

# Duke Law Journal

VOLUME 1991

JUNE

NUMBER 3

## THE GOVERNANCE CRISIS, LEGAL THEORY, AND POLITICAL IDEOLOGY

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Humanity and ideas, as well as things, are facts, and a jurisprudence which takes them into account cannot perish from the earth.

— Charles A. Beard<sup>1</sup>

[W]hat is merit in an author is often a defect in a statesman, and characteristics which improve a book may be fatal to a revolution.

— Alexis de Tocqueville<sup>2</sup>

### I. INTRODUCTION

Calculating the proportion of administrative law scholarship that sets for itself the goal of rethinking, reconstructing, refocusing, or otherwise dramatically reconsidering the field would be an interesting task. I suspect the proportion of such work is higher in administrative law than in most other subjects, perhaps because so many of those in the field find the conceptual foundations of administrative law, and the results of so much judicial and scholarly labor, unsatisfying.<sup>3</sup>

In addressing the administrative problems of today, I seek to challenge the doctrinal separation that has evolved between (1) politics and the partisan struggle over political ideology and public policy, and (2) the realm of legal theory, the source of most prescriptions for the reform of legal doctrines and institutions. Part of this challenge entails sketching

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\* Professor, Harvard Law School. I wish to thank Cynthia Farina, Cass Sunstein, Judge Patricia Wald, Marshall Breger, Neil Gorsuch, Jacquelyn Jones, Marta Wagner, and Roberto Unger for their insightful comments and ideas.

1. Beard, *Introduction: A Background*, in *THE SOCIAL AND ECONOMIC VIEWS OF MR. JUSTICE BRANDEIS* vii (A. Lief ed. 1930).

2. A. DE TOCQUEVILLE, *THE OLD REGIME AND THE REVOLUTION*, Book II, ch. XIII, at 180 (J. Bonner trans. 1856).

3. I confess that this Article is in that vein of perhaps overweening ambition.

my argument, detailed elsewhere,<sup>4</sup> that administrative law fails on its own terms to discipline the arbitrariness of bureaucrats and judges. Administrative law fails, in part, because of a deeply fundamental and conceptually flawed reliance on separation of powers anachronisms. Furthermore, I argue that the preoccupation with controlling discretion is the wrong conception of administrative law for today, and that an alternative project more suited to our moment would focus on the elaboration and application of principles of sound governance, rather than attempting to sustain the pre-New Deal hostility to the affirmative regulatory state.

In addition to challenging the separation between politics and legal theory, I also undertake two broader intellectual enterprises. First, in the sphere of theory, I want to suggest some elements of a compelling post-pluralist theory of public law, relying in part on a reconstruction of civic republicanism.<sup>5</sup> Second, in the sphere of politics, I seek to begin an extra-legal effort to define a post-Reagan political ideology—an exercise that has much to do with partisan politics, but even more to do with governance and progress.<sup>6</sup> Perhaps most importantly, I will try to explain why politics, theory, and practical invention must be linked if they are to be successful. All three tasks concern lawyers, judges, and scholars, whether they recognize it or not. There should be little argument that the content of law is “deeply and thoroughly political,”<sup>7</sup> even if these realms are distinguishable in the abstract. My concern is with the purposes and ideological requirements of useful theorizing *about* law.

Administrative law, properly understood, is of paramount importance. Its enterprise bears considerable credit or blame for the very structure, operation, and even the ultimate efficacy of governance. The success of government cannot be wholly dependent on able administrators because they may or may not be present. Nor can we depend on the romantic image of concerned voters regularly disciplining the political branches because political participation is anemic<sup>8</sup> and awareness of pub-

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4. See C. EDLEY, *ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY* (1990).

5. More generally, I consider the potential contribution of post-modern sensibilities.

6. See C. LASCH, *THE TRUE AND ONLY HEAVEN: PROGRESS AND ITS CRITICS* 41-44 (1991) (characterizing progress in alternative ways, including increasing control over social dysfunction).

7. R. DWORKIN, *A MATTER OF PRINCIPLE* 146 (1985). For an interesting but ultimately unpersuasive effort to characterize the essential formality of law and thereby distinguish it from politics, see Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 *YALE L.J.* 949 (1988).

8. See Berke, *Experts Say Low 1988 Turnout May Be Repeated*, *N.Y. Times*, Nov. 13, 1988, § 1, at 32, col. 2 (“Only half the Americans who were eligible to vote in the Presidential election this week did vote.”); Shenon, *The 1990 Elections: Voter Turnout Still Poor, With 3 Exceptions*, *N.Y.*

lic affairs pitiful.<sup>9</sup> In short, for the very reasons that the Framers and the intellectuals who influenced them turned to structural safeguards to promote their normative vision of sound governance, and for the very reasons that Legal Realists, steeped in decades of Progressive social criticism, appreciated the need for the structural innovations of the administrative state, so too should we appreciate that the processes and institutions of public law must be central to the renewal of governance in our time. In short, effective legal institutions and processes are a necessary, though not sufficient, mechanism for ensuring sound governance.

Today, America is in the throes of a dimly appreciated crisis in governance. The administrative state is diseased: The evidence stretches from budget deficits to homelessness; from bank failures to crack babies; from the failures of public schooling to greenhouse gasses; from persistent racial inequalities to languishing economic growth.<sup>10</sup> Thoughtful observers increasingly question the health of American democratic capi-

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Times, Nov. 11, 1990, § 1, at 27, col. 1 ("[F]ewer than four in 10 people eligible to vote actually did in this year's midterm election.").

9. See Lamar, *Fight to the Finish*, TIME, Nov. 3, 1986, at 18 ("[P]olitical analysts have found that the American electorate has become anesthetized by ignorance and apathy.").

10. This sharp assessment of governance is at odds with the self-congratulatory air in Congress following the impressive, substantive debate concerning the use of military force in the Gulf on January 10-12, 1991. See 137 CONG. REC. S97 (daily ed. Jan. 10, 1991) (Senate debate and presentation of two resolutions scheduled to take place from Jan. 10 to Jan. 12) (House debate and presentation of resolutions from Jan. 10-12 following general discussion on Jan. 7 and Jan. 9). For all the great significance of those deliberations, it is worth observing that a constitutional crisis was only narrowly averted. A switch of only three votes in the Senate would have put President Bush to the test: Would he order an attack in the face of Congressional rejection of an authorizing resolution, and in the face of overwhelming bipartisan votes asserting that such an attack was unlawful without congressional authorization? See 137 CONG. REC. S403 (daily ed. Jan. 12, 1991) (S.J. Res. 2 passed by a vote of 52-47); H.R. Con. Res. 32, 102d Cong., 1st Sess., 137 CONG. REC. H390, H485 (daily ed. Jan. 12, 1991) (H.J. Res. 77 passed 250-183, 2 not voting). Cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (executive power at lowest ebb when President tries to act contrary to Congress). Another troubling feature of the debate was that the crucial decisions to deploy 430,000 troops and adopt a threatening offensive military posture were made without congressional approval or, it seems, meaningful consultation. See Lewis, *Abroad at Home: Presidential Power*, N.Y. Times, Jan. 14, 1991, at A17, col. 1 (editorial) (Bush took action deploying troops "entirely on his own, without consulting Congress, much less asking its approval"). During the Senate debate, Senator Mitchell noted that the President had changed American policy overnight by doubling the troops in the Persian Gulf on November 8 without consultation or public debate. See 137 CONG. REC. S100, S101 (daily ed. Jan. 10, 1991); *id.* at S104-05 (statement of Sen. Leahy regarding unilateral change of policy). This was brilliant political gamesmanship by the President, at least in the short run, but it hardly embodies an admirable model of deliberation by our representatives. Mr. Bush observed, reluctantly, the role of Congress as a check—an approach that treated members of Congress as objects to be manipulated rather than as full constitutional partners in a critical national security decision. See *Confrontation in the Gulf: Bush's Letter to Congressional Leaders*, N.Y. Times, Jan. 9, 1991, at A6, col. 4 (Bush asking Congress to "adopt a Resolution stating that Congress supports the use of all necessary means" to remove Iraqi forces from Kuwait). On balance, this hardly represented a fine moment in governance.

talism, even as our Western model of political economy seems to have decisively vanquished its communist and totalitarian counterparts.

My consideration of how public law has contributed to the crisis in democratic governance, and how it can be turned to good use in addressing the crisis, focuses on the role of what we might imperialistically consider *administrative* law. I approach this in four stages. First, Part II summarizes my view of the governance crisis and (without claim of originality) of the conventional project, or ambition, of administrative law. Second, Part III characterizes the *modus operandi* and the failings of administrative law. Third, Part IV considers the relationship between the task of redefining the project of administrative law and the related intellectual projects of political ideology, legal theory and practical invention. Finally, Part V sketches an alternative project of administrative law that points directly toward the pursuit of sound governance.

## II. THE GOVERNANCE CRISIS AND THE PROJECT OF ADMINISTRATIVE LAW

### A. *The Crisis in Governance and Democracy*

Today, we fear recession, not depression; Gulf wars, not World War; an *ennui* of democratic spirit, not a triumph of brown-shirted fascists. In what sense do our contemporary concerns amount to a crisis or a diseased administrative state?

A partial list of broadly acknowledged difficulties may include:

- Governmental activity is often slothful, wasteful, and even misguided.<sup>11</sup>
- Critical public problems—ranging from public education to bank mismanagement to Third World debt to violent crime—seem to fester for years and years at enormous human and economic cost.<sup>12</sup>
- The economy languishes with dozen-digit deficits, low net savings and growth, declining prosperity relative to other nations, and a widening gap between the wealthy and those mired in persistent poverty.<sup>13</sup>

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11. See, e.g., Schneider, *Military Has New Strategic Goal In Cleanup of Vast Toxic Waste*, N.Y. Times, Aug. 5, 1991, at A1, col. 4 (describing military cleanup plan that "could well result in one of history's costliest failures").

12. See Daniels, *Education; Illiteracy Seen as Threat to U.S. Economic Edge*, N.Y. Times, Sept. 7, 1988, at B8, col. 3; Stevenson, *Savings Industry's New Curbs*, N.Y. Times, Dec. 6, 1989, at D1, col. 3; *Third World Debt Strategy, 1990: Hearings Before the Subcomm. on International Finance and Monetary Policy of the Senate Comm. on Banking, Housing and Urban Affairs*, 101st Cong., 2d Sess. (1990); F.B.I. *Report Confirms Sharp Rise in Violent Crime*, N.Y. Times, Aug. 6, 1990, at A10, col. 4.

13. See Greenhouse, *Report Critical of Drop in Savings*, N.Y. Times, June 10, 1991, at D2, col. 4; Rosenbaum, *Washington Talk; Deficit Up, But in '91 The Furor Has Passed*, N.Y. Times, July 14,

- The country is becoming more unequal, with fault lines of color and class threatening to become chasms.<sup>14</sup>
- Disaffection with the electoral process seems to be steadily increasing, as voter turnout steadily drops<sup>15</sup> and political campaigns become increasingly expensive and empty.<sup>16</sup>
- There is a deepening perceptual gap between those who think all is well in the commonwealth and that opportunity abounds, and those who feel dispirited and, perhaps, angry with government.<sup>17</sup>

With little difficulty, one could double the length of this list. The effort to identify causes, however, is more challenging. At a superficial level one might offer the following:

- Administrative agencies (and corporate bureaucracies alike) are unwieldy, complex, and institutionally unimaginative.
- Congress is not an efficient organization to address complex or difficult policy questions.
- Divided partisan government makes consensus on hard problems especially difficult.
- The nature of the institutional presidency, and its media advantages, make the dynamics of presidential politics quite separate from the dynamics of congressional elections, creating a schism in electoral mandates.
- The news media do a poor job of promoting public understanding of important problems, or facilitating wise voter choices.

At a somewhat deeper level, a partial list of causes might include:

- Excessive present-mindedness: We have developed a gourmand's appetite for the largess of an active welfare state, but we are not willing to tax ourselves to pay the bills; we prefer instead to tax future generations by bequeathing them enormous debts.
- The dominance of the media over democratic processes: Elected representatives and senior appointed officials can survive the accountability of the polls and achieve the Framers' ideal of wisdom only if the electorate can somehow be made to understand their difficult decisions, which in turn requires effective news media and policy processes open to public observation.
- Congressional stagnation: Congress's effectiveness in setting an agenda and forging policy has declined because political parties are in decline; political money is on the rise.

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1991, § 1, at 10, col. 1; Silk, *Economic Scene: Who is No. 1? It's Hard to Say*, N.Y. Times, July 27, 1990, at D2, col. 1; *Study Finds Wage Erosion*, N.Y. Times, Sept. 4, 1990, at D7, col. 2.

14. See *America's Blacks: A World Apart*, ECONOMIST, Mar. 30, 1991, at 17-21.

15. See Berke, *supra* note 8; Shenon, *supra* note 8.

16. See Berke, *Campaign Finance: In Election Spending, Watch Ceiling and Use a Loophole*, N.Y. Times, Oct. 3, 1988, at A1, col. 4.

17. See Williams, *A New Racial Poll*, NEWSWEEK, Feb. 26, 1979, at 48.

- Bureaucratic unreponsiveness: The natural traits of bureaucracy include inertia and rigidity, which tend to incline them against progress.

And so on. By repeatedly asking "Why?" one can generate successive lists of increasingly fundamental hypotheses about governance and its failures. Before long, one reaches propositions drawn from political philosophy, anthropology, or theology.<sup>18</sup> However, the efficacy of public institutions is bound to figure prominently in any analysis of government failure. Yet, sound governance does not appear to be the focus of administrative law.

### B. *The Project of Administrative Law*

From a contemporary perspective, the unsatisfactory performance of administrative law is directly related to the focus of administrative law doctrines: the control of executive discretion through the imposition of procedural fairness requirements; substantive rationality; and fidelity to sources of positive law, especially congressional commands. These concerns proceed from the premise, familiar in liberal legal ideology, that discretion in the state is dangerous. The consequent threat to personal liberty and the general welfare must be contained through public law, including administrative law.

Administrative law's antidiscretion project, rooted in our federal constitution of limited powers, assumes that it is generally better to err on the side of restraining and checking government action, even at some risk to democratically adopted, bureaucratically refined programmatic goals. State action is viewed as the exception to a natural condition of autonomy, free markets, and private orderings. The exceptional instances of state intervention must be closely policed to preserve the integrity of the market, individual rights, and the realm of private affairs. An expansion of state action is made safe for liberty and palatable to democracy only when constraints are imposed on administrative discretion through judge-made law and congressionally enacted procedural safeguards. Virtually every corner of administrative law embodies this *modus vivendi*: discretion, yes, but only with safeguards. Throughout the enterprise of administrative law, judicial review has been essential.

In pursuing the antidiscretion project, judges employ doctrines intended to confine that discretion, but the doctrines themselves seem to transfer much discretion from unelected bureaucrats to unelected judges.

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18. How far one goes in this chain of "whys" is perhaps a matter of intellectual taste and purpose. See, e.g., Reid, *Traditional Morality at Core of Robertson's Political Quest*, Wash. Post, Mar. 2, 1988, at A8, col. 1 (discussing presidential candidate Pat Robertson's characterization of the problems of American government in moral and religious terms).

We must evaluate our legal regime not only by whether bureaucratic discretion is checked, but also by whether we have done so without simply relocating and disguising that discretion—hiding it, as it were, beneath black robes and in dusty volumes unintelligible to the lay public and media.

As to each of these observations, some problems arise. The premise disfavoring state action and privileging private orderings is troublesome not only because it assumes some natural order of private relations antecedent to the state, but also because it shackles the collective action of government, taxing modern ambitions. The *Lochner* era of substantive due process had to yield to the modern collective pursuit of the general welfare. Like the New Deal Realists, we want a vigorous administrative state, capable of difficult and bold actions, not enfeebled by eighteenth-century habits of civic thought. Administrative discretion, after all, is essential to bold action, so discretion cannot be the focus of concern if administrative law is to serve rather than hinder our ambitions. The irony is that the promise that administrative law would constrain discretion helped make the New Deal evolution of government possible in view of the eighteenth-century sensibilities, deeply felt in segments of the legislatures and judiciary.

Expressed in a developmental metaphor, we had an immature administrative state, which was to be disciplined by constraints on discretion, and kept healthy by doses of proceduralism, like so much cod liver oil. Somehow, as the immature enterprise grew to today's ambitious, adolescent welfare state, this legal regime has undergone too little evolution. My claim is not that administrative law of the past three decades has stunted the legitimate growth of government—it has not. But public law has done too little to stave off the aches and traumas of our adolescence. The crisis of our childhood was fear of unconstrained discretion, and public law responded; but today's crisis is wasteful, foolish, indifferent and ineffectual government. These aches and pains of ineffectual governance largely escape the attention of administrative law doctrine, and hence of judicial review. In a fundamental sense we are blinded to the current crisis by the continuing obsession with the discretion accompanying the conmingling of powers, and by the related article of faith providing that the political branches, rather than the courts, are the proper bodies to address misfeasance and nonfeasance.

### III. THE *MODUS OPERANDI* AND THE FAILINGS OF ADMINISTRATIVE LAW

#### A. *The Trichotomy of Decisionmaking Paradigms, and Two Conceptual Failings*

Consider a trichotomy of paradigmatic decisionmaking methods, derived from the separation of powers ethos of public law, and representing different forms of reasoning that we might expect to be used by those who wield the state's power: *adjudicatory fairness*, *science*, and *politics*. They are rooted respectively in the crude images of the judge, the faceless technocratic expert, and the politician. These paradigms and their interrelationships provide the framework for much judicial analysis of where the mood for review of an administrative action should be located along a spectrum that ranges from extreme deference to aggressive interventionism. This framework, however, has conceptual failings that, in turn, cause administrative law doctrine to fail at its antidiscretion project. I hope to provide an account of how the arguments in administrative law controversies are formed, what makes so many propositions debatable, and what makes reasonable observers doubt whether such vital fields as the scope of review doctrine have any underlying rational consistency.

What is the content of this trichotomy of decisionmaking methods? The *adjudicatory fairness* paradigm is not just about courts because the key elements are also familiar in other settings: reasoned elaboration, neutrality of the decisionmaker, well-elaborated notions of hearing and confrontation, and consistency over time and across like situations. This last element includes the discovery of any preexisting rules (whether statutory, constitutional, or common law) thought to control a particular dispute. Appellate court decisionmaking is close to the prototype of the adjudicatory fairness doctrine. A bench trial is also close, although the fact-finding process, as distinguished from the law-applying process, partially implicates the second paradigm, that of expertise.

By *science*, I mean the familiar images of a scientist bent over laboratory bench, an accountant dissecting a balance sheet, or a mechanic servicing a helicopter. Key elements are rationality, objectivity, deductive reasoning, and specialized knowledge. I associate the scientific method with managerial efficiency here, in order to contrast them with the procedural values of broad participation and public disclosure (which are characteristic of the other paradigms). Facts and investigation are often critical. The decisionmaker is depersonalized; although we learn and remember the author of an important court opinion and perhaps even the principal sponsors of noteworthy legislation, we rarely note or



even remember the author of a regulation, however important or controversial.

Finally, the *politics* paradigm encompasses interest accommodation or balancing. At one extreme, the individual decisionmaker undervalues minority interests and straightforwardly applies his or her personal values and partisan preferences. At the other extreme, in a collective or institutional setting, the politics paradigm appears to be pluralism, democracy, or electoral competition at work. As practiced by an individual, the same paradigm can operate as the dispensing of favors, log-rolling, or allegiance to constituents' interests.<sup>19</sup> Discretionary or policy choices implicate this politics paradigm because the highly subjective social values and the balancing of various interest-group concerns distinguish these actions from instances of science-like expertness or adjudicatory fairness.<sup>20</sup>

How are these three paradigms implicit in doctrine? To the extent that a hypothetical judge understands a decisional problem to be one that calls for application of the adjudicatory fairness paradigm familiar to courts, the judge will be more likely to intervene, either to *insist* that the agency apply the appropriate paradigm, or to correct its misapplication. An example of mismatch would arise if an agency relies on the expertise paradigm when the problem called for the fairness methods of an adjudicatory hearing. An example of flawed application would be when the agency correctly selects, say, the adjudicatory fairness paradigm, but then mistakenly fails to supply a neutral decisionmaker or an oral hearing.

Many areas of doctrine—from scope of review to official notice, and from the rulemaking-adjudication distinction to problems of official bias—can be analyzed in terms of the trichotomy. By using the trichotomy as a diagnostic test, one can account for the critical considerations that are overtly employed by courts and advocates in these disparate areas of doctrine. An analysis of the paradigms, their interrelationships, and the crude separation of powers-based presumptive assignment of paradigms to branches of government breaks action down into discrete parts capable of close inspection. The trichotomy, and its manipulation, can provide an underlying explanation for why doctrine contains the tests and categories it does, and why doctrinal analysis is often unsatisfying or inconclusive.

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19. See, e.g., W. RIORDAN, *PLUNKETT OF TAMMANY HALL* (1963) (classic work on patronage and the political mechanism).

20. See C. EDLEY, *supra* note 4, at 74-83.

Doctrinal analysis, however, is not mechanical. If it were, administrative law would be a simple science, rather than the haze of competing considerations that we see played out in briefs and judicial opinions. The heart of my argument, therefore, is an explanation of how the structure of the trichotomy and the process of employing the paradigms of science, fairness, and politics in calibrating judicial deference obfuscate clear decisional principles.

Before I provide examples, I will refine this primitive sketch of the trichotomy by introducing the two most important mechanisms by which the deep reliance of the trichotomy generates uncertainty and argument in administrative law. I term these "conceptual" failings to underscore their logical inevitability.

The first conceptual failing is the notion of *attributive or normative duality*. Each decisionmaking paradigm has associated with it a collection of positive and negative attributes, or normative associations—a kind of Jekyll-and-Hyde dualism that, in a given situation, may make it debatable as to which paradigm applies. The duality also confuses whether in an agency decision the presence of a given paradigm is reason to be comforted and deferential, or concerned and interventionist.

For example, in many judicial opinions and commentaries, the adjudicatory fairness paradigm is praised for its neutrality, concern for consistency, and attention to reasoned elaboration. However, this is accompanied by a set of companion vices: the method tends to be expensive, removed from political accountability, proceduralistic, stylistic, arcane, conservative, and past-focused. The science paradigm is, on the positive side, objective, rational, verifiable, and efficient. On the negative side, however, science is impersonal, alienating, mechanical, and inaccessible to the lay public. Finally, the politics paradigm promises participation, democracy, responsiveness, and accountability. Yet it carries with it the negative attributes of subjectivity, willfulness, majority tyranny, and even irrationality. *These dualities permit advocates or judges, in particular cases, to emphasize selectively one side or the other to support a particular claim about the appropriate degree of judicial deference.* Thus, a brief or opinion will invite judicial intervention against the political paradigm by reciting the negative attributes of arbitrariness and tyranny, whereas the opposing side will suggest deference by reciting the virtues of democracy and accountability. The observer is often left confused and wondering what principle causes one side of the duality to prevail.

The second major conceptual failing of the trichotomy is the *boundary problem*. Although the decisionmaking paradigms are arguably distinct in the abstract, in practice they are commingled and inseparable except when subjected to artificial and distorted conceptual violence,

which often occurs. The commingling is most clear with controversial or difficult agency decisions. Where one paradigm ends and another begins is a matter of arbitrary perceptions or skillful advocacy. Indeed, this confusion of boundaries is often so serious that, when we observe agency actions or statements, our description is nothing but a choice among paradigms, which in turn amounts to a choice about scope of review or judicial deference.

For example, when the Occupational Safety and Health Administration (OSHA) promulgates a health standard that protects workers against benzene exposures greater than one part per million, that decision is an amalgam of fact, policy, and law that reflects the commingled use of scientific, political, and fairness paradigms. Whether and how to extrapolate from imperfect epidemiological information is not, in truth, the province of any single paradigm. (Whether there is "enough" evidence of carcinogenicity is a question of biomedical science, political attitudes towards risk and uncertainty, and adjudicatory construction of the statute.) Focusing on just one of the three fundamental hues in the complex picture may simplify the decision about scope of judicial review, but it requires an unreal understanding of the benzene problem and of OSHA's task.<sup>21</sup>

#### B. *How the Trichotomy Shapes Doctrine and Doctrinal Argument*

In my other work I provide numerous examples of how areas of doctrinal argument in administrative law are shaped by attempts to employ the distinctions and associations of this trichotomy of fairness, science, and politics.<sup>22</sup> Because courts do not use these categories explicitly, the burden of my argument is to demonstrate that the paradigms and modes of analysis that I suggest are a reasonably accurate and useful explanation for the patterns of behavior we observe. Consider the following two examples.

1. *Procedural Choice and Design.* The basic logic of the rulemaking-adjudication distinction is that when the adjudicatory fairness paradigm is appropriate, the analysis will militate toward individualized administrative adjudication, whereas the science or politics paradigm is better suited to rulemaking. The context may be an analysis of procedural due process, interpretation of ambiguous procedural commands in a statute, or the actual discretionary decision by the legislature or agency when designing a procedure. In the familiar teaching cases, such as

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21. See *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607 (1980) (*The Benzene Case*).

22. See C. EDLEY, *supra* note 4, at 13-130.

*Londoner v. City of Denver*,<sup>23</sup> *Bi-Metallic Investment Co. v. State Board of Equalization*,<sup>24</sup> *United States v. Florida East Coast Railway*,<sup>25</sup> *Goldberg v. Kelly*,<sup>26</sup> *NLRB v. Bell Aerospace Co.*,<sup>27</sup> and *NLRB v. Wyman-Gordon Co.*,<sup>28</sup> the opinions struggle with the question of whether quasi-legislative rulemaking or quasi-judicial adjudication is the appropriate procedure for a given problem before the administrative agency.

The judges invoke the attributes or norms to which I referred above,<sup>29</sup> and reliably emphasize the positive attributes of the winning paradigm and the negative attributes of the losing paradigm. More specifically, if we analyze the list of particular circumstances material to the choice between rulemaking and decisionmaking—as offered in the cases, or in commentary such as the seminal articles by Judge Friendly<sup>30</sup> and Professor Shapiro<sup>31</sup>—we find that these circumstances are themselves derived from the distinctions of the trichotomy. Thus, in *Bi-Metallic*, Justice Holmes upholds the denial of hearings by focusing on the large number of property taxpayers affected by the general revaluation:

Where a rule of conduct applies to more than a few people it is impracticable that everyone should have a direct voice in its adoption. . . . Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.<sup>32</sup>

By contrast, the Court in *Londoner* required some opportunity for individualized hearing before the city fixed the amount of property assessments for street improvements.<sup>33</sup> In *Florida East Coast Railway*, Justice Rehnquist's majority opinion upheld the use of informal trial-type rulemaking in a difficult problem of statutory interpretation by emphasizing the negative associations with adjudicatory formality, and comparing these with the positive attributes of expert and political decisionmaking incorporated in quasi-legislative agency procedures.<sup>34</sup>

2. *Scope of Review.* As important as procedural requirements are to contemporary administrative law, even more central is the problem of

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23. 210 U.S. 373 (1908).

24. 239 U.S. 441 (1915).

25. 410 U.S. 224 (1973).

26. 397 U.S. 254 (1970).

27. 416 U.S. 267 (1974).

28. 394 U.S. 759 (1969).

29. See *supra* text accompanying notes 19-21.

30. Friendly, "Some Kind of Hearing," 123 U. PA. L. REV. 1268 (1975).

31. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965).

32. 239 U.S. at 445.

33. 210 U.S. at 385-86.

34. 410 U.S. at 235.

determining the scope of judicial review, or degree of deference, for agency determinations of fact, law, and policy (or discretionary law-application). Again, the trichotomy provides a helpful way to understand why the doctrinal categories are what they are, and how arguments on either side of a proposition can be constructed.

Consider, for example, the infamous *Chevron* case.<sup>35</sup> The Environmental Protection Agency (EPA) had, consistent with the Reagan Administration's antiregulatory *jihad*, decided to permit economically efficient pollution tradeoffs among point sources within an imaginary "bubble" at an industrial source, rejecting a more natural statutory interpretation that seemed to require that every individual source meet pollution control standards. The Court of Appeals for the District of Columbia Circuit reviewed the bubble concept with an independent scope of review, treating it as a question of law calling for the court's traditional decisionmaking methods of statutory construction and *stare decisis*.<sup>36</sup> The Supreme Court disagreed with the lower court's reasoning, holding that the statute did not speak to the definitional question at hand,<sup>37</sup> and effectively treated the dispute not as a matter of law (appropriate for adjudicatory methods familiar to courts) but instead as a matter of policy appropriate for the balancing judgments of the executive branch—the branch ostensibly vested with the authority and expertise to make such choices. Neither court focused on the quality of the scientific or economic evidence supporting the agency's claim that the bubble strategy would serve the statutory purposes, however defined. However, such a "hard-look" approach emphasizing facts, rather than law or policy, was logically available. And perhaps it would have been more helpful, regardless of what residuum of discretion rests with the agency. On its own terms, *Chevron* is about the law-politics distinction, with the Supreme Court attempting to narrow the range of matters that may be placed in the classic "independent" scope of review box traditionally labeled "law." The Court's two-step treatment of statutory language and history is an effort to define what "law" is by reference to what judges can (properly) know, in comparison with things that administrators will know.

Thus, the key doctrinal categories of law, fact, and policy are conceptually grounded on the paradigms of adjudicatory fairness, science, and politics. Yet, the interesting point for my purposes is that because the paradigms are so difficult to disentangle, doctrinal categories will be separable only at the price of severe distortion and logic-chopping. At-

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

36. *Natural Resources Defense Council, Inc. v. Gorsuch*, 685 F.2d 718 (D.C. Cir. 1982).

37. *Chevron*, 467 U.S. at 859-60.

tributive duality compounds the problem of drawing boundaries between the paradigms. Thus, the *Chevron* majority could emphasize the virtues of deference to politics and expertise; those opposed could emphasize the dangers of political arbitrariness or the importance of judicial review to ensure that the expertise paradigm is applied correctly in light of whatever standards of science and policy rationality can be discovered with the aid of communities of opinion outside the agency. The problematic boundary between the paradigms makes the approaches of either the Court of Appeals or the Supreme Court in *Chevron* seem perfectly reasonable. Perhaps more importantly, the boundary problem also helps us understand why and how lower courts and the Supreme Court itself have responded to *Chevron* with ambivalence and inconsistency. Because any given problem can be placed under the rubric of more than one paradigm, the selection of a particular paradigm as controlling reflects a subjective judgment call.

### C. *The Implications of the Trichotomy's Failings for Scholarship*

It is not remarkable that one can trace many elements of administrative law doctrine to the trichotomy, and thence to the separation of powers. After all, structural elements of public law *should* be rooted in the most fundamental structural premises of our constitutional system. A far more interesting observation relates to how this analysis accounts for the observable problems of doctrine in practice. Chief among these problems, as we have seen, are the broad judicial discretion to fashion an *ad hoc* scope of review for the problem at hand, and the bluntness and indirectness of law as an instrument to assure us that administrative decisions will be substantively sound.

But there is more. Scholarship in administrative law overwhelmingly reflects the same deeply pervasive influence of separation of powers concerns and, implicitly, the trichotomy. Predictably, then, the various scholarly prescriptions for doctrinal reform or rationalization fall prey to the conceptual difficulties that I have outlined—attributive duality and the boundary problem.

The most obvious and common error, in my view, is the scholarship that accepts, unquestioningly, the canonical assignment of institutional rules: courts focus on questions of law, while the agency represents expertise and, within some vague bounds, political discretion. Outside questions of law, the court's role must be limited because the judges are neither elected nor expert. Scholarship attempting to divine clear doctrinal guidance from these separation of powers nostrums will, like similarly reasoned judicial opinions, fail to persuade because the boundary problems of the trichotomy require that in interesting cases we will be

unable to disentangle convincingly the three paradigms. Moreover, the normative arguments that may be rehearsed to reinforce the separated institutional roles, such as the virtue of representative government, or of an independent judiciary, can readily be countered as a result of the attributive duality mentioned above.<sup>38</sup>

No writer in the field has been more important to my own thinking than Professor Louis Jaffe. His close analysis of doctrine, however, does not escape these difficulties. In his analysis of scope of review, for example, Professor Jaffe wisely suggests that we recognize the shared responsibility of courts and agencies in finding law,<sup>39</sup> yet we are left unable to separate law-making from fact-finding reliably because the boundary problems are inescapable.<sup>40</sup>

Similarly, in Professor Kenneth Culp Davis's description of the rulemaking-adjudication distinction, we see a list of factors that distinguish quasi-legislative and adjudicative facts, such as the number of individuals affected or the nature of the arguments to be developed at a hearing.<sup>41</sup> The list of considerations, however, can be comfortably linked to the trichotomy. It is because of the conceptual flaws of the trichotomy that the analysis Davis recommends leaves many choices about agency procedures to arbitrary judgment.

More broadly, to the extent that any theory of administrative law, or any elaboration of a doctrinal problem, proceeds from a traditional assumption about the judicial role, it will suffer from the difficulty that modern administration confounds the traditional assignment of roles and decisionmaking paradigms. Nowhere is this clearer than in the quagmire of statutory interpretation. One can accept the Supreme Court's problematic point in the *Chevron* case that congressional silence implies a grant of discretion to the agency.<sup>42</sup> But no court or commentator has provided any useful guidelines to tell us when Congress has fairly implied some statutory standards versus when it has simply granted discretion. Nor can there be any such doctrinal guidelines, because any attempt to discern definitely the boundary between general and particular in what Congress has addressed will implicitly require a vision of appropriate institutional roles. This leads back, once again, to distinctions rooted in the trichotomy, and the conceptual failings of the trichotomy.

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38. See *supra* text accompanying note 21.

39. See L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 25-27 (1965).

40. See C. EDLEY, *supra* note 4, at 133-68.

41. See 2 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* §§ 12:3-12:4, at 412-20 (2d ed. 1978); see also Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 924, 954 n.128 (1965).

42. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

D. *Recognizing the Trichotomy: Marginal Reform Through Disclosure*

Administrative law doctrine is extraordinarily squeamish when it comes to the role of partisan ideology or political preferences in agency decisionmaking. We know, for example, that a strong ideological predisposition that favors *laissez-faire* economics was a virtual litmus test for the appointment of regulatory officials in the Reagan Administration. One can be certain that those prejudices and the desire to be true to the President's program influenced the results of many rulemakings and adjudications.

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. At present, an agency decisionmaker who anticipates judicial review is unlikely to cite political ideology or loyalty to the President's program as a reason for official action, or even one of several reasons. Instead, the political preferences and values are transmuted into expertise and legalisms by means of manipulating the boundaries between science, politics, and law.

For example, FERC concluded that despite consistent interpretations dating back to 1906, the statutory mandate that the agency assure "reasonable rates" for oil pipelines did not require traditional utility rate regulation, but only the mere monitoring of whatever prices deregulated market forces might produce.<sup>43</sup> The D.C. Circuit was not impressed.<sup>44</sup> On its face, the agency's abrupt about-face was politically inspired. So, why did the agency pretend that this was a matter of a newly enlightened construction of broad statutory terms? Why not offer an obviously principled rationale based on a politically-rooted confidence in the efficacy of markets, supported with some empirical evidence for its assertions that intermodal, inter-fuel competition would do the trick?

Similarly, when the Federal Trade Commission (FTC) accomplished its partial deregulation of deceptive advertising by scrapping a long-standing practice of protecting gullible consumers as well as the more discerning, "reasonable consumers,"<sup>45</sup> the orders and public state-

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43. *Farmers Union Cent. Exch., Inc. v. Federal Energy Regulatory Comm'n*, 734 F.2d 1486, 1490-93 (D.C. Cir.), *cert. denied*, 469 U.S. 1034 (1984).

44. *Id.* at 1510. The court held that FERC-set oil pipeline rate ceilings would be "egregiously extortionate" if reached in practice, and that FERC had failed to demonstrate that market forces could be relied on to keep prices at reasonable levels throughout the industry. *Id.*

45. *See Charles of the Ritz v. FTC*, 143 F.2d 676 (2d Cir. 1944).



ments should not have pretended that the law had always been such. This was a change in direction, occasioned by the elections of 1980 and the change of Commission members.<sup>46</sup> An articulated, policy-based confession of deregulation would have been more truthful, and probably more productive of sensible public and congressional review.

As for *judicial* review, confessions of politics would serve three useful purposes. First, to the extent that an agency is free to declare that it understands that expertise only partially justifies a given conclusion, and that claims of special political values also necessarily undergird decisions, the agency will feel less pressure to contrive answers within the science paradigm. As a result, scientific evidence will more easily withstand hard-look review. When a political choice is disguised as "science," the ostensibly technical reasoning may appear arbitrary or flawed, thereby inviting reversal. Second, by indicating its assessment of how scientific rationales should control decisions, the agency focuses the public and reviewing court on whether additional science (i.e., evidence) should be required, and whether other scientific evidence militates against the agency's decision. Common law evolution would develop rules for paradigm applicability and balance—how much politics is too much, how little science is too little? Third, by declaring more carefully when it is exercising discretion to achieve a politically desired result, the agency is signalling to the public and Congress that the decision, for which the administration expects to be accountable, reflects the workings of the electoral process. It also communicates to the reviewing court that a reversal will be tantamount to an overriding of a political decision, which may well strike observers as a political act on the part of the court.

Consider the following paragraph in a statement of basis and purpose in connection with a hypothetical rulemaking:

The epidemiological studies indicate, with 80 percent confidence, that a fifty-microgram exposure to xynothalic creostate is no more dangerous than a twenty-microgram exposure. But our survey of the industry suggests that the expected compliance cost per prevented injury is \$100,000 at the fifty-microgram level and almost twice that at the twenty-microgram level. Although some rule making comments argue that the added cost is a modest price for the added protection, we interpret the act as affording us discretion to strike a balance between

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46. Reagan-appointed FTC Chairman James C. Miller III proposed a two-part definition of deceptive acts and practices that would have required consumers to act reasonably in the circumstances. Michael Pertschuk, FTC Commissioner and former Chairman, disagreed with Miller's proposal, calling it an "effort to embody a conservative political ideology into the country's principal consumer protection statute." *FTC's Authority Over Deceptive Advertising, 1982: Hearing before the Subcomm. for Consumers of the Senate Comm. on Commerce, Science, and Transportation*, 97th Cong., 2d Sess. 67 (1982) (statement of Michael Pertschuk); see also *id.* at 3 (statement of James Miller).

industry costs and worker protection, and we are unwilling to impose the higher costs absent convincing evidence of added benefit.<sup>47</sup>

Or, in an explanation of informal adjudicatory action:

The act does not specify criteria by which the secretary is to select the thirty-five demonstration sites for the experimental housing program. In addition to considering the various demographic and market factors detailed elsewhere, we have consulted widely in an effort to allow as many interested members of Congress as possible to feel some involvement in shaping the program, including through the participation of their constituents. We have also been mindful of the importance of building a broad base of interest and support within the Congress for programs of the department.<sup>48</sup>

The statement reveals the agency's use of more than a computer formula, and also the agency's view that the statute permits it to use what I have elsewhere termed a "strong" or "electoral" form of the politics paradigm, rather than the weaker, politics-as-preferences form evident in the hypothetical rulemaking.<sup>49</sup> Reviewing courts should credit politics as an appropriate element of decisionmaking, subject to reasonable tests of conflict with science and law.<sup>50</sup> Of course, the conceptual problems of the trichotomy make any precise description of the mix impossible. The most that can be said is that full disclosure of political motivations would be an incremental improvement if doctrine affirmatively encouraged the disclosure of otherwise secret politics to promote accountability and reduce casuistic distortion by agencies of the other two paradigms.

#### IV. POLITICAL IDEOLOGY, LEGAL THEORY, AND PRACTICAL INVENTION

Having offered my view of the conventional project of administrative law, and having then characterized the trichotomy-based *modus operandi* and failings of doctrine, I now turn to the third step of my inquiry: As we undertake an elaboration of a more promising project for administrative law, what is there to say for political ideology, for grand legal theories, for practical invention, and for the connections among the three realms?

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47. C. EDLEY, *supra* note 4, at 191.

48. *Id.*

49. For a more detailed discussion of "harder look" review concerning paradigm disclosure, mix, and quality, see *id.* at 169-212.

50. Evaluating the mix of paradigms, and developing useful guidance for when the mix should be ruled unacceptable by a reviewing court, is key. For my attempt, see *id.* at 192-96.

### A. *The Integration of Ideology, Theory, and Invention*

1. *The New Deal.* I look to history for guidance. New Deal warriors, many of them lawyers,<sup>51</sup> understood their task to be the renovation of democratic capitalism, enabling it to overcome economic depression and global totalitarianism. The menaces of bread lines and fascists, Hoovervilles and empire-minded war machines drove leaders in both intellectual and public affairs to invent new institutions, new organizing principles—a new public ideology to fit the new day, as those warriors imagined it.

Adolph Berle, an influential New Deal theorist,<sup>52</sup> argued that the realities of corporate power make people and governments utterly dependent upon these entities, although the market forces that drive corporate behavior are relatively impotent to impose the needed disciplines on their power. Berle's skepticism about corporate self-control undergirds the effort to rethink the relationship between government and enterprise, and his prescriptions for and advocacy of new doctrines and institutions of public law controls over corporations.<sup>53</sup> Professor Felix Frankfurter, writing in 1930, emphasized the importance of avoiding wooden separation of powers formalism (those were not his words) to accommodate what he understood to be "the demands of modern society."<sup>54</sup> As a partial rebuttal to the charge that law obstructed the progress of govern-

51. See Llewellyn, *Some Realism about Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1226-27 n.18 (1931).

52. See Hessen, *The Modern Corporation and Private Property: A Reappraisal*, 26 J. L. & ECON. 273 (1983) (assessing the impact of Berle's work).

53. For example:

[B]oth popular and educated opinion accepts in great measure the proposition that its government stands or falls in large degree upon its ability to bring about economic and social results acceptable to its people.

....

Even the intimate matter of degree of profits is beginning to become a matter for public concern. . . .

The difference between the large private corporation and its predecessor, the smaller enterprise, is yet undefined, but it is important. The latter is controlled considerably, if not entirely, by the ordinary relations of property in a free economy. The former has, almost without exception, moved into a position where it is subjected to limitations and controls of an essentially political nature. This development arises from the companion fact that the large corporation, having apparently become essential to the community, is relied on and, with present techniques, it cannot be dispensed with. . . .

Concentration exists, power exists, and the "free market" is not the continuous controlling influence it once may have been. To fill that deficiency a new force is emerging: the quiet conscription of heavily concentrated enterprises into the status of quasi-public services rather than private fortune-making concerns.

Berle, *Corporations and the Modern State*, in *THE FUTURE OF DEMOCRATIC CAPITALISM* 35, 35, 46-47 (1950); see also A. BERLE & G. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 309-13 (rev. ed. 1968) (arguing that because the modern corporation is potentially the new dominant institution in the modern world, it should be subject to same tests of public benefit to which other powerholders have traditionally been subject).

54. F. FRANKFURTER, *THE PUBLIC AND ITS GOVERNMENT* 1 (1930).

ment, he argued that judicial responsiveness to problems of governance is essential and virtuous:

In simple truth, the difficulties that government encounters from law do not inhere in the Constitution. They are due to the judges who interpret it. For, in the language of the present Chief Justice spoken when he was Governor of New York, "we are under a Constitution, but the Constitution is what the judges say it is. . . ." That document has ample resources for imaginative statesmanship, if judges have imagination for statesmanship. When seen through the eyes of a Mr. Justice Holmes, there emerges from the Constitution the conception of a nation adequate to its national and international duties, consisting of federated states possessed of ample power for the diverse uses of a civilized people. He has been mindful of the Union for which he fought; he has been equally watchful to assure scope for the states upon which the Union rests. He has found the Constitution equal to the needs of a great nation at war, and adequate to the desires of a generous and daring people at peace.<sup>55</sup>

James Landis, a New Deal Legal Realist who was central to the theoretical and doctrinal elaboration of modern administrative law,<sup>56</sup> analogized the policy and management tasks that face a regulatory commission to the similar tasks that face a large industrial corporation. "The significance of this comparison," he wrote, "is not that it may point to a need for an expanding concept of the province of governmental regulation, but rather that it points to the form which governmental action tends to take."<sup>57</sup> Just as no corporation would adopt a separation of powers for its organization and decisionmaking, "it is only intelligent realism" for the commission charged with the stability of the corporation "to follow the industrial rather than the political" model of organization. "The dominant theme in the administrative structure is thus determined not primarily by *political conceptualism* but rather by concern for an industry whose economic health has become a responsibility of government."<sup>58</sup>

Justice Brandeis's jurisprudence was also influenced by a deep appreciation of social realities and the demands of progress. As Charles Beard stated in his 1930 essay:

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55. *Id.* at 79-80.

56. For a study of Landis's life and accomplishments, see D. RITCHIE, JAMES M. LANDIS: DEAN OF REGULATORS (1980).

57. J. LANDIS, THE ADMINISTRATIVE PROCESS 11 (1938). Landis gives several examples of how the rise of particular agencies and regulatory schemes was occasioned by public concern for "a general social and economic problem," and how these agencies and schemes "were called into being when the political power of our democratic institutions found it necessary to exercise some control over the varying phases of our economic life." *Id.* at 16.

58. *Id.* at 11-12 (emphasis added).

Mr. Justice Brandeis, like every other judge, entered upon his responsibilities with a fairly coherent picture in his mind of what he wished American society to represent and become. It is true that he wrote no systematic treatise on sociology before taking on the ermine. Nor was he given to that logical perfection which usually eventuates in Utopia. Yet from his writings and activities . . . can be constructed in bold outlines a mosaic of the convictions and facts that largely determined his approach to controversial questions before the Court.<sup>59</sup>

Beard goes on to mention Brandeis's familiar views: defense of individual enterprises and restraint of monopolies; effective regulation of utilities in defense of consumer interests; strong trade unions; social legislation to protect wage-earners; and interpretation of the Constitution's "convenient vagueness" to sustain social legislation if fairly calculated to accomplish a reasonable purpose.<sup>60</sup>

The lawyers at the center and periphery of both the New Deal and its Progressive foreshadowing can fairly be described as part of the Legal Realist school—regardless of whether they were self-consciously part of any jurisprudential camp. These reformers were driven to institutional and doctrinal invention by the practical import of their social critique. The legal theories they embraced, such as a repudiation of the public-private distinction and the eschewing of separation of powers formalism, were a product of some felt need to remake government. As Rexford Tugwell stated in an address to the Federation of Bar Associations of Western New York: "Government, or any part of it, is not in itself something; it is for something. It must do what we expect of it or it must be changed so that it will."<sup>61</sup> As though tutored by Frankfurter, Tugwell wrote that constitutionality is not "a tangible fact, undeviating and precise," but rather "a legalistic expression of the prevailing political and economic philosophy."<sup>62</sup> The old constitutional conception of government called to mind a policeman; government's role entailed minimal intrusion on private affairs and a *laissez-faire* reliance on the invisible hand. With a Realist's characteristic bite, Tugwell charged:

The jig is up. The cat is out of the bag. There is no invisible hand. There never was. If the depression has not taught us that, we are incapable of education. Time was when the anarchy of the competitive

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59. Beard, *supra* note 1, at xix.

60. *Id.*; see also *Pacific States Box & Basket Co. v. White*, 296 U.S. 176 (1935) (holding that Oregon regulation mandating specific shape and size of containers for berries was not arbitrary or capricious because it bore a reasonable relationship to the goal of consumer protection).

61. R. TUGWELL, *THE BATTLE FOR DEMOCRACY* 3 (1935). In his defense of controversial New Deal legislation against constitutional criticisms, Tugwell integrated a compelling policy argument, rooted in economic and social observations, with a critique of orthodox economic and legal theories and a prescription for their replacement with what we would now term the administrative state.

62. *Id.* at 12.

struggle was not too costly. Today it is tragically wasteful. It leads to disaster. We must now supply a real and visible guiding hand to do the task which that mythical, nonexistent, invisible agency was supposed to perform but never did.

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And there is the importance of the rediscovery of the Constitution. We are turning our back on the policeman doctrine of government and recapturing the vision of a government equipped to fight and overcome the forces of economic disintegration. A strong government with an executive amply empowered by legislative delegation is the one way out of our dilemma, and on to the realization of our vast social and economic possibilities.<sup>63</sup>

In this one brief passage we see the integration of three elements: First, a political ideology that responds to depression and economic concentration; second, a legal theory that challenges the nineteenth-century formalism that, under *Lochner*<sup>64</sup> and the nondelegation doctrine, was antithetical to the political ideology; and third, doctrinal and institutional inventions to accommodate and support the particular conception of progress.

It was no coincidence that lawyers were prominent in these developments, that legal institutions were both instruments and objects of our own velvet revolution,<sup>65</sup> or that renovated legal doctrine served as midwife to the implementation of the modern administrative state. Those leading the New Deal appreciated and promoted law's mediating role in social change.

Constitutional law scholars have paid careful attention to the search for first principles of politico-legal theory. Many goals and hopes motivate such work, the most practical of which is to inform the process of constitutional interpretation. There are often implications, too, for all of public law, including subconstitutional judicial review of agency action. My contention, however, is that such legal theories are insufficient to provide any determinate shape to a program for reform of either governance or legal doctrine. The *legal theory* must flow from and be integrated with a *political ideology*, much as we can, in retrospect, understand the New Deal revolution as an organic amalgam of politics and law, institutions and theory, serendipity and design. This proposition seems valid at three levels, which can be stated in order of increasing subtlety. First, legal theory must have a related and embracing political ideology to find a welcoming climate of public and elite opinion for the theory's prescrip-

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63. *Id.* at 14-15.

64. *Lochner v. New York*, 198 U.S. 45 (1905).

65. The name "velvet revolution" has been used to describe the nonviolent democratic overthrow of the Communist regime in Czechoslovakia. See Tagliabue, *Upheaval In the East; Prague's Velvet Revolutionaries Recall John Lennon*, N.Y. Times, Dec. 12, 1989, § 1, at 9, col. 1.

tions at the level of doctrine and reform. Second, the companion ideology, or sociopolitical critique, provides the test of whether the prescriptions are sound. Third, the theory itself is likely incapable of generating concrete or useful prescriptions, and thus flawed, unless the theory is informed in an immediate sense by an ideology that can provide a direction and purpose to the abstract reasoning.

It is common for people of action, including lawyers, to heap skepticism upon theorists who seem to have little interest in practical details or in the applications of their abstractions. The writings of these theorists are not designed to invite the attention of those of a more practical bent who might be skilled at working out the applications to everyday affairs. So, for example, we expect practical skepticism those writers who seek to renovate legal liberalism, revive classical republicanism, or invent postmodern legal theories. My criticism of those theorists is different. Their problem is not one of linear incompleteness—with failure to follow through by deriving sufficiently concrete and convincing doctrinal or institutional prescriptions from their theories. Rather, their failure stems from a lack of wholly understanding the domain of public law. I suggest that these theorists embark upon a new path—a path that I imagine as a circle with the following component parts:

*Political Ideology:* The theorists should develop an empirical understanding of social and political experience, and an ideology that interprets that experience and offers a normative critique. The political ideology, in my terms, does not flow from a theory of society or of personality—it may even be antecedent to theory. The ideology is a response to the tensions, or “intimations,” within unsatisfactory socioeconomic arrangements. (One example is the New Deal vision, rooted in Progressivism.)

*Theory:* The theorists should develop a legal or politico-legal theory about the interrelationship of law and sociopolitical life, particularly in constitutional matters. (One example is Legal Realism, together with thorough critiques of formalism, the public-private distinction, and economic *laissez-faire*.)

*Practical Invention:* The theorist should apply the theory to prescribe or invent institutions and doctrines that reflect the ideological critique of experience. (One example is the New Deal program of an expanded administrative apparatus, modern administrative law, and a legislative program including the National Industrial Recovery Act and the Agricultural Adjustment Act.)

*Repeat the cycle:* The theorist should test the practical inventions against experience, such that there is a continual process of ideological development, theoretical enterprise, and institutional or doctrinal reform (or revolution).

If, as I believe, the success of each stage depends on the others, the theoretical exegesis so popular in academic writing will not yield practical invention unless there has been (or there accompanies) a passage through empiricism and ideological critique that serves to motivate and ground both theory and invention. When we turn to the work of most contemporary theorists, however, that passage is absent.

One can, in fact, discover an intellectual pedigree for my thesis. Aristotle argued that the value of political philosophy was a function of its rootedness in an understanding of the wide range of matters of political significance. Moreover, this understanding was to be within a comparative framework that permits a scientific appreciation not of one regime (by which he meant sociopolitical makeup and manner of governance), but rather of the many possibilities suggested by a variety of regimes.<sup>66</sup> A philosopher's perspective, then, is thoroughly informed by experience and prudence, and yet at some distance from the politician who, riveted to the immediate, is unable to imagine alternative institutions.

This duality of "groundedness while removed" is precisely the virtue that de Tocqueville ascribed to the seventeenth-century French writers whom he credited with inspiring revolutions on two continents. Unlike their British contemporaries, wrote de Tocqueville, the French writers were not personal participants in public affairs as officials wielding authority; they were, however, deeply committed students of the details of governmental and social life.<sup>67</sup> This characterization may be in part de Tocqueville's projection onto Montesquieu and others of his own empirical predilections.

Nevertheless, the truth of de Tocqueville's message seems irrefutable: visionary prescriptions of philosophers must be initially informed by and then eventually set aside practicalities, lest their visions produce failed or perverted revolutions. This latter pathology is de Tocqueville's account for the unhappy turns in post-revolutionary France, where the absence of a popular political culture meant there was nothing to temper the philosopher's literary visions with what Aristotle would have termed

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66. See Lord, *Aristotle*, in *HISTORY OF POLITICAL PHILOSOPHY* 118, 130-33 (L. Strauss & J. Cropsey 3d ed. 1987) (citing ARISTOTLE, *THE NICHOMACHEAN ETHICS AND POLITICS* 101-29 (D. Chase trans. 3d ed. 1920)).

67. A. DE TOCQUEVILLE, *supra* note 2, at 170. This may be a somewhat idiosyncratic interpretation. My reading is that, although de Tocqueville faults the prescriptions of Locke and Montesquieu (because they were dangerous when applied without editing by French revolutionaries), he found their worldly focus attractive in comparison to German philosophers. In my terms, these theorists lacked a strong empirical connection between the realms of institutional invention and ideological critique. In America, perhaps, this connection was provided by revolutionaries who, although familiar with the continental political philosophers, had a degree of political experience and perspective that their French counterparts lacked.



prudence or practical reason. (Perhaps the same may now be said of literary Marxism and its ultimately failed revolutions.)

My emphasis on the realm of politics resonates with the intellectual and political strategy of Legal Realists who participated in progressive and New Deal reform. Although their empiricism and skeptical stance towards formalism may be understood as hostility to formalism and conceptualism, it seems wrong to presume that the Realists stood apart from theory. Instead, their critiques of governance and of socioeconomic conditions, married to their inventive challenge against doctrines and institutions, were often explicitly directed at such abstract constructs as *laissez-faire*, separation of powers, the public-private distinction, and legal science. Their competing politico-legal theory was perhaps only implicit or inchoate, defined more by what it was not. The affirmative strands are vague: perhaps Tugwell's theme of cooperation;<sup>68</sup> perhaps Brandeis's<sup>69</sup> or Douglas's<sup>70</sup> suspicion of economic concentration; or perhaps Landis's<sup>71</sup> or Frankfurter's<sup>72</sup> dislike of reified constitutional structures—structures that thwart not just the democratically adopted means, but the very ends as well.

If the Legal Realists were a bit thin on political theory (by today's standards), it was understandable as a tactical shift of ground in response to the hegemony of the conceptualism they found in the economic and constitutional theories to which they were opposed. In light of the success of their political program, it is difficult to fault their tactics. One may complain that an overly skeptical stance toward theory may have prevented the completion of their triumphs over *laissez-faire* and the wooden separation of powers.<sup>73</sup>

I am persuaded that as long as we continue to define the enterprise of contemporary administrative law solely by the antidiscretion project and separation of powers doctrine, administrative law will hinder the reinvigoration of government, rather than act as the instrument of democratic evolution. The alternative is a redefined project for administrative law integrated with, if not derived from, a broader effort to renovate governance. That project will, in turn, be rooted in a compelling critique and political ideology, perhaps as sweeping as the New Deal itself, rather than some technocratic aspiration for good government. Therefore, it is

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68. See R. TUGWELL, *supra* note 61, at 3-16.

69. See *Liggett Co. v. Lee*, 288 U.S. 517, 568 (1933) (Brandeis, J., dissenting in part).

70. See *Standard Oil Co. v. United States*, 337 U.S. 293, 315 n.1 (1949) (Douglas, J., dissenting).

71. See J. LANDIS, *supra* note 57, at 123-55.

72. See F. FRANKFURTER, *supra* note 54, at 36-80.

73. The former enjoys renewed vigor in Reaganism and in law and economics; the latter, as we have seen, continues to confuse administrative law.

interesting but ultimately futile to construct a theoretical stance towards doctrinal reform without making explicit the political ideology and, in an abstract sense, the political program that will constitute the institutional arrangements and norms through which one hopes to make the theory come alive. This assertion (I understand it is only that) holds whether the subject is statutory interpretation, scope of judicial review, federalism, or congressional checks on the Commander in Chief.<sup>74</sup> There must be politics, as there was for the Legal Realists and for the Framers.

2. *Reaganism.* In considering the desirability and feasibility of renovating administrative law, we should bear in mind that our efforts to develop the practical implications of legal theory are embedded in a matrix of possibilities that are shaped by prevailing political ideologies. By ideology I mean a cluster of conceptions or attitudes that define what is generally embraced in public policy, political program, or judicial action.<sup>75</sup> Since the New Deal, only one distinctive and successful political ideology has emerged: Reaganism. Yet Reaganism is more than one man, one administration, or one political party. Public figures who have espoused elements of Reaganism include such a diverse lot as George Wallace ( inveighing against Washington),<sup>76</sup> Richard Nixon (advocating revenue sharing and block grants to shrink the role of the national government),<sup>77</sup> Jimmy Carter (reversing the post-Vietnam decline in defense spending),<sup>78</sup> and even Ted Kennedy (supporting transportation deregulation in the mid-1970s).<sup>79</sup>

The elements of Reaganism are:

- A *nouveau*-libertarian, anti-bureaucracy suspicion of all governmental activity, which, because national government is more distant, is particularly manifest as an anti-federalist suspicion (verging on antipathy) of national domestic programs;
- Faith in markets and supply-side incentives, especially in contrast to government regulation;

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74. I have no well-considered instincts about whether the argument that I build can be fruitfully applied to the individual rights and liberties context.

75. See Beer, *In Search of a New Public Philosophy*, in *THE NEW AMERICAN POLITICAL SYSTEM* 5 (A. King ed. 1978).

76. See T. WHITE, *THE MAKING OF THE PRESIDENT* 1972, at 120-21 (1973).

77. See 27 CONG. Q. ALMANAC 23 (1971) (describing President Nixon's proposal for revenue sharing in his State of the Union Address).

78. See Clark, *Salt II Treaty—It Won't Stop Rise in Defense Spending*, NAT'L J., June 16, 1979, at 984.

79. See Cohen, *Carter Shows Who's the Boss When it Comes to Airline Deregulation*, NAT'L J., Mar. 5, 1977, at 352.

- A romantic invocation of loosely defined “traditional family values”; and
- A combative, anticommunist conception of national security, with America resurgent, and even defiant, in the world order.

The implications of Reaganism are not as obvious. Some of its manifestations do not appear partisan or even political in the conventional sense. But this powerful intellectual framework shapes, however invisibly, the limits of contemporary discourse about governance. Indeed, Reaganism’s power to shape our discourse is evidence of the success of Reaganism as political ideology.

What principles can we derive from this *nouveau*-libertarian, anti-federalist, anti-bureaucratic, *laissez-faire* spirit of Reaganism? I propose the following possibilities:

- The autonomy of markets and private actors is preferred over the regulatory impositions of government;
- Political decisionmaking that curbs government activity is favored over bureaucratic expansion and regulatory activism; and
- “Traditional values,” such as law and order, trump broad claims for civil liberties.

Notably, judicial passivity is *not* clearly implied by the ideological tenets of Reaganism—the role of courts is just as likely instrumental, so that deference or intervention would depend upon which posture would, in the particular circumstances, advance the values of anti-federalism, *laissez-faire* efficiency, and so forth. This instrumental calculation may appear arbitrary, but it is, in fact, quite principled within its ideological framework. Moreover, it is relatively visible to the scrutiny of commentators and, for example, administration officials and senators deciding whether to appoint and approve a particular judge or justice.

Against this we must recognize that the life tenure provisions of article III mean that our judicial corps, no less than the legal literature and doctrine, have an archaeological quality like so many layers of ideological fashion. A substantial, although dwindling, number of judges remain sympathetic to the New Deal paradigm, whether consciously or otherwise. Those sympathies seem tempered by an awareness of the basic implications of interest group pluralism and of policy science. Judges of the new Reagan paradigm will likely adopt different understandings of public law; indeed, they are already doing so. For these judges, post-New Deal sensibilities suggest an emphasis on individual autonomy and a prejudice against activist government bureaucracies.

How does this help us understand administrative law? A case such as *Chevron*, widely read as an abdication of judicial responsibility to in-

terpret the law, can instead be read as the Supreme Court's conceptually flawed effort to control the inclinations of some lower court judges to impose their politically unaccountable, unreconstructed New Deal prejudices to push the bureaucracy toward an aggressive regulatory stance. Thus, there is an alliance of antifederalist judicial appointees with their kindred spirits among the political appointees in the executive branch.

#### B. *Waves of Change—From Reagan to Postmodernism?*

To summarize, one might view the first wave of modern public legalism as the New Deal's allied elements:

In the *political ideology realm*, this was latter-day Progressivism, influenced by social democratic sensibilities, which formed a critique that portrayed Democratic Capitalism as ailing from economic concentration, exploitation, and ultimately depression. This ideology led to the most massive political realignment in four decades.

In the *theoretical realm*, there was Legal Realism, Keynesianism, anti-formalism, the methods of empiricism and, perhaps, the pragmatism of, say, Dewey.

In the *practical invention realm*, the New Deal provided the post-formalist enthusiasm for the activist administrative state with commingled powers. Administrative law served simultaneously to promote and to constrain those institutions.

In my terms, the New Deal was successful and enduring in all three realms because *all three were present*.

The second major wave is Reaganism:

In the *political ideology realm*, we have conservative and neoconservative attacks on economic and social regulation, and generally on domestic activism by the federal government. Supply-side incentives are preferred and there is a sharp preference for autonomy over paternalism, however well-intentioned.

In the *theoretical realm*, we have a normative political theory with libertarian strains, a positive political theory stressing interest-group pluralism, and policy science grounded in free market models.

In the *practical invention realm*, we have deregulation, shifts in national spending, devolution of responsibilities to the states, and a remolding of the judiciary to be less sympathetic to private parties who seek, through the courts, to impose regulatory burdens (either economic or social) on private enterprise.<sup>80</sup>

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80. Like any sketch of intellectual or social history, there are oddities and loose ends. For example, the legal process school of thought seems to me a part of the New Deal wave (just after the crest?), whereas public choice theory is part of the backdrop for Reaganism's second-wave skepticism about governmental processes. In the political realms of ideology and invention, Richard Nixon and Jimmy Carter strike me as transition figures (moving us from then to now), as do Justice

This second wave of thought, Reaganism, thus includes two related strands with a less institutional, more atomistic conception of society than their intellectual forbearers. One strand adopts the models of pluralism and interest-group competition; the other emphasizes the descriptive and normative importance of markets and of *homo economicus*—a high-browed, empty-hearted, post-Neanderthal species driven by incentives. These two schools are similar in that the basic unit of analysis is a primitive, self-interested individual, and in both theories any overarching ethical conception of the good is not only exogenous and problematic in shaping individual behavior, but seemingly irrelevant.<sup>81</sup>

Because these themes are unsatisfactory to many theorists, a third wave is developing. The reaction in political theory to the atomizing, rationalistic conceptions of interest group pluralism and of microeconomic analysis has been remarkable, although intellectually incomplete and politically impotent. The growing attention to more communitarian, post-liberal theories has been puzzling to first-wave lawyers and legal scholars of a more traditional mold, no less than the early, second-wave tracings of law and economics or public choice theory were viewed twenty-five years ago as curiosities, if not pollution, in the literature. Yet today, we know there are judges who are importantly influenced by these second-wave perspectives, as well as lawmakers in the political branches to whom these arguments—economic efficiency, public choice theory, interest group bargaining, and so forth—are important, familiar, and persuasive.<sup>82</sup> The third wave post-liberal theories will also 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. Put differently, the post-liberal work in the theoretical realm must find concrete expression in the practical invention realm. My claim is that this will be difficult, and perhaps impossible, unless there is also an allied enterprise in the realm of political ideology and critique.

Critical Legal Studies and civic republicanism are two important strands in this developing, third wave.<sup>83</sup> On a practical level, the more intriguing of the two thus far is civic republicanism, i.e., the resurgence

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Stevens and Senator Lloyd Bentsen. Like rolling waves in a rough sea, there is a slow build up and much confusion in the troughs.

81. Welfare economics refers to a social welfare function, but it is not important to *homo economicus*. A conception of the good is also problematic in postmodern theories. I think, however, that it is a different question. In postmodern theories the good is deeply and inevitably contested, but not at all irrelevant to individual or collective local motivations.

82. Judges who have taught at the University of Chicago come immediately to mind. See, e.g., R. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* (1976).

83. There is actually far more published feminist legal theory than civic republicanism, but it does not generally address the structural aspects of public law.

of interest in the possibility of civic virtue, public deliberation, public-regarding behavior, and freedom as and through self-governance by individuals and collectives. Compared to civic republicanism, Critical Legal Studies has been more impressively influential in both legal scholarship and teaching. Both schools have very respectable pedigrees, as did the second-wave theories. Critical Legal Studies has cousins in intellectual movements in disparate academic disciplines, as a species of postmodernism. However, its major expression through the late 1980s, the indeterminacy thesis, seems to have run its course. Several critical theorists have turned self-consciously to the challenges of invention, though arguably with a somewhat utopian cast.<sup>84</sup>

Civic republicanism was, at least for a time, thought by some to hold great promise of contributing to a positive program of legal and social reform.<sup>85</sup> It is there that we might expect to find suggestive conceptual seeds of a third-wave renovation of administrative law as part of a larger enterprise of renovating governance. I find a definition and framework offered by my colleague Frank Michelman to be especially helpful. Drawing on the seventeenth-century social theorist James Harrington, Michelman discerns a "deep tradition" of civic republicanism. The critical passages from Michelman provide:

We can now see the classical Harringtonian republican conception as composed of seven principles or impulses: (i) self-government; (ii) practical deliberation or dialogue; (iii) equality (of ruling and being ruled); (iv) antistatism (immediacy); (v) rationally cognizable values ("the general good"); (vi) a mechanistic, role-differentiated constitution—balanced government and proprietary independence ("civic virtue"); and (vii) action by promulgation of laws.

At the heart of the conception, motivating the whole, is the first principle: positive freedom realized as self-government through politics. Structured about the conception are three matched pairs of impulses in tension (ii-v, iii-vi, iv-vii). The first member of each pair expresses a subjective or volitional moment of self-government. The second expresses a corresponding objective or cognitive moment. The three subjectivist impulses (ii, iii, iv) together describe republican's participatory

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84. See R. UNGER, *POLITICS: A WORK IN CONSTRUCTIVE SOCIAL THEORY* (1987). My colleagues Charles Fried and Laurence Tribe, each a prominent figure in liberal legalism, have made several trips to Eastern Europe to provide advice to the new democracies. The surprising thing is that so too have my thoroughly postmodern colleagues Duncan Kennedy and David Kennedy. The contributions of the Harvard Law School are more complicated to characterize than the contributions of the Harvard Economics Department. We at the Law School are comparatively more postmodern (or, at least, more confused).

85. See Fallon, *What Is Republicanism, and Is It Worth Reviving?*, 102 HARV. L. REV. 1695 (1989); Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 17-55 (1986); Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 68-85 (1985); *Symposium: The Republican Civic Tradition*, 97 YALE L.J. 1493 (1988).

side. The three objectivist ones (v, vi, vii) together describe its lawful side.

The objectivist moments—common good, civic virtue, and legality—are all essential to the Harringtonian conception but not fundamental within it. . . . The possibility of self-government itself has the visionary status not of an asserted fact but rather of a felt necessity.<sup>86</sup>

In Michelman's interpretation, self-government is the fundamental aspiration, and civic deliberation is a crucial element of that because it both effectuates a civic culture (including the consideration of what is the public good) and makes possible government by and for the governed. It is this deliberative element, and the aspirational focus on the public purpose, continually and immediately discerned, which can serve as the kernel for rethinking aspects of public law. Yet, the rethinking of public law is not yet complete, despite the best efforts of such diverse and able scholars as Cass Sunstein, Jerry Frug, and Mark Tushnet.

Can civic republicanism in fact carry the burden we have before us? To appraise its prospects, there is no better specimen for study than Cass Sunstein's recent book,<sup>87</sup> where scholarship takes a courageous plunge toward proposals of a relatively concrete sort. Building upon a finely argued, intellectually eclectic, and ringing endorsement of the ambitious regulatory state, Sunstein pushes us to consider reforms of public law that will promote the success of that state. His special focus is the task of statutory interpretation<sup>88</sup>—a worthy target in view of its central role in public law doctrine and theory. Nevertheless, there is fundamentally conservative quality to Sunstein's effort. His purpose seems to be the perfection of the New Deal model of governance by, for example, lifting from the economic efficiency models of contemporary policy analysis (an

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86. Michelman, *supra* note 85, at 47. He distinguishes this deep tradition from a somewhat corrupted form that some scholars have identified with the American anti-federalists, or "Opposition ideology":

Opposition ideology began as a language of conservative political grievance, prompted by the post-Restoration emergence of modern executive government as an actively transformative social force. What had been a diction of visionary aspiration became also one of the complaint of the moment. Moreover, the complaint was not, at bottom, that modern government denied its citizens the experience of ruling and being ruled, but that it represented a disturbance or threat to one's personal position in the general order of society, and to related notions of traditional right. Antistatism remained in the rhetoric, but its sense was transformed. In Harringtonian thought the sovereign state, as a government of rulers separated from the ruled, is objectionable as alien authority, denying self-government. In Opposition thought the executive state, with its concentration of means and influence, becomes suspect as excessive power, endangering the interests and rights of subjects. For Harringtonians, sovereignty is conceptually the antithesis of political liberty. For the Opposition, government is operationally the antagonist of individual position, wealth, and right.

*Id.* at 48.

87. C. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* (1990).

88. See Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989).

aspect of second-wave theory) to remind us of the familiar prescriptions against regulatory excess or inappropriate governmental tools—using rigid standards when incentive schemes would be “better,” and so forth. Thus, Sunstein marries rededication to New Deal ends with a fresh sensitivity to the means employed—a sensitivity that reflects the force of Reaganism’s critique of the regulatory state. When we turn to the specific doctrinal and institutional prescriptions, there is an inescapably, overwhelmingly incremental quality to them.<sup>89</sup>

The various civic republican writings thus far strike me in one of two ways: Either they have a utopian quality, or they have a general reformist cast that raises doubt about whether the brew is potent enough to address the deeper, thorough-going problems of governance.<sup>90</sup> Both difficulties are symptomatic of insufficient connection with the realms of political ideology and practical invention.<sup>91</sup> Contrary to the hopes of the civic republicans, however, our doctrinal commitments cannot adequately substitute for a complete retooling of administrative doctrine, even if they are rooted in the sacred realm of proceduralism, Legal Process analysis, and the New Deal. My tentative assessment is that as we struggle to move from the realm of theory to that of institutional and doctrinal innovation, we will fail to achieve a distinctive program unless both theory and innovation are built on a platform of sharp, distinctive critique within the realm of political ideology. There is, perhaps, more energy and clearer direction to be found through a frontal assault on Reaganism, than in a defensive maneuver intended to forestall the final decline of the New Deal ideology.

Richard Fallon has suggested that the republican revival is problematic: “If a theory hews too close to classical republicanism, it risks foundering on modern philosophical sensibilities. Yet if, on the other hand, it departs too far from the classical paradigm, it hazards the loss of republican distinctiveness.”<sup>92</sup> The strategy seems clear to me, because it is so familiar from the legal process tradition: To avoid offending liberal sensibilities, the temptation is to emphasize the procedural and delibera-

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89. This is probably the mark of useful reform-minded scholarship.

90. For other examples of civic republican scholarship verging on the realm of doctrinal and institutional invention, see Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059 (1980) (foreshadowing of republicanism); Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986); Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988); Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

91. For an interesting effort by Michael Sandel to apply (implicitly) his political philosophy to the practical task of Democratic party ideology, see Sandel, *Democrats and Community: A Public Philosophy for American Liberalism*, NEW REPUBLIC, Feb. 22, 1988, at 20. I think he has it about three-quarters right.

92. Fallon, *supra* note 85, at 1725.



tive elements of republicanism, rather than some objectivist notion of the public good. This procedural dodge is also consistent with the Realist and CLS understanding that legal rules have an inescapably subjective and political content; this contestable subjective content is made less obvious if rules are framed in procedural terms.

The proceduralist orientation of much civic republican scholarship gives rise, for example, to the objection that there is too little affirmative commitment to what legal liberals and political progressives alike consider valuable individual "rights," or to social progress of any particular sort. Too much is up for grabs in the civic republican vision of public deliberation and self governance by "undominated" individuals. Furthermore, the possibility of this process yielding what any of us believes, *ex ante*, to be a just order seems remote given our experience of diversity and conflict in communities of any significant size.<sup>93</sup> Professor Mashaw captured some of these issues well:

The crucial question has to do with the concrete meaning of republicanism for American public law and public institutions.

The task for republicans involves at least two sorts of theorizing. First, we must sort out our normative commitments and give them determinate shape. Otherwise republicanism as a normative theory will give us no purchase on the problems that we confront. . . . [Second,] [w]e must be able to specify how legal and political institutions—from electoral voting to legislative processes to judicial decisionmaking—work or can be made to work. Otherwise we cannot choose rules or construct institutions that will pursue our normative ends.<sup>94</sup>

These difficulties—proceduralism, normative emptiness, unreal vision of political discourse—illustrate why civic republicanism is an unstable way station for something else in the realm of theory. The difficulties are largely attributable to the fact that these theorists do not generally look for motivation in the realm of practical sociopolitical critique, or what I have termed political ideology.<sup>95</sup> Without such a critique, modern liberal sensibilities make it uncomfortable to assert normative propositions as the basis for a theoretical framework. The politically successful theories of the New Deal and, indeed, the American Revolution, had this positive and normative quality. There were, in those great moments, political ends from the realm of ideology, under-

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93. See Sullivan, *Rainbow Republicanism*, 97 YALE L.J. 1713, 1718 (1988) (idea of multiple perspectives not even theoretically compatible with republicanism's concept of an overarching common good). To be of any value, after all, a revived republicanism must have applications outside small communities of utopian scale.

94. Mashaw, *As If Republican Interpretation*, 97 YALE L.J. 1685, 1685 (1988).

95. To the extent they have such critiques, they are inchoate or utopian. See M. TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* (1988).

stood as political, that permitted theories about law and the state to have actual, real-world effects.

The republican revival, then, seems trapped in a familiar legal liberalism. It may not be radical enough to be distinctive; its radical potential is limited because it has not come to us as part of a powerful critique of anything important in the world.

If we need radicalism of some sort, do postmodern sensibilities suggest promising directions? Frank Michelman is again helpful:

By a postmodernist frame of mind I just mean a certain, contemporarily recognizable set of attitudes, tastes, styles, reflecting a certain sense of how to know, how to live, how to be in the world. I mean, say, preferring the "transformativity" (self-critical potency) of knowledge over its "performativity" or "effectivity" (instrumental potency). I mean a taste for the discursive agonistic of metaphor, paradox, reversal, disruption. I mean a reach for the division, the incompleteness, the "otherness" in oneself. I mean valorizing patchwork, *bricolage*, Neurath's boat, meaning on the fly, horizons endlessly receding. I mean embracing indeterminacy: not in the sense that meaning is absent or null but in the sense that meaning is local, conventional, relative to purpose, fluid, transient, disruptible. I mean a sustained self-consciousness about the constructedness and vulnerability of all our discourses.<sup>96</sup>

Needless to say, appealing and challenging though this may be as an intellectual method, it is quite some distance from the realms of political ideology and practical invention. Those, of course, are not Michelman's present venue. But to coexist comfortably with postmodern sensibilities, what characteristics would need be present in a successful contribution within the realm of political ideology, or for useful doctrinal prescriptions in the realm of practical invention?

I offer three tentative suggestions (which I state in a far more abstract form than is required of political ideology). First, as a critique of social and political arrangements, *transformation* and *fluidity* would be preferred over *stability* and *hierarchy*. This may have both procedural

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96. Michelman, *Postmodern Constitutionalism?*, (draft manuscript) (available from author) ("The naive claim that I want to put forward as a beginning is that one can perfectly well bring such a temperament to bear, normatively, on American constitutional argument at all the familiar levels of method, doctrine and decision."); see also R. UNGER, FALSE NECESSITY—ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY 67 (1987) ("Because the formative contexts arise out of numerous intersecting trajectories of change rather than from a single, overriding dynamic, deeply rooted in practical and psychological forces, we stand a better chance of changing them. We can see how easily many of these past sequences might have turned out in other ways."); R. UNGER, SOCIAL THEORY: ITS SITUATION AND ITS TASK 5 (1987) ("The aim is not to show that we are free in any ultimate sense and somehow unrestrained by causal influences upon our conduct. It is to break loose from a style of social understanding that allows us to explain ourselves and our societies only to the extent we imagine ourselves helpless puppets of the social worlds we build and inhabit or of the lawlike forces that have supposedly brought these worlds into being.").

and substantive elements: the procedural element recognizing, for example, the republican aims of deliberation as a civic enterprise and a similar structural emphasis on dialogue and dialectic among the branches and levels of government; the substantive element recognizing, for example, the civic sinfulness of enduring racial and sexual hierarchy, or of inherited poverty.

Second, in rejecting the atomistic individualism of Reaganism, a postmodernist theory might look for individual fulfillment and societal transformation to be linked through *participation* and *engagement*. This implies a critique not only of radical antistatism, but also of the abysmal participation in politics and civic voluntarism. It also suggests that the processes of governance must be less alienating and bureaucratically removed from citizens.<sup>97</sup>

Third, the critique of governance, and the prescriptions for doctrines, would rekindle the Realists' attack on formalism, but direct that same skepticism toward any stable set of institutional arrangements. We would question the tremendous election bias that favors congressional incumbents and the judicial deference to imaginary agency expertise; we would challenge the religious fervor of free-marketeers as well as the naïveté of advocates for sweeping economic and social welfare interventions. This need not be carried so far as to produce continuous chaos, but it must be carried far enough to pose an effective counter-impulse against natural conservatism and inertia that impede progress and attention to growing economic and social crises.

## V. AN ALTERNATIVE PROJECT FOR ADMINISTRATIVE LAW: SOUND GOVERNANCE

### A. *The Twin Challenges: Theory and Governance*

In his Article for this symposium, Cass Sunstein proposes refocusing administrative law scholarship away from the problems of agency discretion and judicial review. His preferred focus is the discovery of general principles of when and how regulatory regimes fail in substance, and the promotion of an awareness of these principles.<sup>98</sup> With this, we can easily imagine a steadily growing body of prescriptions for program design and administration, with useful implications for statutes, regulations, and the

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97. One can see the symptoms of alienation at any meeting of a local school board, in the corridors outside the House Ways & Means Committee hearing room, and in the widely shared perception that public power is captured by special interests.

98. Sunstein, *Administrative Substance*, 1991 DUKE L.J. 607, 608; see also C. SUNSTEIN, *supra* note 87, at 74-110. For other examples of this form of scholarship, see B. ACKERMAN & W. HASSLER, *CLEAN COAL/DIRTY AIR* (1981); S. BREYER, *REGULATION AND ITS REFORM* (1982); J. MASHAW, *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS* (1983).

processes of policy development and implementation. Sunstein's self-described audience is legislators and bureaucrats, but he also believes that judges informed of these principles might understand their responsibilities differently. For example, the substantive logic of cost-effectiveness might be incorporated into scope of review under the "arbitrary and capricious" rubric of the Administrative Procedure Act (APA).<sup>99</sup> As a general matter, the content and ambitions of Sunstein's work are certainly correct. But in what sense is it responsive to the maladies of administrative law, or of governance?

As to the maladies, administrative law, as conventionally defined, cannot easily accommodate heightened attention to substance—especially substance imported from the policy sciences or other disciplines, as long as judges and lawyers are locked in a separation of powers framework from which they derive their role definitions and doctrinal tools of analysis, argument, and decision. The suggestion that a lawyer or a court insist that an agency demonstrate that its decision has been made in light of a state-of-the-art application of decision analysis or cost-benefit techniques strikes us as odd, adventuresome, or imperialistic only because we believe there is an important difference between the science paradigm and the adjudicatory fairness paradigm. With these imagined boundaries shaping our personal roles and institutional powers, a lawyer has no more standing to insist that regulations be cost effective than does, say, a dentist. Or so the argument might go.

I reject this formulation for two reasons. The most elementary is that administrative lawyers, and especially judges, unlike dentists, are steeped in the ways of public administration. The program of study and focus recommended by Sunstein would make us more so. One need only chat with a prototypical "Washington lawyer" about the nature of her practice, and the range of advice provided to clients, to demonstrate that, as a sociological matter, the scope of a lawyer's expertise exceeds the range of computerized legal databases and professional education seminars.

The more important point is that reliance on the separation of powers ethos for role definitions, or for institutional legitimacy, raises once again the conceptual flaws in the structure of the doctrines themselves. We cannot escape either the boundary problem or the attributive duality that undermines the persuasiveness of doctrinal argument and invite result-oriented lawyering shrouded in law-speak. We cannot escape the dualities unless we search for alternatives to the traditional dogmas. The

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99. 5 U.S.C. § 706(2)(A) (1988). See Sunstein, *supra* note 98, at 642. I agree with this specific point.

trichotomy creates the malleability, and hence the weakness, of traditional doctrine.

Consider a hypothetical OSHA health regulation. In reference to this regulation, I have elsewhere written:

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 sound decisionmaking 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.<sup>100</sup>

To be sure, this was written with an eye toward radical provocation. Sunstein's theme is not dissimilar, although he makes his arguments for improved regulatory performance more palatable by suggesting that his primary audiences are in the political branches—making his suggestions for a transformation of judicial role *sotto voce*.

If the framework of legitimacy for judicial and administrative action provided by the separation of powers themes<sup>101</sup> is conceptually problematic, why accept it as a constraint on roles or on doctrinal reasoning? We should not, if some alternative can be developed.

In sum, we are left with a two-fold challenge: First, we cannot adopt a thoughtfully aggressive judicial, or "legal," approach to promoting sound regulatory choices without overthrowing the separation of powers framework—a framework that is conceptually flawed and unsuccessful on its own terms. This suggests an agenda for legal theory to devise an alternative basis for legal decisionmaking and legitimacy under law.

Second, we can understand the broader possibility of improving regulatory performance only with an analytical framework that addresses the governance crisis. In particular, we must construct a normative, substantive program of where government must go to perform better—mar-

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100. C. EDLEY, *supra* note 4, at 231.

101. Thomas Sargentich contends that my analysis of the separation of powers-based trichotomy is nothing more than a guise for the analysis of alternative bases for legitimacy of government action, as he has elaborated. See Sargentich, *The Future of Administrative Law* (Book Review), 104 HARV. L. REV. 769 (1991) (reviewing C. EDLEY, *ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY* (1990)); Sargentich, *The Reform of the American Administrative Process: The Contemporary Debate*, 1984 WIS. L. REV. 385. I disagree as to which is logically prior, and as to which form for the analysis has more power to explain the perplexities of doctrine and to generate proposals for both incremental and radical reform.

ket efficiency or redistributive values are good (although vague) examples. But we must also provide an account of why particular substantive ideas for better government performance are so often relegated to library shelves rather than action.

Moreover, to judge the value of new legal theories we should have in mind an image of governance. Otherwise, we can expect that prescriptions are just as likely to be ineffective. Because legal theory is instrumental, our purposes must be stated and debated. It makes sense, therefore, to begin with the larger question of governance.

### B. *The Governance Problem and the Project of Administrative Law*

The claim that we face grave problems in governance reflects an inchoate critique of either the ambitions or the effectiveness of Reaganism: Reaganism does not solve the problems facing us today or tomorrow. Thus, a different ideology is needed. Indeed, just as the developing judicial posture towards the regulatory state is shaped by the ideological milieu from which the judges are drawn and in which they operate, so too will the future shape of public law be derived from broader political culture. However, there is nothing deterministic in this. Judging from history, there may not be a successful new conception of the project of governance for years to come. Nor is its shape historically preordained; it must somehow be created as an inspired response to existing problems and constraints.

In this Article I have suggested that the diagnosis or explanation of our difficulties may be framed at almost any level of abstraction, depending on taste and purpose.<sup>102</sup> I submit that the starting point must be a normative socioeconomic critique with some sharp edges set against Reaganism. For example:

1. *A New Progressivism.* Just as the Progressive Era was a mélange of reformist impulses (although including some unattractive social attitudes) with uneven coherence, we may expect little more from an oppositionist post-Reaganism. Although a detailed presentation is inappropriate here, suffice it to say that my own sense of this would be an amalgam of many themes: 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. Consider, also, the following criticisms of a more specifically institutional character, each of which is an important part of a comprehensive (if mid-level) ac-

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102. See *supra* text accompanying note 18.

count of the governance crisis, and each of which implicates the project of administrative law.

2. *Market Mythology.* The resurgent potency of *laissez-faire* thinking has a grip on policy debates, obscuring the evils that unregulated behavior can produce. Indeed, market outcomes are often quite different from those promised by microeconomic models. Market “failure” is more the rule than the exception, yet the seductive elegance of the model gives it an unyielding grip on policy debate. Relatedly, the myth of private sector managerial competence flies in the face of the evidence revealed each morning in the *Wall Street Journal*.<sup>103</sup> That economic incentives are relevant seems undeniable. Nevertheless, the proposition that the invisible guiding hand of economic incentives can effectively address our economic and social challenges can only be dismissed as myth. The myth, however, has been a useful and powerful element of Reaganism.<sup>104</sup>

3. *Agency Inaction.* Inaction by administrative agencies is a major contributor to the enormous cost of unaddressed policy challenges. Administrative law can serve by inventing doctrinal devices to make agency resource allocation choices, in both policy development and enforcement choices, more subject to public illumination debate. Extreme deference to administrative decisions, suggested by the Supreme Court’s analysis in *Heckler v. Chaney*,<sup>105</sup> is unhelpful, because it fails to balance the values of agency autonomy with those of agency accountability. This is unacceptable in an era where Congressional oversight is inevitably diminished by the press of legislative business and the institutional disabilities of that branch.

4. *Legislative Lethargy and Pseudo-Rationality.* Divided partisan governance, in combination with the sclerotic, lethargic legislative process, raises the transaction costs of both legislative action on controversial matters and of legislative correction of executive or judicial missteps.

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103. See, e.g., Truell, *Clifford Resigns Bank Post, A Casualty of BCCI Scandal*, Wall St. J., Aug. 14, 1991, at A3, col. 1.

104. A very senior official in the Polish government observed in a recent conversation that “radical” disciples of “Milton Friedman” (he picked the name, and not with admiration) have achieved virtual hegemony over the framework of political economy in his country. When I pressed him for an intellectual or sociological explanation for this, he offered two points, something like the following: First, there is intense post-revolutionary opposition to any ideology that seems remotely related to the old discredited regime; second, no competing ideology offers the purity and logical tightness of neoclassical microeconomics. Like a powerful theology, its coherence provides comfort in chaotic times; compromises of that coherence are treated as heretical.

105. 470 U.S. 821, 831-32 (1985).

One cannot assume that administrators and legislators of different parties and ideologies will embrace such notions of bilateral comity as bureaucratic fidelity to statutory intent, or respect by legislators for the advantages of flexible managerial authority. On important matters, administrators and their legislative overseers seem to be antagonists. Administrative law doctrine, therefore, goes astray when it assumes (or pretends) that judicial deference is equivalent to political neutrality. In view of the congressional disabilities, broad deference to the agency amounts to alliance by the judiciary with the executive, which disserves the system of checks and balances; it abdicates any direct judicial responsibility for the quality of governmental actions. On the other hand, policy judgments made by Congress are highly variable in a pure "expertise" sense, being the product not only of expert advice but also of politics and institutional processes that have a distinctive (ir)rationality. Theories of interpretation will fail if they attempt to reconstruct a design crafted by some composite rational individual decisionmaker who had a unitary intention or command in mind. Such constructs are usually fantasy, however helpful those interpretive theories may be at making up some useful guidance in the case at hand. Honoring the legislative role, and strengthening it, requires careful appreciation of the strengths and weaknesses of that institution. More ambitiously, the institution must be reformed to address those weaknesses; judicial or executive pressures can play a key role in promoting such reform.

5. *Mythical Agency Expertise.* The quality of policy judgments made by agencies is highly variable, so that great deference to agency expertise, and to procedural insulation of the agency's decisionmaking against public participation, will in practice mean broad acceptance by the judiciary of preventable misfeasance. It is difficult to count this as a valuable goal of administrative law.

6. *Public Ignorance and Depressed Participation.* The quality of public debate and understanding of most issues is exceedingly low. This undermines the effectiveness of democratic processes because voter choices are less and less informed, even as government becomes more and more critical to our collective and personal welfare. Thus, there is a real need to create a potent ethic of participation—a hundred million points of light, some of them a hopeful glow, some of them an angry burning.<sup>106</sup>

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106. The allusion is to President George Bush's call for a spirit of voluntarism ("a thousand points of light") to address pressing social needs. See *Transcript of Bush Speech Accepting Presidential Nomination*, N.Y. Times, Aug. 19, 1988, at A14, col. 1. The danger with this call is that within



These and other points establish a motivation for theory and a measure for invention. The specific piece of theory I want to propose is a reimagination of the project of administrative law to focus on sound governance, rather than on the control of administrative discretion.

C. *The Sound Governance Project for Doctrine and Judicial Review*

Administrative law can be part of the developing critique and renovation of governance, but only if it abandons its implicit antidiscretion project. That project embodies tension between two elements. One is the affirmative goal of strengthening the administrative state by, for example, promoting the integration of expertise into bureaucratic action. The other is the imitation of separation of powers formalism, with the trichotomy of decisionmaking paradigms as a sort of second-best structural strategy to protect us against arbitrary discretion and official ambition.

Instead, imagine that the core of administrative law can be committed to an ongoing exchange with the political branches about norms of sound governance. I imagine 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.

The new administrative law would have no place for such cases as *Chevron*,<sup>107</sup> *Vermont Yankee*,<sup>108</sup> or last term's decision in *Pension Benefit Guarantee Corp. v. LTV Corp.*<sup>109</sup> Instead, we would find inspiration in cases that, with their activist pursuit of better public administration, invite a dialogue with the agencies and Congress over the norms of sound governance. That activism need not take the form of ham-handed impositions binding in all circumstances for all time. Rather, courts can establish guidelines, presumptions, requirements of explanation, and impositions temporarily stayed to provide time for agency or legislative counter-proposal. Courts have shown an admirable ability to combine appropriate deference or comity with strong activism and authority in settings as diverse as public interest institutional reform litigation, equitable remedies in antitrust cases, and corporate bankruptcies. Implementa-

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Reaganism, voluntarism is posed as an anti-statist alternative to collective action through government programs. Still, there is a truth to the diagnosis of anemic civic participation.

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

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

109. 110 S. Ct. 2668 (1990) (applying *Vermont Yankee* to limit judicial efforts to proceduralize informal adjudication).

tion of an environmental or securities statute is no greater challenge for judicial invention, once one decides to move away from the conceptual failings of reasoning based on unsustainable distinctions between politics, science, and adjudicatory fairness.

The problem is more than an anachronistic concern with arbitrary discretion. That old project is not even appropriate as an indirect means to pursue sound governance. Constraining discretion may be counterproductive, especially given our complex and inexorable ambitions for public enterprise. A realistic appraisal of the problems we face as a society and the undeniable institutional limitations of Congress suggests that we cannot 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.<sup>110</sup> Then, too, if we chase discretion as an indirect means of pursuing sound governance, we make both our ends and means obscure, which in turn makes both popular and professional critique more difficult. Finally, as I argued earlier, chasing discretion has failed on its own terms—like a dog chasing its tail.

Would the separation of powers-based trichotomy of decisionmaking paradigms be irrelevant to sound governance review? I think not, because these paradigms capture some “truth” about the way we think, and all must be present and well-executed in sound decisionmaking. Like senses of perception, they must be balanced and integrated, not artificially divided for purposes of institutional role or decisionmaking. We use a full range of sounds and colors to perceive accurately our surroundings. An observer deaf to high notes or blind to red hues can “hear” a Beethoven string quartet and “see” fall foliage in Vermont. The resulting reports might be unreliable for some purposes: “Don’t buy that record”; or “Visit in August, when it’s easier to get a motel room.”

Several things follow from this. It is certainly misleading and counterproductive to characterize any but the most trivial questions presented to an agency as involving solely one paradigm. If agency officials treat an OSHA rulemaking as a political matter, they are wrong; if courts treat the resulting controversy as a policy matter, they are wrong; and if pro-labor advocates treat it as a question of law, they too are wrong. Similarly, it is a conceptual error to scale the intensity of judicial review based directly, or implicitly, on some characterization of the decisionmaking paradigm actually employed by the agency. For example, when the Court in the *State Farm* airbags deregulation case treated the rescission of the passive restraints regulation as the product of rational

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110. Richard Stewart used a transmission belt metaphor. See Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1675 (1975) (traditional model of administrative law views agency as mere transmission belt for implementing legislative directives).

policy analysis, and used a species of hard-look review to evaluate the action on that basis, it artificially ignored (at least in its rhetoric) the other paradigms at work.<sup>111</sup> This is akin to looking at only the green hues in a Vermont October, or appraising a marinara sauce solely on the freshness of the tomatoes.

If judicial analysis and rhetoric directly engaged the mix and quality of all three paradigms, and sought to evolve a normative framework for sound agency governance, the obscurity and indirection of administrative law would be replaced by a forthright dialogue over how to make the public enterprise more successful. Courts would be drawn into that challenge, with all the attendant risks and potential benefits.

A corollary of this role is that the difficult distinction between procedure and substance would be far less relevant. Thus, for example, when the Court in *Vermont Yankee* sought to limit judicial imposition of extra-statutory procedural obligations in informal rulemaking,<sup>112</sup> judges who were so inclined could respond by increasing their demands for “adequate” reasons and findings, or by exacting a stronger demonstration of policy justification through substantive hard-look review,<sup>113</sup> all under the “arbitrary and capricious” rubric. In my view, lower courts now have effective ability to pursue sound governance only by virtue of the manipulability of such leading cases as *Vermont Yankee*,<sup>114</sup> *Chevron*,<sup>115</sup> and *Mathews v. Eldridge*.<sup>116</sup>

Over time, judges in dialogue with the other branches and with advocates can evolve helpful strategies for sound governance on procedural, quasi-procedural, and substantive dimensions. When judges misstep in this enterprise, the direct revelation of judicial reasoning will invite correction by Congress or by the agency itself. For example, Congress or the relevant agency could expressly mandate regulations concerning the form of cost-benefit analysis to be employed, the mechanism for consulting outside experts, the arrangements to invite negotiations with a politically diverse set of affected interests, or the principles to guide the allocation of enforcement resources.

Does this invite judicial willfulness? The current project of administrative law already affords ample room for this. Sound governance review would structure the judge’s application of personal, practical

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111. *Motor Vehicle Mfrs. Ass’n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

112. *Vermont Yankee*, 435 U.S. at 524-25.

113. *See International Ladies’ Garment Workers Union v. Donovan*, 722 F.2d 795, 812-28 (D.C. Cir. 1983).

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

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

116. 424 U.S. 219 (1976).

wisdom and preferences. The devices of revelation and fluidity will permit public scrutiny, reversals, and the evolution of norms. 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. The blind deference of judges unwilling to take a stand on the soundness of agency action, trapped by separation of powers formalism, would give way to a far more contingent judicial posture, legitimated not by formalism or narrow professionalism, but by other devices and values.

Without the trichotomy and separation of powers precepts, what would provide judicial legitimacy? The first source would be judicial effectiveness in directly promoting the pursuit of sound governance. Courts and jurists would assume the risk of being popularly judged for their actions through the responses of the coordinate branches. The second source would be the multiplicity of forums. Rather than asserting the methodological distinctiveness of law and the judicial branch (an argument rooted in the discredited trichotomy), one would stress the value of sustaining the courts as an alternative forum in which to appeal the alleged missteps of the other two branches. The judiciary's claim of legitimacy would be strengthened, in turn, by framing the judicial role in terms of dialogue: Its holdings and remedies would be flexible and sub-constitutional so as to permit, indeed invite, evolutionary response by the agency and the legislature.

A third source of legitimacy is the institutional and personal competence of the judiciary. For this, it is clear, one requires some institutional invention. It seems an unlikely strategy to rely on article III courts that are staffed with lawyers steeped in separation of powers concerns. Other familiar models deserve exploration: the old idea of specialized article I or article III courts;<sup>117</sup> a quasi-independent administrative agency exercising some of the regulatory review functions currently served by the Office of Management and Budget;<sup>118</sup> the French Conseil d'état;<sup>119</sup> and the use of masters and ancillary procedures by courts supervising complex equitable remedies or bankruptcies.<sup>120</sup> I favor a combination of reformed and new courts, but the best prescription undoubtedly depends on countless matters of ideological and political context.

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117. See Silberman, *Masters and Magistrates Part II: The American Analogue*, 50 N.Y.U. L. REV. 1297, 1307-09 (1975).

118. See Sunstein, *Cost-Benefit Analysis and the Separation of Powers*, 23 ARIZ. L. REV. 1267 (1981).

119. See Note, *The French Conseil d'Etat—An Essay on Administrative Jurisprudence*, 24 ADMIN. L. REV. 315 (1972).

120. I explore these options in C. EDLEY, *supra* note 4, at 236-59.

## VI. CONCLUSION

What I have proposed may be wrong, and I was earlier inclined to characterize these thoughts as utopian or speculative to deflect criticism about practicality.<sup>121</sup> Having now explored the connections among the realms of political ideology, theory, and practical invention, I feel somewhat bolder. My earlier discussion suggests two important points.

First, the ultimate feasibility of any proposed invention will turn on the power of the political ideology that informs it. Just as the inventions of modern administrative law resonated with judges and others because of the context provided by the New Deal political critique and affirmative program, and just as the hegemony of Reaganism makes us unsurprised by *Chevron*,<sup>122</sup> there is every reason to believe that a successful post-Reagan critique of governance might complement a bolder form of administrative law.

Second, success in the realm of political critique and ideology will not only serve to refine the content of doctrinal prescriptions, but will make those prescriptions politically acceptable. Put differently, the calculation of whether a given invention is utopian or practical involves identification of political interests and obstacles, which are in turn contingent on the matrix of reigning and insurgent political ideologies.<sup>123</sup>

Some historians argue that every few decades the relatively stable two-party political system is thrown into confusion and realignment, with the content of party ideology shifting even if the party names remain the same. Thus, we had the alignment of the Founders and Anti-Federalists until that was displaced by the Jacksonian-Whig framework. This gave way to the Republican-Democrat structure of the Civil War period, followed by the 1890s realignment; the 1932 to 1936 New Deal period was clearly transformative. As this is written, President Bush's popularity in the polls is hovering near 122%, and it seems obvious to mention that a realignment is in the works. The financial and media advantages of congressional incumbency make this realignment slower than earlier ones, perhaps. In any case, what remains for us to see is what cogent, counterbalancing political ideology to Reaganism will emerge as the new alignment becomes stable.

I have tried to suggest a few themes that might be represented in allied developments in the realms of political ideology, theory, and prac-

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121. *Id.* at 213.

122. Through judicial abdication, *Chevron* empowers agencies to give a pinched implementation of congressional policies. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-46 (1984).

123. I am indebted to Roberto Unger for showing me that there is an identity between substantive invention and the calculation of political interests—that they are two sides of the same coin.

tical invention. In casting about for some alternative to rewarming the New Deal critiques of *laissez-faire* economics and philosophical formalism, I have urged some attention to postmodernist sensibilities, tempered with an empirically-rooted pragmatism. In this, I self-consciously borrow from the Legal Realists. I take my inspiration from Aristotle's insistence that political philosophy is different from logic;<sup>124</sup> it must be both empirical and abstract, both practical and scientific.

Most important, my theme is that those of us in the academy, on the bench, at the bar, and in the corridors of government who are dissatisfied with the evolutionary direction of administrative law must recognize that doctrinal change is part of a larger ideological and theoretical whole. To do more than wage a guerrilla war in dissenting opinions and law reviews, 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. Such alliances, history teaches, offer the best hope of harnessing invention to good and lasting effect.

Finally, I must return to the governance theme. The fundamental reason to hope for some modification of or alternative to the reigning ideology is that it offers no solution to the crisis in American governance. Without answers to the institutional and social problems we face, the nation is being diminished, and the lowest among us dream less and less of relief from grinding hardship. I believe that administrative law at its best must be concerned with such failures of governance, and with the direct promotion of something better.

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124. See ARISTOTLE, POLITICS 3, 28, 256 (C. Lord trans. 1984).