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SOUND GOVERNANCE AND SOUND LAW

*Colin S. Diver**

ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY. By *Christopher F. Edley, Jr.* New Haven: Yale University Press. 1990. Pp. xiii, 270. $30.

I have often thought of "scope of review" as the black hole of administrative law — a source of endless fascination and utterly no illumination, a collapsed doctrinal star that swallows up every idea in its vicinity, whose presence can be discerned only by the way it distorts the behavior of those who stumble into its gravitational field. In reflecting upon my own encounters with the subject, I am reminded of Oliver Wendell Holmes' description of his days as a law student at Harvard: "One found oneself plunged in a thick fog of details — in a black and frozen night, in which were no flowers, no spring, no easy joys."[1]

Anyone who dares to plunge into this bleak and humorless world deserves credit, if only for courage. In his recent book, *Administrative Law: Rethinking Judicial Control of Bureaucracy,* Christopher F. Edley, Jr.,[2] does just that. And it is indeed a courageous and ambitious effort. Drawing upon extensive experience as a student of law and public policy, federal bureaucrat, political strategist, and law professor, Edley has written a book of broad sweep that probes the underlying causes of administrative law's doctrinal malaise and offers a provocative remedy.

As diagnosis, the book succeeds admirably. Edley locates the principal source of doctrinal confusion in the ambivalences and ambiguities that characterize our attitudes about the separation of powers. As prescription, the book is far less persuasive. Edley urges reviewing courts to cast off the shackles of comparative institutional competence and become full partners in the development of effective public policies through the mechanism of "sound governance review." Like many bold manifestos, Edley's is long on exhortation and very short on specification. His utopia is imagined, not designed. Utopian reformers

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1. O.W. HOLMES, *Brown University — Commencement 1897,* in COLLECTED LEGAL PAPERS 164 (1920). I don't mean to pick on Harvard. It happens that Christopher Edley and I also studied there and that Edley is now a member of its faculty.

2. Professor of Law, Harvard Law School. Edley has also worked as a White House and presidential campaign aide.

will applaud. Curmudgeonly institutionalists will shake their heads. I guess I'm a curmudgeon.

I

Edley devotes the first half of his book to describing and criticizing the "structure" of contemporary administrative law. In a very brief introductory section, he traces the familiar story of the triumph of New Deal pragmatism over nineteenth-century "separation of powers formalism" (p. 5). Following the New Deal, the project of administrative law shifted from maintaining structural integrity in a system of separated powers to controlling the exercise of discretion broadly delegated to multifunctional administrative agencies. In the process, according to Edley, concern with separation of powers did not disappear; it merely went underground, as it were, to form the hidden substructure of contemporary administrative law doctrine. After years of patient jurisprudential archaeology, Edley has unearthed that structure for all to see.

The structure consists of a "trichotomy of paradigmatic decision making methods" that forms "the underlying framework both for calibrating the degree of judicial deference to be accorded agency action and for normative prescriptions about administrative procedure" (p. 13). Edley labels his three models "adjudicatory fairness, politics, and scientific expertise" (p. 3; emphasis omitted). The connection between this taxonomy and traditional separation of powers thinking is obvious. The three paradigms idealize the decisionmaking styles conventionally associated with the three branches of government, and in that sense the trichotomy carries forward into the modern era the structural concerns of nineteenth-century administrative law.

Edley devotes most of Chapter Two and parts of Chapters Three and Four to a demonstration of the pervasive influence of the trichotomy on judicial review of administrative action. Courts use the trichotomy, he claims, as a framework for categorizing particular administrative decisions or actions and then selecting the degree of deference appropriate to the decisionmaking model chosen. Thus, for example, Edley claims that the conventional law-fact-policy distinction in scope of review doctrine "flows neatly from the trichotomy" (p. 29). Courts tend to review "questions of law" most independently because they associate law finding with the adjudicatory fairness model that they themselves practice. They accord more deference to findings of "fact" and still more to determinations of "policy," which they view as products of successively less judicially accessible processes of scientific and political decisionmaking (p. 29). Similarly, Edley attributes a cluster of doctrines[3] based on the familiar rulemaking-adjudication

3. For example, the principle that a hearing is not constitutionally required in rulemaking proceedings, Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915); Londoner v.

distinction to trichotomous thinking (pp. 36-48, 175-80).

Edley devotes the balance of the book's first half to demonstrating the fundamental incoherence of a system of judicial review grounded on the trichotomy's three paradigms. He distinguishes between the system's "descriptive" and "conceptual" failings. The descriptive failings relate to the inevitably messy fit between ideal types and reality. As a consequence, courts often assign a particular agency action to the wrong category or incorrectly assume that the agency has satisfied the strictures of the ideal type. A common example is the reflexive judicial attribution of administrative "expertise" to decisions that were in fact informed primarily by political bargaining or just bad science (pp. 54-57).

The trichotomy's conceptual problems are of two types. First, the categories are intertwined to such an extent that it becomes almost impossible to police the boundaries among them (pp. 74-83). Each paradigmatic method of decisionmaking depends in some measure on methods characteristic of the others. Thus, to use Edley's example, good politics requires a foundation of reliable empirical information about the problem and alternative solutions (good science), which in turn requires some attention to concerns about the consistency with which competing interests are being treated (fairness), and so on (pp. 80-83).

The second conceptual failing of the trichotomy is the "attributive duality" of its three models (p. 83). By "attributive duality," Edley means that each model is associated with both positive and negative normative attributes. Thus, adjudicatory fairness is associated with the virtues of consistency, neutrality, and reasoned elaboration, as well as the vices of political unaccountability, proceduralism, and conservatism. Science has the positive attributes of objectivity, verifiability, and rationality, but also the negative attributes of alienation, impersonality, and inaccessibility. The political method implies both popular accountability and majoritarian tyranny, responsiveness and willfulness (p. 21 fig. 1). Given this duality, no absolute guide determines for courts when an agency should utilize a particular model. Although courts occasionally attempt to balance the costs and benefits of a particular methodology, as in the choice of rulemaking or adjudication,[4] usually they arbitrarily select either the positive attributes of

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Denver, 210 U.S. 373 (1908); the highly deferential standard for reviewing an agency's decision to make policy by adjudication rather than rulemaking, NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974); SEC v. Chenery Corp., 332 U.S. 194 (1947); the greater judicial tolerance for ex parte communications in rulemaking proceedings, Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981); and the "unalterably closed mind" standard for disqualifying a rulemaker for prejudgment or bias, Association of Natl. Advertisers, Inc. v. FTC, 627 F.2d 1151 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 921 (1980).

4. *See, e.g.*, National Petroleum Refiners Assn. v. FTC, 482 F.2d 672 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974); NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969); Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Adminis-*

the model favored or the negative attributes of the model disapproved.

As a consequence of these descriptive and conceptual failings, the trichotomy has not produced a coherent road map to guide courts in their search for constraints on the exercise of administrative power. Instead, it operates more in the manner of a menu, from which courts arbitrarily, selectively, and often inaccurately choose arguments to support conclusions based upon some other unstated considerations. To conclude his demonstration of the incoherent structure of contemporary administrative law, Edley leads us through that notorious jurisprudential swamp known as "scope of judicial review," concluding, as have so many others,[5] that a century of judicial and congressional wordsmithing has left a legacy of only confusion.

The second half of the book is devoted to considering various possible remedies for this state of incoherence. In Chapter Five, Edley surveys several remedial strategies, including statutory interpretation-based approaches exemplified by the work of Louis Jaffe,[6] the interest representation model sketched most fully by Richard Stewart,[7] bureaucratic rationality theories of the sort explicated in the work of Jerry Mashaw,[8] and the reductionist approach of Kenneth Culp Davis.[9] Not surprisingly, Edley finds all of these alternative strategies unsuccessful. The first three theories essentially restate the three parts of the trichotomy, but each fails according to Edley because it provides no escape from the model's descriptive and conceptual failings. Davis' pervasive "reasonableness" standard avoids the incompleteness of the other theories, but does so by merely resurrecting the trichotomy under the name of comparative institutional competence.

In the final two chapters, Edley finally unveils his own proposed remedy for the trichotomy-infected incoherence of administrative law. He begins by offering a "modest agenda" (p. 169) of incremental steps, subsumed under the heading "harder look" review. Edley acknowledges the apparent contradiction of trying to shore up a conceptual structure that he has spent 170 pages dismantling (p. 170). But he recognizes that most courts and commentators will find it impossible to toss away the conceptual crutches they have leaned on for so long.

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trative Procedure Reform, 118 U. PA. L. REV. 485 (1970); Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy,* 78 HARV. L. REV. 921 (1965).

5. *See, e.g.,* 5 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29 (2d ed. 1984); Gellhorn & Robinson, *Perspectives on Administrative Law,* 75 COLUM. L. REV. 771, 780-81 (1975).

6. *See* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION (1965); Jaffe, *The Illusion of the Ideal Administration,* 86 HARV. L. REV. 1183 (1973).

7. *See* Stewart, *The Reformation of American Administrative Law,* 88 HARV. L. REV. 1667 (1975).

8. J. MASHAW, BUREAUCRATIC JUSTICE (1983); Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness and Timeliness in the Adjudication of Social Welfare Claims,* 59 CORNELL L. REV. 772 (1974).

9. K. DAVIS, *supra* note 5, § 29:14 at 392-93.

It is to this audience that the incremental reforms of "harder look" review are addressed.

To the extent that courts persist in using trichotomous templates as the measure of administrative action, Edley's plea is that they use them with greater discrimination and in combination. Courts should look searchingly behind the facade of "fairness," "expertise," and "political choice" to see whether and to what extent the agency has in fact properly and sensitively utilized the methodologies associated with those virtues. The most interesting application of this otherwise unremarkable suggestion is Edley's discussion of how courts should treat agencies' political choices. Reviewing courts rarely acknowledge the operation of political considerations in agency decisionmaking, and when they do, they often exhibit a particularly simplistic or romanticized view of administrative politics.[10]

Edley calls on the courts to confront the operation of politics in administration head on, in three ways. First, courts should demand that agencies disclose the political considerations — both the ideological or partisan preferences and the interest-group accommodations — that played a role in the decisionmaking process. Second, courts should "regulate the mix of political and nonpolitical decision making paradigms" (p. 196) by defining the circumstances under which and the extent to which politics may properly play a role. Third, courts should police the "quality" of the agency's forays into the political world by requiring the agency to demonstrate, for example, that it consulted with all significant interests, or that its decision embodies a clearly expressed electoral mandate or congressional preference (pp. 196-99).

The heart of Edley's argument is the final chapter, in which he abandons the crabbed posture of critic and tinkerer, and assumes the visionary stance foreshadowed for over 200 pages. In this "speculative" essay, Edley calls upon the judiciary to "move away from its anachronistic focus on discretion and face directly the problems of sound governance" (p. 213). In Edley's bravura new world, a "reinvented" judiciary would become a full partner[11] in the poli-

10. Compare the opinions of Justices White (for the Court) and Rehnquist (partially dissenting) in Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 32-57, 57-59 (1983). In striking down a decision of the Transportation Department to rescind a motor vehicle safety standard mandating the installation of passive restraints, Justice White appeared to judge the rescission solely as an exercise in technical expertise, and made no mention of its political dimension. Justice Rehnquist, by contrast, expressly noted the part played by the election of Ronald Reagan and the resulting alteration in the weights assigned by the new administration to the costs and benefits of a passive restraint standard.

11. Pp. 136, 213-14. Edley struggles to find the precise metaphor to capture his thought. He seems most fond of the "partnership" image invoked by Judge Leventhal in Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851-52 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971), and repeated frequently by subsequent courts and commentators. *See, e.g.*, Natural Resources Defense Council, Inc. v. SEC, 606 F.2d 1031, 1048 (D.C. Cir. 1979); Gardner, *Federal Courts and Agencies: An Audit of the Partnership Books*, 75 COLUM. L. REV. 800 (1975); Sha-

cymaking process of government, sharing with the administrative and legislative branches the responsibility to make government more effective at coping with the massively complex problems it daily confronts. The goal of controlling bureaucratic discretion bequeathed to administrative law by the New Deal is no longer up to the task, if it ever was, according to Edley. The antidiscretion project, with its stilted conceptions of institutional roles, is at best an indirect method and at worst a perverse method of promoting sound governance. Separation of powers thinking must embrace a multifunctional conception of administration and a comparably encompassing conception of the judicial role in reviewing its handiwork. In the balance of the concluding chapter, Edley offers some suggestions on how a reviewing court would go about elaborating norms of sound governance and how the judiciary could be better equipped, by training and expert assistance, for the demands of such a challenging assignment.

II

The success of Edley's undertaking depends on the answers to three questions: has he accurately characterized the underlying structure of administrative law, has he convincingly demonstrated its incoherence, and has he constructed an attractive alternative? I would answer: mostly yes, mostly no, and mostly no.

In his search for the deep structure of the law of judicial review, Edley quite conventionally looks to the language of judicial opinions in cases reviewing agency doings.[12] Unfortunately, courts tend to be remarkably inarticulate about the considerations that inform their choice of reviewing posture. To the extent that they do attempt to articulate those considerations, they invoke a wide variety of analogies, metaphors, and rules of thumb to fill the commodious interstices of positive law.[13] The relationship between these judicial dicta and

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piro, *Administrative Discretion: The Next Stage*, 92 YALE L.J. 1487, 1507 (1983). Yet he acknowledges that, unlike partners, courts and agencies stand in a necessarily hierarchical relationship, comparable to that of a corporation's chief executive officer-vice president. Pp. 214-15.

12. Edley considers the possibility that the structure of administrative law might be located only in "a higher rationality" not expressed in judicial opinions. P. 129. But he dismisses the possibility on the grounds that there is no evidence of the increasing doctrinal clarity and articulation that one would expect a hidden rationality to produce.

13. For example, whether the contested action lies within the scope of "administrative routine," Gray v. Powell, 314 U.S. 402, 411 (1941), or the agency's "everyday experience," NLRB v. Hearst Pub., Inc., 322 U.S. 111, 130 (1944); whether there is an especially pressing need for litigation to terminate immediately, O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504, 508 (1951); whether Congress has "directly spoken to the precise question," Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842 (1984); whether Congress has created a presumption in favor of or against regulation, Motor Vehicle Mfrs. Assn. v. State Farm Mut. Ins. Co., 463 U.S. 29, 42 (1983); whether the agency's determination is "judgmental or predictive," FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 813-14 (1978); or whether the contested agency action involves the choice of remedy or sanction to impose for an established violation, Butz v. Glover Livestock Commn. Co., 411 U.S. 182 (1973).

Edley's trichotomy is not obvious to the naked eye. Courts rarely refer to a three-part taxonomy of legitimating concepts. Instead, their constructs are often dichotomous — such as the common distinctions between rulemaking and adjudication, findings of fact and conclusions of law, or independent review and deferential review. More commonly, courts simply invoke unitary concepts — such as "expertise" or "policy" — without specifying the typology of which they are a member. Statutory law also does not support Edley's construct, because Congress speaks in almost as many voices as the courts when it comes to scope of judicial review.[14]

To the extent that this linguistic rubble rests on any single conceptual foundation, however, I think Edley has got it right. Despite the general level of judicial inarticulateness, crude images of idealized judicial, scientific, and political decisionmaking processes lurk at or closely beneath the surface of most judicial opinions. Behind the judicial deference to OSHA's "expertise," for example, one can faintly discern an image of the scientist in her laboratory or the policy analyst at his computer. Similarly, aggressive judicial review of NLRB orders often seems to be based on an image of the agency as a common law court. Thus, while judicial and legislative rhetoric does not neatly map onto Edley's framework, one must conclude, with him, that a separation of powers ethos does indeed permeate judicial thinking.

One must also agree with Edley that the separation of powers, whatever its attractions as a rhetorical device, has not, in application, produced a very satisfactory jurisprudence of judicial review. Judges all too often make simplistic, selective, and conclusory use of the trichotomy. Among the numerous illustrations sprinkled throughout the book, perhaps the most telling are those in which two judges look at the same agency action and see two different things. Thus, in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*,[15] Justice White looked at the rescission of the airbag rule and saw bad science; Justice Rehnquist saw good politics (and acceptable science). In *Association of National Advertisers, Inc. v. FTC*[16] Judge Tamm saw the FTC's proceedings on children's advertising as a political process appropriate for an "unalterably closed mind" test for prejudgment,[17] while Judge MacKinnon saw sufficient trappings of the judicial process to call for application of a more adjudicatory "substantial bias" standard.[18]

Despite the relentlessness of his attack on the trichotomy, how-

14. See, for example, the variety of review standards contained in the Administrative Procedure Act, 5 U.S.C. § 706 (1988).

15. 463 U.S. 29 (1983).

16. 627 F.2d 1151 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 921 (1980).

17. *Association of Natl. Advertisers*, 627 F.2d at 1154, 1170-74.

18. *Association of Natl. Advertisers*, 627 F.2d at 1181-82, 1197.

ever, Edley cannot quite bring himself to consign it to the scrap heap. In his introduction, he characterizes the trichotomy as "unworkable as a foundation for doctrine" (p. 4) and as a cause for the "intractability" of doctrinal problems (p. 8), seeming to foreshadow its outright rejection. But in the body of the work his language is somewhat more temperate,[19] suggesting that the trichotomy may be salvageable after all. Indeed, Edley devotes an entire chapter to suggesting ways to make trichotomy-inspired review more serviceable, and in his final, most utopian chapter, the once-condemned trichotomy is miraculously rehabilitated as a "trio" — that is, as a principle of "sound governance" that "require[s] a combination of all three decision making paradigms included in the trichotomy" (p. 222).

This ambivalence leaves the reader wondering exactly how Edley would overcome the conceptual failings so patiently adumbrated in the earlier chapters. His apparent answer is to "[b]lend and [b]alance" the three models into an "integrated trio."[20] At first blush, the attraction of this strategy is undeniable. We all know that real life administrative decisionmaking is complex and multidimensional. Bureaucrats do (or should) try to follow the commands of applicable constitutional and statutory provisions and judicial precedents, treat like cases alike, worry about precedential effects, consider reasonable alternative courses of action, utilize appropriate analytical and evaluative methodologies, search for reliable data, accommodate significant organized and unorganized interest groups, and vindicate deeply held personal, partisan, or organizational conceptions of good public policy. The product of such a decisionmaking process cannot sensibly be forced into the Procrustean bed of a single paradigm. To the extent that courts in fact behave this way,[21] the "blending" strategy seems an undeniable improvement.

But on closer inspection, Edley's "blending" strategy is really no answer at all to the trichotomy's asserted conceptual failings. One cannot logically construct a coherent structure from three incoherent components. If the three paradigms' cognitive styles are so inter-

19. For example, he characterizes the conceptual failings as "shortcomings" that produce "confusion," "arbitrary" choices, and "unstable" conclusions. P. 73.

20. Pp. 222-23. See also his discussion of "paradigm mix" at pp. 192-96, 202-03.

21. Edley claims that such inappropriate "pigeonhol[ing]" is the "practical effect of most doctrinal reasoning." P. 223. I disagree. While it is true that courts selectively and simplistically invoke concepts like "expertise" and "policy" to justify their conclusions, I do not think that they are insensitive to the complexity of the decisionmaking processes they examine. Simply because, for example, Justice White focused on the analytical aspects of the passive restraint rescission in *State Farm* hardly means that he was unaware of or even unsympathetic with its political motivation. A plausible reading of his view is that the agency may, or should, take political considerations into account, so long as it establishes an evidentiary and analytical basis for concluding that its action is not inconsistent with the statute. Similarly, Judge Tamm's characterization of the FTC's action contested in *Association of National Advertisers* as "rulemaking" hardly implies that he was unaware of the mix of cognitive styles that inevitably enters into a proceeding to regulate children's advertising.

twined that they literally "collapse rather than merely mingle" (p. 135), "integrating" them is meaningless. They are, by Edley's own assertion, already essentially "integrated" into a formless mass. Similarly, if the models each suffer from attributive duality, taking them in combination will not magically produce attributive singularity. Integrating the models into a composite procedure would seem as likely to magnify the attributive duality, by posting even more pluses and minuses on the moral tally sheet, as to dampen attributive duality, by cancelling out the pluses or the minuses.

Edley offers two answers to the apparent logical impossibility of his blending strategy. The first is a rather off-hand and half-hearted suggestion near the end of Chapter 6 that courts should generalize the cost-benefit calculus announced by the Supreme Court in *Mathews v. Eldridge*.[22] Without addressing some of the formidable theoretical and practical difficulties with the *Eldridge* formula,[23] this prescription inspires little confidence as a way out of the conceptual thicket. One would have expected Edley to expend considerably greater energy on a problem apparently so crucial to his thesis.

The second, and by far the more important, answer is "sound governance" review. Edley is confident that courts, liberated from confining self-imposed notions of institutional competence, can fashion over time a common law of sound governance. As they do, principles for defining the proper mix and blend of decisionmaking models will emerge. If he is right, he is a prophet. If he is wrong, he is a dreamer. Which is it?

Unfortunately, Edley's "speculative essay" sketches only the dimmest outline of what "norms of sound governance" would actually look like or where they would come from. Most of the chapter is devoted to telling us what sound governance norms would *not* look like — namely, the trichotomy — and why we should trust courts to be able to handle the job. Precious little space is devoted to telling us what sound governance *is*. The most revealing passage appears in his discussion of how a court might approach the task of reviewing a hypothetical OSHA workplace health standard:

> I would not object to a court requiring the agency to evaluate regulatory alternatives using cost-benefit analysis or the Ames test for bacterial mutagenicity or to do so in terms of impact on each of several classes of affected individuals or firms. These matters seem substantive and certainly inappropriate for courts steeped in separation of powers ethos. But if a judge is persuaded that action without such analysis might well be unsound, the court should require it: When an accessible norm of

22. 424 U.S. 319 (1976). *See* pp. 210-12.

23. *See, e.g.*, Mashaw, *Administrative Due Process as Social-Cost Accounting*, 9 HOFSTRA L. REV. 1423 (1981); Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge: *Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976).

> sound decision making exists, or when the court can attempt to formulate one without prejudice to the power of agency or legislature to correct a judicial misconception, a conscientious judge should act on personal conviction. [p. 231; footnote omitted]

Taken at face value, this is an extraordinary statement. Edley would have reviewing judges substitute their judgment for that of administrators, on the basis of *personal conviction* about "what should be required in order to make sound public policy" (p. 231). Can he mean this? If reviewing judges should impose upon an agency their personal views about decisionmaking methodologies, should they not also impose their convictions regarding the alternatives to be considered, the interests to be consulted, the factors to be weighed, and the values and weights to be assigned? Will the pages of the *Federal Reporter* be filled with the ideological, partisan, even religious ruminations of judges, Republicans and Democrats, pro-lifers and pro-choicers, feminists and masculinists, ecologists and economists, science buffs and management buffs, alike? Will the chambers of the U.S. Courts of Appeals come to resemble the seminar rooms of the Kennedy School of Government?

This is surely a caricature, but how much of one? To his credit, Edley does not shrink from the eyebrow-raising implications of his proposal. He recognizes that he will be accused of unleashing judicial "willfulness" (p. 231) on the land. His response is not denial, but justification. His first line of defense is that open willfulness is preferable to the hidden form of willfulness that characterizes much judicial decisionmaking today (p. 231). Bringing judges' unspoken policy convictions to the surface, Edley argues, will promote a constructive dialogue among the branches about the meaning of sound governance in particular contexts. It is undoubtedly true that, in administrative law as in other fields of law, judges often exercise their personal convictions under cover of open-textured doctrine and conclusory labels. The orthodox remedy, however, is to tighten rather than loosen the doctrinal constraints. The Supreme Court has been doing exactly that, in a series of decisions that severely constrain the discretion of judges to second-guess agency decisions regarding such things as the choice of policymaking procedure,[24] the exercise of prosecutorial discretion,[25] and the interpretation of authorizing statutes.[26] Edley criticizes this recent trend as abdication of the courts' obligation to participate in the search for sound governance (p. 149). But that answer merely restates the underlying puzzle: what is sound governance, and what is the proper role of courts in promoting it?

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24. *E.g.*, Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978); NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974).

25. *E.g.*, Heckler v. Chaney, 470 U.S. 821 (1985).

26. *E.g.*, Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

Edley's second defense is that the danger of judicial willfulness is held in check by the very structure of the judiciary. The political process of judicial appointment helps assure that the "pluralism of political and social life generally will be reflected in the wills of judges" (p. 233). This is an enormously contestable proposition that requires much greater elaboration than Edley provides. There is much reason to doubt its empirical premise. Judges are drawn from a professional elite that is not likely to be representative of the larger populace, even in the long run. In the middle run — as we have seen in the past decade — the ideology of a particular Administration or sequence of Administrations can sharply tilt the political orientation of the judiciary. Given the judiciary's long tenure of office, the gap between the judiciary's and the society's preference structures may widen over time and persist for long periods.

Even if Edley were correct, as an empirical matter, that the judiciary faithfully mirrors the "pluralism" of the larger society, why, as a normative matter, would that fact justify the exercise of "personal conviction" by individual judges? We justify the exercise of "willfulness" by individual legislators by reference to their electoral accountability and the leveling effect of large-number voting.[27] Federal judges are not exposed to electoral recall, or for that matter any politically accountable form of recall short of impeachment. Nor do federal judges exercise authority as members of large groups, but rather sit only as individual presiding officers or as members of small appellate panels. In such a structure judicial "pluralism" will produce not leveling, but fragmentation and divergence. The outcomes and stated rationales of judicial decisions will vary widely, depending on the convictions of the judge or panel involved. Although review by the Courts of Appeals and the Supreme Court could theoretically constrain the degree of variation, it would do so only by substituting one unrepresentative set of personal judicial convictions for another. Furthermore, we know that the Supreme Court has only very limited practical capacity to police deviations among the courts of appeals.[28]

Edley's third argument in defense of the judicial willfulness inherent in sound governance review is the capacity for "correction" of judicial errors by interaction with agencies and Congress (p. 232). He foresees a "continuing dialogue among the branches" in an "interactive, dynamic process of governance" produced by the sheer multiplicity of forums (p. 236). In this part of his defense, Edley introduces two principles of institutional restraint. The less significant is the familiar point that courts should avoid deciding cases on constitutional

27. This, at base, is why the Supreme Court was correct in declaring unconstitutional the legislative veto. INS v. Chadha, 462 U.S. 919 (1983).

28. *See* Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093 (1987).

grounds, to permit Congress to overrule their decisions. The more significant is an exhortation that courts leave room for the exercise of administrative discretion on remand by avoiding excessively specific or outcome-determinative decisionmaking methodologies (p. 232). Thus, for example, Edley suggests that a court should tell an agency which interests must be represented in a regulatory negotiation rather than specify the relative weights to be assigned to the various interests participating (p. 229).

There are two defects in this line of argument. First, the terminology of "error correction" seems utterly misplaced. If sound governance is truly a matter of "personal conviction," the issue is not one of correcting errors, but of wielding power. Whoever has the last word wins. Why, in a "post-trichotomy world," should Congress or the agency have the last word?[29] Second, "dialogue" is not costless. The dialogue Edley envisions is a protracted, sequential, multiforum process that can make ravenous demands on the resources of its participants. And the world goes on. While judges, bureaucrats, legislators, and hired guns pursue their colloquy, workers breathe unregulated carcinogens, overregulated manufacturers lose market share, and unprotected wilderness disappears.

The final arrow in Edley's quiver is institutional and personal competence. At one point, he characterizes himself as "unusually sanguine . . . that federal appellate judges are more capable in more senses, both presently and potentially, than critics maintain" (p. 237). This is a rather remarkable turnaround for someone who has devoted nearly 200 pages to berating the federal judiciary for making an incoherent hash of administrative law for fifty years. Indeed, at one point in Chapter 4 Edley debunks Justice Frankfurter's profession of faith in the competence and self-restraint of the federal judiciary.[30] "[M]eritocratic appointments," sniffs Edley, "probably occur only by accident, and article III tenure insulates the mistakes and allows merit (somehow defined) to fade."[31] With supporters like Edley, who needs critics?[32]

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29. Edley might, although he does not, argue that the process he has in mind is more akin to the "deliberative" process envisioned by modern-day civic republicans such as Cass Sunstein. *See, e.g.*, Sunstein, *Beyond the Republican Revival*, 97 YALE L. J. 1539 (1988).

30. Universal Camera Corp. v. NLRB, 340 U.S. 474, 488-89 (1951).

31. P. 126 (footnote omitted). Edley defends his assertion that meritocratic appointments probably occur "only by accident" with these words: "This claim reflects my harsh view engendered by experience as a White House and agency appointee in the Carter administration and as an alarmed observer of Reagan administration appointments." P. 126 n.68.

32. The apparent variability of Edley's views on judicial competence points up the complete absence in his book of any articulated theory of administrative or judicial motivation. For a recent example of the growing literature on this subject, with citations to earlier examples, see Bishop, *A Theory of Administrative Law*, 19 J. LEGAL STUD. 489 (1990). Without some positive theory of administrative and judicial motivation, one simply cannot decide whether and to what extent the actions of administrators require oversight and whether and to what extent judges can be trusted to provide that oversight.

About the only evidence offered in Chapter Seven to support Edley's magically restored faith in judicial capability is a "quick[ ]" (p. 239) survey of the performance of federal judges in the course of devising and enforcing "structural injunctions" in institutional reform cases (pp. 252-59). But as he points out, fierce debate persists about whether and to what extent institutional reform litigation has been successful and how to legitimate the actions that many judges have taken to bring about those results.[33] Even if one accepts Edley's view of institutional reform litigation, I question whether it is an apt analogy for the job he sets before the federal courts. Most structural decrees are designed to remedy pervasive governmental violations of the constitutional rights of a politically vulnerable class. The high order of the underlying right and the systemic failure of the political branches to protect that right justify a degree of judicial activism thought inappropriate in more conventional settings. I would maintain that most cases of judicial review of administrative action fall securely within the conventional category.

III

I cannot help but wonder if I am beating a straw horse, so to speak. Edley does indeed use the strong language and provocative arguments that I have criticized. But lurking very close beneath this brave surface is a much more cautious vision of the judicial role. He advises courts to be increasingly deferential to agency decisions as they approach the "core of the administrator's role" (p. 229), to structure their orders to give the agency and even Congress an ample opportunity to "correct a judicial misconception" (p. 231), and to stay their hand unless they "see *clearly* how the agency's decision making can be improved" (p. 239). These passages suggest a much more nuanced conception of institutional role, a vision of powers separated functionally as well as chronologically and geographically.

As I read these passages, I cannot help but conclude that Edley's utopia will end up looking very much like our own imperfect world. In the search for "norms of sound governance," where else but to separation of powers would judges look for principles that stand a chance of general acceptance? Edley offers none; his argument is resolutely atheoretical. He would have courts steer their vessel by the constellation of "sound governance norms"; yet he offers us no grand theory of society or of the state from which to derive their content. In an age of aggressively ideological and metatheoretical legal scholarship, Edley is

33. *See, e.g.*, Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43 (1979); Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979); Sturm, *A Normative Theory of Public Law Remedies*, GEO. L.J. (forthcoming 1991).

a throwback to the apolitical days of his Legal Process mentors.[34] So, I confess, am I.[35] To the extent that we really differ, it may be only in our relative assessment of the comparative institutional competence of courts and agencies. As the material from which to craft a coherent structure of administrative law, comparative institutional competence may indeed be terribly plastic. But I think — and, in his heart of hearts, I think Edley thinks — that it is the only material we have. We'll just have to make the best of it.

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34. *E.g.*, H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (tent. ed. 1958); Jaffe, *supra* note 6.

35. *See, e.g.*, Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393 (1981); Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549 (1985).