry in interpretive approach to the two types of error is also apparent in the ways that some critics of *Chevron* deference deploy it. 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.¹⁴⁹ 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.”¹⁵⁰

Of course, unexplained inconsistency of regulatory interpretations has been a central part of Justice Thomas's criticisms of deference in cases like *Encino Motorcars v. Navarro*. There, the Department of Labor changed a longstanding interpretation of a Fair Labor Standards Act overtime exemption for “service advisors” in automobile dealerships, and the Court declined to afford the Department of Labor's interpretation any *Chevron* deference in part because of the change of position. 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.’”¹⁵¹ 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 to the Department of Labor's previous 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. 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. Instead, Justice Thomas said that exemptions should be given a “fair (rather than a ‘narrow’) interpretation.”¹⁵² What a “fair” interpretation is, and how it differs from the “best”

¹⁴⁹ Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Services, 545 U.S. 967, 974 (2005).

¹⁵⁰ *Id.* at 981.

¹⁵¹ Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2129 (2016) (Thomas, J., dissenting).

¹⁵² Encino Motorcars, LLC v. Navarro, 138 S. Ct. 1134, 1142 (2018) (“*Encino Motorcars II*”) (alterations in original).

interpretation, are open questions. Certainly, the dissenters in the case did not agree that the exemption fairly encompassed service advisers.¹⁵³

5. The Roving Ghost of *Overton Park*

There is one doctrinal wrinkle that deserves special scrutiny from critics of deference, but which has received little. The Court recognized in *Citizens to Preserve Overton Park v. Volpe* that there might be statutes which 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.¹⁵⁴ 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, 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,¹⁵⁵ which sounds much like *Chevron* step two. Often, the application of this “no law to apply” concept seems pegged more to extra-statutory 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.¹⁵⁶

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

¹⁵³ *Id.* 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).

¹⁵⁴ *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. at 410.

¹⁵⁵ See Biber, *supra* note 18, at 9 n.22.

¹⁵⁶ 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 Navy v. Egan*, 484 U.S. 518 (1988))).

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.”¹⁵⁷ 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.”¹⁵⁸ 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.’”¹⁵⁹ Somewhat similarly—although without the apartisan overtones—the Court refused to invoke the ghost of *Overton Park* in the Dusky Gopher Frog case, *Weyerhaeuser*.¹⁶⁰ There, the Court held that “Weyerhaeuser’s claim—that the agency did not appropriately consider all the relevant statutory factors meant to guide the agency in 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.”¹⁶¹

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.¹⁶² 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

¹⁵⁷ *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2567-68 (2019).

¹⁵⁸ *Id.* at 2568.

¹⁵⁹ *Id.* (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 819-820 (1992)).

¹⁶⁰ *Weyerhaeuser Co. v. U.S. Fish and Wildlife Serv.*, 139 S. Ct. 361 (2018).

¹⁶¹ *Id.* at 371.

¹⁶² *See, e.g.*, *Cowels v. FBI*, 936 F.3d 62 (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); *CREW v. FEC*, 892 F.3d 434 (D.C. Cir. 2018); *Int’l Brotherhood of Teamsters v. U.S. Dep’t of Transportation*, 861 F.3d 944 (9th Cir. 2017); *Berry v. U.S. Dep’t of Labor*, 832 F.3d 627 (6th Cir. 2016).

Department had the authority to transfer funds to support construction.¹⁶³ 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.¹⁶⁴ When the case comes back on the merits, the Supreme Court will feel the full press of symmetry's mandate. Likewise, this term the Supreme Court will decide whether the Trump administration's reversal of policy on the Deferred Action for Childhood Arrivals (DACA) program is reviewable.¹⁶⁵ At least some of the Justices seemed receptive at oral argument to the government's assertion that the reversal is not subject to review at all.¹⁶⁶

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—much of it traceable to the same historical moment and intellectual foundations as *Chevron*, for instance—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. 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.

¹⁶³ *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.

¹⁶⁴ *Trump v. Sierra Club*, 588 U.S. ___ (2019), *available at* https://www.supremecourt.gov/opinions/18pdf/19a60_o75p.pdf.

¹⁶⁵ *Dep't of Homeland Sec. v. Regents of the University of California*, No. 18-587.

¹⁶⁶ Amy Howe, *Argument Analysis: Justices Torn, Hard to Read in Challenge to Decision to End DACA*, SCOTUSblog (Nov. 12, 2019), *available at* <https://www.scotusblog.com/2019/11/argument-analysis-justices-torn-hard-to-read-in-challenge-to-decision-to-end-daca/>.

B. Candidates for Policy-Driven Asymmetry in Statutory 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.¹⁶⁷ More amorphous and extra-constitutional 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.¹⁶⁸

¹⁶⁷ Cass R. Sunstein, *Reiewing 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.”).

¹⁶⁸ 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, *Importance of Resource Allocation*, *supra* note 18, at 19-20 (collecting policy arguments in favor of prosecutorial discretion, including that some enforcement opportunities carry “higher deterrence value” that economizes government

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 previously described by unitary executive theories. 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.¹⁶⁹ 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 under-comply with the law, at least where Congress has imposed obligations.¹⁷⁰ Together, this scholarship shows that, as a matter of theory, at least, Presidents do not have an infinite well of non-enforcement 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.¹⁷¹ 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.¹⁷²

resources); Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. L.J. 243 (2010) (noting that prosecutorial discretion is supported by both monetary 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.

¹⁶⁹ Julian Davis Mortenson, *Article II Vests Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169 (2019); see also Andrew Kent, Ethan J. Leib, & Jed Shugerman, *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* (working paper).

¹⁷⁰ Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671 (2014).

¹⁷¹ Again, on the account in Part I, judicial tolerance for error in statutory interpretation could be low or high, so long as it is high or low for both *types* of error together.

¹⁷² See *Util. Air. Reg. 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

Second, and perhaps more critically, any Article II source of authority to under-implement the law would also likely justify judicial deference more generally. If Presidents have the authority to under-implement the law, it is only because Congress's specificity ran out. It is well settled, after all, that in inter-branch constitutional relations, the executive power—whatever its inherent bounds—comes to an end in a clear Congressional command.¹⁷³ Any space for non-enforcement 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 under-enforcement 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' non-implementation of the best statutory understanding? In sum, it is difficult to reconcile an Article II permission slip for Type II error with the very case 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.¹⁷⁴ It is the fact that judges have abdicated their duty to say what the law is that creates the problem with deference.

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.¹⁷⁵ If one buys the premise that administrative law is there

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.”).

¹⁷³ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

¹⁷⁴ Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187, 1191 (2016) (noting that the “problem with most discussion of *Chevron* has been an almost exclusive focus on relations among the branches of government” 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 of their cases”).

¹⁷⁵ See Douglas H. Ginsburg & Steven Menashi, *Our Illiberal Administrative Law*, 10 N.Y.U. J. L. & LIBERTY 475 (2016); Biber, *Importance of Resource Allocation*, *supra* note 18, at 14 (noting that Justice Scalia privately argued that only the democratic process, not courts, should correct agency

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 under-utilization of statutory authority.

There may well be threads of this unabashedly libertarian thinking in contemporary critiques of deference.¹⁷⁶ 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.¹⁷⁷ The critiques of this line of thinking have, I think, been fairly convincing.¹⁷⁸ I would only add that, if one accepts the idea that 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 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.¹⁷⁹ In other words, there is an inherent tension between a substantively 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.

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 U. L. REV. 881, 894-97 (1983)).

¹⁷⁶ Sunstein & Vermeule, *Libertarian Administrative Law*, *supra* note 13.

¹⁷⁷ Mila Sohoni, *The Trump Administration and the Law of the Lochner Era*, 107 GEO. L.J. (2019).

¹⁷⁸ Sunstein & Vermeule, *Libertarian Administrative Law*, *supra* note 13; Sunstein & Vermeule, *The New Coke*, *supra* note 96.

¹⁷⁹ See, e.g., Adler & Walker, *supra* note 5, at 6 (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 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.”).

3. Remedial Deterrence

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. 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.”¹⁸⁰ A more recent, and irreducibly normative, debate in constitutional theory concerns whether rights are better conceptualized as trump cards or as one good to be traded off against other goods.¹⁸¹ 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 as well. On this account, 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.¹⁸² 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 unspecified action, and when that is all that courts can do, it is too easy for agencies to take courts for a ride.¹⁸³ Moreover, any action that courts require agencies to take to remedy a Type

¹⁸⁰ Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999); see also ANDREW COAN, *RATIONING THE CONSTITUTION: HOW JUDICIAL CAPACITY SHAPES SUPREME COURT DECISION-MAKING* (2019).

¹⁸¹ Jamal Greene, *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).

¹⁸² Thank you to Nick Parrillo for bringing this argument, and Daryl Levinson's article, to my attention.

¹⁸³ 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 American 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

II error commits agencies to a particular allocation of scarce resources that may be suboptimal from a social-cost perspective.¹⁸⁴

The problem with this argument from remedial deterrence, however, is that there is nothing unique about the remedial difficulties that courts face in reviewing agencies' commission of Type II error.¹⁸⁵ For instance, simple vacatur of a rule that an agency has spent years developing, while easy for a court to effectuate, can have a lasting impact on an agency's workflow and resource allocation decisions.¹⁸⁶ In 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.¹⁸⁷ 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. 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,¹⁸⁸ 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

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.*

¹⁸⁴ Biber, *Importance of Resource Allocation*, *supra* note 18.

¹⁸⁵ *Id.* at 23 (“Resource allocation cannot be the only factor that courts consider in reviewing agency decisionmaking, or judicial review would never take place.”).

¹⁸⁶ 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). Even Bill Jordan’s study of ossification, which looked at what agencies did on remand after rules were vacated and found that agencies often succeeded in promulgating a replacement rule, acknowledged that this 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).

¹⁸⁷ 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 (1975).

¹⁸⁸ See Nicholas 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.”).

appropriate, we would want it to be, as Eric Biber has argued, attuned to the action remedial difficulties in the case, and not pegged imperfectly to blunt distinctions between error types.¹⁸⁹

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 circumstances 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 normal, consensus 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."¹⁹⁰ 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."¹⁹¹ 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 will still be some cases where that is not possible and the issue is deemed "committed to agency discretion by law," and if these cases are mostly clustered on the side of Type II error, then in practice asymmetry may prevail.

To be persuasive, this argument would have to do more to articulate the special circumstances and characteristics—beyond pragmatic, extra-statutory 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

¹⁸⁹ Biber, *Two Sides of the Same Coin*, *supra* note 71.

¹⁹⁰ 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).

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

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,¹⁹² 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 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*.¹⁹³

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 and *Auer* 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. I will argue here that doctrinal

¹⁹² See *supra* Part I.

¹⁹³ Nicholas Bagley, *Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. 253, 255 (2017) (“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 (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.”).

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 interpretation of law “exert[s] a constant steady pressure that tells over time.”¹⁹⁴ 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, and why efforts to curtail deference are unlikely to result in lasting change—abandoning symmetry introduces intolerable instability and inconsistency in an already politically charged environment. Administrative law survives and thrives when it “works itself pure,” at least in part by adhering to norms of doctrinal symmetry that can appeal across political divides.¹⁹⁵

A. The Social Functions of Symmetry in Administrative Law

It is no secret that administrative law historically has been characterized by a “recurrent sense of crisis.”¹⁹⁶ 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.¹⁹⁷ 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.¹⁹⁸ Regulation, in particular, has become a flashpoint in our politics, and

¹⁹⁴ ADRIAN VERMEULE, *LAW'S ABNEGATION: FROM LAW'S EMPIRE TO THE ADMINISTRATIVE STATE* 2 (2016).

¹⁹⁵ *Id.* at 13.

¹⁹⁶ JAMES O. FREEDMAN, *CRISIS & LEGITIMACY* (1978).

¹⁹⁷ Metzger, *supra* note ____; Pojanowski, *supra* note ____.

¹⁹⁸ See, e.g., NOLAN MCCARTY, KEITH T. POOLE, & HOWARD ROSENTHAL, *POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES* (2016); Shanto Iyengar & Sean J. Westwood, *Fear and Loathing Across Party Lines: New Evidence on Group Polarization*, 59 AM. J. POL. SCI. 690 (2014); Steven W. Webster & Alan I. Abramowitz, *The Ideological Foundations of Affective Polarization in the U.S. Electorate*, 45 AM. POL. RES. 621 (2017). On regulation in particular, see Matthew A. Baum, *Partisan Media and Attitude Polarization: The Case of Healthcare Reform*, in *REGULATORY BREAKDOWN: THE CRISIS OF CONFIDENCE IN U.S. REGULATION* (Cary Coglianese, ed. 2012); Jonathan Baron, William T. McEnroe, & Christopher Poliquin, *Citizens' Perceptions and the Disconnect Between Economics and Regulatory Policy*, in *REGULATORY BREAKDOWN: THE CRISIS OF CONFIDENCE IN U.S. REGULATION* (Cary Coglianese, ed. 2012); Karlyn Bowman, *Where Is The Public On Government Regulation?*, FORBES (Oct. 23, 2017), available at

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

Unfortunately, we are going backwards, not forwards, 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.”¹⁹⁹ 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 a decidedly libertarian slant, insofar as it puts a thumb on the scale against government action and prizes governmental inaction.²⁰⁰ 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.²⁰¹ Symmetry norms in the law are often thought of as a powerful constraint on anti-social uses of the law, and they can be found in many politically charged pockets of law, such as anti-discrimination law,²⁰² constitutional

<https://www.forbes.com/sites/bowmanmarsico/2017/10/23/where-is-the-public-on-government-regulation/#1f63c50465b9>.

¹⁹⁹ Damon Root, *Federal Judge Says Judicial Deference to Executive Branch Agencies is “Judicial Abdication,”* REASON (April 20, 2017), available at <https://reason.com/2017/04/20/federa-judge-says-deference-to-executiv/>; see also Pojanowski, *supra* note 40 (describing a camp of “administrative skeptics” that believe that the administrative is “root and branch” unconstitutional and illegitimate, and that judges should exercise their power to say so).

²⁰⁰ Bagley, *Procedure Fetish*, *supra* note 14, at 21; see also Shapiro, *supra* note 6.

²⁰¹ SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT, *supra* note 31 (discussing the importance of bracketing disagreements to focus on foundational agreements).

²⁰² 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 (2017).

law,²⁰³ election law,²⁰⁴ and even intellectual property.²⁰⁵ Writing about constitutional law and some of the hot-button social issues it often addresses, Zachary Price notes how an “ethos” of “bipartisan symmetry may give force to notions of mutual toleration and broadly shared equal citizenship that ultimately underlie our system of constitutional self-governance.”²⁰⁶ He also notes that, “by seeking cross-partisan distribution of constitutional law’s benefits, symmetric constitutionalism may respond to the central political-process risk facing our constitutional order: the danger that tribal factionalism will degrade and destroy institutional structures and shared fundamental commitments.”²⁰⁷ Melissa Wasserman has extended these insights to administrative law and judicial review of agency action, which is almost as inextricably enmeshed in political conflict, finding that asymmetrical deference often cuts in favor of identifiable constituencies—namely, regulated entities—in terms of distributive effects.²⁰⁸ Symmetry by definition minimizes such skewed distributions of political outcomes.

While such 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.²⁰⁹ As Nicholas Bagley recognizes, the legitimacy of administrative institutions “is not solely—not even primarily—a product of proceduralism,” but “arises more generally from the perception that an agency is capable, informed, prompt, responsive, and fair.”²¹⁰ Left unaddressed,

²⁰³ Zachary S. Price, *Symmetric Constitutionalism: An Essay on Masterpiece Cakeshop and the Post-Kennedy Supreme Court*, 70 HASTINGS L.J. 1273 (2019); Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915 (2018); Richard Primus, *The Republic in Long-Term Perspective*, 117 MICH. L. REV. ONLINE (2018).

²⁰⁴ Andrew Chin, Gregory Herschlag, & Jonathan Mattingly, *The Signature of Gerrymandering in Rucho v. Common Cause*, 70 S. C. L. REV. 1241, 1253 (2019).

²⁰⁵ Rebecca Tushnet, *Towards Symmetry in the Law of Branding*, 21 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 971 (2011).

²⁰⁶ Price, *Symmetric Constitutionalism*, *supra* note 203, at 1276.

²⁰⁷ *Id.*

²⁰⁸ 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.”).

²⁰⁹ Bagley, *Procedure Fetish*, *supra* note 14, at 38, 48-62 (drawing on Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005) (drawing a contrast between legal and sociological legitimacy)).

²¹⁰ *Id.* at 49.

political inequities have the potential to undermine entire systems that rely on acceptance of common norms of fair play.²¹¹ 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 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.²¹² This gap is roughly symmetrical—*i.e.*, winners gain about as much confidence in the system as losers lose.²¹³ More importantly, though, social scientists have found that the losses in perceptions of legitimacy are exponential when there is a series of losses.²¹⁴ Tom Tyler’s work on procedural justice²¹⁵ 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.

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. Without symmetry, the regulated entity can discount these benefits and focus only on the downsides to deference—namely, the 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.²¹⁶ But of course many progressive constituencies worry much about corrosive capture (*i.e.*, the tendency of agencies to

²¹¹ *Id.* at 48 (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 U.C.L.A. 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).

²¹² Betsy Sinclair, Steven S. Smith, & Patrick D. Tucker, ‘*It’s Largely a Rigged System*’: *Voter Confidence and the Winner Effect in 2016*, 71 POL. RES. Q. 854 (2018).

²¹³ *Id.*

²¹⁴ CHRISTOPHER J. ANDERSON ET AL., *LOSERS’ CONSENT: ELECTION AND DEMOCRATIC LEGITIMACY* (2005); Anna Kern & Ann-Kristin Kolln, *The Consequences of Repeatedly Losing on Legitimacy Beliefs*, Conference Paper 2017.

²¹⁵ *See, e.g.*, Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUSTICE 283 (2003).

²¹⁶ Bagley, *Procedure Fetish*, *supra* note 14.

capitulate to regulated entities' requests for regulatory relief) and wish judges would constrain it.²¹⁷ 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 asymmetry will alleviate political conflict altogether, but it will shift its locus to the legislative and larger political arena where it belongs.

In short, an insistence on symmetry produces a laudable self-regulating and de-politicizing 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.

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

²¹⁷ Shapiro, *supra* note 6; 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 (2010). 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*, AMERICAN CONSTITUTION SOCIETY ISSUE BRIEF (Oct. 2018), available at <https://www.acslaw.org/wp-content/uploads/2018/10/Oct-2018-APA-Farber-Heinzerling-Shane-issue-brief.pdf>. 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. 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.

ultimately suggests that deference is likely to win out in the long run as long as symmetry does discipline the calculation.²¹⁸ In Part II.B.3, I argued that, from a formalist perspective, a concern about judicial interference with agency resource allocation and with 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 allow 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.²¹⁹

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.²²⁰ To the contrary, it would be a grave mistake to underestimate the costs of interpretive formalism, perhaps especially because those costs will be fully borne and not externalized by an asymmetric 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 eliminate deference. One inherent difference between agency inaction and action is that there are bound to be many more instances of inaction than action. There are countless decisions and non-decisions 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

²¹⁸ I do not see this point as in any inherent tension with my contention in Part III.A that symmetry tends to de-politicize 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.

²¹⁹ See *supra* Part II.B.3.

²²⁰ See Biber, *Importance of Resource Allocation*, *supra* note 18; Sunstein & Vermeule, *Law of Not Now*, *supra* note 6; Parrillo, *supra* note 188.

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,²²¹ 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.²²² 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 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. 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, both with respect to 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 non-deferential, but it needs to be symmetrical as to these error types. Beyond 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.

²²¹ Biber, *Importance of Resource Allocation*, *supra* note 18.

²²² Vermeule, *Law’s Abnegation*, *supra* note 194, at 2.