COMMENTS

THE "NEW ADMINISTRATIVE LAW"—WITH THE SAME OLD JUDGES IN IT?

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And now, as they say, news from the front. Twelve years of reviewing administrative decisions brings to mind *The Witching Hour,* the current best seller by Anne Rice.[1] In it, a Lucifer-like spirit called Lasher roams through several generations of a New Orleans family. In each generation, a female family member, also a witch, acts as the medium for calling Lasher into being. At various times, depending on the nature of the witch, his spirit heals and nourishes; at other times it maims and destroys. Always, however, there is a seductive relationship between the spirit and the earthbound witch—they entice, thrill, and eventually take over one another, body and soul. This description is probably as good as any of what administrators and judges do with statutory spirits: New relationships form in each generation and the statutory spirit itself takes on new forms—sometimes for the good, sometimes for the bad. Our friends in academia are not innocent bystanders. Invariably, they also join in the seance, successively urging judges to be more adventurous, skeptical, deferential, or restrained—and now more substantive (in Sunstein's case) and governance-oriented (in Edley's case)—in calling forth the statutory spirit.

I. EDLEY'S "NEW ADMINISTRATIVE LAW"

In his Article, Professor Edley prefers to explain our current administrative law through a different, developmental metaphor: a system born in the New Deal era and now approaching its adolescence. Adopting his metaphor, sometime during the "bar mitzvah period" of administrative law, Judge Harold Leventhal spoke of agencies and courts as "collabora-

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1. A. RICE, THE WITCHING HOUR (1990).

tive instrumentalities of justice,"[2] and a "partnership in furtherance of the public interest."[3] We may have come full circle in Professor Edley's proposed "dialogue" between courts and agencies on the norms of sound governance.[4] However, relations between agencies and courts have soured in the intervening two decades. The "adolescent" agencies often perceive courts as oppressive and outdated patriarchs (or matriarchs, as the case may be) laying down absolute and even dysfunctional rules that make the normal operations of the agencies well-nigh impossible. Academics, however, think of courts as parents, too weak and permissive to insure the healthy development of our precocious ward. Edley urges us to move away from the interminable wrangling over discretion and the fine print of statutes, and to move toward a higher concern with sound governance principles.

Edley tells us that the "third wave post-liberal theories" he espouses so elegantly will "find resonance with judges *if* the implications of those theories are given concrete meaning in the work of the law and the design of institutions."[5] Here, I hope to provide some constructive criticism from the judicial trenches. Like Edley, I also would welcome change in the direction of sounder governance, but I believe the conceptual roots of such a change must accommodate judicial realities and constitutional constraints if it is to happen at all.

A. *Discretion: The Acne of Administrative Law*

Edley's criticism of the current administrative law scene recognizes (as it must) that a complicated administrative state such as our own requires a great deal of discretion, liberally spread around. On one hand, Edley chides the "liberal legal ideology" for too facilely portraying the role of discretion in government as inherently dangerous, such that "[t]he consequent threat to personal liberty and the general welfare must be contained through public law, including administrative law."[6] On the other hand, however, Edley also seems to buy into the popular criticism of judicial review as simply transferring discretion from the bureaucrat to the judge, "hiding it, as it were, beneath black robes and in dusty

2. Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir.), *cert. denied*, 403 U.S. 923 (1971).

3. *Id.* at 851.

4. *See* Edley, *The Governance Crisis, Legal Theory, and Political Ideology*, 1991 DUKE L.J. 561, 600-04.

5. *Id.* at 589.

6. *Id.* at 566.

volumes unintelligible to the lay public and media."[7] Eventually, Edley embraces more discretion for both agencies and courts, and trusts that abuses will be controlled by a kind of family therapy exchange between the two entities, replacing the inadequate and manipulative sets of "dos and don'ts" that presently govern the relationship. "Rather than shrouding judicial discretion in indirection and doctrinal manipulation, new courts and new judges would undertake this project with a self-conscious sense of their potential contribution to a collective effort to improve governance."[8]

Edley's diagnosis of the "normative dualities" and the tripartite "boundary problems" between adjudicatory fairness, science, and politics (a.k.a. law, expertise, and policy) that plague our adolescent administrative law is creative and instinctively plausible. Edley correctly traces that model to its ancestral origins in the constitutional separation of executive, legislative, and judicial powers.[9] Nonetheless, for the following reasons, I am not convinced that he has made the case for throwing out the current system—acne and all—or even demoting it to a subsidiary role as the framework for judicial review.

First, judges are relatively sophisticated about the artificiality of compartmentalizing disputes into one paradigm over another. We are aware that none of the three major governance functions—legislative, executive, and judicial—are exclusively performed by any one branch, and that these functions are overlapping ones with permeable boundaries, *INS v. Chadha*[10] notwithstanding. In government, there are few bright lines, and many shades of grey. I doubt that many of today's judges "indulge a dream that Congress must make all fundamental policy judgments and that the role of bureaucrats should be confined as nearly as possible to ministerial implementation."[11] Similarly, judges know that administrative disputes inevitably involve mixes of the three paradigms—law, expertise, and policy—and that the boundary lines are often fuzzy. Thus, I am neither ready to plead guilty on behalf of the judiciary to any significant amount of judicial "paradigm-shopping" to find the right standard of review, nor about to concede to judicial naiveté that administrative decisions can easily be categorized into a single paradigm. For instance, I do not believe that judges generally move faster to intervene in a case grounded on adjudicatory fairness challenges than in cases

7. *Id.* at 567. As an aside, I would put my money on the media's capacity to understand judicial decisions. For instance, the *Wall Street Journal*'s editorial page takes delight in ferreting out any conceivable—let alone real—judicial takeover of which its writers disapprove.

8. *Id.* at 604.

9. *See id.* at 574.

10. 462 U.S. 919 (1983) (invalidating legislative veto as usurpation of executive function).

11. Edley, *supra* note 4, at 602.

brought on other grounds. *Vermont Yankee*[12] put a stop to judicial innovation in the procedural arena; an occasional case involving a dispute over the need for notice and comment is basically all the administrative procedure we deal with now. On the whole, courts have been quite hospitable to the agency's need for flexibility in wielding its discretion.[13] In sum, I am not sure that the case for excessive judicial formalism and manipulation in the trichotomy-based review has yet been made.

Second, I believe the distinction between agencies (or Congress) as the expert policymakers, and the courts as the Moses-like parent figures confined to saying mostly "you can't do this or that, but in between, lead your own life—we don't want to be your pals or join in your games," *is* the correct primary focus for judicial review. Of course, different judges (and sometimes even the same judge in different cases) may on occasion exploit the "normative dualities" of the distinctions between law, expertise, and policy, stressing plain textual meaning (even after fifty years of a different interpretation), or the need for reasoned elaboration, or political accountability, or the need for consistency in administrative interpretation as necessary to meet the desired result. And, indeed, some cases involve facts so complex, or legal doctrines so vague and inherently judgmental (a "reasoned judgment" could go either way) that judges are driven to a synergistic bottom line. In such cases, even the most conscientious judge who reads the record and briefs, and listens to the arguments of counsel, often leaves the bench with a gut feeling that one side is right. However, the same judge (unless of course she has come from academia) may not be able to present an elaborate organization of her reasoning at conference—the subconscious has knit a multitude of concerns into a tapestry in which the individual skeins are not easily pulled apart.

Despite all this, the nature of judging requires a bona fide attempt at a reasoned rationale as a critical part of the integrity of both the agency and court decisionmaking processes, even though "dualities" of "trichotomies," and more, enter into the process, however hard theorists try to define or confine it. Thus, although judges recognize the duality and the boundary problems that Edley cites, I believe we already deal with them as conscientiously as we can. Of course, we have not yet systematically directed our efforts toward Edley's prescription of "evolv[ing] a norma-

12. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978) (holding that courts may not require agencies making rules to adopt and follow procedures not specifically required by Congress).

13. *See* Schuck & Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law,* 1990 DUKE L.J. 984, 1011 ("The courts have practically gone out of the business of imposing new procedural requirements on agencies.").

tive framework for sound agency governance."[14] Many judges resist being "drawn into that challenge, with all the attendant risks and potential benefits."[15] Maybe like Hamlet, we would simply "rather bear those ills we have / Than fly to others that we know not of,"[16] but I think our doubts go deeper.

I am not sure we can or should escape the separation of powers focus of judicial review. That focus is still needed for our legitimacy and is best attuned to our competency. Administrative agencies are hybrid creatures juxtaposed on the three constitutionally defined branches. Although we need them, we also need some rules to prevent these sometimes unruly, rebellious adolescents from taking over the entire household.

As Edley points out, administrative agencies have grown up in an era of divided government: Republicans in the Presidency and in control of the agencies, Democrats in control of Congress. The agencies typically want to do things they think need doing, in accordance with the philosophical bent of the current administration. Although they may chafe at the bridle of old statutes, agencies do not always have the power to get objectionable statutory language repealed or amended within a reasonable time frame. In frustration, the agency often "goes for it" anyway, by new interpretations of the old law. Of course, this approach puts the courts in the middle. The "law of the referee" is invoked to call the shot—up or down, and of course to give reasons. Although one may disagree with some of our calls, the essence of the judicial function and its structural role in these disputes is still, I believe, sound and necessary. At the behest of aggrieved parties, the courts act as a brake on the political branch that tries to run off with the powers of another. In administrative law, of course, the aggrieved party typically charges that the executive has exceeded the powers delegated by Congress. This allegation recurs hundreds of times every term in our court. Short of constitutional overhaul, how will reconceptualizing administrative law, rethinking judicial review, or even revising our "ideology," change that essential role of the judiciary or the inevitable focus it puts on separation of powers concerns?

Our Constitution operates on a notion of limited government, and administrative agencies wield vast powers over everyday human affairs. Assuming we do not want their actions to be totally discretionary, how should they be limited? Although internal executive monitoring has its role, not everyone—including Congress—would be content to let the Of-

14. Edley, *supra* note 4, at 603.

15. *Id.*

16. W. SHAKESPEARE, HAMLET act 3, sc. 1, lines 81-82 (T. Spencer ed. 1980).

fice of Management and Budget (OMB) have the final word. Its proximity, both geographically and politically, to the Oval Office does not assure neutrality in isolating itself from the excesses or conflicts of power.[17] Of course, Congress can hold oversight hearings, and even occasionally deny appropriations for a specific purpose, but that hammer-and-chisel approach must be and is used selectively, albeit often on political grounds. Thus, it is not clear what would replace the "containment" potential of judicial review in the new administrative law.

Edley accepts the relevancy of separation of powers to sound governance review, but would mute its dominant role.[18] I am not so sanguine that this shift in institutional role can or should occur. After all, the courts are a receptor branch, and unhappy litigants push our judicial buttons. If parties raise challenges of lack of statutory authority for an agency's action, courts must react. If Edley's broader aspirations for sound governance, i.e., "growth and investment stimulated through regulation; equality (not mere promises of opportunity); education and children; environmentalism; activist government; and effectiveness and accountability of large organizations, public and private"[19] actually came to fruition, I believe the need for separation of powers review by courts would be greater, not less. The more social and economic power we give government agencies, the more essential judicial review becomes as a safety valve to insure that they do not abuse it.

The separation of powers doctrine itself stems from a fear of concentration of power, and envisions a watchdog stance among the branches. However, Edley's approach adopts a "let us reason together" thesis, a much more optimistic tack than the Framers took. Even if time proves Edley right, agencies will still need watching. Although most judges do not conceive of executive discretion as dangerous[20]—indeed, in the D.C. Circuit, we uphold agency action in over sixty percent of our cases[21]—many also feel that the evaluation of agency action under authorizing statutes or even the broadly worded mandates of the Administrative Procedure Act (APA)[22] is still vitally necessary to an accountable govern-

17. *See, e.g.*, Lewis, *Regulatory Review Office in Dispute*, N.Y. Times, May 5, 1990, § 1, at 10, col. 4 (OMB has been "main focus of an ideological battle over reducing the amount of Government regulation").

18. *See* Edley, *supra* note 4, at 597.

19. *Id.* at 598.

20. *See, e.g.*, Williams, *The Roots of Deference* (Book Review), 100 YALE L.J. 1103 (1991) (reviewing C. EDLEY, ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY (1990)) (criticizing Edley's enthusiasm for judicial activism as too extreme).

21. Schuck & Elliott, *supra* note 13, at 1042.

22. 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 5372 (1988).

ment and, in some cases, to individual liberties.[23] The real question is: Can or should we be doing more?

B. *Judicial Politics*

Before turning to the new and enlarged role Edley envisions for courts, let me briefly allude to one of Edley's most intriguing suggestions. Edley calls for an express recognition of "the role of partisan ideology or political preferences in agency decisionmaking" in the context of judicial review.[24] Edley correctly finds that the content of administrative decisions is often "deeply and thoroughly political."[25] Everyone who has done a stint in the federal executive branch (including many currently on the bench) has war stories of the White House or OMB "knocking agency heads together" in an attempt to make results come out in a politically acceptable way. The question of course is what, if anything, the courts can or should do about this phenomenon. Even if, as Edley hypothesizes, an agency were to be utterly candid about revising regulations to better fit the President's regulatory philosophy,[26] our basic judicial function would remain the same. We would still need to determine if the challenged regulation was authorized by the statute and whether it made sense under the APA, in light of the facts or expert opinions considered by the agency. Even if agencies appear to be hunting and scratching for objective justifications to support a highly desirable political result,[27] the court's basic mission remains, even if it feels compelled to treat the agency's asserted justifications as its real reasons, although the Beltway coguoscenti know differently.

Edley claims that there are three benefits from increased agency and judicial candor about the role of politics in administrative law: (1) "the agency will feel less pressure to contrive answers within the science paradigm"[28] so as to bring its decisions within the bounds of its discretion under the statute; (2) "the agency focuses the public and reviewing court

23. It is interesting to observe that the newly emerging democracies in Eastern Europe and the Baltics are most avidly interested in the American experience with review of executive and legislative action by an independent judiciary as an antidote to decades of citizen impotence in the face of omnipotent bureaucracies. *See, e.g.*, Skapska, *The Rule of Law from the East Central European Perspective*, 15 LAW & SOC. INQUIRY 699, 700 (1990) (Polish reformists stress "the independence of the courts of law and their rights to control all other authorities created in order to protect the legal order and the public interest."). The courts' control of administrative discretion is apparently academically *avant garde* rather than *passé* in Eastern Europe.

24. Edley, *supra* note 4, at 576.

25. *Id.* at 562 (quoting R. DWORKIN, A MATTER OF PRINCIPLE 146 (1985)).

26. *See id.* at 578.

27. *See id.*

28. *Id.* at 577.

on whether additional science (i.e., evidence) should be required";[29] and (3) "the agency is signalling to the public and Congress that the decision . . . reflects the workings of the electoral process."[30] As to the first and second benefits, agencies *should* be constrained by their statutory authority, and it is the courts' job to see that they are. And although the third benefit may have some merit, Congress is directly elected by the people, whereas agency heads partake only indirectly in the President's electoral mandate. Thus, when Congress passes a law, that action has just as much (if not a greater) majoritarian imprint as an agency decision justified in whole or in part by the President's political preferences. If an agency decision is argnably outside the intent of Congress, it signals no victory for majority rule even if it is consistent with the President's policies.

Actually, the Justices of the Supreme Court have recently expressed their recognition of politics as a legitimate component of administrative action. In *State Farm,*[31] the Reagan Department of Transportation sought to revoke a mandatory rule on automobile airbag and passenger restraints. On review, the Supreme Court reversed the agency on standard administrative law "hard-look" grounds.[32] Although it recited that an "agency must be given ample latitude to 'adapt their rules and policies to the demands of changing circumstances,' "[33] the Court also insisted that "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.' "[34] The Court overturned the rule revocation as unjustified, based on the evidence before the agency.

It was Justice Rehnquist's separate opinion, however, that explicitly posed the weighty "P" issue:

> The agency's changed view of the standard seems to be related to the election of a new President of a different political party. It is readily apparent that the responsible members of one administration may consider public resistance and uncertainties to be more important than do their counterparts in a previous administration. A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations. As long as the agency remains within the bounds established by Congress, it is entitled to assess

29. *Id.*

30. *Id.*

31. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

32. *Id.* at 41, 57.

33. *Id.* at 42 (quoting Permian Basin Area Rate Cases, 390 U.S. 747, 784 (1968)).

34. *Id.* at 43 (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962)).

> administrative records and evaluate priorities in light of the philosophy of the administration.[35]

It may surprise some to hear that I think now-Chief Justice Rehnquist was both right in principle and accurate as to the current practice. Political ideology and presidential policies are thumbs on the scales when agencies balance their various obligations and considerations under a statute or decide how to evaluate certain kinds of factual or expert evidence in a record. Ideology can, and frequently does, provide a lens through which the agency views the evidence, and even reinterprets broadly worded statutory standards like "best interests of the public." Judges intuit this and generally provide ample elbow room to the passing parade of new agency heads in interpreting their old statutory mandates. The Federal Communications Commission (FCC), for instance, was able to accomplish a communications deregulation revolution in radio and television licensing without running afoul of the courts, going to Congress for new authority, or even talking about politics.[36] But as Justice Rehnquist points out, political ideology cannot carry the agency outside of statutory commands or prohibitions, and presumably not outside the APA's "substantial evidence"[37] or "arbitrary and capricious"[38] standards.

So what would more agency and judicial candor about politics achieve? One might envision a diminished judicial review, limited to determining whether an agency's change in direction ran clearly contrary to statutory directives. This would limit review to a *Chevron*[39] inquiry that asks only if Congress had specifically prohibited the agency action. This move, however, would clearly require a change in the APA. Beyond that, a court could dispense with any arbitrariness/rationality inquiry on the assumption that politics has its own *raison d'etre.* Of course, constitutional *sine qua nons* like procedural due process or equal protection would still have to be honored. I doubt, however, that Edley's plea is headed in that direction. Edley may merely be requesting more explicit acknowledgment of what the courts are already doing.[40] He says:

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35. *Id.* at 59 (Rehnquist, J., dissenting).

36. *See, e.g.,* Office of Communication of the United Church of Christ v. FCC, 707 F.2d 1413 (D.C. Cir. 1983) (upholding FCC decision to eliminate or modify existing regulations and to adopt new rules and policies as a product of informed rulemaking procedures conducted pursuant to the APA).

37. 5 U.S.C. § 556(d) (1988).

38. *Id.* § 706(2)(A).

39. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 865-86 (1984).

40. For another example of Supreme Court recognition of the legitimacy of political considerations, see Justice Stevens's opinion in *Chevron* itself:

> My own view is that when the Federal Energy Regulatory Commission (FERC), the National Highway Transportation Safety Administration (NHTSA), EPA, OSHA, and other agencies discharge mandates of great political moment, governance would profit from some frank effort to explain the interrelationship of science, politics, and rule of law methods. . . .
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> . . . . Reviewing courts should credit politics as an appropriate element of decisonmaking, subject to reasonable tests of conflict with science and law.[41]

But how are courts supposed to react to this statement? Should we merely take judicial notice of the articulated political component of a decision and apply our standard tests to the rest of the decision to see if it passes muster?[42] Or should courts give special deference when the decision is avowedly at least partially political? Edley's warning that an overruling of a political decision would be perceived as a "political" act highlights the downside of letting it all hang out.[43] I fear that more explicit judicial candor about the role of politics in decisionmaking, particularly by reviewing the political aspects of agency decisions, would inevitably bring politics into the courthouse as well. Perhaps political considerations already lurk in the shadows of judicial review, but do we really want to bring it into the sunlight? The judiciary still operates on the public perception that courts perform some type of neutral umpire function in a nonpolitical way. If we dive into the political surf neck deep, will we not pay the price of increased cynicism about our role in other areas of the law where our credibility is even more essential to our function?

Edley makes one telling point that does hit home. In an era of divided government, agency deference is not equivalent to political neutrality. In practice, too much deference to an agency can amount to a judicial alliance with the executive against the legislature. Edley recognizes that the legislature deserves the system of checks and balances.[44] I suppose that everything in law, especially administrative law, partakes

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> [A]n agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

Id.

41. Edley, *supra* note 4, at 576, 578.

42. This would not be unlike excusing bar applicants from the essay part of the bar exam if they score high enough on the multistate portion!

43. *See* Edley, *supra* note 4, at 577.

44. *See id.* at 599-600.

somewhat of politics, but there are gradations. In the end, I think judges must be cautious about explicitly inviting politics into the realm of their review. Politics as well as discretion must operate within legal and constitutional constraints; my view is that it already has plenty of room to do so.

C. *The Dialogue*

Edley's project theorizes a larger role for courts than merely keeping agencies statutorily or even politically honest. The core of his new administrative law would be:

> an ongoing exchange with the political branches about norms of sound governance. . . . [A] process of subconstitutional, common law elaboration of substantive and procedural matters ranging from cost-benefit methodology, to the paper hearing requirements in informal rulemaking, to presumptions about the direction of congressional policies trenching on such fundamental social concerns as federalism and income redistribution.[45]

I am intrigued but perplexed about several aspects of the "dialogue." Who authorizes it? Congress, of course, has been vested by the Constitution with the authority to define the jurisdiction of courts and the scope of judicial review.[46] So presumably Congress must be a willing partner in any revamping of the federal courts' role in the new governance. Fidelity to an ephemeral congressional intent has been much criticized as an exclusive or even primary goal of judicial review,[47] but apparently Congress continues to see the courts as their post-enactment defender. It remains unclear how readily Congress would authorize a radical change in that role.

Redefining our own role would be more difficult. Edley cites examples in our present jurisprudence where courts engage in dialogue with agencies, i.e., public interest institutional reform, antitrust decrees, and corporate bankruptcies.[48] Although federal judges have indeed worked with schools, prisons, and asylum officials over many years to insure constitutional rights, the dialogue in these cases occurs in the remedy phase—after there has been an initial finding or concession of constitutional or statutory violations. If Edley's prescription for judicial guidelines, presumptions, and temporary stays of mandates to allow agency counterproposals are all geared to post-violation administrative law remedies, they may indeed have some analogies in other parts of our juris-

45. *Id.* at 601.

46. *See* U.S. CONST. art. III, § 2, cl. 2.

47. *See* C. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 127-37 (1990).

48. *See* Edley, *supra* note 4, at 601.

prudence. But if his conception of the dialogue would actively engage us in agency governance review before deciding if an agency has erred, I know of no current practices that resemble his proposal. The authority for any such departure from our present practice, if indeed it is constitutionally permissible, must surely come from Congress, especially after *Vermont Yankee,*[49] *Chevron,*[50] and *Pension Benefit Guarantee Corp. v. LTV Corp.*[51] (which Edley suggests would disappear into the mist[52]). Permitting a court to review and presumably remand if it disagrees with agency use of resources, public participation, experts, or cost-benefit analyses in their decisions[53] would amount to an awesome extension of judicial power. Assuming it would be constitutional, this step would surely require approval by Congress before implementation.[54]

Finally, what do judges like myself really have to contribute to the governance dialogue? Edley is more optimistic than I am after twelve years on the D.C. Circuit. He believes that "administrative lawyers, and especially judges, . . . are steeped in the ways of public administration," and a "program of study and focus recommended by Sunstein would make us more so."[55] However, asking judges to familiarize themselves enough with the policies and operations of the dozens of agencies that

49. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978).

50. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 865-86 (1984).

51. 110 S. Ct. 2668 (1990).

52. *See* Edley, *supra* note 4, at 601.

53. Edley correctly points out that courts now frequently remand for a more adequate explanation when they find it impossible to decide whether the agency's decision has been rational and taken into account all relevant considerations. *See, e.g.,* Tennessee Gas & Pipeline Co. v. Federal Energy Regulatory Comm'n, 926 F.2d 1206 (D.C. Cir. 1991) (remanding for more adequate explanation concerning selection of rate and return in ratemaking proceeding). This concept, however, is not infinitely expandable to include all the components of decisionmaking on which the court and agency heads might disagree.

54. In fairness, the new judicial role is only one part of Edley's larger cosmos for administrative law, which involves integrating a view of the world and an all-embracing political ideology with the way we govern. The bigger regulatory picture is also the backdrop for Sunstein's value-laden, contestable canons. In view of this, the source of the global vision becomes all the more important.

In a political democracy, one might expect that global view to come from Congress and the President, preferably as a unit. But I understand that the vision of the new administrative law is one that should not change with every election, veering from New Deal to Reaganomics, but must exist on some higher plane, apart from these political shifts. In my experience, however, power influences ideology just as much as ideology influences the exercise of power. Thus, the anti-government, quasi-populist philosophy attributed to Reaganism gave way in some administrative decisions to an aggressive assertion of executive power and a decided tilt against broadened public participation. Indeed, even articulate proponents of judicial restraint often took on a decidedly activist stance when it came to announcing revisionary doctrines on standing, political question, ripeness, zone of interest, federalism, and separation of powers. The dialogue that Edley envisions would seem to require a good deal more consensus on the global vision among the participants than presently exists.

55. Edley, *supra* note 4, at 596.

appear in hundreds of cases a year, and whose functions vary from labor to shipping to nuclear energy to gas regulation, so that we can participate as equals in their good governance, is asking a great deal. Edley suggests that specialized courts, masters, and super-agency review boards might supplant, or at least supplement, article III judges in this regard.[56] We are all familiar with the separate debate about the legitimacy of those devices,[57] but even if their usefulness as adjuncts is conceded, the reason for the dialogue never becomes quite clear. Why should the courts become "an alternative forum in which to appeal the alleged missteps of the other two branches?"[58] Our intent might be pure—Edley says legitimacy would stem from our efforts to promote good governance[59]—but our abilities would be highly suspect. Would we not become super-agencies reviewing the same groundwork as the agencies themselves, and if so, why? Why should the effort not begin with getting better administrators rather than redirecting judges' energies down this radical path?[60] In Edley's world, judges would presumably continue to act out their traditional roles in other areas of the law. Is it really cost efficient to turn courts into super-administrators in this area only?

Edley twits critics of the current administrative law that they must do more than "wage a guerrilla war in dissenting opinions and law reviews"; to be effective "those who would urge a redirection of doctrine must make intellectual alliance with those who are struggling to create a coherent loyal opposition in the realms of ideology and theory."[61] I applaud his gargantuan efforts to articulate tenets of that new ideology, but I think we may need another round of dialogue about the judicial role in it.

II. SUNSTEIN'S "ADMINISTRATIVE SUBSTANCE"

Professor Sunstein calls upon legislators, administrators, and judges to become more intimately acquainted with the substantive purposes of regulatory programs, the pathologies to which the programs are subject, the forces that bring these pathologies into being, and the consequences

56. *See id.* at 604.

57. *See, e.g.*, McCree, *Bureaucratic Justice: An Early Warning*, 129 U. PA. L. REV. 777 (1981) (describing growth in judicial staff and accompanying danger of dilution of individual judge's responsibility for decisionmaking); Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) (tracing historical development of the role of federal judges and the challenges they face with increased workloads).

58. Edley, *supra* note 4, at 604.

59. *See id.*

60. *See* Williams, *supra* note 20, at 1109.

61. Edley, *supra* note 4, at 606.

of regulation for the real world.[62] That is good advice for legislators and administrators, but as to judges, I am not so sure. Although Sunstein states that his emphasis on substantive principles of regulation is aimed primarily at legislators and administrators, he also asserts: "[I]t would be surprising if an understanding of regulatory goals and performance did not ultimately affect the practice of judicial review."[63] Moreover, Sunstein devotes more than half of his recent book to a new mode of statutory construction that considers the substantive content of regulation.[64]

I agree with many of Sunstein's conclusions about the necessity of regulation and its success in some areas, and also about the causes of its failure in others. I also emphatically subscribe to the value of empirical research in determining how administrative and judicial decisions affect doings in the real world. I hope law professors do this type of research more and more. However, I remain somewhat skeptical that there are many regulatory lessons—on which consensus can be found—that are distillable into canons that judges may then use to interpret a broad range of different statutes to achieve the kind of improvements that Sunstein anticipates.

A. *What Are the Lessons?*

Initially, I have doubts about the available data on which to base conclusions about regulatory failure and its causes. Sunstein's examples are interesting, often plausible, but occasionally a bit conclusory or reflective of a particular point of view. For instance, it is now fashionable to applaud incentive schemes, such as emissions trading, as a clearly superior alternative to the command-and-control strategies adopted in regulatory legislation a decade ago. But do we yet have the whole story? Can we be sufficiently certain that such market-based strategies will be so successful five or ten years from now that we want to incorporate that preference into a new judicial canon to construe regulatory statutes or to decide if regulatory decisions are arbitrary or capricious?

For instance, Sunstein suggests that a good "first step" for administrators, and presumably judges, would be:

> [T]o adopt a strong presumption in favor of flexible, market-oriented, incentive-based regulatory strategies. . . .
>
> Incentive-based systems should focus on ends, defined in terms of the number of lives saved or the amount of pollution reduced, rather

62. *See* Sunstein, *Administrative Substance,* 1991 DUKE L.J. 607.

63. *Id.* at 608.

64. *See* C. SUNSTEIN, *supra* note 47, at 111-233.

> than on the means of achieving those ends. Means (and technologies) are best left to the market, not to bureaucrats.[65]

Emission trading programs, we are told, hold enormous promise.[66] Companies can buy and sell permits to pollute: "In one bold stroke, a system of tradeable permits would create market-based disincentives to pollute and market-based incentives for pollution control."[67] In this instance, Sunstein cites the work of Professors Ackerman and Stewart (people I respect) in support of his proposition.[68] But as to differing points of view, we are told that "most of the criticisms are unpersuasive or ill-informed."[69] We are also provided with the "right" approach to regulating pesticides, international pollution, waste disposal, automobile pollution, and workplace safety.[70] In many cases, Sunstein's proposals sound logical and one cannot reasonably expect a law professor, even one as gifted as Sunstein, to present the authoritative case for dozens of regulatory strategies in an Article of this kind. But, as a judge, how do I know whether any one book or article is close enough to the final word to use as a "norm" to decide the legality of executive regulatory actions, or to interpret the ambiguous words of the legislature?

Sunstein's basic approach to regulatory lessons is acknowledgedly an optimistic one: "To be sure, there have been failures, some of them extremely serious. But the failures come in identifiable patterns, and they can be avoided in the future."[71] He may be right, but certainly one must accept his evaluation of which regulatory attempts have failed and why, as well as his curative solutions, before one can proceed to the next step of translating the lessons into canons or norms for judges to apply on administrative review. I question whether enough of the returns are in yet to make that giant step.

In his book, Sunstein admits that many of his corrective canons are "contestable" and "value laden"; he is to be commended for his candor.[72] Although I would guess that his and my values are not that far

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65. Sunstein, *supra* note 62, at 633 (footnote omitted); *see also* C. SUNSTEIN, *supra* note 47, at 109.

66. *See* Sunstein, *supra* note 62, at 634.

67. *Id.*

68. *Id.* at 635 (citing Ackerman & Stewart, *Reforming Environmental Law: The Democratic Case for Market Incentives,* 13 COLUM. J. ENVTL. L. 171 (1988)).

69. *Id.* at 636. However, Sunstein does cite to a few equally impressive authorities who he says set forth "the difficulties of emissions trading." *Id.* at 636 n.115 (citing S. BREYER, REGULATION AND ITS REFORM (1982) (setting forth the problems with alternatives to classical regulation schemes); S. KELMAN, WHAT PRICE INCENTIVES? (1981) (a critique of economic approaches to environmental regulation)).

70. *See id.* at 634-42.

71. *Id.* at 610.

72. Specifically, he states:

apart, it makes me uneasy to assume tenets of regulatory truth from a few case studies or analyses, however thoughtful or respected their authors. In my twelve years on the D.C. Circuit, I have reviewed hundreds of administrative actions by the Environmental Protection Agency (EPA), the Federal Energy Regulatory Commission (FERC), the Occupational Safety and Health Administration (OSHA), the Department of Health and Human Services (HHS), the Federal Communication Commission (FCC), the National Labor Relations Board (NLRB), and other agencies. Although I hold suspicions or impressions about who is on top or at the bottom of the regulatory honor roll, I do not feel at all sanguine about concluding that OSHA has regulated toxic substances too strictly in some cases and too leniently in others, or that EPA has failed or succeeded as an air, water, or hazardous waste regulator.[73]

Perhaps I belabor the point, but if and when judges are asked to infuse regulatory lessons into our interpretations of statutory language or into our judgments about the reasonableness of agency decisions, we will need more consensus and less contestability than provided by Sunstein's examples. Valuable scholarship about how regulation fails or succeeds

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> The challenge is to identify norms on which people might be persuaded to agree. That task will be highly value-laden. It is impossible to select interpretive norms without making some assessment of their role in improving or impairing the operation of statutory law.... It follows that the interpretive norms will be defensible only to the extent that good substantive and institutional arguments can be advanced on their behalf.

C. SUNSTEIN, *supra* note 47, at 158.

73. Similarly, I do not think it so clear cut that the Sherman Act antitrust law must be "read ... as an effort to promote economic welfare (rather than, for example, to promote small business as such)." *Id.* at 176. In fact, a few years ago I wrote a separate concurrence to an opinion by Judge Bork suggesting that there were other goals to antitrust law of which judges should take cognizance. *See* Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 230-31 n.2 (D.C. Cir. 1986) (Wald, J., concurring) (noting that the objectives of antitrust law include not only promoting economic efficiency, but also enhancing individual and business freedom and allaying political fears), *cert. denied,* 479 U.S. 1033 (1987). However, Sunstein tells me that "[a]n interpretive principle [promoting economic welfare] is the only administratable standard, and such a principle conforms best to contemporary understandings about the nature of a well-functioning antitrust law." C. SUNSTEIN, *supra* note 47, at 176. Incidentally, the documentation for that statement is two works by Robert Bork and Richard Posner, formidable authorities to be sure, but not necessarily conclusive. *Compare* R. BORK, THE ANTITRUST PARADOX (1978) (only goal of antitrust law is to increase economic efficiency) *and* R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE (1976) (efficiency not only an important goal of antitrust law, it is the only goal) *with* Pitofsky, *The Political Content of Antitrust,* 127 U. PA. L. REV. 1051 (1979) (antitrust laws promote political values, including fear of excessive concentration of economic power and a desire to enhance individual and business freedom); Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged,* 34 HASTINGS L.J. 65, 68 (1982) ("Congress passed the antitrust laws to further economic objectives, but primarily objectives of a distributive rather than of an efficiency nature"); *and* Schwartz, *"Justice" and Other Non-Economic Goals of Antitrust,* 127 U. PA. L. REV. 1076, 1076 (1979) ("putative economic gains should not be the exclusive or decisive factor in resolving antitrust controversies"). *See generally Symposium: The Goals of Antitrust: A Dialogue on Policy,* 65 COLUM. L. REV. 363 (1965) (various authors debate the means and ends of U.S. antitrust law).

will probably emerge only slowly and spasmodically, but scholars must produce more before judges' "comfort level" will reach the point of inferring—or letting someone else infer for them—generalized regulatory principles to guide statutory interpretation or judgments about the reasonableness of agency actions.[74]

B. *The Nexus Between the Regulatory Lessons and the Regulatory Principles*

Even assuming consensus on regulatory pathologies and their causes, converting those failures into judicial principles that would help prevent future failures is a daunting task. Indeed, although Sunstein has made a remarkably creative start, most of his canons are understandably general and abstract. The nexus between the "lessons" from regulatory failures and the canons designed to avoid their repetition is not always clear. For instance, Sunstein asserts that experience shows that most command-and-control regulatory strategies are wrong; that concentrating on regulating new technology is counterproductive because it encourages keeping old, often worse, technology in place; that regulation should generally balance costs and benefits; and that most regulatory failures are due to (1) failure to coordinate different rules for differently situated regulates; (2) capture of the regulators by the regulated; (3) changes in circumstances after the adoption of regulation; (4) Congress's unwillingness to make complex tradeoffs among social goals; and (5) unanticipated systemic consequences that create disincentives for the players to perform as regulators intend.[75] At first glance, only a few of these lessons—perhaps changes in circumstance, but certainly not unintended consequences—are potentially translatable into any judicially usable principles. Unfortunately, any across-the-board principles that can be profitably applied to the construction of a broad range of regulatory statutes require a level of generality that does not make for "smart" weapons, i.e., ones likely to hit the target. This is true for Sunstein's regulatory principles for judicial use, which include promoting high-level accountability for important decisions, guarding against subversion of statutory goals because of problems of collective action by beneficiaries, favoring narrow construc-

74. Sunstein pointed out in informal conversation at the *Duke Law Journal* Administrative Law Symposium that judges now often refer to and discuss regulatory norms or principles much like those he proposes in their opinions as part of "reasoned decisionmaking." I am sure he is right. In my view, however, the critical difference is that those discussions and references explain judicial conclusions in particular cases but do not rise to the formal level of precedential canons that judges must accept or reject as part of their reasoning in future cases. The difference, although perhaps narrow in concept, is vitally important in practice, especially if (as in my court) judges publish approximately 300 administrative opinions every year.

75. *See* Sunstein, *supra* note 62, at 631-34.

tion of procedural qualifications of substantive rights, and favoring coordination and consistency and disfavoring irrationality, injustice, and obsolescence.[76] Unfortunately, these principles require judges to make many preliminary judgments about the case before deciding if the canons apply at all.

More specifically, Sunstein says that some of his judicial canons, including those favoring cost-benefit proportionality and *de minimis* exceptions, apply only to "market failure statutes and statutes responding to short-term public outcry."[77] However, Sunstein also supports a broad construction of statutes to protect "traditionally disadvantaged groups and noncommodity values."[78] Then Sunstein prescribes a narrow construction of statutes "embodying interest-group transfers."[79] The correct application of Sunstein's canons assumes that statutory language can be easily categorized. Nevertheless, I believe that this threshold categorization requires a good bit of judicial judgment.[80]

The problem I raise, endemic to all canons, is whether the necessarily abstract level of canons overwhelms their utility as accurate guides to correct outcomes. When reformers design canons to prevent regulatory failures, the criticism is even more telling because of the multitude of unique factors that cause major regulatory failures. Although administrators, who are intimately familiar with all the details and background of a proposed regulatory action, might usefully apply Sunstein's principles as a checklist to ensure that regulatory actions would arguably fit within the boundaries they propose, it is an altogether different (and I think more problematic) exercise for a judge to apply those principles to a record in deciding whether the administrator evaluated the issues correctly.

In sum, an expanded canonical jurisprudence raises questions about the extent of knowledge and consensus on the sources of regulatory pa-

76. *See* C. SUNSTEIN, *supra* note 47, at 237-38.

77. *Id.* at 237.

78. *Id.* at 238.

79. *Id.*

80. Indeed, the initial task of deciding which canons are relevant would require more information than judges usually receive under current practices. Judges would need to discern why a particular statute was enacted, which groups exerted pressure for or against the statute, and the real-world consequences of the policies under challenge. Where would judges get the information necessary to make these determinations? Are we to scan the court librarian's index for new studies; or should we rely on the parties' briefs (assuming counsel would start arguing such points if canonical jurisprudence became ensconced, and realizing that such information would always be presented through the adversaries' lenses). Worst of all worlds, but perhaps most likely, judges might get their information about statutory background and consequences from potentially conflicting sources. One judge might rely upon American Enterprise Institute studies, others might accept only Brookings, and still others might consult the Cato Institute. Different sources do not necessarily convey the same messages.

thology, the general principles we can extract from such knowledge, and the assurance with which we can apply those principles to new and infinitely varying regulatory scenarios.

C. *"Canons to the Right of Us, Canons to the Left of Us"—Dilemmas of Choice*

Some of Sunstein's canons appeal to me; others do not. Some have been with us a long time.[81] Judges tend to use the familiar canons like SCUD missiles and Patriot interceptors leveled against each other. Recognizing the propensity of canonical jurisprudence to invite canonical wars, Sunstein helpfully provides us with a hierarchy among canons.[82] Even so, I doubt that the twelve judges on my court would agree on the validity of the several dozen canons, let alone on their ranking. This raises the important question of from where consensus for canons should come: counsel, enterprising judges, courts of appeal, the Supreme Court, or the Congress. Perhaps even more important in day-to-day judging, can the majority of a court force those judges who don't agree with Sunstein's judicial canons to use them? Right now a *laissez faire* attitude toward the use of judicial canons seems to prevail.

Given the infinite permutations and combinations of the canons that courts might apply in any one case, it is at least questionable whether the infusion of canons would make judicial outcomes any more predictable or less "indeterminate" than they are now. For example, suppose an agency seeks by regulation to limit the timing or traditional scope of a "hearing" required by the statute. This type of dispute often divides our court. One side argues plain meaning of the statute; the other says the statute is ambiguous and therefore requires deference to the agency. This single dispute could conceivably and simultaneously invoke canons on changed circumstances, principles focusing on the systemic effects of regulatory controls, broad constructions for noncommodity values, narrow constructions for interest group transfers, presumptions favoring judicial review and hearing rights, as well as those against the subversion of statutory purpose by collective action problems. At a minimum, I can count six potential canons that might apply depending on how one views the case. Candidly, the consistency of our application of the relatively narrow doctrines we now use in statutory construction is sometimes difficult

81. Some examples of well-established canons include those statutory constructions that favor the avoidance of constitutional issues, favor the harmonization of different parts of the same statute, make presumptions against implied repeals, announce the need for a clear statement to preempt state law, and favor Indian tribes.

82. *See* C. SUNSTEIN, *supra* note 47, at 186-89, 238.

to rationalize successfully. Thus, I worry that more canons or principles will make our decisions less coherent.[83]

The administrative issues that courts review are usually quite discrete. Examples of administrative issues in recent D.C. Circuit cases include: whether Congress intended to grant the Secretary of Transportation absolute discretion in regulating the price for the sale of repossessed vessels under Title XI of the Merchant Marine Act;[84] whether the EPA's regulation allowing states to enforce state drinking water standards is prohibited by the Safe Drinking Water Act;[85] whether the Department of Labor's new methodology for computing the minimum wage for alien temporary agricultural workers is authorized by the Immigration Reform and Control Act;[86] and which agency—FERC or the ICC—has jurisdiction to regulate rates charged for the transport of anhydrous ammonia by pipelines.[87]

Unlike administrators or legislators, judges cannot always see how their little piece of the regulatory puzzle fits into the big picture. Judges know agency policies interface with, reinforce, or undermine one another. But courts are generally not privy to all the facts that permit a coherent overall regulatory assessment about under- or over-regulation. In appropriate cases, courts might require agencies to touch on some of Sunstein's ideas as part of their task of adequately explaining their rationale, but that is the most I see courts doing with Sunstein's principles in the near future. Even if courts were willing to take this step, however, it would be only a modest increment to an existing practice, and not the dramatic transformation of review that Sunstein may seek.

D. *Where Is Congress in All This?*

Sunstein tells us that his plea for more attention to the substance of administrative law is directed primarily to legislators and administrators rather than to the courts.[88] Elsewhere, however, Sunstein asserts that the courts have an important role in responding to regulatory malfunction because legislative reform must overcome an enormous "burden of inertia,"[89] while interstitial regulatory reform can be brought about "most easily" through executive and judicial interpretation.[90]

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83. Minimally, I need more detailed and persuasive case studies showing how a number of the proposed canons would help.

84. *See* Liberty Maritime Corp. v. United States, 928 F.2d 413 (D.C. Cir. 1991).

85. *See* National Wildlife Fed'n v. EPA, 925 F.2d 470 (D.C. Cir. 1991).

86. *See* AFL-CIO v. Dole, 923 F.2d 182 (D.C. Cir. 1991).

87. *See* C.F. Indus. v. FERC, 925 F.2d 476 (D.C. Cir. 1991).

88. *See* Sunstein, *supra* note 62, at 642.

89. *Id.* at 632.

90. C. SUNSTEIN, *supra* note 47, at 111.

But—as Sunstein is aware—the understandable frustration with divided government and the cumbersome nature of congressional reform cannot satisfactorily answer the question of why general principles of statutory interpretation—especially value-laden ones—should not come from Congress rather than the courts. Why, for instance, ought courts to assume Congress meant to allow *de minimis* exceptions in all statutes where it does not expressly deny them, or that Congress intended to endorse cost-benefit balancing if it does not say otherwise? A vastly superior outcome, and one that Sunstein does not contest, would be for Congress to provide checklists in all its statutes covering issues like *de minimis* exemptions and cost-benefit balancing. Better still, Congress could pass its own general canons of construction or put a particularized interpretive section in each regulatory statute. In a few instances Congress has done just that. In the Freedom of Information Act, for example, Congress announced that the listed exceptions to disclosure were exclusive, and also that courts had *de novo* review authority.[91] The Federal Courts Study Committee's recent report suggests a legislative checklist for every bill, including provisions on preemption, retroactivity, the forum for judicial review, statute of limitations, standing, private rights of action, and the definition of "key terms."[92] Such a checklist might also include other indications of how and by whom Congress wants the law to be construed. Most reformers—happily not Sunstein—assume that Congress is incapable of addressing these issues when drafting new statutes. The fact remains, however, that Congress is the primary lawmaker and the most logical source of general principles of statutory construction.

The trouble with judicially created canons is that judges make them up and then tell Congress to legislate with them in mind. This approach is topsy-turvy. More logically, Congress should announce its own interpretive principles and judges should merely apply them.

E. *What Is the Court's Real Function on Review?*

Yet another fundamental question pervades Sunstein's work: What is the objective of statutory construction? Most judges I know still adhere to the simplistic notion that the court's mission is fidelity to congres-

91. 5 U.S.C. § 552(a)(4)(B), (d) (1988).

92. FEDERAL COURTS STUDY COMMITTEE, JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 91 (1990); *see also id.* at 92-93 (additional views of Congressman Kastenmeier, Judge Keep, President Lee, Congressman Morehouse, and Judge Posner that Congress needs an office to (1) assist committees to assess the impact of legislation on the judiciary, (2) call Congress's attention to important court decisions, and (3) facilitate communication between the branches).

sional intent, fictional or not. According to Sunstein, however, the goal of a construing judge should be to direct the interpretation of the law in ways that are regulatorily sound and enhance good national policy (where she can do so without flouting a clear congressional intent).[93] This sounds a bit like a "natural law" or a substantive due process approach to regulation.

However, experience has taught this judge that once courts leave the moorings of the statute—its text, history, and enunciated purposes—and move into the sphere of good and bad regulatory policy, the bounds of their authority and discretion become decidedly murky. For instance, consider the proportionality canon that says the aggregate social benefits should equal the aggregate social costs of a particular regulatory application. Sunstein says the principle "becomes workable on the assumption that in some cases it will be clear, by reference to a widely held social consensus, that social benefits are small in comparison to social costs."[94] He continues: "In such cases the proportionality principle can be administered by reference to widespread intuitions, and statutes should be construed so as not to permit or require the action at issue."[95] That idea is a bit scary to me. It is reminiscent of parallel mandates in other parts of our law, such as deciding whether something "shocks the conscience of a civilized people" or identifying community-based standards for obscenity. Somehow, however, intuitions about the effects of a regulation seem even less judicially accessible. This may seem like a cheap shot, but how can we be sure that the "widespread intuitions" are not the judges' own or those of her ADA or Federalist friends?

Let me offer another, more pragmatic plea for relatively simple and certain frameworks for reviewing courts: Judges of radically different political and social viewpoints can only reason together on the basis of a few relatively simple propositions that they can all agree govern, so that disputes can be narrowly focused on their application. The *Chevron* decision,[96] warts and all, has accomplished this. *Chevron* says that unless Congress has addressed the issue, the agency's interpretation of a statute wins in all but the most extreme cases.[97] On the D.C. Circuit, we vigorously debate what the issue is in a particular case, whether Congress has

93. *See* C. SUNSTEIN, *supra* note 47, at 111-59 (discussing the problems judges confront when interpreting statutes and several ways of addressing them consistent with sound public policy). *But see* Moglen & Pierce, *Sunstein's New Canons: Choosing the Fictions of Statutory Interpretation,* 57 U. CHI. L. REV. 1203, 1245 (1990) (rejecting Sunstein's canons as "interpretive fictions" that cannot provide consistent guidance to 800 individual federal judges).

94. C. SUNSTEIN, *supra* note 47, at 182.

95. *Id.*

96. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

97. *Id.* at 843-44.

addressed the issue, whether Congress meant to delegate interpretation to the agency or to the courts, and how reasonable the agency's interpretation of a particular statute is. But these debates are conducted within a narrow consensual framework. Were we to switch to a broader framework of what is good regulatory policy or which of thirty canons apply, our debates would be less focused, our work would be more complex, and our differences would more frequently prove irreconcilable. A simple decisional framework may be essential to collegial decisionmaking in a court of widely differing views. Sunstein says his principles would "convert hard cases into easy ones,"[98] but precisely the opposite could be true.

Heaven knows we have enough to dispute in applying so simple a directive as *Chevron*. In a recent case, one panel, over a spirited dissent, remanded a case to the Food & Drug Administration based upon a statutory ambiguity the court itself found in the use of the word "the" instead of "an" to modify the phrase "active ingredient."[99] This ambiguity was not previously identified by the agency or the petitioner. You see, we do not want for grist at our mill. Can you imagine what we would do with an arsenal of canons?[100]

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98. C. SUNSTEIN, *supra* note 47, at 192.

99. *See* Abbott Laboratories v. Young, 920 F.2d 984, 985-88 (D.C. Cir. 1990).

100. The ability of Sunstein's canons to coexist with *Chevron* is a subject all to itself. In a recent article Sunstein recognizes *Chevron*'s primacy in current administrative law: "In its allocation of governmental authority and in its production of outcomes in the real world, the importance of the case far exceeds that of the Supreme Court's more celebrated constitutional rulings on the subject of separation of powers in the 1980s . . . ." Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2075 (1990). *Chevron* has been judicially cited more than 1,000 times since its inception, *id.* at 2074-75, although Sunstein believes (and I agree) that the lower courts have grasped onto its two-step analysis too tightly. *See id.* at 2075-76.

In his article, Sunstein tackles the problem of how his canons would fit with the *Chevron* mother lode. They could play an important role in the first step of *Chevron*'s analysis, the determination of whether Congress has spoken to the issue or left it ambiguons: "[A]n agency should be permitted to depart from the literal meaning of the statute in cases involving issues that Congress has not specifically considered, especially when such departures plausibly make sense of the statute in light of Congress's general purposes." *Id.* at 2118.

Sunstein would also have courts decide if Congress intended agencies or the courts to be the prime interpreters on the basis of an "assessment of which strategy is the most sensible one to attribute to Congress under the circumstances." *Id.* at 2086. "This assessment," he cautions, "is not a mechanical exercise of uncovering an actual legislative decision. It calls for a frankly value-laden judgment about comparative competence, undertaken in light of the regulatory strncture and applicable constitutional considerations." *Id.* "By itself, an ambiguity is not a delegation of law-interpreting power, and it would be a major error to treat all ambiguities as delegations." *Id.* at 2090. To say the least, this dilution of the current *Chevron* presumption favoring agency delegation in all ambiguous cases would effect a major transfer of interpretive power to the courts and away from the agency.

The canons would presumably come into play to an even greater extent, however, in *Chevron*'s second step (in which the court ascertains whether the agency's action is based on a permissible construction of the statute), where agency deference is currently at its zenith. More and more,

F. *Conclusion*

It is easy to criticize and fault new ideas. Usually, however, even radical new concepts, emanating from the responsibly adventurous, contain salvage-worthy points. That is certainly true of Sunstein's Article. Many judges have been restive under the rigid approach to judicial review dictated by *Chevron*. Sunstein forces us to think about whether we would prefer a quite different approach, resembling a kind of regulatory substantive due process. When Sunstein says that "[i]nterpreters should be authorized to depart from the original meaning [of a statute] and to press the usual meaning of words in particular directions if the context suggests that this strategy would lead to superior outcomes," that "the test for superior outcomes will necessarily call into play controversial judgments of value and policy," and that "[t]he reservation of judicial authority to push ambiguous statutes in particular directions seems more rather than less likely to yield a coherent, rational, and just system of law,"[101] he is throwing out a challenge to the way most judges currently perceive and perform their interpretive functions. Even if I am too timid or groove-worn to immediately grab on to that challenge, I believe his detailed analysis and proposal merit close and continued study. I hope my critique will aid, rather than hinder, that process.

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courts are finding ambiguities that give the nod to the agency rather than finding a controlling congressional intent. In this area, Sunstein's regulatory canons would compete with the deferential push of *Chevron*, perhaps returning courts to something akin to the pre-*Chevron* era when we freely interpreted statutes. Because of the greater role judicial canons would play in Sunstein's world, Sunstein has not only prioritized the canons but also rated them in relation to the *Chevron* deference to agencies. Thus, Sunstein would have the following canons trump agency deference: norms of syntax; interpretive norms such as clear intent or the presumption against retroactivity; constitutionally inspired norms, including the preference for interpreting statutes so that they are constitutional; norms designed to counter agency bias against vulnerable groups; and, probably most important, regulatory presumptions against allowing agencies to decide their own jurisdiction. *Id.* at 2100. On the other hand, norms *against* repeal by implication, exceptions to the antitrust laws, and substantive amendments in appropriation statutes, trump *Chevron*'s agency deference under *Chevron*'s first step only if they help ascertain congressional intent. However, under *Chevron*'s second step these canons could not come into play if they were merely aids to the reasonableness of the agency interpretation. This last formula introduces a third layer for courts to juggle—some canons would beat *Chevron* only some of the time. Interestingly, most of Sunstein's regulatory canons, including the ones favoring *de minimis* exceptions and cost-benefit proportionality, give way to *Chevron* agency deference. *Id.* at 2105-19.

It is not easy to predict in this complex calculus who gains in power by mixing *Chevron* with the canons: Congress, the executive, or the courts. Initially, under *Chevron*'s first step, courts can look to more sources for legislative intent. In the second step, courts can weigh the canons against deference, yet courts will also find themselves deferring to agencies even when their actions contradict the literal terms of the statute. Courts would definitely gain overall power and flexibility, and the reign of *Chevron* would be drastically weakened. On balance, I think the legislature comes out worst, for Sunstein's program would subject its laws to the mercy of the executive and the courts more than ever before.

101. C. SUNSTEIN, *supra* note 47, at 135-36.