BEYOND THE BINARY: TOWARD A NEW GLOBAL MODEL OF CONSTITUTIONAL RIGHTS ADJUDICATION

Oren Tamir*

Both the literature and practice of constitutional rights adjudication around the world strongly suggest that we live in a binary. Only two "models" are realistically available for us to choose from when deciding how to organize systems for adjudicating rights. The first model is proportionality analysis. *In this model, which is extremely common around the world, constitutional rights are defined expansively. And Courts then make highly granular and context-specific determinations on defending rights based on a familiar, single, three or four-step protocol. By contrast, the second model is* categorical reasoning. *In this model, which is primarily associated with the United States, rights are defined much more narrowly. And Courts then review rights claims based on predetermined but varied tiers of scrutiny or bespoke tests which (1) limit the considerations judges are allowed to weigh and (2) are often meant to be rigid and outcome-determinative. Since the domain of constitutional rights in this model is relatively narrow and because some of the outcome-determinative tests judges use under it tend to sharply bias results in favor of the right being protected, the categorical reasoning model is closely associated with Ronald Dworkin's conception of rights as "trumps."*

This Article argues that the set of choices available to us is broader than the binary. There is another model around which we can choose to organize systems for adjudicating constitutional rights. And this alternative model is importantly

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* Postdoctoral Fellow, Harvard Law School; Adjunct Professor & Global Hauser Postdoctoral Fellow, NYU School of Law. For comments on earlier drafts and conversations about ideas in this paper I thank Asli Bali, Josh Braver, Emily Bremer, Jon Gould, Vicki Jackson, Nadiv Mordechai, David Pozen, Kari Ragnarsson, Cristina Rodriguez, Glen Staszewski, Mark Tushnet, Chris Walker, and Ilan Wurman, as well as participants in the Administrative Law New Scholarship Roundtable at Yale Law School, the Michigan Law School Junior Scholars Conference, and the International Society of Constitutional Law Mundo Conference (panel on "Beyond Backsliding"). Thanks go as well to the wonderful editorial staff of the *Berkeley Journal of International Law*. All the usual caveats apply.

distinct from the existing models: on the one hand, it allows systems to combine key elements of proportionality and categorical reasoning in surprising and previously unexplored ways. On the other hand, this new model diverges from proportionality and categorical reasoning along several crucial dimensions, including the degree of deference to political decision-makers it institutionalizes, the judicial technique and remedy for protecting rights it supplies, and this model's consistent focus on protecting rights endangered by governmental inaction.

Perhaps surprisingly, the origins of this new model are also found in the US system, much like categorical reasoning. It is just that it operates in a different corner of American public law than the one we tend to focus on: that of administrative law. This Article describes this new "administrative law model" *of constitutional rights adjudication, highlights its distinctive features, and identifies its primary strengths and costs. The Article then argues that it is already possible to identify where the administrative law model would prove attractive and should displace the reliance on the existing models, either in whole or in part. Most clearly, the administrative law model seems especially suited for the system from which it originates—the United States. And in fact, this Article suggests that recognizing that this model exists can increase the prospects of achieving meaningful and desirable change in domestic US constitutional law. However, signs of dissatisfaction with the state of constitutional rights adjudication around the world, among other things, indicate that the model could prove attractive also in other domestic jurisdictions, and even at the international level. Going forward, the administrative law model therefore deserves a permanent place in the global and comparative constitutional toolkit.*

INTRODUCTION

How might we go about structuring systems for adjudicating constitutional rights? Three possibilities seem relatively easy. The first would apply if we were full-blown rights' absolutists. True, given the world we live in today, this would probably mean having a very limited set of rights.[1] But having courts enforce them would not raise unique challenges. Judges would simply enforce them absolutely and without any qualification. A second easy option would apply if we were full-blown political constitutionalists.[2] Here, we could certainly have a broader list of rights. But, again, there would not be much of a challenge structuring rights *adjudication*. That task would simply be nonexistent and entirely political. A final easy option would be to accept that rights are not normally absolute and can be qualified, and to accept as well that judges have a place in adjudicating rights disputes. At the same time, we would forgo any attempt to structure judicial discretion in this context. When conflicts involving

1. *See, e.g.*, CHARLES FRIED, RIGHT AND WRONG 162-63 (1978) (advocating a world of absolute rights that are very limited in scope and nature).

2. *See, e.g.*, J.A.G. Griffith, *The Political Constitution*, 42 MODERN L. REV. 1 (1979).

rights surface to courts, judges would simply make what philosophers call a holistic, "all-things-considered" judgment[3] to determine the result in each case.

While easy in different ways, these options are not truly available for us today. No contemporary system appears committed to the position that all rights are absolute and cannot be qualified. This status is preserved, at most, for only a limited number of rights.[4] Similarly, the notion associated with full-blown political constitutionalism of "taking the constitution [completely] away from the court[s]"[5] might have been strong in the past, certainly in some jurisdictions. Today, however, this notion has been largely "withdrawn from sale."[6] All constitutional democracies around the world, and even nondemocracies, appear to accept that judges should have a role to play in issues of rights (though, of course, what role exactly is fiercely disputed). And the thought that the courts' role in adjudicating rights should be entirely formless or doctrinally empty also does not have much contemporary bite. There is substantial cross-cutting consensus that some sort of doctrinal structure to organize the way judges go about adjudicating rights is in fact necessary.[7]

Within this domain of the possible, even a brief exploration of the practices that exist around the world and even a peek at the relevant scholarly discussions would quickly lead one to conclude that our menu of options is a severely limited one. Simply put, we live in a binary. Only two doctrinal "models" are realistically available for us to choose from when we consider how to organize systems for adjudicating rights.

The first is *proportionality analysis*. This model is now incredibly common around the world, so much so that it is often described as a "global model"[8] of constitutional rights adjudication, or, simply, "generic"[9] constitutional law. It is employed in some form by courts from jurisdictions as diverse as Canada, South Africa, Israel, Hong Kong, Taiwan, Colombia, and Brazil, to name only a few examples. And it is also a staple of international human rights adjudication,

3. *See* Ruth Chang, *All Things Considered*, 18 PHIL. PERS. 1 (2004).

4. Usual examples include the right against being tortured, the right against an arrest solely on the ground of failure to fulfill a contractual obligation, and, most controversially, certainly in the United States., the right against the death penalty.

5. This is of course a play on the title of MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURT (1999).

6. Mark Tushnet, *New Forms of Judicial Review and the Persistence of Rights- and Democracy-Based Worries*, 38 WAKE FOREST L. REV. 813, 814 (2003); Stephen Gardbaum, *Separation of Powers and the Growth of Judicial Review (or Why Has the Model of Legislative Supremacy Mostly Been Withdrawn from Sale?)*, 62 AM. J. COMP. L. 613 (2014).

7. One gets a strong sense of the consensus on the desirability of doctrinal structure from reading the collection of essays in PROPORTIONALITY IN ASIA (Po Jen Yap ed., 2020) all of which assume that such need is strongly desirable and attempt to square various judicial exercises, in this case from various jurisdictions in Asia, as compatible with a doctrinal structure (explicitly or, more interestingly, implicitly).

8. KAI MÖLLER, THE GLOBAL MODEL OF CONSTITUTIONAL RIGHTS (2012).

9. David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652 (2005).

including at the European Court of Human Rights and at the Inter-American Court of Human Rights. Among this model's key features are that constitutional rights are defined under it quite expansively. And courts then engage in a highly granular and context-specific evaluation of disputes about rights that is guided by a familiar, single, three- or four-step protocol.[10]

By contrast, the second model is *categorical reasoning*. This model is closely associated with the adjudication of constitutional rights in US courts. And, in fact, the United States may be the only jurisdiction around the world that consistently embraces this model—another example of an alleged American exceptionalism that some identify in all matters of public law and well beyond.[11] Among categorical reasoning's key characteristics are that constitutional rights are defined under it quite narrowly, certainly much more so than under the proportionality model. And courts then review claims involving infringements on rights based on predetermined classifications, labels, or bespoke tests which (1) limit the range of considerations judges are allowed to weigh or balance and (2) are often meant to be rigid and outcome-determinative. Since the scope of rights in this model tends to be narrow, and since some of the outcome-determinative tests judges employ under it sharply bias results in favor of rights, the categorical reasoning model is usually associated with Ronald Dworkin's famous characterization of rights as "trumps."[12]

This binary has for a long time now defined the debates around rights adjudication in domestic and comparative constitutional law, as well as in the community of international human rights. Scholars, judges, and practitioners constantly and passionately discuss proportionality and categorical reasoning's relative merits and demerits.[13] And, to the extent that their own jurisdiction or system of interest embraces the model they view less favorably, they advocate reforms that aim to "export," "borrow," "transplant," or "migrate"[14] the competitor model instead.

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10. *See infra* Part I.B.

11. *See, e.g.*, Moshe Cohen-Eliya & Iddo Porat, *The Hidden Foreign Law Debate in Heller: The Proportionality Approach in American Constitutional Law*, 46 SAN DIEGO L. REV. 367, 372–73 (2009); Frederick Schauer, *The Exceptional First Amendment*, AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 30 (Michael Ignatieff ed., 2005).

12. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY xi (1977). For a useful discussion of the evolution of Dworkin's thought on matters of rights, *see* Paul Yowell, *A Critical Examination of Dworkin's Theory of Rights*, 52 AM. J. OF JURIS. 93 (2007).

13. The literature is extremely vast, but several of the important contributions are ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS (Julian Rivers trans., 2002); AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS (Doron Kalir trans., 2012); MOSHE COHEN-ELIYA & IDDO PORAT, PROPORTIONALITY AND CONSTITUTIONAL CULTURE (2013); JACCO BOMHOFF, BALANCING CONSTITUTIONAL RIGHTS: THE ORIGINS AND MEANINGS OF POSTWAR LEGAL DISCOURSE (2013); DAVID M. BEATTY, THE ULTIMATE RULE OF LAW (2004); ALEC STONE SWEET & JUD MATHEWS, PROPORTIONALITY, BALANCING, AND CONSTITUTIONAL GOVERNANCE (2019).

14. For a survey of, and contribution to, the debate in comparative constitutional law about the meaning of these terms and their appropriateness, *see* Vlad Perju, *Constitutional Transplants,*

For example, in recent US scholarship, Professors Vicki Jackson[15] and Jamal Greene[16] have claimed that the American system would substantially benefit from drawing on the proportionality model and relax its strong commitment to reason-by-category and rights as "trumps."[17] Doing so, they suggest, would strengthen the connection between constitutional rights adjudication and justice, which in their view requires a more expansive approach to the domain of constitutional rights and a more contextual, fine-grained analysis that a proportionality model naturally brings, and which categorical reasoning mostly blocks. They moreover claim that embracing proportionality at the expense of categorical reasoning would resolve pathologies inherent in contemporary US constitutional law and even American politics and culture much more broadly. And to be sure, the calls for more proportionality and less reason-by-category in the US system haven't been entirely academic. They have found judicial support as well. At the Supreme Court, Justice Breyer,[18] sometimes jointly with Justice Kagan,[19] and echoing earlier positions by Justice Stevens[20] and Justice Thurgood Marshall,[21] consistently expressed enthusiasm for the proportionality model at the expense of the existing categories, at least in some "pockets" of constitutional rights' law. And—particularly important perhaps given Justice Breyer's recent retirement from the Court and though speaking from a very different ideological outlook—one even finds sympathy for the proportionality frame of rights adjudication in Justice Barrett's recent concurrence in *Fulton v. City of Philadelphia*.[22]

Borrowing, and Migrations, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 1304 (Michel Rosenfeld & Andras Sajo eds., 2012).

15. *See* Vicki C. Jackson, *Constitutional Law in the Age of Balancing*, 124 YALE L.J. 3094 (2015).

16. *See* Jamal Greene, *The Supreme Court Term 2017—Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28 (2018); JAMAL GREENE, HOW RIGHTS WENT WRONG (2021).

17. A similar extensive argument to that extent has been put forward by Professors Alec Stone Sweet and Jud Mathews in their joint work from a few years ago and more recently. *See* Jud Mathews & Alec Stone Sweet, *All Things in Proportion? American Rights Review and the Problem of Balancing*, 60 EMORY L.J. 797 (2010); STONE SWEET & MATHEWS, *supra* note 13.

18. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 682, 690 (2008) (Breyer, J., dissenting); Sorrell v. IMS Health, Inc., 564 U.S. 552, 582 (2011) (Breyer, J., dissenting).

19. United States v. Alvarez, 567 U.S. 709, 730–31 (2012) (Breyer, J., concurring).

20. Regan v. Time, Inc., 468 U.S. 641, 696 (1984) (Stevens, J., concurring); Craig v. Boren, 429 U.S. 190, 211–12 (1976) (Stevens, J., concurring).

21. Dandridge v. Williams, 397 U.S. 471, 521 (1970) (Marshall, J., dissenting).

22. 140 S. Ct. 1868, 1882–83 (Barrett, J., concurring).

Conversely, scholars like Stavros Tsakyrakis,[23] Francisco Urbina,[24] and Grégoire Webber[25] (among others)[26] have argued that systems committed to the proportionality model in adjudicating rights disputes are the ones that ought to reconsider their position. For these scholars, the proportionality model has major difficulties, including its failure to capture the overriding (or deontic) quality of constitutional rights over mere interests, that it guarantees merely a weak level of protection for rights and "cheapens" them, and that it fails to achieve important rule-of-law values such as guidance, constraint, and predictability. They thus call for an injection of the categorical approach into systems that appear, in their eyes, too uncritically committed to proportionality.

Against this conventional backdrop, this Article argues that we can move beyond the present binary. Indeed, I argue that there is *another* model that is available for us and around which we can organize systems of constitutional rights adjudication. And this new model is importantly distinct from both proportionality and categorical reasoning. On the one hand, this new model combines key features of these existing models in surprising ways. On the other hand, this new model diverges from the existing models in several crucial respects, including in how it allocates decision making responsibility about rights between judicial and political elements, in the precise tools it supplies to judges for the task of solving rights disputes in the first place, and in the extent of rights protection this alternative new model provides when contrasted with proportionality and categorical reasoning.

Somewhat surprisingly, we need not go far to see this new model. Its basic contours are hiding in plain sight: just like categorical reasoning, this new model also originates from the US system. It is only that it operates in a corner of American public law we mostly ignore or tend to quickly gloss over when we talk about constitutional rights—the corner of administrative law. Accordingly, I will call this new model here the *administrative law model* of constitutional rights adjudication.[27] And my aim in this Article is to introduce this model for the first

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23. Stavros Tsakyrakys, *Proportionality: An Assault on Human Rights?*, 7 INT'L J. CONST. L. 468 (2009).

24. FRANCISCO J. URBINA, A CRITIQUE OF PROPORTIONALITY AND BALANCING (2017).

25. GRÉGOIRE WEBBER, THE NEGOTIABLE CONSTITUTION: ON THE LIMITATION OF RIGHTS (2009); Grégoire Webber, *Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship*, 23 CAN. J. OF L. & JURIS. 179 (2010).

26. *See, e.g.*, Christopher Heath Wellman, *On Conflicts Between Rights*, 14 L. & PHIL. 271 (1995); John Oberdiek, *Lost in Moral Space: On the Infringing/Violating Distinction and Its Place in the Theory of Rights*, 23 L. & PHIL. 325 (2004); Basak Cali, *Balancing Human Rights? Methodological Problems with Weights, Scales, and Proportions*, 29 HUM. RTS. Q. 251 (2007).

27. This Article is not the first to label an approach to constitutional rights adjudication an administrative law model. Professor Cass Sunstein has once described the South African Constitutional Court decision in the well-known *Grootboom* case as reflecting an "administrative law model" for rights adjudication. *See* CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 234 (2001). Professors Moshe Cohen-Eliya and Iddo Porat, in their important book and other work, also speak of elements in proportionality analysis that seem to resemble what they describe as an administrative law approach to constitutional rights. *See* COHEN-ELIYA & PORAT,

time, highlight its key attractions and drawbacks, and suggest where this new administrative law model would prove highly appealing and should already displace the existing models, either in whole or at least in part.

Part I begins by describing in more detail the present binary as well as the main characteristics of the categorical reasoning model and the proportionality model. It also discusses how these models are more connected than is sometimes recognized by existing scholarship and judicial practice, but why it is still appropriate and indeed important to think of them as distinct.

Part II introduces the new administrative law model. It begins with the threshold issue of explaining why it makes sense to even look to the field of administrative law as a template for constitutional rights adjudication. Some, especially in the United States, may find this move surprising. But I argue that this is based on a myopic, even misleading, perception of the field of administrative law that can more easily and systematically be connected to issues of constitutional rights. Next, I present the various components of the administrative law model. This model is based on (or inspired by) several central—indeed, foundational—principles of contemporary adjudication in US administrative law, which are undoubtedly familiar to anyone working in this field, but likely well beyond:

> First, the principle of deference to "reasonable" interpretations, associated today most prominently with the seminal *Chevron*[28] case in US administrative law;
> Second, the standard of review for "reasoned decision making," mostly associated now with another seminal administrative law case in the United States, *State Farm*;[29]
> Finally, the "highly deferential" and "extremely narrow" standard of review courts apply in the context of governmental inaction, stemming from the foundational US administrative law case, *Massachusetts v. EPA*,[30] as well as the principle of "anti-abdication."[31]

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supra note 13, at 129–32. Finally, there is also literature that draws on administrative law principles from systems of the commonwealth, and especially those associated with a very famous case called *Wednesbury*, to the context of constitutional rights adjudication. *See, e.g.*, Michael Taggart, *Proportionality, Deference*, Wednesbury, 2008 N.Z. L. REV. 423.

The "administrative law model" I flesh-out and defend in this Article differs substantially from these other incarnations found in previous scholarship, however. Cass Sunstein's identification of an "administrative law approach" inspired by the South African case of *Grootboom* captures only *one* component of the full model outlined here, and even this only partially. Professors Cohen-Eliya and Porat's description of an administrative law approach to constitutional rights adjudication is based on mostly *continental* approaches to administrative law rather than on the domestic field of administrative law *in the United States* on which I draw here. And the United States derived administrative law model I articulate in this Article is moreover different from the commonwealth approach that is influenced by the *Wednesbury* case, among other things in the technology of review that the former supplies to courts.

28. Chevron U.S.A., Inc., v. Natural Resource Defense Fund, 467 U.S. 837 (1984).

29. Motor Vehicles Manufacturers Ass'n v. State Farm, 463 U.S. 29 (1983).

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

31. *See infra* notes 100, 101 and accompanying text.

With the basic components of the administrative law model in hand, Part III highlights how exactly this model diverges from proportionality and categorical reasoning. There are four main differences that I will flag. First, the administrative law model institutionalizes deference to political decision-makers to a much greater extent than the existing models. Second, the administrative law model, especially given what we will see are the upstream and downstream interactions between its various components[32] creates a unique structure that would allow systems to dynamically negotiate their level of commitment to key features of the existing models: on one hand, expansive rights and context-specificness in rights adjudication (associated with the proportionality model) and, on the other hand, a narrower set of rights and a more rigid, rule-like structure of rights adjudication that often relies on more "legalistic" modes of reasoning (associated with the categorical model). As we will see, under the administrative law model, it is possible that systems would retain (or pick anew) a dominant commitment to only one of these. However, and importantly, this negotiation can also end up with systems combining and experimenting under the administrative law model with both types of commitments in ways not clearly possible under the existing models. Third, the administrative law model introduces a novel technology for reviewing rights' claims that diverges substantially from what is available for them under proportionality and categorical reasoning. That technology is the "reasoned decision making" standard, associated with the *State Farm* case, which, as we will see, is a unique form of review that limits judges to look at the "reasoning process"[33] or "internal thought process"[34] that led to the decision in matters of rights rather than directly to the merits of those decisions. Finally, whereas in proportionality and categorical reasoning the ability of courts to review claims directed against governmental inaction—what may be called "initiation claims"[35]—is limited in crucial ways, the administrative law model substantially expands the focus on exactly that.

Part IV is my normative discussion where I take each of the distinctive features of the administrative law model flagged in the previous Part and explain why and how they could be thought of as attractive compared to proportionality and categorical reasoning. So, for example, I will suggest that the greater degree of deference the administrative law model institutionalizes has much going on for it because it enhances the place of political constitutionalism in the rights adjudication context compared to the existing models. I will moreover claim that the administrative law model's unique structure of dynamic negotiation between, on the one hand, expansive rights and context-specificity, and, on the other hand, limited rights and rigidity or variability seems valuable, too. It creates a kind of a

32. *See also infra* Part II, diagram I.

33. Gary Lawson, *Outcome, Procedure, and Process: Agency Duties of Explanation for Legal Conclusions*, 48 RUTGERS L. REV. 313, 318–19 (1996).

34. Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 530 (1985).

35. This is my adaptation of the term "initiation rights" in Cass R. Sunstein & Richard B. Stewart, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1202 (1981).

desirable meta structure of rights adjudication that could lead systems to optimally combine these elements rather than fall into the trap of excessively relying on only one of them. And it does so in a way that is attentive to, rather than ignores, important differences between rights' cultures in different jurisdictions and places.

I will furthermore argue in Part IV that the "reasoned decision-making" standard can prove an incredibly appealing technology for rights' protection that might be superior to what courts draw on today under the existing models. For one, it implies a sensible allocation of roles between courts and political decision-makers in matters of rights that are free of some conceptual and practical difficulties afflicting the existing models. For another, this standard's focus on the more process-based element of adequate reason-giving, rather than on substance, seems especially important today in an age where rights disputes become more "fact-y,"[36] among other things given the rise of administrative states, as well as in an age of increased distrust in government. Finally, I will suggest that the expansive focus on judicial review of governmental inaction that is a feature of the administrative law model also seems to have much to commend. It will provide better protection for rights that the existing models currently do not protect well enough, including liberty rights, a right to governmental protection from the risks of private power, as well as to a nascent constitutional right to "effective government."[37] And this feature also helps close the circle of political constitutionalism itself, so to speak—because the focus that the administrative law model brings with it to situations of governmental inaction would provide avenues for outsiders to press governments not only to exercise their powers under the existing understanding of rights but also to consider new interpretations of rights.

Part V switches the focus to discuss the concerns the administrative law model might legitimately raise. There are three primary concerns that I will flag. The first is the concern of faux deference—that is, that the model will fail to deliver on the goal of providing more political constitutionalism and deference to political institutions. The second is what I will call the "too little/too much problem"—namely, that the administrative law model might prove either under-protective of rights or over-protective of rights at the expense of other rights or values. A final concern that could be raised against the model is what I will call the "administrative law outside administrative law" concern. By this I mean that the tools that have been developed specifically in the administrative law context may prove unsuitable to the institutions regulated by constitutional law that differ in important respects from administrative agencies.

While these concerns are not to be dismissed, I will suggest in Part V that they are also far from prohibitive. For instance, I argue that some degree of "faux

36. Allison Orr Larsen, *Constitutional Law in an Age of Alternative Facts*, 93 N.Y.U. L. REV. 175, 182 (2018).

37. *See infra* notes 296, 297 and accompanying text.

deference" may be desirable and that the correct lens through which we should view the administrative law model is not necessarily as a form of reflexive judicial deference but rather as a form of unique "dialogue"[38] between courts and politics in matters of rights. And I moreover suggest that there are various doctrinal (and other) solutions that systems could adopt to mitigate many of the model's remaining concerns and costs.

Part VI concludes by suggesting where the administrative law model might prove suitable already today. I argue that this is most clearly the case in the jurisdiction from which this model originates—the United States. And I will even propose that realizing that the administrative law model exists can surprisingly increase the chances of achieving meaningful and desirable changes in the trajectory of American constitutional law, at least in the medium term. This is true, I argue, notwithstanding the current trend of "anti-administrativism"[39] in American courts and beyond under which central tenets of administrative law, including the ones I build on here (such as *Chevron*), are under fierce attack. As I will suggest, this trend might be transient rather than enduring and should not deter us from ambitiously seeking to expand administrative law's domain.

Saying with similar confidence that the administrative law model is immediately suitable outside the United States is more challenging though. While I provide reasons for thinking that the administrative law model is *generally* attractive, we should also be mindful that different systems or jurisdictions may have legal structures in place that would make embracing the model in full and right away tricky (including what comparative scholars refer to as "limitation clauses").[40] Nonetheless, even if the administrative law model cannot be adopted in other places in full under current legal conditions, there is nothing that should prevent various systems from considering embracing the model at least in part. And indeed, I will suggest that there are strong signs that they should, including a renewed criticism of "juristocracy"[41] in matters of constitutional rights in some places around the globe, the appearance of what has been called a "procedural turn"[42] in constitutional rights adjudication, and, finally, the increased constitutional attention– in large part because of the COVID-19 pandemic– to matters of governmental "underreach."[43]

Before diving into the argument, two clarifications are in order. First, my main goal in this Article is to introduce a genuinely new model for constitutional

38. *See infra* notes 316, 317 and accompanying text.

39. Gillian E. Metzger, *The Supreme Court 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 4 (2017).

40. *See infra* Part VI.B.

41. RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2009).

42. Oddný Mjöll Arnardóttir, *The 'Procedural Turn' Under the European Convention on Human Rights and Presumptions of Convention Compliance*, 15 INT'L J. CONST. L. 9 (2017).

43. David E. Pozen & Kim Lane Scheppele, *Executive Underreach, in Pandemics and Otherwise*, 114 AM. J. INT'L L. 608 (2020).

rights adjudication. The aim is to illustrate to US audiences how our own federal administrative law can be "exported" to the context of constitutional rights with great gains, and to introduce to audiences beyond the United States the potential appeal of this US administrative law-derived approach to rights adjudication. Because this task is substantial, the discussion in this Article is necessarily preliminary in nature and cannot incorporate all the issues that the introduction of this model may plausibly surface. My hope is that further refinements, complications, and challenges will stand at the center of future work that would be able to build on the foundation I lay here.

Second, this Article is about doctrinal structures in matters of rights. It focuses on what we can think of as the "meta"[44] level, or on doctrinal "architecture."[45] That does not mean that the readers should prepare themselves for a rather boring read that has no real-life stakes (as meta discussions sometimes seem to imply). And, indeed, the heated debates between proponents and opponents of either proportionality or categorical reasoning, which we will encounter very soon, strongly suggest this much. What this focus on meta or architecture does mean is that discussion in the Article will often gloss over many of the specific controversies including controversies about abortion rights, free speech, and antidiscrimination, that make the field of constitutional rights so crucial and exciting, both in general and especially today.

I. OUR PRESENT BINARY

It is hard to dispute that in the world of constitutional rights adjudication we are living in a binary. As things currently stand, only proportionality and categorical reasoning seem available to us as "models" around which we can organize systems for adjudicating rights. But what exactly do each of these models entail? To show that we can and should go beyond this binary, we first need to understand what the binary supplies to us. This Part tries to do just that.

A. Categorical Reasoning

I begin with the categorical reasoning model. Briefly speaking, several characteristics of this model seem important to capture how it works.

(*) Classifying and labeling. The first feature is that a key responsibility of judges operating on the basis of the categorical model is to perform a "job of classification and labeling," like any good "taxonomer" would do.[46] Indeed, to

44. Mark Tushnet, *The Coverage/Protection Distinction in the Law of Freedom of Speech—an Essay on Meta-Doctrine in Constitutional Law*, 25 WM. & MARY BILL RTS. J. 1073 (2017).

45. *See* Frederick Schauer, *Freedom of Expression Adjudication in Europe and America: A Case Study in Comparative Constitutional Architecture*, in EUROPEAN AND US CONSTITUTIONALISM 47 (George Nolte ed., 2005).

46. Kathleen M. Sullivan, *Categorization, Balancing, and Government Interests*, in PUBLIC VALUES IN CONSTITUTIONAL LAW 241, 241 (Stephen E. Gottlieb ed., 1993).

get any traction in the categorical reasoning model on issues of rights, judges initially face a series of "threshold"[47] questions on which it is very common to find them spending a lot of time. For instance, judges might ask themselves: how far exactly does a particular right reach? Or what is its precise substance, meaning, or scope? Judges may moreover ask: what are the right's manifestations that are generally more valuable or that would generally be more vulnerable to unjustified governmental infringement? And conversely: what manifestations of this right would be less valuable or vulnerable in this way? Alternatively, judges may approach the task of "classifying and labeling" from the side of the governmental act infringing the right. They might ask for example: which circumstances of a right's infringement would normally raise greater suspicion for impermissibility? And which would not raise such suspicion?

Under the categorical model, the responses to these various questions would then lead judges operating to either screen out claims from the domain of constitutional rights entirely, if they are found outside the scope of the right in question, or to sort rights claims into various "boxes" within that domain.

(*) Varied, bespoke, and often rigid and outcome-determinative standards of review. A second central characteristic of the categorical model is that the results of the previously discussed "classifying and labeling" stage, to the extent that a claim was found to be within the domain of constitutional rights, will trigger a series of varied tests or tiers of review that guide the judicial inquiry into claims involving rights. Sometimes these standards can be bespoke standards that simply limit judges' analysis to certain questions or elements that are involved in a particular dispute about rights, akin to creating a deliberate "tunnel vision" in this matter for the decision-maker. Examples here are tests about "time, place, and manner" restrictions or speech or the "undue burden" for abortion rights, now of course obsolete after the US Supreme Court's dramatic decision in *Dobbs*.[48]

In many cases, however, these standards are more general than that. They produce a series of well-known tiers of scrutiny. And what characterizes these tiers is that they are meant to be relatively "outcome determinative,"[49] very much in the way we think of rigid rules as opposed to standards.[50]

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47. MÖLLER, *supra* note 8, at 74.

48. *Cf.* STEPHEN G. BREYER, BREAKING THE VICIOUS CYCLE: TOWARD EFFECTIVE RISK REGULATION 11–19 (1993). Prominent examples are the test that restricts judges to "time, place, and manner" restrictions in the context of First Amendment, *see, e.g.*, Hill v. Colorado, 530 U.S. 703 (2000), or the "undue burden" in the context of abortion rights, *see* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

49. Evelyn Douek, *Governing Online Speech: From Posts-As-Trumps to Proportionality and Probability*, 121 COLUM. L. REV. 759, 772 (2021).

50. The literature on the divergence of rules and standards is of course significant. Prominent contributions include Antonin Scalia, *The Rule of Law as the Law of Rules*, 56 U. CHI. L. REV. 1175 (1989); Kathleen M. Sullivan, *The Supreme Court 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 65-6 (1982); Louis Kaplow, *Rules v. Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992).

On one end of the spectrum, and for rights (or manifestations of rights) that judges found at the initial "classifying" stage to fall into a category or box of "high value" or "high vulnerability," courts apply a standard that begins with a very strong presumption of unconstitutionality. In the United States, which is probably the only jurisdiction committed to the categorical model, this standard of review is famously known as strict scrutiny. It requires a showing that the governmental goal supporting the infringement of the right is "compelling"[51] and that the means it chose "minimally impair" the right in question, or are "narrowly tailored."[52] And indeed, strict scrutiny has a general reputation in the United States as a very robust standard that may be not only strict in theory but is potentially "fatal in fact."[53]

However, on the other end of the spectrum, for rights or manifestations of rights that fall under a category of "low value" or "low vulnerability," courts in the categorical reasoning model apply a standard of review that begins with a very strong presumption of *constitutionality*. In the United States, this standard is known as rational basis or minimum rationality.[54] And it is indeed usually very weak, not to say "meaningless."[55] Under it, infringement on rights is highly likely to be found constitutional unless wholly irrational; in other words, that it is not likely to achieve *any* legitimate governmental goal.[56]

In between those tiers, courts in the categorical reasoning model apply what public lawyers in the United States call "intermediate scrutiny."[57] This tier of review requires that governmental goals that may infringe on individual rights are "important"[58] and the means chosen to pursue them are "substantially related."[59] And while it is meant to be much less outcome-determinative than the previous tiers, in principle it is also meant to apply to a relatively minimal number of classes of rights disputes.[60]

* * *

51. *See, e.g.*, Adarand Constructors v. Pena, 515 U.S. 200 (1995).

52. Grutter v. Bollinger, 509 U.S. 306, 326 (2003).

53. Gerald Gunther, *The Supreme Court 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

54. *See generally* Thomas B. Nachbar, *The Rationality of Rational Basis Review*, 102 Va. L. Rev. 1627 (2016).

55. Erwin Chemerinsky, *The Rational Basis Test Is Constitutional (and Desirable)*, 14 GEO. J.L. & PUB. POL'Y 401, 410 (2016).

56. *See, e.g.*, Williamson v. Lee Optical, Inc., 348 U.S. 483, 487–88 (1955).

57. See Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 GEO. WASH. L. REV. 298 (1998).

58. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976).

59. *See, e.g.*, Lehr v. Robertson, 463 U.S. 248, 266 (1983).

60. In the United States, intermediate scrutiny formally applies to relatively few categories, which include most conspicuously claims for discrimination based on gender and infringements on commercial speech. *But see infra* note 119 and accompanying text for why in practice that description may not be stable.

Combined, the two features I described capture much of what is distinct about the categorical reasoning model for adjudication rights. They also obviously help explain the name given to it. But this model has a few *other* important features worth highlighting separately.

(*) Rights are narrow and act as "trumps." One such additional feature is that rights under the categorical model tend to be narrow but strong.[61] This is first and foremost the result of the importance of the initial task of "classifying and labeling," which can quite naturally lead courts to narrow the meaning of rights and keep the domain of rights restricted rather than expansive.[62] However, this narrowness of rights is also the result of the stringency of the strict scrutiny standard that, by its nature and given the acceptance that rights today are not generally absolute, can only be preserved for relatively few rights or manifestations of rights. This means that there is a built-in incentive under the categorical model that most rights that have "survived" the initial stage of categories to be cordoned off to the weaker standards of review.[63]

This narrow domain of rights that can also come with very strong judicial protection in the form of strict scrutiny that might be "fatal in fact" is precisely what makes the categorical model closely associated with Ronald Dworkin's idea of rights as "trumps."[64]

(*) A prominent place for "distinctively juridical technologies." Another feature of the categorical model is that it is quite hospitable for reasoning about constitutional rights and solving rights disputes in what can be called "distinctive juridical technologies"[65] such as text, precedent, or history.[66] And indeed, in the United States, judges commonly rely on these kinds of "technologies" in rights disputes rather than on more instrumental, empirical, or explicitly moral features

61. *See* Greene, *supra* note 16 (arguing that the rights model in the United States leads to both a narrowing category of what is to be considered rights, and offers quite strong protections for rights).

62. The most salient example is "uncovered" speech in First Amendment law. *See, e.g.*, R.A.V. v. St. Paul, 505 U.S. 377, 382-86 (1992) (discussing the relevant categories of protected and unprotected speech).

63. I note, though, that this is not a conceptually necessary conclusion, but merely a tendency, a point illustrated in the United States by the claim of increased *Lochnerization* of the First Amendment. *See, e.g.*, Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915 (2016).

64. *See* Dworkin, *supra* note 11.

65. Greene, *supra* note 16, at 63.

66. These constitute only a portion of the well-known "modalities" of constitutional argument. On the modalities, *see* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 9 (1991); Richard H. Fallon. Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987).

of rights and their infringement. These "legalistic,"[67] "conceptual,"[68] or "expository"[69] arguments can be the conclusive word in solving disputes in matters of rights, such as where they determine what comes within a right's scope in the first place. Alternatively, these legalistic, conceptual, or uniquely juridical technologies of reasoning can serve as the criteria that help courts decide to which box a specific claim of rights belongs and what test would then apply.[70]

(*) Deference in the categorical model. A final feature of the categorical reasoning model worth emphasizing here is its approach towards deference to political decision makers. For the most part, and certainly if one takes its cues from contemporary US law, the categorical model is not very open to deference, certainly not at the level of official doctrine. Indeed, the task of classifying and labeling rights into their respective categories or how to "interpret" the meaning or scope of constitutional rights is conceived in this model to be a purely judicial one that calls for no explicit deference.[71] In the United States, the famous slogan here comes from *Marbury v. Madison*: it is the judiciary's province to "say what the law is."[72]

Similarly, when courts employ strict scrutiny, intermediate scrutiny, or any of the relevant "bespoke" standards that operate in categorical reasoning, they are usually far from deferential as well. They engage in independent substantive evaluation of the dispute, including deciding themselves what would be considered a "compelling" interest or a sufficiently "narrowly tailored" means.[73] And courts do so quite freely, basing their evaluations on new facts and new arguments they receive in the process of litigation, often in the form of *amicus*

67. Mattias Kumm & Victor Ferrerz Comella, *What Is so Special about Constitutional Rights in Private Litigation? A Comparative Analysis of the Function of State Action Requirements and Indirect Effect*, in THE CONSTITUTION IN PRIVATE RELATIONS: EXPANDING CONSTITUTIONALISM 241, 278 (Andras Sajo & Renata Uitz eds., 2005).

68. Adrienne Stone, *Introduction*, in THE OXFORD HANDBOOK OF FREE SPEECH xiii, xix (Adrienne Stone & Frederick Schauer eds., 2021).

69. For this term, *see* Randy J. Kozel & Jeffrey Pojanowski, *Administrative Change*, 59 UCLA L. REV. 112, 141–46 (2011).

70. On the rise of historical categories in First Amendment law and a critique, *see, e.g.*, Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166 (2015). And for the increased use of historical and traditional sources in US constitutional law more broadly, and in the recent judgments by the Roberts Court, *see generally* Jacob D. Charles, *The Dead Hand of a Silent Past: Bruen, Gun Rights, and the Shackles of History*, 73 Duke L.J. (2023).

71. Some describe this feature of the model as "juricentric." *See* Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Powers*, 78 IND. L.J. 1 (2003).

72. Marbury v. Madison, 5 U.S. (I Cranch) 137, 177 (1803).

73. As Professor Peter Cane aptly describes the state of affairs: there is an "externally derived and judicially imposed benchmark of propriety" to which governmental decision makers must aim if they want to survive review. *See* PETER CANE, CONTROLLING ADMINISTRATIVE POWER: A HISTORICAL COMPARISON 255 (2016).

curiae briefs.[74] Finally, the remedy courts provide is a "heavy"[75] one—they strike down the decision. This means that governments are not normally allowed a redo under the categorical model.

Only under rational basis which, as we saw, is inherently weak, courts tend to exemplify high measures of deference under the categorical model. In fact, under rational basis, deference seems especially strong because courts are allowed to approve the constitutionality of a governmental action based on any "conceivable"[76] rationale, which means even a rationale that courts (or litigants) can "dream up" in the litigation process and which was not meaningfully articulated by the government itself (not to mention guided its actions). In other words, under rational basis, courts might even "shoulder"[77] governmental decision makers.

Even here, though, there is a limit to this deference. Indeed, in those cases where courts do intervene under rational basis, their remedy is again mostly the heavy one of a strike down. Thus, a redo is not normally allowed.[78]

B. Proportionality

Things are different in many respects under the proportionality model, the so-called "global model"[79] of constitutional rights adjudication.

(*) No labeling and classifying. For one, under the proportionality model there is no significant task of "classifying and labeling" of rights and fitting them to distinct boxes as we have seen under the categorical model. While judges in systems that embrace proportionality also nominally ask themselves "threshold" questions,[80] including what is included within the scope of the right, in the vast majority of cases this threshold question would be extremely thin and quickly glossed over.[81] Judges in the proportionality model certainly are not perceived as, or meant to be, spending time at this initial stage on creating categories and

74. Professors Yoav Dotan and Michael Asimow dub this practice one of *open* reasons and records. *See* Michael Asimow & Yoav Dotan, *Open and Closed Judicial Review of Agency Action: The Conflicting US and Israeli Approaches*, 64 AM. J. COMP. L. 521 (2016). For a general discussion of deference to facts in constitutional adjudication, and the relevant complexities and sometimes inconsistencies, *see* Larsen, *supra* note 36, 218–31.

75. Wheeler v. Montgomery, 397 U.S. 280, 283 (1970) (Burger, C.J., dissenting).

76. *See, e.g.*, U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 174 (1980); FCC v. Beach Communications, Inc., 508 U.S. 307, 315 (1993).

77. Cooper Laboratories, Inc. v. Commissioner, 501 F.2d 772, 790 (D.C. Cir. 1974) (Leventhal, J., dissenting).

78. We will see later some exceptions to this general tendency in the case law. *See infra* note 118 and sources cited therein.

79. MÖLLER, *supra* note 8.

80. *See* Nelson Tebbe & Micah Schwartzman, *The Politics of Proportionality*, 120 MICH. L. REV. 1307, 1318 (2022).

81. *See, e.g.*, Stephen Gardbaum, *The Myth and Reality of American Constitutional Exceptionalism*, 107 MICH. L. REV. 391, 424 (2008).

deciding which manifestations of rights are more valuable or vulnerable, for example.[82] These types of considerations are relevant at a different stage, as we will soon see.[83]

(*) Single, flexible, non-outcome-determinative standard of review, with four components that include "balancing." Given this weak initial stage, much of the judicial work under the proportionality model is left to the stage of review itself rather than that of definition and scope. And here, precisely because judges in this model do not tend to linger on classifications and labels, there is in principle only one unified standard of review that applies across the board rather than a more complex structure of different bespoke standards of review or the tiers we see in categorical reasoning. Moreover, and for the same reason, that standard is not rigid or outcome-determinative. To the contrary: the standard is flexible and open to various applications and results—a kind of "intermediate-scrutiny-for-all."[84]

Famously, the unified standard courts utilize in the proportionality model is the well-known proportionality protocol. This protocol has, depending on the version, three or four key steps,[85] and some jurisdictions or systems tend to apply them sequentially[86] whereas others do so more flexibly and as a sort of a gestalt.[87] In the first step, courts must ask themselves if the goal the government is pursuing is legitimate or worthy, a usually very weak bar that is easily crossed in most cases.[88] In the second step, courts ask a question of "rationality" or "suitability," namely—whether the means chosen by the government can be said to fulfill the government's legitimate goal. Courts also almost always find this step satisfied. In the third step, courts ask a question of "necessity," namely whether there are means that can achieve the goal that are "less restrictive" on the right in question. Finally, the fourth step is "overall balance," proportionality "as such," or proportionality "in the strict sense" (*stricto sensu*), among other names. In this final step, courts engage in an openly normative act of balancing which evaluates

82. Tebbe & Schwartzman, *supra* note 80, at 1318.

83. *See infra* note 89 and accompanying text.

84. Greene, *supra* note 16, at 58. *See also* Edmonton Journal v. Alberta (Attorney General) [1989] 2 S.C.R. 1326, 1355–56 (Canada) (emphasizing, in the context of Canadian jurisprudence, that the outcome of each dispute is highly context dependent).

85. Scholarship is full of descriptions of the protocol and those exhibit minor variations. *Compare* Stone Sweet & Mathews, *supra* note 17, at 802–04 (presenting proportionality as a three-step protocol) with BARAK, *supra* note 13, at 131–33 (presenting proportionality as a four-step protocol). My presentation in the text brackets these nuances in ways that I think do not seriously compromise any important detail.

86. Canada and Germany are leading examples. *See, e.g.*, Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, 57 U. TORONTO L.J. 383 (2007).

87. South Africa is the leading example here. *See* S v. Manamela & Another 2000 (3) SA 388 (CC) [18] (S. Africa). For the distinction between "vertical proportionality," which applies the protocol sequentially, and "horizontal proportionality," which applies it flexibly and as a gestalt, *see* JONAS CHRISTOFFERSEN, FAIR BALANCE: PROPORTIONALITY, SUBSIDIARITY, AND PRIMARITY IN THE EUROPEAN CONVENTION ON HUMAN RIGHTS 69–76 (2009).

88. *See, e.g.*, NIELS PETERSEN, PROPORTIONALITY AND JUDICIAL ACTIVISM: FUNDAMENTAL RIGHTS ADJUDICATION IN CANADA, GERMANY AND SOUTH AFRICA 117–19 (2017).

whether the infringement on the rights is ultimately justified given the harm it causes and the value of the goals the government seeks to achieve. At this stage, courts can take under consideration a multitude of circumstances and features, free of categories that necessarily create a "tunnel vision" and leave some residue of considerations out of the picture, including the nature of the right in question (like how valuable or vulnerable it is), the circumstances of the infringement of the right or how it is enjoyed, and much more.[89]

* * *

While the lack of labeling and classifying on one hand, and the existence of a single, non-outcome-determinative, and highly flexible standard of review that draws on the four-step proportionality protocol and includes a last "balancing" step on the other hand, are undoubtedly much of what makes the proportionality model distinct, let me highlight a few other features of this model that would help to further emphasize how it differs from categorical analysis.

(*) Expansive, even "inflated" rights, and no trumps. First, in contrast to categorical reasoning and precisely because the task of labeling and classifying is not a strong feature of this model, rights tend to be much more expansive under proportionality even if—because the same standards apply to *all* rights claims—they do not behave as "trumps."[90] In fact, not only are rights expansive here, it is well-documented that under the proportionality model, rights tend to become "inflated."[91] Indeed, what may strike us as even marginal individual interests could be considered as rights and trigger serious judicial inquiry and ultimate protection (in the famous examples mentioned in the literature, the proportionality model might accept that there is a right to feed pigeons,[92] to ride horses in the woods,[93] and even a constitutional right to go to sleep).[94]

(*) Empirical, instrumental reasons rather than "distinctive juridical technologies." Second, in the proportionality model, the reliance on "distinctive juridical technologies" that we often see under the categorical reasoning model is extremely thin, even nonexistent.[95] Most of the focus is on the reasons that would matter for the application of the proportionality protocol, which are more

89. *See, e.g.*, Sujit Choudhry, *So What is the Real Legacy of* Oakes*? Two Decades of Proportionality Analysis Under the Canadian Charter's Section 1*, 34 S.C.L.R. 501, 503 (2006) (highlighting that the lesson of Oakes, which introduced the proportionality standard into Canadian jurisprudence and has been hugely influential comparatively, is the "need to tailor judicial review to the unique context of each case.").

90. *See* Greene, *supra* note 16, at 65.

91. *See* GEORGE LESTAS, A THEORY OF INTERPRETATION OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS 126 (2007); Kai Möller, *Proportionality and Rights Inflation*, in PROPORTIONALITY AND THE RULE OF LAW 155 (Grant Huscroft et al. eds., 2014).

92. *See* MÖLLER, *supra* note 8, at 4.

93. *Id.*

94. *See* LESTAS, *supra* note 91, at 126.

95. *See* Greene, *supra* note 16, at 63.

instrumental or "prescriptive"[96] in nature and indeed straightforwardly political, moral, or empirical. Because of this more instrumental, and less "legalistic" or "conceptual" nature of the judicial inquiry when utilized, the proportionality model is often associated, in both scholarship and judicial practice, with ideas about the existence of a fundamental right to justification or, more broadly, a "culture of justification."[97] These are then contrasted with a "culture of authority"[98] that is substantially characterized by the resort to more legalistic modes of reasoning in rights' issues and which is precisely what the categorical model, as we have seen before,[99] allows.

(*) Deference in the proportionality model. Finally, the proportionality model's approach to deference to political decision-makers is less schizophrenic than what we see with the categorical reasoning model. In general, systems committed to proportionality tend to acknowledge that some measure of deference may be appropriate across the entire domain of constitutional rights adjudication, a fact that is captured in the domestic context by the development of terms like a "zone of proportionality,"[100] and in the international context by the development of the concept of the "margin of appreciation."[101] Nonetheless, there is much ambiguity about where and how deference would apply, and cross-jurisdictional practice also varies substantially.[102] The best description of the state of deference in the proportionality model across the world seems to be, crudely, that it exists to some extent but is not dominant and far from fully institutionalized. More often than not, courts in systems committed to the proportionality model engage in the independent interpretive and substantive application of rights claims, including especially in the final steps of the proportionality standard of "necessity" and proportionality "as such."[103] That is, courts decide for themselves what goals are permissible, what are the least restrictive means, and what is the appropriate overall balance between goals and means—as the proportionality protocol instructs. At most, courts give some weight to the government's view, the extent

96. Kozel & Pojanowski, *supra* note 69, at 141–46.

97. Leading expositions of this view are COHEN-ELIYA & PORAT, *supra* note 13; Mattias Kumm, *The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review*, 4 L. & ETHIC. OF HUM. RTS. 141 (2010), and David Dyzenhaus, *Proportionality and Deference in a Culture of Justification*, in PROPORTIONALITY AND THE RULE OF LAW: RIGHTS, REASONING, JUSTIFICATION 234 (Grant Hscroft et al. eds., 2014).

98. *See* COHEN-ELIYA & PORAT, *supra* note 13, at 4.

99. *See supra* notes 65–70 and accompanying text.

100. *See* BARAK, *supra* note 13, chapter 14.

101. *See generally* ANDREW LEGG, THE MARGIN OF APPRECIATION IN INTERNATIONAL HUMAN RIGHTS LAW: DEFERENCE AND PROPORTIONALITY (2012).

102. *See, e.g.*, Cora Chan, *A Preliminary Framework for Measuring Deference in Rights Reasoning*, 14 INT'L J. CONST. L. 851, 661 (2016).

103. *See, e.g.*, Alison L. Young, *In Defence of Due Deference*, 72 MODERN L. REV. 554, 555 (2009).

of which is itself up to the court's discretion and is not guaranteed to be substantial.[104]

Finally, as to remedy, the proportionality model's key remedy is almost always a strike down. This means that aiming for a "redo" by the government, in the sense of *doing the exact same thing* after an adverse judicial order, is not normally open to decision-makers. To do so, governments in the proportionality model would have to draw on various mechanisms that would "override" the adverse judicial ruling (to the extent that those exist).[105]

C. Similarities, Instabilities, Infidelities, and Why the Models Matter

All these differences between the categorical reasoning model and proportionality described in the previous Section have served as fodder for many fierce debates in both the fields of domestic and comparative constitutional law, as well as in the community of international human rights.[106] We will see some of the arguments in more detail later in Part IV.[107] At this stage, however, it is important to note that the models are not necessarily as distinct as some might suggest.

(*) Similarities between the models. First, there are important similarities between these models in their various doctrinal components. Most obviously, there is a clear similarity between, on one hand, the requirement of "minimal impairment" or "narrow tailoring" that exists in the categorical reasoning model's strict scrutiny tier and, on the other hand, the "least restrictive means" requirement in proportionality. And the requirement of "suitability" in proportionality (the second step of the protocol) is also identical to the requirement that we see even in a rational basis for lack of irrationality.

Perhaps less obviously, though, the categorical reasoning model's function can at least in part be viewed as a case of "definitional," "principled," or even "meta" proportionality.[108] True, as I have emphasized, in their task of "classifying and labeling" in the categorical reasoning model courts sometimes draw on more legalistic forms of argumentation or on "distinctively juridical technologies."[109]

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104. *See generally* Chan, *supra* note 102.

105. I return to this issue below, *see infra* note 348 and accompanying text.

106. *See infra* sources cited throughout Part IV.B. For some glimpse of how these debates have indeed been fierce and passionate, consider the title of one article that tries to summarize and contribute to these debates: Matthias Klatt & Mortiz Meister, *Proportionality—A Benefit to Human Rights? Remarks on the ICON Controversy*, 13 INT'L J. CONST. L. 354 (2015).

107. *See infra* Part IV.B.

108. For these terms, *see* Jochen von Bernstoff, *Proportionality without Balancing: Why Judicial Ad Hoc Balancing is Unnecessary and Potentially Detrimental to the Resolution of Individual and Collective Self-determination*, in REASONING RIGHTS: COMPARATIVE JUDICIAL ENGAGEMENT 63, 76 (Liora Lazarus et al. eds., 2014); BARAK, *supra* note 13, at 12, 542; Melville Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935, 938 (1968).

109. *See infra* notes 65–70 and accompanying text.

But this is not always the case. As I have also highlighted, sometimes courts using the categorical reasoning model build these categories on elements such as the justifications for the right or their likely applications or consequences in the real world—including what is more valuable or vulnerable and what is less so. When courts reason in such a manner, they are essentially guided by the same ideas that are prominently featured in the proportionality model, and especially the final stage of the proportionality protocol of proportionality "as such" that requires balancing. The only difference is that they do so in a *more general, a priori way*, given this model's commitment to a more rule-like (rather than standard-like) structure of adjudicating rights.

(*) Convergence between the models. Second, one must also consider the possibility that proportionality and categorical reasoning will tend to converge with one another, both in style and results.[110] For example, the categorical model can become more like proportionality when courts introduce exceptions to their own created categories of rights and when these exceptions proliferate.[111] Such proliferation, after all, undermines the ability to speak sensibly of a robust category that is truly outcome-determinative. It also gives judges much flexibility to drive to the results they deem just in the specific cases at hand—a component of the model on the other side of the binary (and, of course, judges are moreover always free to create a new category that seems general but is in fact tailored to only the case at hand).

As to the proportionality inquiry: while it is certainly conceptualized and may in fact begin as highly context-specific—which some say is this model's defining feature[112]—proportionality too can transform into a more categorical framework, particularly as judges gain more experience with the relevant constitutional issues and can thus arrive at more concrete specifications of how they might structure their decisions.[113] In fact, there are now important discussions in systems committed to the proportionality model that encourage courts to do exactly that, by, for example, "calibrating" their intensity of review under proportionality or "systematizing" it to more defined categories, very much like how, as just discussed, categorical reasoning can be understood as "principled," "categorical," or "meta" proportionality.[114] What is more, it seems that courts committed to proportionality across various domestic jurisdictions and

110. On the general tendency of rules to become more like standards, and vice versa, *see* Frederick Schauer, *The Convergence of Rules and Standards*, 2003 N.Z. L. REV. 303.

111. On the proliferation of exceptions in First Amendment law, *see, e.g.*, Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 515 (1996). On the proliferation of exceptions in Fourth Amendment law, *see, e.g.*, Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994).

112. Evelyn Douek, *All Out of Proportion: The Ongoing Disagreement about Structured Proportionality in Australia*, 47 FED. L. REV. 551, 553 (2019).

113. This is a hypothesis most prominently raised by Fred Schauer. *See* Schauer, *supra* note 45.

114. *See, e.g.*, Rosalind Dixon, *Calibrated Proportionality*, 48 FED. L. REV. 92 (2020); Julian Rivers, *Proportionality and Variable Intensity of Review*, 65 CAMBRIDGE L.J. 174 (2006).

at the international level already engage in this calibration approach in practice, though perhaps this calibration is "softer"[115] and less outcome-determinative than what we usually attribute to the tiers of scrutiny in the United States

(*) Infidelities in the models' operation. Finally, it is far from uncommon to observe, in particular jurisdictions that are ostensibly committed to either one of the models, a series of "anomalies" or "infidelities" that do not really square with those commitments.[116] For instance, in the United States, even though strict scrutiny is considered an almost "fatal" test, we know that it is not always so in practice.[117] Additionally, rational basis's regular weakness might occasionally and perhaps unexpectedly become more aggressive and have real "teeth" or "bite."[118] And the introduction of "intermediate scrutiny" in the United States as a goldilocks standard between strict scrutiny and rational basis also created significant instability within the categorical model—signified by the title of one important article that describes intermediate scrutiny as the "test that ate everything."[119]

Conversely, while the proportionality model is meant to be "heavy on the bottom" rather than "on the top,"[120] in the sense that most of the judicial work is to be performed not at the initial stage of defining the scope of rights or the "labels" into which rights fall but rather in applying the proportionality standard, it is not rare to see places where the proportionality model is "heavy on the top." Indeed, sometimes we see courts in jurisdictions committed to proportionality determine the outcome of cases based on questions of the rights' scope—partly because systems that adhere to the proportionality model also accept the existence of some absolute or "essential" rights.[121] Other times, courts employ the legitimate goal step of the proportionality protocol to strike down governmental

115. For the idea of "soft trumping," *see* MATTIAS KLATT & MORITZ MEISTER, THE CONSTITUTIONAL STRUCTURE OF PROPORTIONALITY chapter 2 (2012).

116. Here I note as well that some pockets of US law do seem to explicitly rely on proportionality, both as principle but more clearly as doctrine. *See* Jackson, *supra* note 15, at 3096; E. THOMAS SULLIVAN & RICHARD S. FRASE, PROPORTIONALITY PRINCIPLES IN AMERICAN LAW (2009); Stone Sweet & Mathews, *supra* note 17, at 814–24.

117. *See, e.g.*, Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006). On the various uses of the strict scrutiny tier, see the lucid discussion in Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267 (2007).

118. Gunther, *supra* note 53, at 21. *See also* Katie R. Eyer, *The Canon of Rational Basis Review*, 93 NOTRE DAME L. REV. 1317 (2018) (illustrating many ways through which rational basis becomes more aggressive than the standard picture or "canon" of that test normally portrays).

119. Ashutosh Bhagwat, *The Test that Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783 (2007).

120. For these terms, *see* Denise G. Reaume, *Limitation on Constitutional Rights: The Logic of Proportionality*, 26 OXFROD LEG. STUD. RES. PAPER (2009).

121. *See, e.g.*, Sebastian Van Drooghenbroeck & Cecilia Rizcallah, *The ECHR and the Essence of Fundamental Rights: Searching for Sugar in Hot Milk?*, 20 GERMAN L.J. 904 (2019). See also Article 19(2) of the German Basic Law which states "In no case may the essence of a basic right be affected."

actions as unconstitutional, much like how we expect the categorical model to work.[122]

(*) How to understand the differences. Despite all this, the differences between the models still seem to matter. They clearly represent distinctive jurisprudential commitments and "intellectual styles"[123] about how to adjudicate disputes regarding rights. And systems do seem to exemplify systematic adherence or preference to one of the models, and an aversion to the competitive model. In the United States, the idea of forgoing categories and engaging in the context-specific analysis associated with proportionality, and especially the final stage of the relatively free-form normative balancing, has been characterized as "startling and dangerous."[124] And in systems committed to the proportionality model, the idea of creating sharp categorical definitions for rights, while avoiding context-specific balancing, has been framed as nothing less than having your head in the sand and "avoiding an unavoidable choice."[125]

Consequently, the models might still have significant real-world effects. For one, they might impact how cases come out and which cases are litigated in the first place. Categorical reasoning will tend to defend fewer rights and usually do so more powerfully and predictably, whereas proportionality will tend to defend more rights and in a less predetermined and powerful way. For another, and perhaps more importantly, the models may help reflect, sustain, and construct a particular *culture and politics of rights* in a system that seems deeply committed to one of the models—including what is the social meaning of having rights in the first place, the political discourse we employ in matters of rights, and more. In categorical reasoning, rights are much more either/or and the domain of constitutionality is limited and restrictive. Moreover, rights are crucially determined based on arguments drawn from "modalities" that lawyers and judges uniquely employ and seem perhaps to possess unique expertise about—such as text, precedent, or history.[126] In proportionality, rights are seen as complex

122. For relevant discussion, *see* Iddo Porat, *The Dual Model of Balancing: A Model for the Proper Scope of Balancing in Constitutional Law*, 27 CARDOZO L. REV. 1393, 1403–06 (2006); Mattias Kumm, *Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement*, in LAW, RIGHTS, DISCOURSE: THEMES FROM THE LEGAL PHILOSOPHY OF ROBERT ALEXY 131, 142–48 (George Paulsen ed., 2007).

123. Daniel A. Farber, *The Categorical Approach to Protecting Speech in American Constitutional Law*, 84 IND. L.J. 917, 919 (2009).

124. Alvarez, 567 U.S. at 717. For important scholarship presenting a critique of balancing, *see* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987); Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711 (1994); Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767 (2001).

125. HCJ 769/02 The Public Committee Against Torture in Israel v. The Government of Israel (11 December 2005), ¶ 46 (Israel).

126. And especially history of the kind lawyers, and originalist lawyers in particular, find relevant. On the tension between law office and originalist history, on one hand, and history as understood by historians, on the other hand, *see, e.g.*, Jack Balkin, *Lawyers and Historians Argue About the Constitution*, 35 CONST. COMMENT. 345 (2020).

bundles that can more easily be challenged by claims from the other side. We also come to the domain of rights more easily and quickly, including by getting courts to hear our claims. And judges and the political culture broadly draw more consistently on politics, empirics, and morality in matters of rights directly and openly rather than in a way intermediated by a lawyer's unique "craft" or tools.

II. THE NEW "ADMINISTRATIVE LAW MODEL"

My claim in this Article is that we can move beyond this binary that Part I sketched. Indeed, there is *another* available model around which we can structure systems for adjudicating rights that combines key elements of categorical reasoning and proportionality but is also distinct from them. And surprisingly, this other model is hiding in plain sight. It originates from—or is inspired by—a usually glossed over corner of American public law in this context: the corner of federal administrative law.

This Part presents the new model.

A. What's Constitutional Rights Got to Do with It?

Before proceeding to the important task of elaborating on the doctrinal features of this new model, let me first deal with a potential hurdle. The hurdle is captured by the title of this Section (with apologies to the late Tina Turner): what's constitutional rights got to do with… administrative law?

My reason for flagging this is that I would not be surprised if some readers, especially from the United States, may be puzzled by the suggestion that administrative law is an appropriate place to look at as a model for adjudicating constitutional rights. After all, US federal administrative law is not often considered to belong in the domain of *constitutional* rights. Rather, the much more common view is that the "task"[127] of administrative law is to regulate the behavior of specific institutions called administrative agencies,[128] that operate under delegated powers, and which formulate and execute "regular" policies.[129] Moreover, administrative law in the United States is not directly grounded in the so-called "big-C" Constitution.[130] Rather, it is based on "regular" statutes, the most important of which is of course the Administrative Procedure Act (APA)[131]

127. Felix Frankfurter, *The Task of Administrative Law*, 75 U. PA. L. REV. 614 (1927).

128. My focus here is on federal administrative law in the United States rather than state or local administrative law. For some discussion of important differences, *see, e.g.*, Nestor M. Davidson, *Localist Administrative Law*, 126 YALE L.J. 567 (2017).

129. FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 307 (1927) (remarking that the fields of administrative law and constitutional law differ from one another in "the content of the materials [and] the nature of the interests.").

130. For the "big-C" v. "small-c" distinction, *see, e.g.*, Richard Primus, *Unbundling Constitutionality*, 80 U. CHI. L. REV. 1079, 1081 (2013).

131. 5 U.S.C. §§ 551, 553–559, 701–706 (2012).

and, more controversially, on what administrative lawyers call "administrative common law."[132]

Of course, this is not to say that administrative lawyers in the United States do not see any constitutional connections to their field. But the only ways that they do so today are, again, extremely limited. First, administrative law is often seen as connected to *structural* constitutional law, not constitutional rights, namely as a field whose goal is to "compensate" for (among other things) the lack of clear constitutional standing of administrative agencies in the text of the Constitution, which makes agencies known in the United States as the "headless" fourth branch.[133] If issues of constitutional rights are at all recognized to be involved in administrative law, it is only through the very narrow prism of constitutional procedural due process, which has to do with the decision processes that agencies must follow, rather than the substance of these decisions themselves (including especially if there is a requirement of a hearing).[134]

While deeply entrenched in the United States, this view of administrative law seems myopic, even misleading. The field of administrative law *can* be connected to constitutional rights much more widely than presently acknowledged. Most clearly for present purposes, administrative law can be seen as a field that consistently enforces constitutional rights that are simply "underenforced" today elsewhere in US constitutional law.[135]

The first example is substantive due process rights, or, as they are called outside the United States, rights to general liberty, autonomy, or to the "development of personality."[136] As is well-known, the US Supreme Court has rejected a more-than-toothless enforcement of these rights ever since the

132. *See, e.g.*, Jack M. Beermann, *Common Law and Statute Law in Administrative Law*, 63 ADMIN. L. REV. 1, 3 (2011).

133. *See, e.g.*, Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984).

134. On the requirements of constitutional procedural due process, *see generally* Henry J. Friendly, "*Some Kind of Hearing*," 123 U. PA. L. REV. 1267 (1975). The qualification of "narrow" in the text is necessary because (1) this is the only constitutional right that is explicitly recognized as involved in administrative law consistently and (2) because constitutional procedural due process is itself highly limited in contemporary US law. For one, constitutional procedural due process doesn't apply to legislative and quasi-legislative processes. *Compare* Londoner v. City of Denver, 210 U.S. 373, 380–86 (1908); Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445–46 (1915). For another, constitutional procedural due process applies to what courts deem are "life, liberty, and property" interests under the Due Process Clause, which are now understood in importantly narrow ways. *See, e.g.*, Perry v. Sindermann, 408 U.S. 593, 599 (1972); Bd. of Regents of State Coll. v. Roth, 408 U.S. 564, 569–70 (1972).

135. The classic citation for the idea that constitutional law in the United States contains many areas of judicially underenforced constitutional norms is of course Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978). *See also* Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 HARV. L. REV. 2299 (2021); Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408 (2007).

136. *See* Article 2(1) of the German Basic Law (Germany).

repudiation of *Lochner*[137] and the consolidation of the equally well-known *Carolene Products*[138] "compromise"[139] or "settlement."[140]

Second, administrative law can be seen as a field that engages in consistent enforcement of socioeconomic rights, including a right to food, shelter, education, healthy environment, healthcare, safe working conditions, and more.[141] All of these are issues various administrative agencies consistently touch upon in their day-to-day operation. And as is well-known, the Supreme Court has so far rejected the place of meaningful judicial enforcement of socioeconomic rights as grounded directly in the US Constitution,[142] at least outside of some very narrow contexts.[143]

Finally, administrative law can be seen as a field that enforces an underenforced constitutional right for state or governmental protection against the "traps"[144] of private power, which, once more, can be seen as the consistent preoccupation of administrative agencies and which case law from the Supreme Court has emphatically dismissed from constitutional law "proper."[145]

To be sure once again: this specific link to constitutional rights is not obvious in the "hornbook" version of the doctrine in administrative law or the stories administrative lawyers tend to tell themselves. But it can be easily seen in its reality—namely, in the so-called libertarian and progressive strands of US administrative law that consistently pop up in case law and theory and even cycle between them with time. Today, we arguably live in the United States in an era of "libertarian administrative law"[146] that is focused more systematically on

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

138. U.S. v. Carolene Products, 304 U.S. 144 (1938).

139. LAURA WEINRIB, THE LIBERAL COMPROMISE: CIVIL LIBERTIES, LABOR, AND THE LIMITS OF STATE POWER, 1917–1940 (May 21, 2011).

140. Felix Gilman, *The Famous Footnote Four: A History of* Carolene Products *Footnote*, 46 S. TEX. L. REV. 163, 164 (2004).

141. For a recent discussion, *see* Mila Versteeg, *Can Rights Combat Economic Inequality (Reviewing* SAMUEL MOYN, NOE ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD (2018)), 133 HARV. L. REV. 2017 (2020).

142. *See*, *e.g.*, Dandrige v. Williams, 397 U.S. 471 (1970); San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973); Maher v. Roe, 432 U.S. 464 (1977). In contrast to the federal level, states' constitutions do offer stronger protections of this kind. *See*, *e.g.*, EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS (2013).

143. *See* Douglas v. California, 372 U.S. 353, 355 (1963); Gideon v. Wainwright, 372 U.S. 335, 343–45 (1963); Bullock v. Carter, 405 U.S. 134 (1972); Lubin v. Panish, 415 U.S. 709 (1974); Griffin v. Illinois, 351 U.S. 12, 18–19 (1956).

144. JOHN OBERDIEK, IMPOSING RISK: A NORMATIVE FRAMEWORK 86 (2017).

145. DeShaney v. Winnebago County Dep't of Social Services, 489 U.S., 195–96 (1989). *See also* Harris v. McRae, 448 U.S. 297, 316 (1980). For a recent discussion of how the meaning of protection including within the scope of this rights ought to be expanded, *see* Barry Friedman, *What Is Public Safety?*, 102 B.U. L. REV. 725 (2022).

146. Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393 (2015). For the rise of the major questions doctrine as a manifestation of this contemporary

protecting, via normal administrative law tools, substantive due process rights or a right to general liberty and is fearful of excessive governmental burdens on regulated entities. In the past, during the so-called "environmental era,"[147] the focus was on drawing on administrative law to protect socioeconomic rights and a right to governmental protection—that is, administrative law was keenly concerned with the wellbeing of regulatory beneficiaries.[148]

What these systematic tendencies of administrative law in the real world suggest, then, is that it is myopic to see the field of administrative law as merely a response to the problem of "delegated" power or as covering run-of-the-mill subconstitutional policymaking. Instead, administrative law is also a field that responds to the *substance* of governmental regulation itself and to the constitutional rights regularly involved in regulatory action (or inaction), which are precisely the kinds of rights I flagged before.[149] And while administrative agencies are certainly different institutions from those we commonly associate with constitutional law—such as Congress or the President[150]—it is also important to recall that in today's administrative state, both in the United States and elsewhere, administrative agencies are the "dynamo of modern government"[151] or how we "run a constitution."[152] That is, these agencies are more and more the bodies that do the work of governing in the modern State at the expense of the more "traditional" constitutional institutions. Consequently, looking at what agencies do and the field that regulates them, administrative law, may teach us much "about constitutional authority itself."[153]

Even if, however, one remains less convinced by these claims, there is still another reason why administrative law seems appropriate for constructing a model of constitutional rights review. This reason is less ambitious or

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administrative law trend, *see* Oren Tamir, *Getting Right What's Wrong with the Major Questions Doctrine*, 62 COLUM. J. TRANS'L L. (forthcoming, 2024).

147. For important discussions of this "environmental era" in administrative law, *see* Alfred C. Aman, Jr., *Administrative Law in the Global Era: Progress, Deregulatory Change, and the Rise of the Administrative Presidency*, 73 CORNELL L. REV. 1101 (1988); Richard B. Stewart, *The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decisionmaking: Lessons from the Clean Air Act*, 62 IOWA L. REV. 713 (1977); Robert Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189 (1986).

148. For the familiar distinction in administrative law between the perspective of regulated entities and regulatory beneficiaries, *see*, *e.g.*, Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397 (2007).

149. In the discussion below I will suggest *another* constitutional right that can be connected to the field of administrative law. *See infra* Part IV.D.

150. Though even here some caution is warranted. *See, e.g.*, Alan B. Morrison, *Administrative Agencies are Like Legislatures and Courts—Except When They're Not*, 59 ADMIN. L. REV. 1 (2007).

151. LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 33 (1965).

152. JOHN ROHR, TO RUN A CONSTITUTION: THE LEGITIMACY OF THE ADMINISTRATIVE STATE (1986).

153. Daniel Halberstam, *The Promise of Comparative Administrative Law: A Constitutional Perspective on Independent Agencies*, in COMPARATIVE ADMINISTRATIVE LAW 185, 193 (Susan Rose-Ackerman & Peter L. Lindseth eds., 2010).

controversial than implying, as I did now, that administrative law is already a field of "applied"[154] or "concretized"[155] protection of constitutional rights (though underenforced elsewhere). And the reason is this: the basic doctrines of administrative law conceptually fit to the domain of constitutional rights adjudication simply because courts ask on a high level of abstraction very similar, if not identical, questions. Indeed, in both fields, courts must ask themselves identical basic questions about interpretation of legal texts or the review of actions and decisions that go beyond mere interpretation by governmental institutions. We will see this immediately below in Sections B and C. And conceptually at least (I will talk about the legal aspects later),[156] there is nothing that should prevent us from "exporting" the tools that courts have developed in administrative law to the conceptually parallel domains of judicial activity in the field of constitutional law. In fact, in the United States (and increasingly elsewhere) there is literature on what is sometimes known as "administrative constitutionalism"[157] that substantiates exactly that. What this literature consistently shows is that issues of constitutional law—including constitutional rights but even issues like separation-of-powers or federalism—can easily be folded into the tools of "normal" administrative law and dissected through them. In the words of one leading scholar, administrative law can serve as an appropriate "vehicle"[158] for constitutional issues and constitutional law analysis.

In short, administrative law does seem like an appropriate site from which to construct a model for constitutional rights adjudication. With apologies to the late Tina Turner again, constitutional rights have everything to do with it. For one, the field of administrative law already deals with constitutional rights that are simply underenforced elsewhere, at least in the United States. Alternatively, the field of administrative law doctrinally and conceptually fits the basic task of constitutional rights adjudication.

* * *

Having highlighted this connection, I can now proceed to present my administrative law model. For ease of exposition I will begin, in Section B, by presenting the model "at home" in US administrative law and as if it applies to

154. This term is drawn from William D. Araiza, *In Praise of a Skeletal APA: Norton v. Southern Utah Wilderness Alliance, Judicial Remedies for Agency Inaction, and the Questionable Value of Amending the APA*, 56 ADMIN. L. REV. 979, 1002 (2004).

155. This term is drawn from a well-known phrase from German public law according to which administrative law is "concretized" constitutional law. FRITZ WERNER, VERWALTUNGSRECHT ALS KONKRETISIERTES VERFASSUNGSRECHT 527 (1959).

156. *See infra* Part VI.

157. The literature here is now vast, but two pioneering works are Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace*, 96 VA. L. REV. 799 (2010) and Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897 (2013).

158. Gillian E. Metzger, *Administrative Law as the New Federalism, 57* DUKE L.J. 2023, 2027 (2008).

administrative agencies. Then, in Section C, I will "translate" the model to the constitutional rights' context.[159]

B. The Model at Home

The administrative law model that I flesh-out in this Article does not look to the entire field of US administrative law. Rather, it takes its form from the way courts operate in three different sites of adjudication in US administrative law, and importantly, as we will see, from the interaction between these sites.

1. Interpretation: Chevron

The first site of focus is where courts confront issues of statutory interpretation. Here the guiding framework that courts presently employ in administrative law is outlined in a seminal case called *Chevron*[160] and its progeny (I will get to issues relating to Chevron's continued validity later, in Part V).

The inquiry under *Chevron* is traditionally described in US administrative law as a two-step process. In Step I, courts ask themselves whether, after "employing the traditional tools of statutory construction,"[161] it is evident that "Congress has directly spoken to the precise question at issue."[162] If so, the interpretive task is at an end, and courts must enforce clear congressional directives. However, if at the end of Step I the relevant statute is found ambiguous or vague, Step II kicks in. And in Step II, *Chevron* instructs courts to defer to

159. One final preliminary note: my proposed administrative law model is a kind of act of "exportation" from the field of US administrative law to the field of constitutional law on a global scale. I do not deny, however, that my presentation here of the model will diverge along some dimensions from the "official state," so to speak, of present-day hornbook US administrative law. Alternatively, I do not deny that my presentation extends some of these principles beyond their reach in contemporary administrative law.

I will highlight these extensions and tensions between my model and the "official" present-day state of administrative law in either the text or notes that accompany the text when they arise. I stress here however that nothing in this should stand as a barrier for my claims here. My ambitions in this Article are explicitly reconstructive and concern the organization of the field of constitutional law, which is not bound to the present-state of the field of federal administrative law in the United States, especially not if the model were to be applied outside the United States. Even if we embrace a US-focused perspective, however, it is important to remember that the field of administrative law is in constant "flux," and perhaps especially today. In other words, we cannot view the field of administrative law in too frigid terms. The "official state" of the field may be changing. And while, for reasons I will discuss in Part VI, it may not look like it is changing in the specific directions that I'm taking it here, we cannot rule out that the winds would be changing yet again soon. And, indeed, I will suggest below that they might.

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

161. *Id.* at 843 n.9.

162. *Id.* at 842.

administrative agencies' proposed interpretations so long as they are "based on a permissible construction of the statute"[163] or when they are "reasonable."[164]

The pages of law journals and the various federal reporters are filled ad nauseam with analyses about how to implement this two-step framework. The basic idea underlying *Chevron* is nonetheless sufficiently clear: in administrative law, and contrary to other fields in American law and especially constitutional law where *Marbury* and the idea of judges emphatically pronouncing "what the law is"[165] reigns, *Chevron* creates significant room for interpretive deference to agencies.[166] In other words, in relation to the statutes agencies administer, it is not the province of courts to say what they mean but rather the province of agencies themselves.

Of course, this is not to say that *Chevron* does not preserve any role for courts in interpretive affairs in administrative law. *Chevron* explicitly does. It is only that what is left is supposed to be much narrower than de novo interpretation by judges. Synthesizing much of the judicial and scholarly discussion, we can identify two broad tasks that courts are entrusted with under *Chevron* in administrative law and on which my administrative law model will build: First, it is to make sure that some level of "fit" with the relevant legal materials is maintained and that agencies' proposed interpretations do not cross it, whether under Step I or Step II.[167] Second, cases at both the Supreme Court level and at the lower courts suggest an additional, even if more implicit, judicial task under *Chevron* that I will extend here:[168] to guarantee that the interpretive freedom agencies are granted under it is not abused—especially by too easily offering interpretations that are inconsistent compared with earlier ones.[169] And indeed, courts under *Chevron* are in practice much more hesitant in accepting inconsistent agency interpretations—or when they observe interpretive flip-flops or ping-pongs. They might reject such inconsistent interpretations primarily because of that.

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163. *Id.* at 843.

164. *Id.* at 844.

165. Marbury v. Madison, 5 U.S. (I Cranch) 137, 177 (1803).

166. *See* Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2583 (2006).

167. *See, e.g.*, NLRB v. Hearst Publications, Inc., 322 U.S. 111, 131 (1944). Of course, the idea of "fit" has become canonical following Ronald Dworkin's work. *See* RONALD DWORKIN, LAW'S EMPIRE 100–53 (1986).

168. *See infra* Part III.A.

169. For this judicial role under *Chevron*, *see, e.g.*, Cuozzo Speed Techs, LLC v. Lee. 136 S. Ct. 2131, 2145 (2016); Kent H. Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 64–66 (2017). The qualification of "implicit" is required because at the level of formal doctrine, the most recent Supreme Court pronouncement seems to reject the role of inconsistency under *Chevron*. *See, e.g.*, Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Serv., 545 U.S. 967, 981 (2005).

2. *Review of decisions and actions: State Farm and "reasoned decision-making"*

The second site on which my administrative law model draws is where courts confront in US administrative law the need to review decisions or actions *beyond interpretation as such*. Here the relevant framework courts employ is associated with another seminal case in administrative law known as *State Farm*.[170] This case now provides the central "gloss" on the requirement, grounded in the text of the Administrative Procedure Act, that agencies do not act in an "arbitrary" or "capricious" way.[171]

Under the framework that this *State Farm* case is now affiliated with, courts engage in a unique form of review, which has both a substantive and process-based component. Substantively, the judicial task under the *State Farm* framework is very minimal. Indeed, courts are emphatically not allowed under it to "substitute their judgment for that of the agency."[172] The only thing courts can do substantively is to make sure that an agency's decision is not wholly irrational and that there is a "rational connection between the facts found and the choices made"[173] by the agency. As should be clear, this is a very high benchmark that is rarely crossed.

This of course means that most of the meaningful work courts do under the *State Farm* framework has a more process-looking cast. First and foremost, courts require from agencies under the *State Farm* framework reasons for their decisions and some form of record to support them.[174] Then, based on these reasons and records and—in the normal course of affairs at least—only them and without the ability of ex post supplementation or "shouldering" from outsiders (including amicus curiae),[175] the *State Farm* framework licenses courts to engage in what has been aptly called a "reasoning process review"[176] or "internal thought process review"[177] to secure a standard of reasoned decision-making.[178] This standard is

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

171. 5 U.S.C. § 706(2)(A) (2012).

172. State Farm, 463 U.S. at 43. *See also* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971).

173. State Farm, 463 U.S. at 43.

174. On the requirement of a record, *see* Overton Park, 401 U.S. at 420 (elaborating the record requirement); Sierra Club v. Costle, 657 F.2d 298, 407-08 (D.C. Cir. 1981) (same).

175. In Professors Dotan and Asimow's terminology, administrative law operates based on *closed* reasons and records. *See* Dotan & Asimow, *supra* note 74. For a discussion of the principle of closed records and reasons in US administrative law, which stems primarily from a seminal case known as *Chenery I*, *see* Sidney A. Shapiro & Richard W. Murphy, *Arbitrariness Review Made Reasonable: Structural and Conceptual Reform of the "Hard Look*," 92 NOTRE DAME L. REV. 331 (2016).

176. Lawson, *supra* note 33, at 318–19.

177. Garland, *supra* note 34, at 530.

178. *See, e.g.*, Allentown Mack Sales & Service, Inc. v. NLRB, 522 U.S. 359, 374 (1998). *See also* State Farm, 463 U.S. at 43 (highlighting that the agency must "articulate a satisfactory explanation for its action.").

highly contextual and varies in its intensity (a point to which I will return below in Part V).[179] However, the following elements are likely to stand at the core of the judicial inquiry in each and every case:

> (*) That in making the decision or taking its action, the agency considered the "relevant factors"[180] and that it did not consider irrelevant ones;
> (*) That the agency's action or decision was in fact supported by those "relevant factors" and by the facts and evidence before it (including that the agency invested sufficient resources in gathering the relevant data and based its determinations on acceptable methodologies);[181]
> (*) That the agency did not ignore an "important aspect of the problem"[182] and that it considered "significant and viable"[183] alternatives to its chosen course of action and explained why it rejected those alternatives;
> (*) And, finally, that the agency considered reliance interests that might be affected by its action or decision[184] and, to the extent relevant, that it acknowledged inconsistencies between its current decision or action and previous ones and explained why it thinks the new decision is in fact a "good one."[185]

Finally, if a court ends up finding the agency's reasoning to be lacking in any or all these components, the "ordinary"[186] remedy courts give here is not a heavy remedy of a strike down. Rather, the remedy is a remand. As a result, an agency that so chooses can emphatically aim for a "redo"—that is, to return to courts and convince them (likely with further explanations and, if appropriate, data) that its original decision is in fact a reasoned one.[187]

3. Review of initiation claims: Massachusetts v. EPA + the "anti-abdication" principle

The third and final site on which my administrative law model draws on is the site where courts are asked to review what might be called "initiation claims,"[188] where litigants come to courts to claim that agencies must act or decide on something that they have not done or refused to do. For my purposes, there are two central principles of present-day US administrative law that operate

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179. For discussion of the variability of the *State Farm* framework, including the differences between "hard look" and "soft glance," *see infra* notes 398–402 and accompanying text.

180. Citizens to Preserve Overton Park, 401 U.S. at 416.

181. State Farm, 463 U.S. at 43.

182. *Id.*

183. City of Brookings Municipal Tel. Co. v. FCC, 822 F.2d 1153, 1169 (D.C. Cir. 1987).

184. *See*, most recently, DHS v. Regents of the University of California, 140 S. Ct. 1891, 1913 (2020).

185. *See* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009); Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2120 (2016).

186. *See, e.g.*, Christopher J. Walker, *The Ordinary Remand Rule and the Judicial Toolbox for Agency Dialogue*, 82 GEO. WASH. L. REV. 1553 (2014).

187. *See generally* Emily Hammond Meazell, *Deference and Dialogue in Administrative Law*, 111 COLUM. L. REV. 1722 (2011); Walker, *supra* note 187. I speak more to the nature of "dialogue" in the administrative law below. *See infra* notes 347–354 and accompanying text.

188. Again, this is my adaptation of a term from Sunstein & Stewart, *supra* note 35.

in this site and on which I will build in constructing my new model of constitutional rights adjudication.

First, in the landmark case of *Massachusetts v. EPA*[189], the Supreme Court held that claims that try to initiate agencies to engage in what is surely the most consequential "policymaking form"[190] administrative agencies employ today—the issuance of rules or what administrative lawyers call "informal rulemaking" or notice-and-comment rulemaking—are reviewable and courts would also look to the reasons agencies have for refusing to act or decide. At the same time, the Court has also made clear that this review would be "extremely limited" and "highly deferential"[191] and thus different from the kind of reasoning process review courts apply to agencies' actions and decisions under the "normal" *State Farm* framework in the second site discussed before.[192] As a result, agencies today have a firm obligation in administrative law to offer at least "some reasonable explanation"[193] for their decision not to issue rules, are subject for what we can think of as "super-weak"[194] review of these reasons, and may encounter a judicial remand if they fail to do so.[195]

Second, courts, including most importantly the Supreme Court, have suggested in a related corner of US administrative law that there is another scenario where they would intervene to compel agencies to act or decide even if there are "some reasonable explanations" for their inaction. This can happen, courts have said, when agencies "abdicate"[196] their statutory responsibilities—for instance, if agencies deliberately and consciously adopt a general policy of ignoring their responsibilities[197] or if there is a consistent pattern signaling that agencies are essentially dodging these responsibilities.[198]

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189. 459 U.S. 497 (2007).

190. M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383 (2004).

191. Massachusetts v. EPA, 459 U.S. at 527.

192. Many believe, though, that the review that was actually performed by the Court in the *Massachusetts v. EPA* case was far from highly deferential. *See, e.g.*, Jody Freeman & Adrian Vermeule, Massachusetts v. EPA*: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 97.

193. Massachusetts v. EPA, 459 U.S. at 533.

194. For this term, *see* Mark Tushnet, *State Action, Social Welfare Rights, and the Judicial Role: Some Comparative Observations*, 3 CHI. J. INT'L L. 435, 452–53 (2002).

195. *Id.* at 534–35.

196. Heckler v. Chaney, 470 U.S. 821, 833 at n.4 (1985) (quoting Adams v. Richardson, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (*en banc*)).

197. *Id.*

198. Friends of the Cowlitz v. Fed. Energy Regulatory Comm'n, 253 F.3d 1161, 1167 (9th Cir. 2001). For explication of the "anti-abdication" principle in U.S. administrative law, on which I draw here, *see* Cass R. Sunstein & Adrian Vermeule, *The Law of "Not Now": When Agencies Defer Decisions*, 103 GEO. L.J. 157 (2014).

4. Upstream/downstream interactions

My proposed administrative law model builds on *all* these principles described above—*Chevron* with its requirement of deference on interpretive questions, *State Farm* with its license for reasoning process review of agencies, and *Massachusetts v. EPA*'s "highly deferential" review of agencies' reasons not to act or initiate action and the principle of "anti-abdication." But before moving to "translate" the model from its home in administrative law "proper" into explicit constitutional rights' terms, let me emphasize something that would prove important soon: the principles that I have described in each of the sites I mentioned interact with each other in crucial ways.

One sort of interaction is that the conclusions from *Chevron* (the first site) significantly shape the way the analysis under the reasoned decision-making standard is performed (the second site). As we saw, one component of the reasoned decision-making requirement is that courts review whether agencies reasoned based on the "relevant factors."[199] But these "factors" do not come from nowhere. They importantly come from the interpretation of the statute that authorizes the agency to act, which in US administrative law is first and foremost a *Chevron* inquiry.[200] This means, then, that the scope and basic form of the reasoning that agencies are expected to perform, and that courts would review under *State Farm* and its requirement of reasoned decision-making, are crucially determined by the *Chevron* stage.

Moreover, and importantly, experience in administrative law shows that there are two general ways that *Chevron* can shape the requirement for agencies to reason based on the "relevant factors." One option is when agencies reasonably interpret statutes (or courts enforce interpretation of statutes under *Chevron*'s requirement of "fit") as "priority" statutes.[201] In this case, the statute is interpreted in a rather categorical or restrictive way, very much like how courts adjudicate constitutional rights disputes under the categorical reasoning model. For example, the statute can be reasonably interpreted to elevate one or only a handful considerations or "factors" that agencies must consider in their decision above everything else, or give them a special weight.[202] Alternatively, a statute can be reasonably interpreted to exclude certain considerations that may interfere with what the statute deems as its elevated and focal priorities. When this is the case,

199. *See supra* note II.B.2 and accompanying text.

200. *See, e.g.*, Richard J. Pierce, Jr., *What Factors Can an Agency Consider in Making a Decision?*, 2009 MICH. ST. L. REV. 67.

201. For this term, *see* Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L.J. 1487, 1505 (1983).

202. A first example of this is the famous *Benzene* case from the administrative law where the court said that agencies must identify in their reasoning that a "significant risk" exists that would justify the regulation. *See* Indus. Union Dep't v. Am. Petroleum Inst. (Benzene), 448 U.S. 607, 639 (1980). In addition, in *Overton Park*, the Court moreover interpreted a statute to essentially mean that the goal of park preservation trumps other goals and especially the goal of building a highway and improving metropolitan transportation. *See* Overton Park, 401 U.S. at 412–13.

agencies' reasoning will obviously have to be categorical and limited as well to satisfy the requirement of "relevant factors" under *State Farm* and the standard of reasoned decision-making. And courts, in their review, would have to make sure that this is appropriately done.

By contrast, another option is that agencies reasonably interpret statutes (or courts enforce such an interpretation under *Chevron*'s "fit" threshold) that leads to seeing statutes not as restricted, categorical, or "priority" statutes, as before, but rather as what has been called "lottery" statutes.[203] In this case, no specific consideration is elevated or excluded from being part of the "relevant factors." And agencies' reasoning that leads to their decisions, and which later courts would review under *State Farm* and the requirement of reasoned decision-making, can be much more capacious and unrestricted. They can consider any factor that seems "logically relevant"[204] for their decision. Under this scenario, agencies' reasoning would look very much like what we see in constitutional rights adjudication in systems committed to the proportionality model.

So far, I have highlighted how *Chevron* significantly impacts the shape of the inquiry of reasoned decision-making under *State Farm*. But a second kind of interaction in fact goes in the *opposite direction* and relates to how the *State Farm* framework and the standard of reasoned decision-making might influence the inquiry at the *Chevron* stage. As we know from the real life of administrative law, sometimes the *Chevron* stage can be conclusive and not even reach the *State Farm* and the reasoned decision-making inquiry. This occurs most clearly when agencies' "reasonable" interpretations (or the courts' enforcement of a "fit" threshold) rely on what can be called, to draw on the term I used before, "distinctive juridical technologies" such as text, precedents, or history.[205] If the text is clear, after all, then this is the end of the matter under *Chevron*. And distinctive juridical technologies or other legal "craft" methods or lawyerly "canons" can also fill much of a statute's meaning in a way that restricts the domain of "reasonable interpretations" or "permissible constructions."[206]

However, as we also know from practice in administrative law, even if that is the case and the *State Farm* inquiry into reasoned decision-making doesn't formally come into view, this doesn't mean that this would be forever so. Indeed, the *State Farm* framework can climb up, so to speak, to the *Chevron* stage (usually through Step II). In this way, the *State Farm* framework can operate to put pressure on agencies that "reasonably" interpreted statutes relying on these juridical technologies in the past (or on courts that enforced a formalistic

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203. Shapiro, *supra* note 201, at 1505.

204. For an argument that this should occur more regularly in administrative law, *see generally* Pierce, *supra* note 200; Sharon B. Jacobs, *The Administrative State's Passive Virtues*, 66 ADMIN. L. REV. 565 (2014).

205. *See supra* note 66 and accompanying text.

206. For an argument that illustrates and calls for more of this filling up of statutory meaning through lawyerly craft moves in present-day administrative law, *see* Jeffrey Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852 (2020).

interpretation of the statute through a "fit" threshold) to at least consider relaxing the commitment to "distinctive juridical technologies" and replacing it with the more instrumental and empirical frame that *State Farm* brings with it.[207]

Finally, there's also an important interaction between the *Chevron* stage and the super-weak review of claims that agencies must issue rules under *Massachusetts v. EPA* as well as the principle of anti-abdication (third site). More specifically, these will be triggered *only if* the *Chevron* stage is crossed, that is—if the initiation claim directed toward the agency squares with how it "reasonably" interprets the statute. When such a claim is based on something that is not within the agencies' powers, as reasonably interpreted by them, it is moot and would not even advance to the stage of review.

To summarize: we end up with two kinds of interactions in administrative law between the three sites of judicial activity on which I focused. First, there is what we can think of as an *upstream-downstream interaction*, where *Chevron* influences the inquiry under the reasoned decision-making standard and *State Farm*. As we saw, *Chevron* determines the scope of "relevant factors" that agencies must consider (and courts must review), specifically whether those factors are limited or elevated and the reasoning is thus categorical (akin to what we see in the model of categorical reasoning on rights), or rather whether it is broad and flexible and the reasoning is thus highly context specific (akin to what we see under the proportionality model). In this type of interaction, we can also include the way *Chevron* influences the super-weak review of initiation claims under *Massachusetts v. EPA* and the anti-abdication principle. Second, there's also what we can think of as a *downstream-upstream interaction* where the requirement of reasoned decision-making and *State Farm* penetrates the *Chevron* inquiry to put pressure on decision-makers (or courts) to relax their commitment to "distinctive juridical technologies," opening up the possibility for more instrumental types of reasons.

To be sure, there's a tricky question in administrative law about how much and when exactly can courts or agencies insist that the *State Farm* inquiry would be more like a "priority" or a "lottery," and thus more categorical or flexible.[208] Moreover, there's a tricky question in administrative law concerning when exactly *State Farm* and the requirement of reasoned decision-making can and should put pressure on *Chevron*.[209] I will get to these issues in a later stage of the discussion.[210] For now, however, the main point is merely to note the possibility—indeed often inevitability—of these interactions.

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207. For a recent discussion of this pressure that *State Farm* can put on *Chevron*, *see* Catherine M. Sharkey, *Cutting in on the* Chevron *Two Step*, 86 FORDHAM L. REV. 2359 (2018).

208. For relevant discussion in the literature, *see generally* Pierce, *supra* note 200; Jacobs, *supra* note 204.

209. For a permissive view, *see* Sharkey, *supra* note 207; Daniel J. Hemel & Aaron L. Nielson, Chevron *Step One-and-a-Half*, 84 U. CHI. L. REV. 757 (2017). For a more restrictive view, *see* Matthew Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597 (2009).

210. *See infra* Part V.A.

C. Constitutional "Translation" of the Model

Now that I have described the administrative law model at home, I can more easily "translate" it to the constitutional rights context. Suppose someone claims her or his constitutional right has been adversely affected. How will courts consider this claim under a jurisdiction or system that embraces the administrative law model? Just like they would if the dispute was a "standard" administrative law dispute!

(*) First, courts will review whether the government's interpretation of the right in question is "reasonable." This review would be based on a kind of constitutional *Chevron*, which, as we have seen before,[211] requires that the interpretation does not cross a threshold of "fit" with the relevant legal materials and is not an excessive case of interpretive flip-flop.

(*) Then, if the claim is directed against an action or decision the government has actively taken and that is said to adversely affect a constitutional right, courts will review whether the decision satisfies a reasoned decision-making standard under a kind of a constitutional *State Farm*. This includes all the components mentioned above,[212] including the need to consider the "relevant factors," to gather data, to examine any important aspect of the problem, significant and viable alternatives, and, if relevant, reliance interests and inconsistencies, as well as to give adequate explanations for all these choices. If the decision or action is not reasoned in this way, a remand will be issued.

(*) If, however, the relevant infringement of a right is said to occur because the government has failed to act—that is, an "initiation claim"—courts will review in a "super-weak" form whether the government has some "reasonable explanation" for not initiating action, inspired by a kind of constitutional *Massachusetts v. EPA*.[213] So long as there is such an explanation, courts will refrain from remanding the issue. However, a remand might be issued nonetheless if the point of "abdication" has been crossed, including when something that is within the government's constitutional powers has been constantly put to the end of the queue or when there are other signs that the government is dodging its responsibilities.

This is the simple structure of the administrative law model of constitutional rights adjudication. But, as explained above, the administrative law model is more complex than that since there are important upstream/downstream interactions between these stages. So, this basic sketch of the administrative law model requires some additions to reflect these interactions:

(*) First, the *Chevron* stage can face some downstream pressures from *State Farm* to move to a more prescriptive take on the issue of rights rather than rely singularly on distinctive juridical technologies as the crucial, even decisive, reasoning style.

(*) Second, the entire reasoned decision-making analysis under this constitutional version of *State Farm* is deeply influenced by the *Chevron* step, upstream, which

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211. *See supra* Part II.B.1.

212. *See supra* Part II.B.2.

213. Here my presentation of the administrative law model importantly diverges from the "official state" of administrative law, which currently recognizes some key exceptions to the reviewability of initiation claims, the most important of which are that the agency action under review must be "discrete" (*see* Norton v. S. Utah Wilderness All., 542 U.S. 55, 62 (2004)) and unrelated to what is known in US administrative law as "enforcement decisions" (*see* Heckler, 470 U.S. at 821, 835 (quoting 5 U.S.C. § 701(a)(2) (2012)).

can in turn either be limited and categorical (as when in administrative law agencies or courts interpret "priority" statutes and limit the scope of "relevant factors") or flexible and open ended (as when in administrative law agencies or courts interpret "lottery" statutes that expand the scope of "relevant factors"). And it is also possible that the reasoned decision-making stage of *State Farm* would not be reached if the *Chevron* inquiry is conclusive.

(*) Finally, the review of initiation claims under the super-weak standard of *Massachusetts v. EPA* as well as the enforcement of the anti-abdication principle will be triggered only if these claims square with the "reasonable" interpretation of the relevant decision-maker, also determined by the *Chevron* step.

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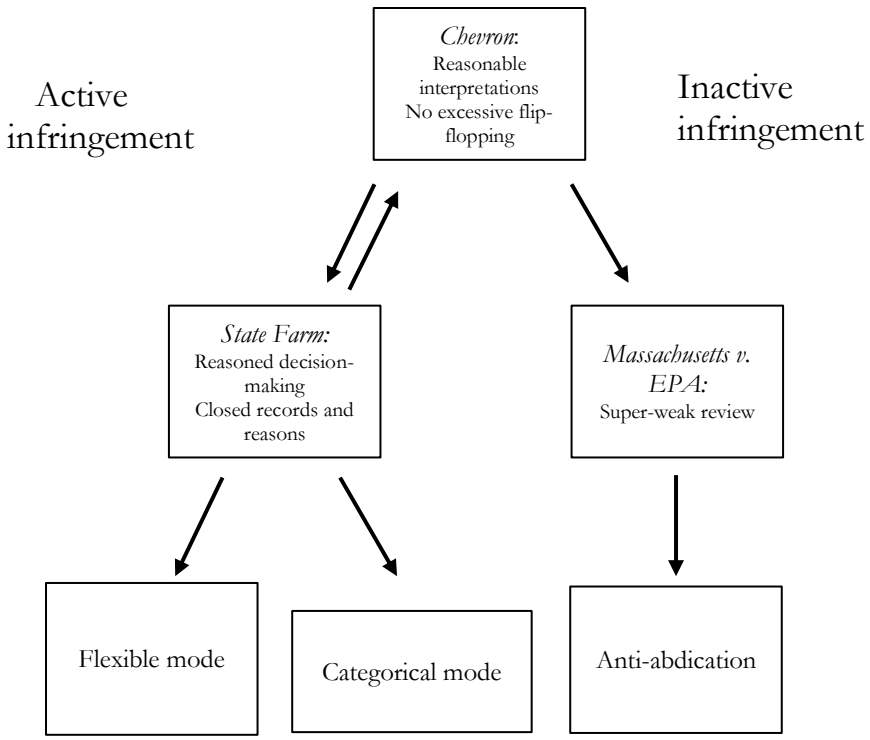
The following diagram attempts to capture the operation of the administrative law model in a more graphic form:

Diagram 1: The Administrative Law Model of Constitutional Rights



III. WHAT'S DIFFERENT?

We now hopefully have a solid view of the administrative law model and its various components (as well as interactions), at least in the abstract. Thus, it is time to get to the heart of the matter: first, explaining how the administrative law model is distinct from the existing models and thus goes beyond the binary. Second, identifying what reasons we may have to think that the administrative law model is superior to the dominant models, or in what conditions that would be so.

The remainder of the Article is devoted to fleshing this out. In this Part, I begin by clarifying the precise differences between the new administrative law model and the previously existing models for adjudicating rights. I will then build on this foundation in the rest of this piece to show why the administrative law model is attractive, what are its costs, and where it should be implemented already today or in the future (and whether in whole or in part).

So, what is exactly different?

A. Institutionalizing Deference

The first difference is the most obvious one to point out: the administrative law model institutionalizes deference to political decision-makers to a much greater degree than either of the existing models. This is so first and foremost because of the way the administrative law injects *Chevron* to the constitutional rights adjudication context. As we saw, a constitutional *Chevron* would instruct courts to defer to any "reasonable" interpretation of the scope and meaning of rights rather than make interpretive determinations themselves. Under the existing models, this task is conceived as almost exclusively judicial—as previously discussed, judges rather than decision-makers in politics "say what the law is."

But this institutionalization of increased deference in the administrative law model is also the result of insertion of the reasoned decision-making standard associated with *State Farm*. As highlighted in Part II, this standard limits courts to intervene primarily if the "reasoning process" or "internal thought process" of decision-makers is defective. Courts do not themselves engage in the task of substantive evaluation, including determining which governmental goals are sufficiently important ones and which means are suitable to pursue them. In categorical reasoning and proportionality, as emphasized in Part I, they often and regularly do. Substantively, the reasoned decision-making is at most like the rational basis tier we find under the categorical model or like the requirement of "suitability" we find in the proportionality model.

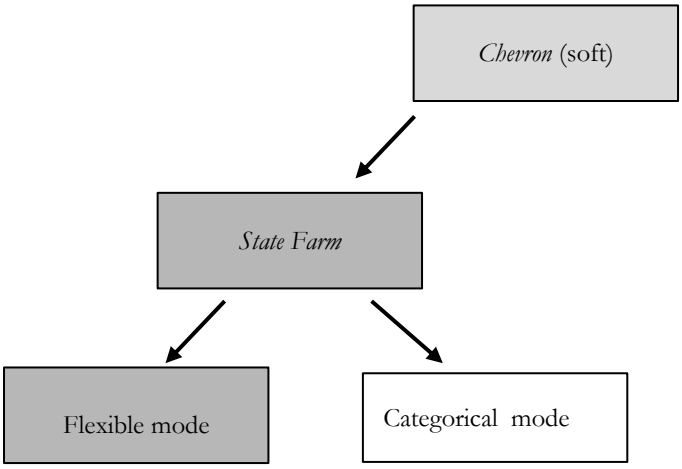
B. Inter-Model Negotiation

A second difference is more complex and subtle: the administrative law model creates a unique structure that would allow systems to *negotiate* between

key commitments that characterize both existing models. On one hand, systems would be able to draw on proportionality's commitment to expansive rights, instrumental or prudential reasoning in matters of rights, and context-specificity. On the other hand, under the new administrative law model, systems would also be able to draw on categorical reasoning's commitment to narrower rights, reasoning on rights based on lawyerly "craft" tools or "distinctive juridical technologies," and a more rule-like method for resolution of rights disputes. This is so given the various upstream/downstream interactions the *Chevron* stage and *State Farm*'s reasoned decision-making stage discussed at the end of the previous Part.

One possibility is that, under the administrative law model, systems would *retain* a dominant commitment to only one of those styles of rights' reasoning. So, for instance, a system that would be drawn to preserve a commitment to proportionality's key features would be able to do so within the confines of the administrative law model, simply by easily skipping the *Chevron* requirement or employing it softly to enable the kind of flexible, lottery-like analysis that can occur, as we saw, at the reasoned decision-making stage when *Chevron* does not restrict the "relevant factors" requirement. There would then be just one *State Farm* and a reasoned decision-making standard for any and all rights claims. This is illustrated in the following diagram by the highlighted boxes:

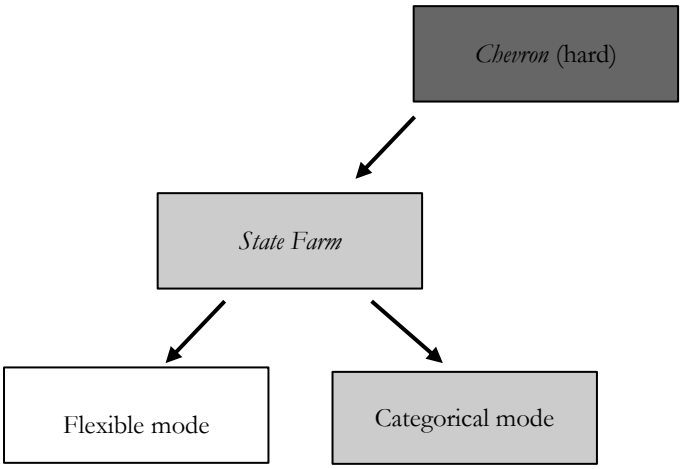
Diagram 2: The Administrative Law Model–Flexible Mode



Conversely, a system that would be drawn to preserve a commitment to categorical reasoning's key features would linger more on the *Chevron* stage, both to screen out rights from the constitutional domain altogether or to consecutively structure the analysis under reasoned decision-making to become more categorical in nature—by, for instance, elevating one or a few elements above the others or excluding elements from consideration altogether (much like what

happens when agencies reasonably interpret statutes as "priority" statutes). In that way, something identical to the tiers of scrutiny can easily be created by, for instance, requiring decision-makers to illustrate the existence of a very important goal and narrowly tailored means or creating bespoke tests that limits the considerations judges are allowed to consider or weigh. Furthermore, the *Chevron* stage also fully preserves the ability to rely on "distinctively juridical technologies" for both of these tasks. Indeed, the *Chevron* inquiry is entirely hospitable to these kinds of lawyerly "modalities" of legal reasoning, as we have seen before. This is illustrated in the following diagram again by the highlighted boxes:

Diagram 3: The Administrative Law Model–Categorical Mode



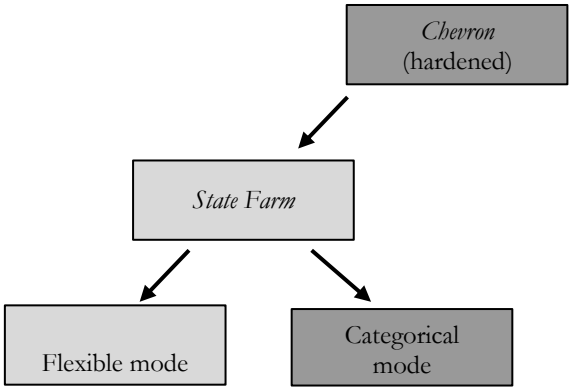
However, and crucially, because of the upstream/downstream interactions that are inherent to this model, the administrative law model also opens-up possibilities for change and dynamism. Systems that embrace a dominant commitment to features of mostly one of the models would be able to experiment with injecting the features of the competing model instead of what it has today or in combination with its existing commitments.

So, for instance, in a system that begins with a strong commitment to broad rights, mostly instrumental reasoning in issues of rights, and context-specificity (as in the proportionality model), the *Chevron* stage of the model is always there in the background and must be confronted. Both decision-makers in politics and judges after all are required to ask, as a condition to moving along with the inquiry, if the decision "fits" the relevant legal materials. And this component, which again originates from *Chevron* and is now elevated to a key element of an administrative law model of rights adjudication, institutionalizes the possibility of backtracking from context-specificity to more rule-like thinking about rights. It also institutionalizes the possibility to retreat from more prescriptive reasoning in matters of rights to reliance on "distinctive juridical technologies."

In fact, the existence of a permanent "fit" stage under the administrative law model might be considered as a move that to some extent encourages systems to do so, akin to what we can think of as a "rule in favor of rulification."[214] This is so because it focuses the attention of both decision-makers in politics as well as judges on questions of "fit" with legal materials—which can be understood as either an encouragement to look to the past pool of cases and think about whether the experience a system has gained can lead to more precise rules and specifications in rights adjudication. We can think of it as a "speeding up" mechanism[215] that tries to quicken the process of induction from experience to the creation of doctrinal rules or categories. Alternatively, this "fit" step can lead decision-makers to think about rights adjudication in more rule-of-law ways that are associated with the need of giving future audiences better guidance and predictability.[216]

This dynamic is illustrated in the next diagram where the darker boxes are the additions that occur as a result of the employment of the model:

Diagram 4: The Administrative Law Model–Flexible Mode Combining Categorical Features



Alternatively, a system that starts with a more categorical frame can also change within the administrative law model, or experiment with such a change. It can convert itself to something more flexible and which resembles

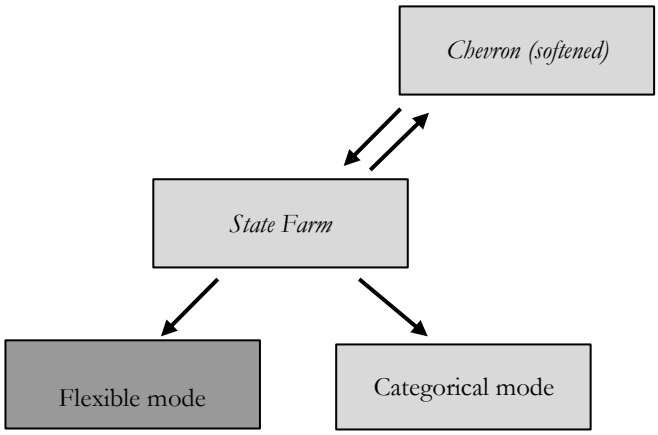
214. This is a play on Michael Coenen, *Rules Against Rulification*, 124 YALE L.J. 644 (2014).

215. On speeding-up constitutional mechanisms, *see* Jon Elster, *Comments on a Paper by Ferejohn and Pasquino*, 2 INT'L J. CONST. L. 240 (2004).

216. There's in fact another administrative law analogy here: to the debate between whether it's preferable that agencies will proceed by general rules or rather by specific adjudications. Under present-day administrative law, agencies are quite free to choose. *See* SEC v. Chenery Corp., 332 U.S. 194 (1947) (*Chenery II*). However, scholars have for a long time tried to shape administrative law in ways that would at least gently incentivize administrative agencies to draw on rules when they can. *See, e.g.*, Lisa Schultz-Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461 (2003).

proportionality. After all, the possibility of introducing a more lottery-like, flexible, context-specific *State Farm* and reasoned decision-making analysis is always there and built into the model. And, in fact, because the *State Farm* analysis can climb-up and penetrate the *Chevron* stage upstream, as we previously saw,[217] it provides opportunities for both decision-makers in politics and judges to also consider the need for change, and specifically displacing both rigidity and reliance on distinctive juridical technologies as the dominant tools to dissect and resolve rights claims.

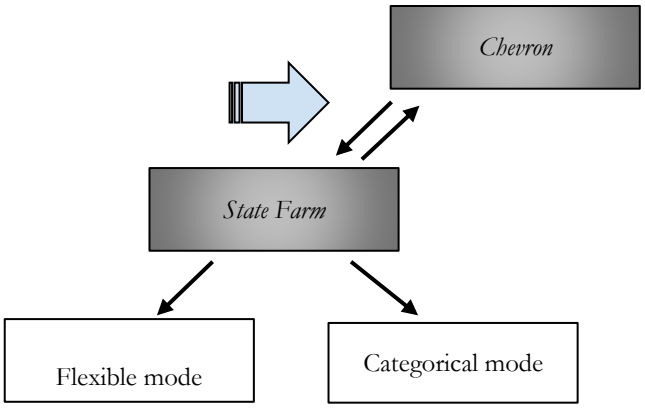
Diagram 5: The Administrative Law Model–Categorical Mode Combining Flexible Features



And, of course, this process is not static. Systems can backtrack from previous experimentations. A system that moved from a flexible rights adjudication structure to a more categorical one, can go back to the previous state. And a system that moved from more categorical thinking in matters of rights to more flexibility in these matters can also go back. The model leaves the possibility of moving back and forth freely by making these options fully and entirely available all the time.

217. *See supra* Part II.B.4.

Diagram 6: The Administrative Law Model–Categorical Mode Combining Flexible Features



To summarize: under the administrative law model, we therefore end up with a potentially much more complex and diverse spectrum of choices about how to organize systems for adjudicating rights with respect to adhering to central features of categorical reasoning and proportionality. What is more, this change can be accomplished *throughout the process of adjudication itself* and without the need for amending the relevant constitutional texts (at least, of course, so long as the "reasonable" interpretation of these texts does not prevent this form of experimentation).

C. Judicial Technique

A third difference between the administrative law model, on one hand, and proportionality and categorical reasoning, on the other, relates to the technique used to protect rights. That technique is what comes with the *State Farm* framework and the standard of reasoned decision-making associated with the administrative law model. To be sure, this *State Farm* framework can also be understood as a means/ends inquiry, very much like what we see with the tiers of review in categorical analysis and the famous proportionality protocol. But it is different first and foremost because the analysis under the reasoned decision-making is importantly proceduralized. As we saw, under this standard, courts are not allowed to opine directly on, for instance, whether the goals that governments pursue are compelling and the means minimally impair a given right, but only on whether the reasoning offered by governmental decision-makers are adequate to support such a conclusion.

Relatedly, there's also a difference in terms of the remedy supplied. As we saw, the "ordinary" remedy offered by the *State Farm* framework and the standard of reasoned decision-making attaching to it is a remand. It explicitly invites a redo or, in a language paraphrased from a famous case from the Canadian Supreme

Court, it welcomes the possibility for the government to "try, try again."[218] Under proportionality and categorical reasoning, and precisely because the *modus operandi* there is regularly substantive rather than procedural, the remedy provided is regularly a strike down. Thus, the primary way for decision-makers to overcome an adverse judicial ruling and do the exact same thing is to override what the courts have said–to the extent that something like this is at all permitted.[219]

But there is actually more to the difference here. Recall that in the administrative law model, the inquiry under *State Farm* and the application of the reasoned decision-making standard can come in two modes. One is categorical and the other is more flexible.[220] When *State Farm* comes in the first variant, there is not much of a difference between the administrative law model and categorical reasoning. The "proceduralization" and a remand remedy pretty much summarize the extent of the divergence in techniques. However, when *State Farm* has not been shaped by *Chevron* to become more categorical and is in fact employed in a flexible and open-ended way, allowing decision-makers to consider any "logically relevant" consideration, the reasoned decision-making standard injects into the constitutional rights context a unique technology of review that importantly diverges from what courts today do under the proportionality test in several respects. First, as we saw, there is no explicit requirement of "minimal impairment" or "least restrictive means" nor an explicit separate requirement of balancing or proportionality "as such." The only "formal" doctrinal requirement that comes with the standard of reasoned decision-making is that, as we saw above, the decision-maker must address any "important aspect of the problem" and illustrate that it considered "significant and viable" alternatives to its chosen course of action and explained why it rejected those alternatives. Second, the standard of reasoned decision-making, as we also saw, includes a requirement, which does not clearly exist in the proportionality model, to explain inconsistencies and consider reliance interests.

Another way to emphasize the differences between proportionality and the administrative law model in this context is that the latter conducts the analysis of rights not very differently from how "regular" policymaking is evaluated by policy analysts.[221] Decision-makers need to define the relevant policy problem depending on the "relevant factors," which would now emphatically include consideration of rights. They then follow the rest of the path in the same way as

218. Sauve v. Canada (Chief Electoral Officer), [2002] 3 S.C.R. 519 [Sauve II] (Canada).

219. Another way to put this is that "second look" cases are rarely ever those that the government can clearly come to courts and justify the *same* action that was disqualified before. For this use of the term "second look," *see* Rosalind Dixon, *The Supreme Court of Canada, Charter Dialogue, and Deference*, 47 OSGOODE HALL L.J. 235, 240 (2009).

220. *See supra* Part II.B.4.

221. For a discussion on the divergence between proportionality and regular "policy analysis," *see* Mordechai Kremnitzer & Raanan Sulitzeanu-Kenan, *Protecting Rights in the Policy Process: Integrating Legal Proportionality and Policy Analysis*, 3 INT'L REV. PUB. POL'Y 51 (2021).

how they would normally make any other policy decision. We will see later that this transformation has much to be said for.

D. Focus on (& Scope of) Initiation Claims

A fourth and final difference between the administrative law model and the existing models has been mostly implicit in the discussion so far. The difference is that the administrative law model significantly expands the potential focus on (and scope of) constitutional review of initiation claims–or infringements on rights as a result of governmental inaction–compared to what the existing models allow.

In categorical reasoning, there is rarely any focus on initiation claims in the context of constitutional rights' review. We have seen hints of this before, when I highlighted in Part II that in the contemporary United States—which is the clearest example of a system consistently committed to reasoning-by-category in matters of rights—the Supreme Court emphatically denied the place for socioeconomic rights and a right to government protection.[222] After all, these rights systematically speak to incidents when governments fail to act or do not do "enough,"[223] and can thus be accurately cast as rights that almost always come in the form of initiation claims.

There are many potential explanations for why the US Supreme Court did just that.[224] But part of the reason and what matters for my purposes here is very likely that the categorical reasoning model to which the United States seems committed is simply ill-fitting to provide responsible judicial treatment to initiation claims. The more stringent standard of "strict scrutiny" appears generally inappropriate for situations of real governmental inaction, which involve complex issues of priority-setting in conditions of limited budgets and limited attention spans. What we are left with are largely the more toothless options—and especially rational basis—which does not seriously get the courts into the business of meaningful review, especially if courts can rely on any "conceivable" rationale to reject the need to intervene (and as we have seen, courts in the United States are currently able to do just that).

The only exception that we see for this, and where the categorical reasoning model does seem to provide some response to constitutionally inflected initiation claims, is outside the United States, in places committed to protection of socioeconomic rights under a "minimum core" concept. Under this concept, either courts or legal documents define some baseline of subsistence that is then supposed to be enforced categorically.[225] But, of course, this is only a limited

222. *See supra* Part II.A.

223. This is of course a reference to SAMUEL MOYN, NOE ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD (2018).

224. For sources discussing these reasons more broadly, *see supra* Part II.A.

225. *See, e.g.*, Katharine G. Young, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*, 33 YALE INT'L L.J. 113, 115 (2008) (emphasizing how the "minimum

exception that does not apply in the United States which, again, is the primary representative of a system devoted to reasoning-by-categories in matters of rights. What is more, there is reason to be cautious in drawing too much on the concept of a "minimum core." As of today, it is highly controversial when used, for instance for being insufficiently ambitious as a tool for protecting socioeconomic rights (because of its emphasis only on guaranteeing minimal conditions) or because courts and other enforcement bodies have found a way to dodge its categorical nature.[226]

With the proportionality model, a focus on governmental inaction and providing constitutional review for initiation claims is possible and more consistently supplied. Indeed, as I also alluded to in Part II,[227] in systems that are committed to the proportionality model, we can see this openness in the context of socioeconomic rights or a right to governmental protection. But the administrative law model still differs from the proportionality model. Most clearly, the techniques of review are different. Rather than employ the full-blown proportionality protocol, either sequentially or as a gestalt, *Massachusetts v. EPA* outlines a super-weak form of review of the reasoning of governmental actors and especially the need to offer "some reasonable explanation" for the inaction. So long as this applies, a court is unable to intervene. And if the court does intervene, the remedy is at most a remand. Moreover, the administrative law model adds to the mix the somewhat categorical principle of "anti-abdication" as a backstop for continued deference to governmental inaction. Nothing like this exists, certainly not in any explicit form, under the proportionality model.

A final difference between the administrative law model and proportionality is however not about technique but about potential coverage. In a nutshell, the administrative law goes farther than proportionality in covering initiation claims in two distinctive respects:

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core" concept of giving protection to socioeconomic rights was envisioned when it originated as a "nonderogable obligation, and an obligation of strict liability.").

226. *See, e.g.*, Kevin Iles, *Limiting Socio-Economic Rights: Beyond the Internal Limitation Clause*, 20 S. AFR. J. HUM. RTS. 448 (2004) (illustrating how in practice courts implement the "minimum core" standard much less categorically). For a position in support of a "minimum core" concept, at least in the context of austerity measures, *see* David Bilchitz, *Socio-economic Rights, Economic Crisis, and Legal Doctrine*, 12 INT'L J. CONST. L. 710 (2014).

227. *See supra* Part II.A. I bracket here for present purposes the claim, noted in scholarship, that systems committed to proportionality tend to in fact *not* draw on the protocol of proportionality itself when it comes to the review of claims that engage socioeconomic rights or rights to governmental protection. *See* Stephen Gardbaum, *Positive and Horizontal Rights: Proportionality's Next Frontier or a Bridge too Far?*, in PROPORTIONALITY: NEW FRONTIERS, NEW CHALLENGES 221 (Vicki Jackson & Mark Tushnet eds., 2017); Kari H. Ragnarsson, *The Counter-Majoritarian Difficulty in a Neoliberal World: Socio-Economic Rights and Deference in Post 2008 Austerity Cases*, 8 GLOB. CONST. 605 (2019). *But see* Xenophon Contiades & Alkmene Fotiadou, *Social Rights in the Age of Proportionality: Global Economic Crisis and Constitutional Litigation*, 10 INT'L J. CONST. L. 660 (2012). I will return to the kinds of forms of review that might have emerged instead of proportionality later in Part V. *See infra* notes 379, 380 and accompanying text.

First, the reviewability of initiation claims under the administrative law model is not necessarily contingent on the existence of specific textual grounding of socioeconomic rights or a right to governmental protection, as it seems to be in systems committed to the proportionality model. Rather, in the administrative law model, initiation claims could be raised and trigger the super-weak review inspired by *Massachusetts v. EPA* and the anti-abdication principle with respect to *anything that governments are constitutionally empowered to do*. In other words, the domain of constitutional law becomes, under the administrative law model, coexistent with the domain of the sub-constitutional powers governments possess. The only requirement is, as we have seen, that the claim squares with how governments "reasonably" interpret their powers under the *Chevron* step of the model.

Second, precisely because of this expansive domain of the administrative law model, this also means that initiation claims that would trigger the super-weak review of *Massachusetts v. EPA* and the principle of "anti-abdication" could be raised not only in the direction of demanding that government would do more, which is what the context of socioeconomic rights and a right to governmental protection are all about. Rather, the administrative law model opens the door for initiation claims, and constitutional review by courts, of a different kind: those which aim to make governments *do less*. In particular, the review envisioned by the administrative law model might also be directed toward compelling governments to perform a kind of a "lookback"[228] into previous laws it had enacted in the past to make sure that they are still justified and that it is not the case that they should be announced as having reached their "shelf life."[229] Alternatively, the review would be conducted to find out whether it's not time to insert important revisions in these past laws.

Indeed, we see this possibility of initiation claims that are akin to "lookbacks" in US administrative law where courts can review, for instance, petitions for rules to not only create new rules but also to repeal or amend existing rules.[230] What the administrative law model does in this context is simply to bring the "lookback" function of judicial review from the regular context where it occurs in administrative law to that of constitutional law. Contemporary practice, under proportionality, suggests that this form of review rarely occurs.[231]

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228. For this term, *see* Cary Coglianese, *Moving Forward with the Regulatory Lookback*, 30 YALE J. ON REG. ONLINE 57 (2013); Cass R. Sunstein, *Regulatory Lookback*, 94 B.U. L. REV. 579 (2014).

229. Allison Orr Larsen, *Do Laws Have A Constitutional Shelf Life?*, 94 TEX. L. REV. 59 (2015).

230. This focus on repeal and amendment are grounded in the text of the APA, *see* 5 U.S.C. §§ 553(a), and has been exercised in administrative law case law. *See, e.g.*, Nw. Envtl. Advocs. v. U.S. E.P.A., 537 F.3d 1006, 1013 (9th Cir. 2008).

231. The only exception that I am aware of is Germany, whose courts have at least partly recognized the constitutional requirement of "post-legislative scrutiny." *See* A. Daniel Oliver-Lalana, *Due Post-Legislative Process? On the Lawmakers' Constitutional Duties of Monitoring and Revision*, in RATIONAL LAWMAKING UNDER REVIEW: LEGISPRUDENCE ACCORDING TO THE GERMAN CONSTITUTIONAL COURT 257 (Klaus Messerschimdt & A. Daniel Oliver-Lalana eds., 2016). In the

We will see later how this form of expansive constitutional review can be and is connected to the context of constitutional rights.

IV. THE NEW MODEL'S APPEAL

We now have the basic contours of a new model of constitutional rights in hand (Part II). We also know how precisely this model differs from the existing models of proportionality and categorical reasoning (Part III). It is time to turn to explicit normative evaluation: what reasons are there to think that the administrative law model, given all these differences and interactions, might in fact be desirable and preferable to proportionality and categorical reasoning?

In this Part, I suggest the answers, taking each difference or interaction discussed in the previous Part in turn.

A. Political Constitutionalism

As emphasized previously,[232] a key feature of the administrative law model is that it institutionalizes deference to a much greater degree than proportionality and categorical reasoning. This means that one important potential strength of the administrative law model must surely be that it injects more forcefully political constitutionalism into the context of rights' adjudication.

Political constitutionalism is of course a complex family of views.[233] But what unites all these views is the position that in many things constitutional, including especially perhaps in matters of constitutional rights, is the belief that politics should have the primary say, not courts. Rights provisions are after all usually drafted in constitutional documents in a highly abstract way. They are ambiguous or vague and thus are open to a multitude of potential interpretations and applications. And since there are likely to be reasonable disputes about which of those to choose, and because political institutions are regularly more democratic than courts as well as possess higher epistemic credentials compared to them, political constitutionalism insists that there is no reason why the judicial view ought to be preferred. To the contrary: investing courts with the chief task of interpreting and implementing constitutional rights' provisions can distort the

U.S., as Professor Larsen's cited work suggests, there's also some discussion and basis of this. However, the idea of constitutionally required "lookback" review is far from an institutionalized idea that applies across the board as the administrative law model would potentially make it. And, of course, the primary case where the Court has used this concept, and on which Professor Larsen's work zeros-in, seems like a deeply unattractive context to apply these ideas. For relevant discussion, *see* Nicholas O. Stephanopoulos, *The Anti-Carolene Court*, 2019 SUP. CT. REV. 111.

232. *See supra* Part III.A.

233. Among the leading works here are LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); TUSHNET, *supra* note 5; Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006); RICHARD BELLAMY, POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENCE OF THE CONSTITUTIONALITY OF DEMOCRACY, WHICH PAGE? (2007).

desirable and indeed important incentives of political institutions to do so responsibly themselves.[234]

Proportionality and categorical reasoning both occasionally recognize the strong claims of political constitutionalism in matters of rights. After all, we have seen that there is some place for deference to politics in both, and more consistently so under proportionality.[235] But the administrative law model takes the claims that originate from political constitutionalism much more seriously and systematically. For one, the model takes from the courts the responsibility to independently interpret rights provisions and "say what the law is"—a constitutional *Chevron*. For another, the administrative law model takes from courts the responsibility to independently and substantively assess the merits of rights claims—especially via a constitutional *State Farm* and the standard of reasoned decision-making. Given the powerful claims of political constitutionalism, deeply familiar by now to scholarship, there is no reason to overrule, as the present binary does, something more ambitious like this.

Of course, the administrative law model is not akin to "taking [constitutional rights completely] away from the court[s]."[236] It is also different from the more familiar Thayerian view that courts should abstain from intervening in cases of "clear error" or when manifest unreasonableness is present.[237] Indeed, both *Chevron* and *State Farm* leave in the hands of courts something potentially much more significant. But that role seems potentially attractive as well. It would help achieve what seems like a kind of highly plausible "mix" between political and judicial constitutionalism.

I defer discussion of the judicial role under the *State Farm* framework and the reasoned decision-making requirement of the administrative law model to later in this Part.[238] Here I emphasize that the role courts would retain under the *Chevron* component of the administrative law model seems on its face to have much to commend in the context of constitutional rights. First, the requirement of "fit" under *Chevron* is a way for courts to guarantee that political institutions' interpretive choices of rights demonstrate respect and connection to the textual provisions of rights and to the (likely wide range of) acceptable technologies that have been developed in a particular system or context to interpret those provisions. Indeed, something that cannot be reasonably squared with the relevant text or is "off the wall"[239] in terms of these acceptable technologies of interpretation, raises flags that courts might have a reasonable place to weed out.

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234. This is of course the claim that judicial review creates an undesirable "judicial overhang" or "moral hazard." *See, e.g.*, TUSHNET, *supra* note 5, at 57–65.

235. *See supra* Parts I.A & I.B.

236. TUSHNET, *supra* note 5.

237. James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 155–56 (1893).

238. *See infra* Part IV.C.

239. Jack M. Balkin, *From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream*, THE ATLANTIC, June 4th, 2012,

Second, the ability of courts to be more cautious in deferring to inconsistent interpretations, and reject excessive flip-flopping, also seems to be a powerful judicial function in the context of rights adjudication. After all, the concerns that have arisen in in administrative law from interpretive flip-flopping and which have pushed courts to be more skeptical about these instances—including bad faith, short-termism, endangering reliance interests, and more[240]—would apply to the constitutional rights context as well once it has been injected with political constitutionalism more forcefully (as the administrative law model aims to do). In fact, some might think that these concerns would be more pronounced in this new constitutional law context, for instance due to the increased need for stability or the high importance of constitutional norms about rights, more so than regular sub-constitutional legal norms, and the need to "settle" them.[241]

B. The Model as a Desirable Rights Meta Structure

An important additional feature of the administrative law model, I have shown in Part III,[242] is that it lets systems negotiate in a rather unobstructed way, dynamically, and along the process of ongoing interpretation and litigation (rather than via means of amendments of legal texts), between some of the key commitments of proportionality and categorical reasoning. One option is that systems under the administrative law model would retain (or pick anew) a dominant commitment to key features of the categorical reasoning model (*i.e.*, narrow rights, reliance on distinctive lawyerly craft tools, and rule-like adjudication structure) or to those of the proportionality model (*i.e.*, expansive rights, reliance on more prescriptive reasoning in matters of rights, and more open-ended and context specific structure of adjudication). Alternatively, however, the administrative law model also lets systems combine between these elements and to some extent pushes them to do so, given the various upstream/downstream interactions within the model.

What might be said in support of this specific feature of the administrative law model? To see the potential appeal, let me begin by providing a qualified defense of key features of the categorical reasoning model which, again, the administrative law model allows systems to retain.

(*) A (qualified) defense of the categorical reasoning model. Some fierce proponents of the proportionality model would be quite frustrated with this possibility under the administrative law model. They believe the categorical

https://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040/.

240. For a lucid discussion and exploration of the values served by consistency in administrative law, *see* Yoav Dotan, *Making Consistency Consistent*, 57 ADMIN. L. REV. 995 (2005).

241. For an account that emphasizes the increased importance of stability in constitutional law, *see* Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997).

242. *See supra* Part III.B.

reasoning's commitment to a relatively narrow domain of rights is unfortunate.[243] That relying on "distinctive juridical technologies" is inappropriate when reasoning about rights because these technologies are not sufficiently empirical or moral or political and even offend the demands of "public reason."[244] And that it blocks the need for more granular and context-specific analysis and for case-by-case "balancing."[245]

But these claims seem too quick, especially if taken to the extreme. There are entirely sensible, indeed powerful, reasons that support these commitments of the categorical reasoning model. First, not all rights included in the relevant legal documents have the same structure. Some rights seem more specific rather than general and expansive, and thus more naturally call for more categorical and legalistic analysis.[246] Specific histories of countries can furthermore lead them to make more deliberate rights' codification choices which a more legalistic reasoning style, and the categorical reasoning model, will tend to respect.[247]

Second, it is not necessarily the case that "distinctively juridical technologies" offend the demands for "public reason" or are not sufficiently empirical or prescriptive in nature, as some supporters of proportionality suggest. Some "legalistic" styles of reasoning have respectable instrumental support. The only difference is that this support operates on the second-order level rather than on the first-order level that adherents to proportionality too quickly expect.[248] So, for example, reliance on texts can advance coordination, encourage settlement, and supply a plausible, and to some extent inescapable, means of communication between drafters and courts.[249] Reliance on history or tradition is not necessarily following dogma but may be justified by the need to incorporate valuable conventions and norms or supply epistemically valuable "gloss."[250] And stare decisis—a potentially distinctive lawyerly technology as well—may have respectable instrumental credentials, too, including achieving stability, consistency, and guaranteeing that "like cases are decided alike."[251]

Third, the categorical reasoning model is often defended by its own proponents, and in response to the critique from proportionality adherents, as a

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243. *See, e.g.*, Möller, *supra* note 91.

244. *See, e.g.*, Kumm, *supra* note 97; Wojciech Sadurski, *Judicial Review and Public Reason*, in COMPARATIVE JUDICIAL REVIEW 337 (Erin F. Delaney & Rosalind Dixon eds., 2018).

245. *See, e.g.*, Douek, *supra* note 49.

246. Jackson, *supra* note 15, at 3168–70.

247. I discuss later, in Part VI *infra*, the role of specific and general limitation clauses.

248. For this distinction, *see* JOSEPH RAZ, PRACTICAL REASONS AND NORMS 39–40, 46–47 (1990).

249. *See generally* Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988).

250. *See, e.g.*, Aziz Z. Huq, *Fourth Amendment Gloss*, 113 NW. U. L. REV. 701 (2019).

251. *See, e.g.*, Alexander & Schauer, supra note 242. *Cf.* Vlad Perju, *Proportionality and Stare Decisis: Proposal for a New Structure*, in PROPORTIONALITY: NEW FRONTIERS, NEW CHALLENGES 197 (Vicki C. Jackson & Mark Tushnet eds., 2017). For the claim that stare decisis exists and is in fact pervasive in politics too, *see* Oren Tamir, *Political Stare Decisis*, 22 CHI. J. INT'L L. 441 (2022).

way for achieving judicial constraint. This is largely associated with the traditional claims that the literature on the rules/standards distinction elaborates.[252] That seems true to some extent. However, a better defense of the categorical reasoning model might be more systemic and wholesale rather than retail. On this view, the value of the categorical reasoning model is that it helps systems to fulfill the legitimate need they have in what can be called optimal doctrinal complexity.[253] After all, it seems important to save both judges and decision-makers in politics who are expected to follow higher courts' rulings from doing unnecessary "work" if we can limit and specify more clearly and accurately their inquiry or giving them signals or presumptions about where they are supposed to land. And, given the prospect of mistakes and the potential "pathologies"[254] of both lower courts judges and decision-makers in politics more broadly, in general but perhaps especially in matters of rights, we want to minimize the costs of errors as well.[255] The categorical reasoning model, by creating a more rule-like structure of decision-making, seems like a sensible, some might say indispensable, reaction to the need of systems for retaining as much as possible a structure of optimal doctrinal complexity and to minimize both decision costs and error costs in the context of constitutional rights adjudication.

Fourth, the previous point emphasized the perspective of judges and political decision-makers. But the categorical reasoning model also seems important if we add the perspective of the *public* as well. And in addition to the kind of familiar rule-of-law and guidance values that categories or bright-line rules supply,[256] which are clearly relevant here, we might note another thing: categories can have important expressive value that some systems might plausibly want to retain. Indeed, categories can signal for example that the government is in fact limited rather than that it is allowed to "do everything subject to the principle of proportionality."[257] The structure of rights protection might serve as a kind of "billboard"[258] for how the State sees its relations with citizens. And systems could

252. *See, e.g.*, Scalia, *supra* note 50; Sullivan, *supra* note 50.

253. *See, e.g.*, Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1063 (2015); Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerus Clauses *Principle*, 110 YALE L.J. 1 (2000).

254. *Cf.* Vincent A. Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985).

255. For the concept of decision costs and error costs, intimately related to the need for optimal doctrinal complexity, *see, e.g.*, Cass R. Sunstein & Edna Ullmann-Margalit, *Second-Order Decisions*, 110 ETHICS 5 (1999); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 193 (1988).

256. Again, a point that is pervasively made in the rules/standards literature. *See* sources cited *supra* note 50.

257. *Cf.* Webber, *supra* note 25, at 4.

258. For this term, *see* Tom Ginsburg & Alberto Simpser, *Introduction: Constitutions in Authoritarian Regimes*, in CONSTITUTIONS IN AUTHORITARIAN REGIMES 1, 6 (Tom Ginsburg & Alberto Simpser eds., 2014) (although the authors use the term in the context of authoritarian regimes, they highlight that it applies to stable constitutional democracies as well).

have sensible reasons to want to achieve that by drawing on a more categorical structure of rights.

Fifth, Karl Llewellyn's discussion of a legal cycle between periods of "grand style" and "formal style"[259] suggests another strength of categorical reasoning that proportionality supporters may be discounting: first-order practical reasoning of the kind these supporters prefer in matters of rights might be a systematically limited good. Law responds to changes in constitutional politics and, importantly, may need to occasionally retreat to the "formal style"—captured by rigid rules and distinctive juridical technologies when pressures on law from politics creep. Indeed, John Hart Ely for example spoke of rules as a form of "refuge."[260] Others have similarly emphasized the necessity for rules in matters of rights especially in politically "stressful"[261] times.

Moreover, the efficacy of features of categorical thinking as a place for occasional retreat is general, as Llewelyn's cyclical term suggests. But the argument of the need to retain categorical thinking as a permanent place for retreat, as the administrative law model does, seems perhaps to have special "bite" today, given the phenomenon of recent growing pressures on courts.[262] Indeed, even recent supporters of proportionality of late seem to have reconsidered their commitments precisely because of these global trends.[263]

Finally, supporters of proportionality may be discounting the costs of expansive constitutional rights and especially "rights inflation,"[264] which, as we have seen, is a feature of this model. The key challenge here is that the more rights are inflated, especially beyond the domain of "special" or "preferred" rights, the inevitable consequence of this is that more and more political judgments would be subject to the demands of rationality and judicial review. But the reality of pluralist politics, bargaining, and inevitable line drawing makes this subjection quite costly. Hans Linde famously described the legislative process, in the US context but arguably more broadly, as "irrational" because of the recognition that modern democracies today rely, crucially, on pluralistic mechanisms of bargaining.[265] And for Linde, and others as well, a system may have a reasonable interest in allowing this pluralist dynamic to largely exist free of heavy

259. KARL LLEWELLYN, THE COMMON LAW TRADITION 35–45 (1960).

260. JOHN HART ELY, DEMOCRACY AND DISTRUST 109–16 (1980).

261. Geoffrey R. Stone, *Limitations on Fundamental Freedoms: The Respective Roles of Courts and Legislatures in American Constitutional Law*, in THE LIMITATION OF HUMAN RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 182 (Armand de Mestral et al. eds., 1986). A potential example for the efficaciousness of rules in the context of rights adjudication may be the flag burning cases in the U.S. *See* Texas v. Johnson, 491 U.S. 397 (1989).

262. For discussion of recent threats to courts around the world, *see* Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 125–27 (2018).

263. *See* Moshe Cohen-Eliya & Iddo Porat, *Proportionality in the Age of Populism*, AM. J. COMP. L. (2022).

264. *See* MÖLLER, *supra* note 8.

265. Hans Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 212 (1976).

constraints, including especially those that would flow from a highly expansive take on the scope of rights and rights inflation.[266]

All this suggests that the categorical reasoning model, or, more accurately, key features of that model, such as narrow rights, legalistic modes of reasoning, and more rule-like structure of rights dispute resolution, certainly have a respectable place in the context of constitutional rights adjudication. They should not be rejected as some proponents of proportionality often imply when they insist for example that it "is all and only about proportionality";[267] or that proportionality is a "universal criterion of constitutionality"[268] and the "ultimate rule of law."[269] The fact that the administrative law model preserves these features therefore seems valuable, indeed important.

In fact, all this also suggests that systems committed to proportionality would also benefit from the administrative law model. After all, the various justifications I have highlighted above for the features of the categorical model are general in nature. They would apply anywhere. And the critiques that are heard against proportionality from those embedded in systems committed to it[270] suggest in an important sense that they might indeed have real "bite." True, as we have seen in Part II, when I discussed the connections between the models, proportionality can for example become more "systematized" or "calibrated" and thus transition to resemble the categorical model.[271] But as suggested in Part III,[272] the administrative law model—by institutionalizing a "fit" requirement via *Chevron*—can speed-up the likelihood that this would in fact occur, by establishing a kind of rule in favor of rulification.

(*) The problem of excess. So far, I have defended the administrative law model as preserving elements of the categorical reasoning model that are valuable across-the-board. As I noted at the outset, though, this defense is ultimately a qualified one. More specifically, it is quite easy to see how a system can retain categorical thinking in rights' matters in excess of what this defense sensibly and plausibly implies. For example, a particular jurisdiction would rely on categorical thinking, textual formalism, and other distinctively juridical technologies in ways that cannot be reasonably squared with the second-order consequentialist justifications of formalism or specific rights' codification styles. Or a system would retain categories beyond what can be sensibly justified given the legitimate need of preserving optimal doctrinal complexity. And, while the costs of

266. For a recent "skeptical" discussion of proportionality in this vein, *see* Mark Tushnet, *Making Easy Cases Harder*, in PROPORTIONALITY: NEW FRONTIERS, NEW CHALLENGES 303 (Vicki C. Jackson & Mark Tushnet eds., 2017).

267. BEATTY, *supra* note 13, at 170.

268. Stone Sweet & Mathews, *supra* note 17, at 160.

269. BEATTY, *supra* note 13.

270. *See* sources cited *supra* notes 23–26 and throughout.

271. *See supra* note 114 and accompanying text.

272. *See supra* Part III.B.

expanding and "inflating" rights might be significant in a system that values (even ambivalently) pluralist politics, it is also possible that the benefits of expansion and inflation would outweigh these costs—perhaps if there is a sufficiently gentle technology that would make judicial review not too burdening on pluralist politics.

Indeed, the best defenses of the proportionality model highlight exactly *that* as the problem with the categorical reasoning model. That reasoning-by-category might be in excess of what is sensible;[273] that it is applied too "mechanically,"[274] perhaps merely for the fear of making tough but nonetheless required judgment calls in matters of rights.[275]

(*) Challenges in remedying excess. Of course, all this suggests that it makes sense to think about solutions to the problem of excessive reasoning-by-category. After all, constitutional law need not be static and only "codify" what exists today; it can aspire to "transform"[276] as well. But here, there are two challenges. The first is uncertainty and complexity in knowing that there is indeed excess. Consider for instance whether a commitment to categorical reasoning represents, in a particular context, an excessive reaction to the problem of optimal doctrinal complexity. It's quite hard to know if that is really the case. The answer depends on the variance of decision-makers in lower courts and in politics in terms of their qualities, abilities, and tendencies, and many other factors.[277] And, as always, this issue of whether something is indeed excessive would be subject to reasonable disagreement in the specific context.

The second challenge is that the excess may not be a result of what we can think of as purely "rationalistic" reasons. Rather, it may be a component of a culture of rights in a particular place. So, for example, in the relevant system the excessive reliance on formalistic or legalistic reasons in matters of rights or "distinctively juridical technologies" does not necessarily raise what has been called recently a "resonance gap."[278] These forms of reasoning do in fact resonate with the culture in place. Additionally, it is also possible that a given system is culturally committed to pluralistic politics and it is the culture that is not open for the possibility of more expansive and inflated take on constitutional rights (for

273. Another way to put this point, suggested by Professor Vicki Jackson, is that the best defenses of the proportionality model are those that take proportionality proportionally. *See* Vicki C. Jackson, *Being Proportional About Proportionality*, 21 CONST. COMMENT. 803 (2004).

274. Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 847 (Breyer, J., dissenting).

275. *See* Mark Tushnet, *The First Amendment and Political Risk*, 4 J. LEG. ANAL. 103, 104–05 (2012) (suggesting this in the context of First Amendment law in the U.S.).

276. *Cf.* Karl Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AFR. J. IN HUM. RTS. 146 (1998).

277. For a relevant list of factors in the context of political decision-makers, *see* Dawn E. Johnson, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 L. & CONTEMP. PROBS. 105, 109–10 (2004).

278. David E. Pozen & Adam Samaha, *Anti-Modalities*, 119 MICH. L. REV. 729 (2021).

instance because it "cheapens" rights).[279] Finally, a culture may have an especially high regard of specific rights that would encourage thinking of it in rigid, uncompromising terms, and beyond what seems justified on purely rationalistic terms.[280]

(*) The "right" strategy. To be sure, these problems do not suggest that we should be indifferent to the concerns from excessiveness. Cultures of rights are again not static. And we can validly consider working to change them if that seems necessary. Moreover, uncertainty, complexity, and reasonable disagreement do not imply and should not be taken to imply paralysis.

What these challenges do seem to suggest, however, is that change should likely be pursued with caution rather than in a form of a blunderbuss. To allow for incremental evolution[281] such that systems would be able to settle on a what would be the optimal "package" of elements from both categorical reasoning and proportionality. And that would also not bring to situations where law on constitutional rights would be "disharmonious"[282] with a given culture of rights.

But the administrative law model seems to suggest exactly this kind of strategy of careful, incremental change. On one hand, as we have seen, it allows to open the door for the kinds of elements that are characteristic of proportionality, especially through *State Farm* and the requirement of reasoned decision-making. And because of *State Farm*'s ability to climb up to the *Chevron* step, the administrative law model also provides some pressure and a kind of "nudge" in the direction of opening the doors to these kinds of claims in matters of rights. Litigants, judges, and decision-makers can introduce rights' arguments in this direction. At the same time, the administrative law model retains the full strength and possibility to reject the attempt to open this door when a culture is not ready or when such opening the door is not justified for more rationalistic reasons. Alternatively, the administrative law model retains the ability to go back to a more categorical frame once a period of experimentation has run out. The way that the administrative law model does that is through retaining the full place of *Chevron*—with its requirement of "fit"—which is always hospitable to the key features of the categorical frame.

(*) Excessive proportionality. My presentation up to this point has been mostly from the point of view of excessive categorical thinking. But the problem of excess can also exist in contexts committed to the proportionality model. Like excessive categorical thinking, reliance on proportionality may also be a cultural

279. This of course has connections to what Professor Richard Fallon has described as "sociological legitimacy." *See* Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005).

280. For this claim, *see* Frederick Schauer, *The Exceptional First Amendment*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 29 (Michael Ignatieff ed., 2005).

281. On the need for incremental constitutional change speaking from a different, though not entirely unrelated context, *see* HANNA LERNER, MAKING CONSTITUTIONS IN DEEPLY DIVIDED SOCIETIES (2011).

282. I draw this term from GARY JEFFREY JACOBSOHN, CONSTITUTIONAL IDENTITY 15 (2010).

phenomenon that is not reducible to clear rationalistic reasons. And there would likely be complexity, uncertainty, and reasonable disagreement about the right mix between elements of categorical thinking and proportionality. The same analysis of how the administrative law model can affect incremental change would therefore be relevant in this case of excessive proportionality as well. The only difference is that here the model would work upstream, not downstream—from *Chevron* and the requirement of "fit." On the one hand, *Chevron* opens the door for experimenting with some reasoning-by-category in matters of rights and, as I have suggested, may even help speed up and encourage it. On the other hand, *State Farm* and the reasoned decision-making standard in ways that reflect the features of proportionality is always retained and can be easily re-introduced. The choice between the two features of the distinctive models is always available.

(*) Summary. I am now able to more generally suggest why the administrative law model seems desirable. In a nutshell, the administrative law model appears to establish what we can think of as an attractive meta structure for rights adjudication. That structure would allow systems of rights adjudication to figure out the optimal "mix" between key elements of proportionality and categorical reasoning, both of which have potential merits. But given the complexity and uncertainty around what that optimal package would be in a specific setting and given moreover that reasoning about rights reflects cultural, not-necessarily-rationalistic commitments, the administrative law model does not assume a blunderbuss strategy. It retains the features of the two models as fully valid rather than being biased in one direction. And it then lets systems figure out, muddle through, incrementally, in the process of adjudication and as disputes arise, what is right for them given the cultural and other conditions in which they operate.

(*) Political constitutionalism, redux. My discussion so far implicitly assumed that this process of negotiation within the meta structure of rights would be a judicial one. That, for instance, courts would be able to relax categorical thinking by introducing *State Farm* on the expense of *Chevron* (when pressed by litigants), or that courts would be able to move more quickly upstream and categorize a system, via *Chevron*, whose commitment is to proportionality's features. But that is not how the administrative law model is meant to work. As we have seen before,[283] the administrative law model comes with a substantial measure of deference to political decision-makers. It is enhancing political constitutionalism. This means that, when rights-based texts are open to various reasonable interpretations, most of the navigation within the administrative law model is intentionally political, not judicial.

This feature of the administrative law model also has relevant merits. For one, it is certainly possible that political institutions could be better than courts in navigating the kinds of choices about doctrinal structure that the administrative law model opens up. In current scholarship and judicial practice, discussions of

283. *See supra* Part III.A.

whether "calibration" or "rational systematization" in a proportionality system is desirable, or, conversely, how much to expand rights and relax categories in categorical reasoning systems are presently conceived in exclusively judicial terms.[284] But it is at best unclear why politics should not have a more meaningful role here. All the "regular" political constitutionalist claims, discussed above in Section A, suggest that politics might be superior to courts in the task of structuring rights adjudication at this meta level, too. After all, political institutions might have a more systemic outlook on the structure of doctrine.[285] And politics may moreover be a better "regulator," so to speak, of cultures of rights.

In fact, giving politics this leading role in navigating choices about how rights are structured might increase the prospects that a culture of rights would change and move away from the problem of excess. After all, one plausible reason why systems may be in "excess" of reasoning-by-category is the enhanced role of judges in constitutional adjudication. In other words, excessive judicialization of constitutional politics might be pushing systems to rely on more and more juridical technologies as tools for adjudicating rights disputes.[286] Conversely, it is possible that the excessive reliance in jurisdictions committed to proportionality is driven by lawyers and judges who have incorporated, mistakenly, an overly idealized picture of rationalized politics that can be readily administered by judges and lawyers.[287] By instructing courts to defer to politics, within the confines of *Chevron* and the requirement of "fit" that comes with the administrative law model, we might weaken the hold of the "legal complex"[288] on the process of change. As a result, we might potentially even quicken it.

C. The Benefits of the New Technique

A third distinctive feature of the administrative law model stems, I have suggested, from the way it introduces a new technique for the adjudication of rights, one that differs importantly from the existing models. This technique is captured by the form of review implied by the *State Farm* framework and the requirement of reasoned decision-making in US administrative law. What might support such a switch in technology?

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284. For a sense of this strong judicial focus, *see generally* Dixon, *supra* note 114; Jackson, *supra* note 15; Greene, *supra* note 16.

285. The structural and panoramic advantages of political institutions compared to courts have led various scholars to advance deference to them in other contexts of, for example, US constitutional law. *See, e.g.*, Daphna Renan, *The Fourth Amendment as Administrative Governance*, 68 STAN. L. REV. 1039 (2016).

286. On the phenomenon of "juristocracy," *see generally* HIRSCHL, *supra* note 41.

287. For such a suggestion, mostly in relation to Germany, *see* Ernst-Wolfgang Böckenförde, *Constitutional and Political Theory*, in SELECTED WRITINGS 259 (2017).

288. For the term, *see* Lucien Karpik & Terence C. Halliday, *The Legal Complex*, 7 ANN. REV. L. & SOC. SCI. 217 (2011).

Obviously, an important part of the answer relates to the political constitutionalist claims discussed earlier.[289] After all, the *State Farm* framework, contrary to the regular operation of reasoning-by-category and proportionality, entirely denies judges the ability to directly evaluate the substance of rights claims. The only explicit substantive cause for intervention is irrationality, an extremely narrow ground that should be rarely met.

But the *State Farm* framework and the reasoned decision-making requirement still leave something potentially meaningful in the hands of courts. First, they empower them to insist that governmental institutions supply reasons and some form of record.[290] Second, these tenets of the administrative law model empower courts to review these reasons and records for being "reasoned," and to issue remands.[291]

To see the appeal of this technology of review that comes with the administrative law model it is necessary to distinguish between two different modes that, as discussed before, it can come to us in this model: one that is categorical and the other more flexible.

(*) Categorical mode: When *State Farm* and the requirement of reasoned decision-making are implemented in the categorical way the difference between the administrative law model and the categorical reasoning model is mostly the proceduraliztion of the judicial inquiry. And, while this particular difference may seem modest, it is important nonetheless. This proceduralization not only injects a dose of political constitutionalism; it also strengthens the incentives of decision-makers to make sensible rights' decisions. Indeed, in many cases today, decision-makers in politics can rely on the adjudication process to "shoulder[]"[292] them (for example when more reasons in support of government decisions that infringe on rights are presented at the litigation stage and facts might also be adjudicated anew). But the administrative law model would block this possibility. It operates, as we have seen, based on closed records and reasons.[293] Thus, the administrative law model encourages governments to be the most responsible decision-makers they can when rights are on the line. This proceduralization moreover encourages interested parties to reach out to the government and present their case rather than to "hold out" on it.[294] It also pushes governments to seek this input on their own initiative in advance.

(*) Flexible mode: The differences become starker, however, when the *State Farm* framework and the requirement of reasoned decision-making doesn't

289. *See supra* Part III.A.

290. *See supra* Part III.C.

291. *Id.*

292. Cooper Laboratories, Inc. v. Commissioner, 501 F.2d 772, 790 (D.C. Cir. 1974) (Leventhal, J., dissenting).

293. *See supra* Part III.C.

294. On the various process-benefits of the closed records and reasons rule, *see* Mila Sohoni, *Notice and the New Deal*, 62 DUKE L.J. 1169 (2013).

operate in a categorical mode but rather in a flexible one. When, in other words, constitutional rights are interpreted in a way that decision-makers can consider a variety of considerations and give them weight, without limitations.[295] Here, the divergence is stronger when the administrative law model is compared to proportionality, which is supposed to be similarly flexible. As we have seen, the *State Farm* framework doesn't include a requirement of minimal impairment or a separate stage of balancing. And it instructs decision-makers to think about rights not very far from any policymaking. But this has potentially important virtues.

Note first that the kind of review supplied by the reasoned decision-making requirement, while it applies to "regular" policymaking, seems entirely suitable for rights claims. For one, through the requirement of "relevant factors" that comes with the reasoned decision-making standard, courts make sure that the governmental decision-makers have internalized considerations of rights (or any authoritative previous interpretations of rights' scope) into their decision-making process. In that way, the reasoned decision-making requirement seems to satisfy what we can think of as the minimal demands of constitutionalism—that decision-makers move based on awareness of constitutional considerations.[296]

For another, the benefits of this form of review in the administrative law context, and as applied to standard, run-of-the-mill policymaking, are also relevant in the constitutional rights domain. These benefits include avoiding arbitrariness, securing transparency and accountability, and making sure that decisions are the best they could potentially be.[297] The way that the *State Farm* framework and the requirement of reasoned decision-making achieve these benefits in US administrative law and would achieve them in the constitutional rights context as well, is first and foremost because they outline a broad standard of what a reasoned decision is (or at least how it looks like). This includes, in addition to considering the "relevant factors," also the various elements we have seen in Part II, including the need to gather data, explore "viable and substantial" alternatives, and explain inconsistencies and effect on reliance interests.[298] Then, we can reasonably expect this *State Farm* framework to have two potential desirable effects. The first is an ex-ante effect—that this form of review might

295. *See supra* Part III.C.

296. For writing that associates constitutionalism with appropriate attention to constitutional values in decision-making, *see, e.g.*, Jennifer Nedelski, *Legislative Judgment and the Enlarged Mentality*, in THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE 95 (Richard W. Bauman & Tsvi Kahana eds., 2006); Mark Tushnet, *Some Notes on Congressional Capacity to Interpret the Constitution*, 89 B.U. L. REV. 499 (2009).

297. For a recent discussion, *see* Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 YALE L.J. 1748 (2021).

298. *See supra* Part II.B.2.

create a kind of "in terrorem,"[299] "second-look,"[300] or "observer effect"[301] and might prevent the need for judicial intervention in the first place. Decision-makers will have to "show [their reasoned] work" when deciding in matters of rights.[302] The second effect is an ex-post one: that talented judges with the help of capable litigants will be able to identify areas where a decision seems to falter in achieving any of the benefits previously discussed (non-arbitrariness, transparency, optimal decision-making, etc.). Finally, if judicial intervention is needed, the remedy is light and in the form of a remand. Failures of reasoned decision-making can be corrected with appropriate explanations. They are not and should not be fatal.

The *State Farm* framework therefore seems entirely suitable and a potentially attractive technology for evaluation of rights notwithstanding its administrative law and "standard" policy origins. It helps achieve what seems like a highly attractive mix between political and judicial constitutionalism. Political decision-makers possess the primary responsibility to determine substance. And courts intervene only when these decisions are not reasoned, to make sure that rights have been appropriately internalized into decision processes according to the minimum requirement of constitutionalism, and to secure the other benefits of this form of review —including avoiding arbitrariness, transparency, accountability, and responsible, optimal decision-making.

All the above is important. But as discussed, the *State Farm* framework also differs from proportionality in dropping the "formal" requirement of least restrictive means as well as the separate stage of balancing. Rather, all it requires is that decision-makers identify "viable and significant" alternatives and explain their chosen course of affairs.

This, too, seems potentially powerful. By doing so, the evaluation of rights claims might be conceived of as more simple and more integrated with the world of policymaking. Today, under proportionality, rights and policy seem much more bifurcated—they are analyzed under different protocols of decision-making.[303] The unification brought by the administrative law model will end this bifurcation. And that might in itself have beneficial effects. For example, it can enhance the possibility of better attention and acceptance of rights in policy processes. And it might increase input from non-lawyers and non-judges into issues of rights,

299. Cass R. Sunstein, *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*, 1989 DUKE L.J. 522, 527 (1989).

300. Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Inter-branch Dialogue*, 42 WM. & MARY L. REV. 1575 (2001).

301. Ashley S. Deeks, *The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference*, 82 FORDHAM L. REV. 827 (2013).

302. David L. Markell & Emily Hammond, *Administrative Proxies for Judicial Review: Building Legitimacy from the Inside-Out*, 37 HARV. ENVT'L. L. REV. 313, 324 (2013).

303. *See* Kremnitzer & Sulitzeanu-Kenan, *supra* note 221.

something that political constitutionalism encourages (and present-day US administrative law, too).[304]

Furthermore, it is not clear that anything significant in terms of appropriate protection for constitutional rights would be lost by dropping the explicit requirement for least-restrictive-means and balancing. To be sure, a key strategy through which courts defend rights is by looking at alternative courses of action to what governments are trying to achieve. In this way, courts can "smoke out" illicit governmental motivation and ensure that choices regarding rights are made in a responsible way.[305] All this remains central under the administrative law model and the requirement of reasoned decision-making. What is less clear is why the analysis of alternatives should be accompanied by an additional and separate stage of balancing rather than incorporate both in a single step. And, indeed, systems applying proportionality, especially in a sequential, step-by-step form, struggle with coming up with convincing responses.[306]

One response seems to be that the additional step guarantees that an alternative of "no action" is also considered. But this can easily be folded into the previous step of evaluating alternatives (simply as a "zero action alternative"). Another response is that by separating the stages, courts might avoid balancing altogether or maintain more crisp normative guidance in a separate stage. But as many recognize,[307] balancing must also take place at the stage of evaluating alternatives, at least when the requirement of effectiveness of means relative to the goals is interpreted to require similar effectiveness. There is no escape from balancing. And at least in a system of political constitutionalism, there is no need to guarantee a separate step for this normative analysis.

As to the explicit requirement of least restrictive means that the reasoned decision-making requirement also formally drops, this is also potentially powerful, at least outside the context of more "preferred" rights. As recent scholarship has emphasized, the requirement of least restrictive means can lead to *overprotection* of rights at the expense of other important rights or interests. More specifically, by searching for least restrictive means judges may too quickly discount issues of administrative costs (which may themselves have an impact on rights).[308] And, they may also too quickly overlook the practical difficulties of

304. *Cf.* Elizabeth Magill & Adrian Vermeule, *Allocating Power within Agencies*, 120 YALE L.J. 1032 (2011).

305. For a valuable discussion, *see* Fallon, *supra* note 117.

306. For one, in my view unsuccessful, attempt to explain the need for distinction, *see* David Bilchitz, *Necessity and Proportionality: Towards a Balanced Approach*, in REASONING RIGHTS: COMPARATIVE JUDICIAL ENGAGEMENT 123 (Liora Lazarus et al. eds., 2014).

307. *Id.*, at 127.

308. *See, e.g.*, STEPHEN HOLMES & CASS R. SUNSTEIN, THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES (2000); Jeff R. King, *The Pervasiveness of Polycentricity*, 2008 PUBLIC LAW 101.

getting governmental action off the ground (especially perhaps because of bottlenecks and veto-gates that usually characterize the legislative process).[309]

The *State Farm* framework and the requirement of reasoned decision-making suggest what seems like a more elegant solution that is potentially free of these immediate concerns. As we have seen, it instructs decision-makers to identify "significant and viable alternatives," without the requirement that they be the least restrictive means. This means that decision-makers in politics frame what is viable and substantial given current amounts of funding, costs, and the limits of political feasibility. And, of course, to the extent that judges nonetheless reasonably think that other viable and significant alternatives ought to be explored, they can always remand the issue.

(*) Other virtues: age of facts, policy states, and governmental distrust. Finally, the move to the *State Farm* framework and the reasoned decision-making requirement as a technique of rights' evaluation has additional virtues that apply to both modes in which it might operate—the categorical and the flexible. First, the technique seems especially important due to the modern rise of global administrative and policy states, and the increased bureaucratization of politics.[310] Indeed, one consequence of this has been the transformation of constitutional litigation to become more "fact-y"[311] and complex in the United States and elsewhere. Courts and decision-makers address and consume more facts and more complex facts than they did before. The *State Farm* framework and the reasoned decision-making technology, with its factual and process-based focus, including the requirement that decision-makers collect data and use adequate methodologies in their decision, thus seem more apt to capture this transition than the more substantive nature of inquiries under the existing models of proportionality and categorical reasoning.

Second, the intense focus on reason-giving that comes with the reasoned decision-making standard might be important for another reason as well. Many have noticed a trend of growing governmental distrust, both in the United States and globally. Less people believe in what governments are doing and more people tend to either respond aggressively or disengage.[312] The solution to the problem of increased governmental distrust is likely complex and varied. But one possible way to give more attention to this and governmental trust might be suggested by the reasoned decision-making standard and its intense attention to the quality of

309. For this claim, *see* Vicki C. Jackson, *Pockets of Proportionality: Choice and Necessity, Doctrine and Principle*, in COMPARATIVE JUDICIAL REVIEW 357, 368–76 (Erin F. Delaney & Rosalind Dixon eds., 2018).

310. KAREN ORREN & STEPHEN SKOWRONEK, THE POLICY STATE: AN AMERICAN PREDICAMENT (2017); Thomas Christiansen et al., *National Parliaments in the Post-Lisbon European Union: Bureaucratization Rather than Democratization?*, available at https://orbilu.uni.lu/bitstream/10993/16908/1/ChristiansenHogenauerNeuholdOPAL.pdf.

311. I draw this term from Larsen, *supra* note 36.

312. *See, e.g.*, Richard H. Pildes, *Political Fragmentation and the Decline of Effective Government*, J. OF DEMOCRACY, October, 2021.

reason-giving by governments. Indeed, it is not farfetched to believe that governments that reason more extensively and transparently, and with more attention to complexities and counter arguments, will gain more trust. And, to the extent that the administrative law model helps encourage this approach, this might be an additional important strength of the model.[313]

D. The Benefits of Expanding the Scope & Focus on Initiation Claims

The final distinctive feature of the administrative law model, as we have seen in Part III, is that it substantially expands the potential scope and focus of initiation claims compared to the existing models. This is so particularly when compared to categorical reasoning, which rarely acknowledges initiation claims.[314] But this is also true when compared to the proportionality model, which, as we have seen, does not equate the domain of initiation claims with the full scope of governmental powers,[315] nor does it recognize the possibility of initiation claims in the direction of "lookbacks."

What can be said in support of this specific move that would be brought by endorsing the administrative law model?

(*) The generality of the problem of governmental inaction. To see the potential appeal of the model in this context, it is useful to begin by discussing why the field of administrative law itself has regularly opened the door to initiation claims.[316] The reason seems largely the following: administrative agencies are often given broad mandates in their authorizing statutes to accomplish various goals. And while these agencies should largely enjoy broad discretion to prioritize what they pursue, especially in a world of finite and limited resources, there are nonetheless risks or concerns that can accompany this type of discretion. Indeed, agencies may face bottlenecks, "blind spots", and suffer from tunnel vision.[317] They can exemplify "arteriosclerosis,"[318] work on "autopilot,"[319] and generally be exposed to "inertia and torpor."[320] And, they might even be "captured"[321] in ways that prevent them from moving even though

313. Stephen Griffin, *How Can Biden Govern? Think "Zero-Based" Government*, BALKINIZATION, December 4th, 2020, available at https://balkin.blogspot.com/2020/12/how-can-biden-govern-think-zero-based.html.

314. *See supra* Part III.D.

315. *Id.*

316. Though I highlight here again, as I did before, that contemporary US administrative law includes important limits on the reviewability of initiation claims. *See supra* note 214 and sources cited there.

317. I draw these terms from Rosalind Dixon, *Creating Dialogue about Socioeconomic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited*, 5 INT'L J. CONST'L. L. 391 (2007).

318. JAFFE, *supra* note 151, at 12.

319. Philip J. Weiser, *Entrepreneurital Administration*, 97 B.U. L. REV. 2011, 2029 (2017).

320. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2263 (2001).

321. *See* Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337 (2013).

movement and action might be desirable—perhaps also from the point of view of agencies themselves.

By making instances of agencies' inaction and indecision, or "initiation claims," reviewable in courts—and not only cases where the government is actively pursuing something or has decided to move on an issue—the field of administrative law can essentially shift the burden of inertia away from those who may be harmed by agency inaction to the agencies themselves. As a result, judicial review of initiation claims might jump-start agency decision-making processes in ways that might have not been without accepting initiation claims. This may open up possibilities for some "prods and pleads"[322] to combat the risks or concerns that statutes are not fully pursued by agencies, and, finally, provide outsiders from the public an opportunity to participate in agency priority-setting rather than leave issues like these to be an impenetrable "black box."[323]

But all this does not seem unique to the administrative law context. These rationales that support the recognition of initiation claims and their potential reviewability by courts apply just the same to the constitutional law context as well. After all, all constitutions provide broad powers for all the institutions that operate under them, and not only to administrative agencies (which constitutions empower either directly or through delegations).[324] And while these institutions should certainly have substantial discretion to prioritize their actions, given the reality of scarce resources, they are just as vulnerable to the problem of potentially unjustifiable inaction that the field of administrative law has recognized. Indeed, very much like administrative agencies, all the institutions regulated directly by constitutional law can suffer from inertia, torpor, tunnel vision, "paralysis,"[325] and ore. And just as in administrative law, acknowledging the reviewability of initiation claims on these institutions, would have the exact same potential effect of jump-starting the political process, supplying opportunities for "prods and pleas," and opening the black box of governmental priority setting to the public.

(*) A better, fuller protection of certain constitutional rights (or manifestations of rights). This description highlights that reviewability of initiation claims might have *general appeal* beyond administrative law "proper." But the discussion still seems disconnected from the relevant context here. More specifically, some might suggest that the concerns from governmental inaction just discussed and which reviewability of initiation claims might solve are "normal" governmental issues, not ones that relate to constitutional rights in particular.

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322. Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 YALE L.J. 350 (2011).

323. *See* Livermore & Revesz, *supra* note 321, at 1356.

324. For the uncertainty about the constitutionality of delegation under present US law, *see infra* Part VI.A.

325. On the phenomenon of "legislative paralysis," *see* Henry J. Friendly, *The Gap in Lawmaking—Judges Who Cannot and Legislators Who Won't*, 63 COLUM. L. REV. 787, 797 (1963).

This suggestion would be wrong, though. The problems that initiation claims are meant to resolve can sensibly be connected to issues of constitutional rights. Which right exactly would depend on the nature of the initiation claim being presented. When an initiation claim asks for governments to do more—including introducing more regulation or supplying further services—it is very likely that the initiation claim would fall well within the acceptable domain of socioeconomic rights or an expansive right to governmental protection. In contrast, when an initiation claim is presented to courts to ask them to alleviate previous burdens, including by announcing that certain laws have reached their "shelf life" or should at least be amended, the initiation claims are well within the scope of what we can describe as a general right to liberty or autonomy or, in US jargon, substantive due process rights. Today, some scholars would group these manifestations of rights together under a banner of a right to "effective government," which in important respects combines these positive and negative elements of liberty.[326] By making sure, through reviewability of initiation claims in both possible directions that governments are effective, the administrative law model therefore helps protect this novel right that more and more discussions on constitutionalism have started addressing, as a kind of, borrowing from Hannah Arendt, "right to have rights."

What this suggests is that the administrative law model's expansive focus on initiation claims has the potential to more fully protect rights that the existing models do not robustly protect. In categorical reasoning, this under-protection is almost complete, at least as measured by current practice in the United States Under the proportionality model, the protection exists, but may not go far enough as presently practiced. Or, in other words, to the extent that in the proportionality model the domain of constitutional rights does not fully track the domain of governmental powers, the proportionality model does not seem to allow the possibility that rights would be inflated enough.

(*) Completing the circle of political constitutionalism. So far, I have suggested that the administrative law model has the potential to protect more rights (or manifestations of rights) compared to the existing models. But there is in fact another advantage in this expansive focus on initiation claims that the administrative law brings with it. After all, initiation claims of this kind need not necessarily require governments to exercise their powers under existing authorities. Initiation claims can moreover be directed toward the need to *consider new understandings of their powers, including new interpretations of rights provisions*.

In that way, the administrative law model could serve another potentially valuable function: it could help close the circle of political constitutionalism itself by establishing a mechanism to "prod and plea" political institutions to re-engage

326. For an edited volume that includes important discussions about the issue, *see* CONSTITUTIONALISM AND A RIGHT TO EFFECTIVE GOVERNMENT? (Vicki C. Jackson & Yasmin Dawood eds., 2022).

and renew the domain of constitutional rights. Something like this does not naturally exist under the existing models, perhaps unsurprisingly given the way that they both retain a major place for courts in the development of constitutional meaning. But under the administrative law model, where courts would be normally limited in their ability to offer de novo interpretations of rights (under a constitutional *Chevron*) or to evaluate the substance of rights (under a constitutional *State Farm* and the requirement of reasoned decision-making), such function seems important, indeed indispensable.

(*) The attractiveness of the technique. I close this Section by highlighting that the precise technology of review supplied by the administrative law to the review of initiation claims also seems generally attractive.

First, the claim that governments should initiate actions is filtered through *Chevron*, which means only those initiation claims that fall within the "reasonable" interpretations of political institutions of the relevant constitutional documents can continue. Given the commitment of the administrative law model to political constitutionalism, this sort of screener seems sensible. It is at the reasonable discretion of politics whether and how to expand the domain of initiation claims.[327] The administrative law model, in other words, provides an *option* to expand initiation claims, it does not mandate it.

Second, the review under the administrative law model, inspired by *Massachusetts v. EPA*, is supposed to be super-weak. All that it asks is that there would be "some reasonable explanation"[328] for the decision not to proceed. But that seems generally sensible, too. After all, the context of initiation claims does seem at least presumptively different from when governmental institutions do in fact already choose to act or decide. In a world of limited resources and broad constitutional powers that can be taken in many different directions and aim to accomplish "utopian goals,"[329]a too aggressive form of review carries with it a genuine risk of substantially hindering the ability of governments to act.[330] It would cause them to divert too many resources from what they *actually do* to deal with what they *could have done*.[331] And governmental institutions—for the same political constitutionalist reasons that justify recognizing that they, rather than courts, act as the primary vehicle for carrying forward the meaning and

327. In this sense, the administrative law model takes more seriously the political constitutionalist claims compared to a variant of political constitutionalism that asks courts to be more attentive to social movements.

328. *See supra* Part III.B.3.

329. R. Shep Melnik, *The Political Roots of the Judicial Dilemma*, 49 ADMIN. L. REV. 585, 586 (1997).

330. The best articulation of this defense of the super weak standard in administrative law is Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 ADMIN. L. REV. 1 (2008); Eric Biber, *Two Sides of the Same Coin: Judicial Review of Agency Action and Inaction*, 26 VA. ENVTL. L.J. 461 (2008). *See also* Sunstein & Vermeule, *supra* note 198.

331. For the idea of "diversion costs," *see* David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097, 1124 (2017).

application of rights, also deserve a kind of presumption that they prioritize within their limited resources reasonably, which is exactly what *Massachusetts v. EPA* sensibly does.

Finally, if applied faithfully, the "super-weak" standard of review should mean that governmental institutions would mostly win initiation claims even if these claims are potentially meritorious. After all, many issues on which initiation claims can be raised take time and leeway should be provided, perhaps especially when these claims ask for a new normative regulation of an entire field rather than more focused decisions by governments. Nonetheless, there also seems to be a sensible limit to how much courts should sit on the fence. When governmental institutions consistently put something that is reasonably within their powers or mandates at the end of the queue, the lingering on ceases to be something that credibly signals reasonable discretion in a space where resources are tight, and priorities must be set. Rather, they signal complete abdication. And judicial intervention drawing on a somewhat categorical principle of "anti-abdication" developed in administrative law seems to have power.[332] It will be a kind of final backstop or "nuclear option" when governments consistently drag their feet.

V. CHALLENGES & RESPONSES

The administrative law model, I have suggested, has much going for it. It injects political constitutionalism, provides a desirable meta structure for rights, introduces a new powerful technique for rights adjudication, and gives an option for a very expansive focus on initiation claims, either to better protect some rights or to close the circle of political constitutionalism itself.

No doctrinal framework comes without costs or concerns, however. And the administrative law model is certainly no exception. This Part highlights what precisely these concerns and costs are and offers ways to address them. As we will see, while the relevant challenges associated with the administrative law model are not to be dismissed, they are also far from prohibitive. Sometimes the challenges that could be raised in relation to the model help highlight its unique features rather than undermine it. Other times, there are potential doctrinal (and other) solutions to these challenges that systems considering adopting the administrative law model would be able to introduce. As a result, some of the sting out of these concerns is taken away.

A. Faux Deference

(*) The concern—generally. One of the administrative law model's key attractions, I have argued in the previous Part, stems from the way it injects into systems of constitutional rights adjudication a substantial measure of political

332. For the claim that the remedy for anti-abdication is, at least as a general matter, to compel decision, *see* Sunstein & Vermeule, *supra* note 198. This seems to also be the view that is taken by the Supreme Court as well in a related context. *See* Norton, 542 U.S. at 65.

constitutionalism.[333] But while the administrative law model is certainly built in a way that aims to achieve all this, it is quite easy to imagine how it might fail to do so in fact. The basic reason is this: judges can use the doctrinal resources that the administrative law model leaves in their hands in a way that would ultimately *frustrate* political constitutionalism, not fulfill it. In other words, while under the administrative law model doctrine is explicitly geared to prevent it, strong judicial constitutionalism in matters of rights might nonetheless enter the scene through the "backdoor."[334]

To see this, begin with *Chevron*. While *Chevron* instructs courts to defer to reasonable interpretations, which means, as I have constructed it here,[335] to interpretations that do not cross a certain threshold of "fit" with the relevant legal materials or interpretations that do not constitute a case of unacceptable or excessive interpretive flip-flopping or ping-ponging, it is judges who ultimately remain responsible for deciding where that deference will occur and where it won't. Indeed, in US administrative law, *Chevron* explicitly leaves this responsibility in their hands when it licenses them to draw on any "traditional tools"[336] of statutory interpretation to decide whether the requirement of "fit" has been crossed. And in the practice of *Chevron*, judges are also the ones who get to decide what is an excessive interpretive flip-flop that they will reject.

If that is the case, though, it is easy to realize that there is a real risk that judges will implement a constitutional *Chevron* in a way that would be too aggressive and would not leave ample space for political constitutionalism to emerge and develop. They will do so based on their own preferred interpretive methodology (*i.e.*, which "traditional tools of construction" they believe are appropriate and which are inappropriate), on their own level of confidence and temperament (*i.e.*, when they think the text is "clear" or not and how much self-confidence and shoot-for-the-moon temperament they generally possess),[337] on their own views about the desirable degree of constitutional experimentation with constitutional norms (including what amount of flip-flopping should be considered excessive), or on their own more directly and overtly political views and ideologies. And to be sure, this possibility is far from theoretical. We have already seen it happen in contemporary administrative law in the United States. Indeed, US courts have increasingly shown a tendency to deny deference to agencies under *Chevron*. So much so, that some suggest that under present

333. *See supra* Part IV.A.

334. I draw this term from William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 598 (1992).

335. *See supra* Part IV.A.

336. Chevron, 467 U.S. at 843 n.9.

337. Some argue that judges who adhere to certain interpretive philosophies are systematically more likely to feel more confidence. For this claim in the context of textualism, *see* Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U.L.Q. 351 (1994).

practice, a regime with *Chevron* and a regime without it might be very similar (I return to this subject in the final Part of this Article).[338]

A similar concern will also arise under the frameworks of review outlined by *State Farm* and *Massachusetts v. EPA*. As I have discussed, these doctrinal tenets do not allow judges to make explicit substantive determinations about what goals to pursue or the means fitting to achieve them and thus infringe rights. Judges are limited to a reasoning process or internal thought process review to secure a standard of reasoned decision-making, which, in the case of *Massachusetts v. EPA*, is also supposed to be super-weak.[339] We should not be too naïve, though. Reasoning process review is not truly divorced from substance. It cannot be. Even if it is possible to identify the broad contours of the components of a "reasoned decision" (or what such decision looks like), making determinations about when specific instances satisfy that requirement will inevitably call for some measure of substantive judgment. How else do judges decide for example whether a certain alternative course of action is sufficiently meaningful that the fact that it has not been explored by a decision-maker renders a decision unreasoned under *State Farm*? Or how else do judges decide, under *Massachusetts v. EPA*, whether the reasons that a decision-maker has put forward for why an "initiation claim" should not be prioritized is similarly defective? These judgments will inevitably involve some evaluation of the merits of the issue or the substantive reasonableness of the decision (or indecision)—including how important or valuable it is and how much effort should be invested in exploring it further before proceeding.

Consequently, a more accurate description for the *State Farm* framework and *Massachusetts v. EPA* is not as "pure" reasoning process or internal thought process review. It is rather a form of "proceduralized substantive review"[340] or "quasi-procedural review."[341] It allows judges to have substantive input without being totally frank about it. Given this, the administrative law model quite clearly opens-up the possibility that the ultimate decision-makers will be judges, not political institutions. Borrowing a phrase from courts in New Zealand, we can say

338. *See, e.g.*, Jeffrey Pojanowski, *Without Deference*, 81 MO. L. REV. 1075 (2016). There is also an important body of empirical work that shows that patterns of deference to agencies change considerably by the ideological composition of judicial panels. *See, e.g.*, Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823 (2006). *But see* Kent Barnett, Christina L. Boyd & Christopher J. Walker, *Administrative Law's Political Dynamics*, 71 VAND. L. REV. 1463 (2018) (arguing that *Chevron* reduces political dynamics in administrative law).

339. *See supra* Part IV.D.

340. Jerry Mashaw & David Harfst, *Proceduralized Substantive Review and "Technology Forcing" Regulation*, 4 YALE J. ON REG. 257 (1987).

341. Garland, *supra* note 34. *See also* Martin Shapiro, *The Giving Reasons Requirement*, 1992 U. CHI. LEGAL F. 179, 187 ("Giving reasons review is an ideal cover."); Loren A. Smith, *Judicialization: The Twilight of Administrative Law*, 1985 DUKE L.J. 427, 454 ("There is no bright line between a judicial challenge to an agency's reasoning… and a court's "sub[stitution of] its judgment for that agency.").

that the review under *State Farm* and *Massachusetts v. EPA* can quickly become nothing more than "merits in [procedural] drag."[342]

Finally, while under both *State Farm* and *Massachusetts v. EPA* the "ordinary" remedy is only a remand, rather than strike-downs, we should not think that remands are necessarily always so light. A remand can be light in theory but "fatal in fact."[343] For one, because a remand can ask the decision-maker to "obtain[] the unobtainable."[344] In such circumstances, a remand may only superficially look light and open to response even though in reality it is anything but. For another, the timing when decision-makers act is often crucial to the ability to succeed. Delay can itself put an end to the achievability of a decision—for example if a certain coalition was necessary to advance something in politics, and that coalition is fragile and can unravel when it has lost its momentum.[345] It is far from unthinkable that sophisticated judges who wish to prevent governmental decision-making from occurring might aim for precisely that.

(*) The concern—as applied to the model's meta structure. So far, I have described all the ways by which judges, employing the tools that the administrative law model provides for them, can prevent decision-makers from leading the way on the interpretation and substance of rights disputes. But recall that part of what is attractive under the administrative law model, I have argued, is also that it lets politics decide how to structure rights adjudication: and specifically, whether to opt for a commitment to features of the categorical model or to proportionality or rather to combine the two. My discussion above assumed of course that these advances within the model would occur when rights documents could reasonably be interpreted in ways that political institutions would suggest. When they do not, courts would justly be able to block politics from doing that. But the discussion above about the ability of courts to deny deference suggests that courts might do so more aggressively than that. For example, even if rights can be reasonably interpreted categorically, courts might nonetheless insist on applying a more flexible version of *State Farm*. Or when politics seeks to rely on "distinctive juridical technologies" as a mode of decision in matters of rights, and stop at the *Chevron* stage, judges might nonetheless insist on bringing *State Farm* downstream. As a result, all the virtues I have flagged

342. *See* Mark Aronson, *The Growth of Substantive Review: The Changes, their Causes, and their Consequences*, in PUBLIC LAW ADJUDICATION IN COMMON LAW SYSTEMS 113, 114 (John Bell et al. eds., 2016). I note that there's also ample empirical research that indicates how courts in the United States are deeply influenced by ideology in applying *State Farm* and the requirement of reasoned decision-making. *See, e.g.*, Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717 (1997); Miles & Sunstein, *supra* note 338; Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Court of Appeal*, 107 YALE L.J. 2155, 2162–76 (1998).

343. *Cf.* Gunther, *supra* note 53, at 8.

344. FCC v. Fox Television Stations, Inc., 556 U.S. 502, 519 (2009).

345. For a more extensive analysis of this and related points, *see* Mark Tushnet, *Alternative Forms of Judicial Review*, 101 MICH. L. REV. 2781, 2793–97 (2003).

above about providing politics with the primary responsibility for structuring rights would disappear, too.

(*) Response: refocusing the model—a new kind of dialogue. The concern of "faux deference" under the administrative law model, just discussed, is without doubt a substantial one. If political constitutionalism will not be achieved under it, much of the force of the model goes away. At the same time, we should not consider any possibility of more robust judicial intervention under the administrative law model as necessarily unwelcome. Rather, another way to understand the administrative law model is that, under the right conditions, it can provide for a new and attractive form of what comparative constitutional law scholars would describe as "dialogue"[346] between politics and courts.

At the *Chevron* step, at least when the effect of judicial interventions under it is not "strong" but rather "weak,"[347] that is—when politics can override the judicial intervention on how to interpret rights or structure them without too many substantial hurdles, the correct way to understand the judicial intervention is as reflecting the views of the judiciary about these issues. That view might be different than the view of political institutions and ultimately wrong or unattractive. But so long as politics has a way to respond, this intervention may not be necessarily troubling. The whole point of "dialogue" is to have some kind of judicial input rather than suffice with "pure" political constitutionalism alone, partly to guarantee with surety that non-judicial institutions take constitutionalism seriously enough.

When we move to the other components of the administrative law model, beyond *Chevron*, the "dialogue" metaphor becomes even clearer. This is so because under *State Farm* and *Massachusetts v. EPA* the review is always weak rather than strong. After all, the "ordinary" remedy under these tenets is a remand which can, by definition, be overridden and displaced by politics.

The only difference is that contrary to the kind of dialogue that might exist under the proportionality and categorical reasoning models, in the administrative law model the dialogue is procedural, not substantive. It is only about the existence of reasoned decision-making. Alternatively, now that we have seen that the review under *State Farm* is a form of "proceduralized substantive review," we can say that the dialogue under the administrative law model, contrary to the other models, is one that gags the ability of judges to rely directly on substance but limits their interventions to be in process-like terms and especially the adequacy of the reasons given. The substantive dialogue is implicit rather than direct.

For some, this process-based form of dialogue might strike as problematic. One fear might be that this more procedural interaction lacks transparency, even

346. *See, e.g.*, CONSTITUTIONAL DIALOGUE: RIGHTS, DEMOCRACY, INSTITUTIONS (Geoffrey Sigalet et al. eds., 2019).

347. On this distinction, *see* Mark Tushnet, *Alternative Forms of Judicial Review*, 101 MICH. L. REV. 2781 (2003).

candidness, which are often touted as important virtues.[348] It hides the ball. Another fear, by contrast, might be that by this process-based dialogue we may be losing the value of direct substantive judicial input, which some believe is important.[349]

There is certainly some power to these points. But here, too, there may be good responses. To begin, this process-based dialogue rather than a more substantive one might be attractive in places that are more skeptical about overt judicial balancing or especially weary of counter-majoritarianism.[350] This might be because of a more cultural aversion coupled with the fact that in some systems, judicial review was never introduced for explicitly normative reasons as it perhaps was in other places.[351] Moreover, this "gag" on substance and focus on reasoning-process might have important virtues. One virtue is that it might encourage judicial modesty and restraint. While talented judges would likely find it easy to intervene under the reasoned decision-making standard to pursue their own view of substantive reasonableness in matters of rights, it is likely going to prove more difficult to do so under the administrative law model. In a system committed to political constitutionalism, this seems desirable.

Another virtue, however, is that this form of process-based dialogue can encourage a sense of political ownership in matters of constitutional rights. After all, we know from other contexts that have employed the "dialogue" metaphor between courts and politics that something like a true back-and-forth does not always and even regularly occur. Rather, dialogues tend to become more like a "monologue," and one in which courts ultimately are the ones that are doing most of the speaking and deciding. Indeed, evidence often shows that politics fails to come back to courts and stand their ground even if they can and should.[352] With a more process-based interface, which the administrative law model supplies, this problem might manifest itself much less. When courts are only able to intervene for inadequate reasoning, it is quite clear that the ultimate decision is in political hands. And non-judicial institutions might be encouraged therefore to utilize this responsibility more and consistently respond to judicial interventions. In other words, the administrative law model, precisely because of its procedural posture, might be better at creating a culture of complementarity between courts and

348. For a recent discussion of the role of judicial candor in comparative perspective, see Erin F. Delaney, *Analyzing Avoidance: Judicial Strategy in Comparative Perspective*, 66 DUKE L.J. 1 (2016).

349. In some contexts, it might be argued that this model is too weak—given that a remand can be overcome without jumping more hoops, such as in a system with an override clause that sometimes required a more robust majority.

350. For the claim that the United States is such a system, *see generally* COHEN-ELIYA & PORAT, *supra* note 13.

351. For the related concept of a "postwar paradigm" of constitutional rights adjudication, *see infra* note 445 and accompanying text.

352. *See, e.g.*, Aileen Kavanagh, *What's So Weak about "Weak-Form Review"? The Case for the UK Human Rights Act 1998*, 13 INT'L J. CONST. L. 1008 (2015).

politics than the existing, more substantive, "dialogue" that is meant to occur under the present models of proportionality and categorical reasoning.[353]

(*) The limits of "dialogue" under the administrative law model, and the need for doctrinal and other responses. Of course, all this still does not eliminate legitimate concerns. I have explicitly said above that it makes sense to identify the administrative law model as a new form of dialogue in systems where interventions under *Chevron* would be weak rather than strong, that is—when politics would be able to overcome them without too many hurdles. But this might not necessarily be the case. Most clearly, interventions under *Chevron* in the United States, at least following current constitutional understandings, would be definitive and would not allow for a kind of dialogue that I have been describing. The only way to overcome an adverse judicial interpretation of rights in the United States, under a constitutional *Chevron*, would either be through a process of constitutional amendment or by convincing courts to change their minds.

In addition, there are no guarantees, even in the context where the administrative law model would clearly be weak rather than strong, that the weakness would be achieved in fact. While I have speculated above that the administrative law model might encourage better than existing models a real "culture of complementarity" between courts and politics, I cannot rule out that this would prove to be false in reality. My speculation is a hypothesis, which I think is plausible, but nothing more.

This means that the administrative law model does sensibly call for all kinds of potential responses to the concern of faux deference. At one level, part of the response must in the end be political, social, and cultural rather than purely legal or doctrinal. After all, there is simply a limit to what a doctrinal framework can do on its own. To get the administrative law model working as it is supposed to, we need judges with the right "mental attitude"[354] or "psychology of office"[355] to make the underlying dynamic of this model work "fair[ly]."[356] And we moreover need a culture (and a legal profession) that has an interest in making this arrangement work and that would also monitor judges' products for not going too far.

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353. For this term, *see* Rosalind Dixon, *The Forms, Functions, and Varieties of Weak(ened) Judicial Review*, 17 INT'L J. CONST. L. 904 (2019). I acknowledge two complications in the mechanics of dialogue that the text assumes. First, the substantive gag of the model is not perfect because judges can always opine in the judgment itself on the substantive issue even if the formal cause of intervention is procedural. Second, there's a problem of esotericism. For this sense of ownership to develop, everyone needs to believe that the intervention is mostly procedural. But if we know that interventions under the model are substantive in nature, even if they speak the language of process, this won't work.

354. JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 84 (1999).

355. Peter L. Strauss, *Foreword: Overseer, or the "Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 704 (2007).

356. Universal Camera Corp. v. NLRB, 340 U.S. 474, 489 (1951).

On another level, however, some doctrinal responses do seem to make sense. In my discussion below,[357] I will point out various ways that systems might tinker with the requirements of reasoned decision-making and the review under *Massachusetts v. EPA* and the principle of "anti-abdication" in ways that would weaken them. Let me suggest that there are ways to tinker with *Chevron* that would limit judicial discretion under it, especially in systems such as the United States where *Chevron* interventions would indeed have a strong effect. More specifically, discussions in US administrative law have highlighted various ways to institutionalize or formalize what administrative lawyers call the "*Chevron* space"[358] or "zone of ambiguity"[359] within which courts should defer. Some have suggested for example to make *Chevron* almost symbolic and make the requirement of "fit" underenforced, at least in relation to old statutes.[360] Others have suggested that courts should defer reflexively to any reasonable interpretation under any plausible on-the-wall theory of constitutional interpretation.[361] Still others have even offered that *Chevron* will transform into a supermajority vote.[362]

All these certainly seem plausible as candidates to cabin a constitutional *Chevron*, and perhaps there are other options as well not yet discussed in the literature. My point here is not to definitively endorse any one of those solutions, but to point out that adopting any of these would appear to leave ample room for the administrative law model to work even in systems where intervention under *Chevron* is strong rather than weak.

B. Too Little/Too Much

Another important concern from buying into the administrative law model of rights adjudication, and which would exist even if judges operated faithfully to fulfill the kind of dialogue and deference this model is meant to provide, relates to a "too little/too much problem." In other words, the administrative law model might prove either under-protective of rights or over-protective of them. This is so especially given the technology of review the model introduces with the *State Farm* framework and the requirement of reasoned decision-making, on one hand and *Massachusetts v. EPA* and the principle of "anti-abdication" on the other hand.

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357. *See infra* Part V.B.

358. I draw this term from Peter L. Strauss, *"Deference" Is Too Confusing: Let's Call them "*Chevron *Space" and "*Skidmore *Weight*," 112 COLUM. L. REV. 1143 (2012).

359. I draw this term from Matthew Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597 (2009).

360. Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1 (2014).

361. For this view, *see* Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885 (2003).

362. For this view, *see* Jacob E. Gersen & Adrian Vermeule, Chevron *as a Voting Rule*, 116 YALE L.J. 676 (2007).

I will begin by introducing the "too little" side of the problem and then offering responses. Next, I will move to address and respond to the "too much" side of the problem.

(*) Too little—the concern. There are several ways that the administrative law model might prove under-protective toward rights and as supplying less than what we might sensibly think is desirable. Begin with the *State Farm* framework and the requirement of reasoned decision-making. While the idea of limiting courts to review reasoning adequacy, rather than substance, has the various attractions that I have flagged before,[363] it is possible that in some domains of constitutional rights adjudication, and even within a framework of strong commitment to political constitutionalism, we may want judges to perform direct substantive review rather than suffice with reviewing the adequacy of reasons. After all, in some circumstances we may have sensible reasons to think that politics would generally and systematically not perform well in protecting rights themselves, for example because politics is likely to be biased against rights or would tend to under-value them. Discussions in comparative constitutional law have emphasized the contexts of "law of democracy" rights and free speech rights in connection with "classic" sedition laws (that involve, of course, censorship laws against governmental criticism), as potential examples.[364] But there may be other relevant examples as well.[365] To the extent that the administrative law model prevents this type of protection when reasonably needed, this seems like a substantial drawback.

In addition, the reasoning process review outlined by the *State Farm* framework and the requirement of reasoned decision-making blocks not only the ability of judges to opine on substance but also their ability to make factual determinations anew. As we saw, a key component of these features of the model is that both reasons and records are closed rather than open. Judges conduct their review based on the reasons and records provided to them by governments. That has several important advantages, as I have pointed out before.[366] But here again there are potential limits. Indeed, sometimes we may have entirely valid and powerful reasons to want courts to adjudicate facts anew. This can happen in precisely these contexts where we want a more substantive input from courts, discussed just now,[367] given the way that facts and substance are often intermingled.[368] But it can also occur in other instances. For example, the kind of

363. *See supra* Part IV.C.

364. *See, e.g.*, Mark Tushnet, *The Relationship Between Political Constitutionalism and Weak-Form Judicial Review*, 14 GERMAN L.J. 2249, 2262 (2013).

365. Of course, this intuitively leads to the kind of process-based justifications for review associated with John Hart Ely's "democracy-reniforcing" theory. *See generally* ELY, *supra* note 260.

366. *See supra* Part IV.C.

367. *See supra* notes 365–366 and accompanying text.

368. So, for example, if we conclude that courts should make substantive decisions about the constitutionality of sedition laws and decide when censorship might be justified, it will also make sense to let courts adjudicate the relevant facts that are required to make these substantive

factual work that courts do might be especially valuable when institutions like administrative agencies do not exist in the background and there is no alternative institution that is vested with responsibility of doing the relevant factual work that bears on constitutional rights' claims.[369] And even if such institutions do exist, it is also possible that either for reasons of limited institutional capacity of these other institutions or because of the advantages of relatively detached courts that moreover operate on the basis of an adversarial process, we may nonetheless prefer vesting courts with primary responsibility for making factual determinations.[370] Again, to the extent that the administrative law model prevents that, it seems like an important drawback.

I have also suggested above that the form of reasoning process review outlined by the *State Farm* framework and the requirement of reasoned decision-making has advantages over proportionality in that it eliminates the requirement of minimal impairment or least restrictive means. As we saw,[371] there are general difficulties with this requirement both on its own and especially in relation to separating it from the last sub-test of proportionality of balancing or proportionality "as such." At the same time, we should also acknowledge the plausibility that some jurisdictions may resist dropping off the least restrictive means for sensible reasons. For one, as I suggested before,[372] the argument in favor of dropping the least restrictive means may not work, or not work as well, in relation to more important or "preferred" rights. In such instances, we may want to insist on the least restrictive means and to weaken the weight given to considerations like administrative costs or governmental inertia. For another, some systems may want to retain the requirement for expressive reasons as well—perhaps to signal that in matters of rights, these systems take pain to minimal impairment on them. I have discussed this expressive function in relation to the categorical reasoning model,[373] but the argument seems to apply to the least restrictive means component that comes with proportionality as well.

Up to this point, I have addressed the "too little problem" as applied to the *State Farm* framework and the requirement of reasoned decision-making. But the same applies to the standard of review captured by *Massachusetts v. EPA* and the "anti-abdication" principle. They, too, can prove under-protective. For example,

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determinations, rather than relying on governmental institutions' credibility and responsibility in adjudicating these facts themselves.

369. *Cf.* Ann Woolhandler & Michael G. Collins, *Judicial Federalism and the Administrative States*, 87 CAL. L. REV. 613 (1999) (emphasizing the important service federal courts serve vis-à-vis states that often lack similar institutions as federal administrative agencies).

370. For a general argument about the superiority of courts in the context of factual determinations, especially in an age of "alternative facts," *see* Vicki C. Jackson, *Thayer, Holmes, Brandeis: Conceptions of Judicial Review, Factfinding, and Proportionality*, 130 Harv. L. Rev. 2348 (2017). For an emphasis on one type of judicial deficiency in this context, *see* Caitlin E. Borgmann, *Appellate Review of Social Facts in Constitutional Rights Cases*, 101 CAL. L. REV. 1185 (2013).

371. *See supra* notes 309–310 and accompanying text.

372. *Id*.

373. *See supra* notes 258–259 and accompanying text.

we cannot rule out that governmental inaction and indecision may justify a more aggressive judicial stance than what would be supplied by both these components. Indeed, though I have suggested that institutions in politics, like agencies in US administrative law, should enjoy a presumption that they allocate resources and prioritize reasonably,[374] we cannot dismiss the possibility that sometimes this presumption ought to be challenged. Certain institutions behave in a way that would justify a more rigorous and less deferential judicial review for initiation claims directed toward them (perhaps because they are "failed" institutions).[375] If so, insisting on a rigid application of *Massachusetts v. EPA* and the anti-abdication principle in their highly deferential, super-weak, and "last resort" form might be reasonably thought as under-protective.

Furthermore, we also cannot rule out that a system might have sensible reasons to opt to supply a more robust form of review for initiation claims (or rights that trigger initiation claims) than what is implied by the framework of review that comes with the administrative law model. For example, we have seen before that some places may be drawn to the concept of a "minimum core" in matters of socioeconomic rights.[376] And while, as I suggested, this concept might be criticized and is exposed to myriad problems,[377] it is certainly not the case that we can say with confidence that this concept ought to be entirely rejected. Moreover, there are other available standards of review for rights that involve initiation claims, including socioeconomic rights that are different from the "minimum core" concept. These standards seem to give judges a more robust role in their enforcement than would be provided for under the administrative law model. One example is the standard of securing "progressive realization"[378] of rights (within available resources) that we sometimes see in contexts that provide protection for socioeconomic rights. Another example, which originates from South Africa, is a form of more robust "reasonableness review" that is inflected with proportionality concerns.[379]

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374. *See supra* Part IV.D.

375. There is in fact now a suggestion in administrative law, partly as a response from recent years and experience with deregulation, that calls for the elevation of the standard of review that applies to agencies' inaction. *See* DANIEL A. FARBER, LISA HEINZERLING & PETER M. SHANE, REFORMING "REGULATORY REFORM": A PROGRESSIVE FRAMEWORK FOR AGENCY RULEMAKING IN THE PUBLIC INTEREST 13 (Oct. 2018), available at: https://www.acslaw.org/issue_brief/briefs-landing/reforming-regulatory-reform-a-progressive-framework-for-agency-rulemaking-in-the-public-interest/. *See also* Sidney A. Shapiro, *Rulemaking Inaction and the Failure of Administrative Law*, 68 DUKE L.J. ONLINE 1805 (2019) (criticizing the fecklessness of the present standards of review in administrative law for regulatory inaction).

376. *See supra* note 226 and accompanying text.

377. *See supra* note 227 and accompanying text.

378. This language of course appears in the International Covenant on Economic, Social, and Cultural Rights, art, 2(1), New York, 16 December 1966, in force 3 January 1976.

379. For a recent discussion, *see* Katherine G. Young, *Proportionality, Reasonableness, and Economic and Socioeconomic Rights*, in PROPORTIONALITY: NEW FRONTIERS, NEW CHALLENGES 248 (Vicki C. Jackson & Mark Tushnet eds., 2017).

I need not go to the details of these various standards here. What matters for present purposes is that they exist. And that, like in the context of the "minimum core," there is no reason to assume that these are inappropriate. To the extent that the administrative law model would require us to forgo them, and rigidly endorse the super-weak framework that it specifically outlines, that might be a sensible reason for concern.

(*) Too little—responses. All these certainly expose potential drawbacks in the administrative law model. But there seem to be appropriate solutions to them. Most clearly, much of this concern can be resolved if we treat the administrative law model as a *default model*, rather than a hard blueprint. That is, if we allow for the possibility of giving the courts to *do more* in all these contexts specified above, including evaluating the substance of rights dispute directly when that seems justified, adjudicating facts anew, retaining the least restrictive means component, and accepting more aggressive forms of review for initiation claims. In that way we retain the basic features of the administrative law model but allow courts to diverge from it in appropriate places where this divergence seems sensibly called for.

Conceptualizing the administrative law model as a default model rather than a strict blueprint should not be surprising or novel. Administrative law as a field is itself normally conceived, in the United States and elsewhere, as only a default or generic kind of law that operates in "the shadow of political choice."[380] And retaining this feature of administrative law even when it is exported to the constitutional law context therefore makes complete sense.[381]

It is important to emphasize however that by opening this possibility of treating the administrative law model as a default rather than a rigid blueprint, my intention is not necessarily to endorse that it should often or regularly be used in this way. For example, it is not entirely clear if the reasons for retaining the least restrictive means requirement, outside of the context of some highly prized rights, is necessary or powerful. In literature on proportionality, there is often a distinction between two possible conceptions of proportionality: a more State-limiting and a more optimizing conception.[382] One might argue that by dropping

380. Daniel B. Rodriguez, *Jaffe's Law: An Essay on the Intellectual Underpinnings of Modern Administrative Law*, 72 CHI.-KENT L. REV. 1159, 1175 (1997).

381. To achieve this default nature, systems that would endorse the administrative law model would obviously be able to include relevant provisions to that effect in the relevant constitutional (or subconstitutional) texts that serve as the foundation for constitutional rights adjudication in those systems. But the administrative law model opens up the possibility of achieving this default nature *within the process of litigation itself*, through the *Chevron* step and to the extent that this move represents a "reasonable" construction of the right in question.

382. *See, e.g.*, Rivers, *supra* note 114. For a somewhat different conception, between State-limiting and autonomy based conception, *see* Kai Möller, *Luth and the 'Objective System of Values': From 'Limited Government' Towards an Autonomy-Based Conception of Constitutional Rights*, in GLOBAL CANONS IN AN AGE OF UNCERTAINTY: DEBATING FOUNDATIONAL TEXTS OF CONSTITUTIONAL DEMOCRACY AND HUMAN RIGHTS (Sujit Choudhry et al. eds., 2022), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4062206.

the least restrictive means requirement systems would get closer to the optimizing conception. It would encourage systems to develop a potentially less libertarian, more communitarian, system of rights protection. And that, I believe, may be good overall.

(*) Too much—the concern. Up to this point I have suggested ways that the administrative law model might prove under-protective of rights and responded to this specific concern. But as I said at the outset, the administrative law model might raise concerns in exactly the opposite direction. That is, that it would be too aggressive and thus would supply over-protection rights.

To see the possibility for this, start again with the *State Farm* framework and the requirement of reasoned decision-making. Experience from US administrative law suggests that this framework entails serious costs. For example, we know from administrative law in the United States about the problem of "ossification" and slowing down that might be the result of reasoning process review and *State Farm*.[383] We know as well from US administrative law that judges can make serious mistakes in identifying reasoning blunders under this framework.[384] They might incorrectly identify what are "viable and significant alternatives." Or they might insist on transparency and accountability in situations where doing so might be costly—for example, in contexts when some opacity in governmental decision-making might be socially beneficial (e.g., in situations of "tragic choices").[385]

Moving to *Massachusetts v. EPA* and the principle of anti-abdication for reviewing initiation claims, these may have substantial costs as well and prove to be overly protective of rights. First, even if the review is super-weak, it will still entail some "diversion costs"[386] from governments. And those diversion costs can be meaningful and may substantially interfere with pursuing priorities. Second, we are also familiar from US administrative law that review for initiation claims can be manipulated or used by the "shrewd and the powerful"[387] (who tend to submit more petitions, "sham"[388] petitions, use tactics of "informational

383. The literature on the so-called "ossification" of rulemaking because of the *State Farm* framework of arbitrariness review is quite substantial. Two representative pieces are Thomas O. McGarity, *Some Thoughts on 'Deossifying' the Rulemaking Process*, 41 DUKE L.J. 1385 (1997) and Richard J. Pierce, Jr., *Judicial Review of Agency Actions in a Period of Diminishing Resources*, 49 ADMIN. L. REV. 61 (1997).

384. *See, e.g.*, Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243, 1307 (1999).

385. For a general claim to this extent, *see* GUIDO CALABRESI & PHILIP BOBBIT, TRAGIC CHOICES: THE CONFLICTS SOCIETY CONFRONTS IN THE ALLOCATION OF TRAGICALLY SCARCE RESOURCES (1978). *See also* Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1132 (2009) (discussing the benefits of legal facades).

386. For this term, *see* David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097, 1124 (2017).

387. Morton J. Horwitz, Book Review, *The Rule of Law: An Unqualified Human Good?*, 86 YALE L.J. 561, 566 (1977).

388. *See, e.g.*, Lars Noah, *Sham Petitioning as a Threat to the Integrity of the Regulatory Process*, 74 N.C. L. REV. 1 (1995).

overload,"[389] and more). To the extent that this would in fact be the case, many of the benefits of the administrative law model's expansion of the scope of initiation claims seems to fade away. Third, the ability of judges to evaluate whether reasons for inaction are adequate, as expected under *Massachusetts v. EPA*, or to decide when the point of *abdication* has been reached, probably has a significant risk of error as well. Judges might be operating, both in the United States but also more generally, under a private law frame[390] that looks to the specific incident before courts rather than to more systemic facts and context. But these systemic facts and context seem crucial to understand whether more resources can be diverted to an issue not currently on the government's radar, or when that can be done or expected from governments to do and in what time frames. Finally, the vast expansion of the scope and focus to initiation claims brought by the administrative law model seems to make constitutional law truly "total."[391] It creates a "right to everything,"[392] so to speak. But that move might be quite costly as well. It is not the case that everything that could possibly be included in an initiation claim should merit serious attention by governments and courts. And there are likely limits on judicial capacity to deal with a right to everything.

This concern of unjustified "totality" might have special weight in systems that are committed to what is known as direct or indirect horizontal effect.[393] In those systems, courts themselves enforce constitutional provisions through "background laws" without the need for governments to initiate action or regulate. Consequently, it might be thought that courts are doing a reasonably good job in ways that would make the expansion and potential totality of the administrative law model redundant and unnecessary.

(*) Too much—responses. Again, all these concerns certainly merit caution. But there are also ways to respond to them. One kind of response is to highlight again that the administrative law model is not a model of full-blown political constitutionalism. It deliberately leaves some measure of judicial involvement as well. As a result, some potential error and decision costs from judicial intervention are to be expected. The hope under the administrative law model is not to eliminate these costs from judicial review entirely, but that they would ultimately

389. Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1339 (2010). On the use of mass postcard or email campaigns during notice-and-comment rulemaking to "explode" agencies, *see* Steven J. Bella et al., *Where's the Spam? Interest Groups and Mass Comment Campaigns in Agency Rulemaking*, 11 POL'Y & INTERNET 460 (2019).

390. *See, e.g.*, RICHRAD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 73–76 (7th ed. 2015). *See also* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

391. Mattias Kumm, *Who Is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law*, 7 GERMAN L.J. 341 (2006).

392. I draw this term from OCTAVIO L.M. FERRAZ, HEALTH AS A HUMAN RIGHT: THE POLITICS AND JUDICIALISATION OF HEALTH IN BRAZIL (2020).

393. For the concept, *see* Stephen Gardbaum, *The "Horizontal Effect" of Constitutional Rights*, 102 MICH. L. REV. 387 (2003).

be worthwhile, because they counter the costs of full-blown political constitutionalism.

Another response to the concerns of "too much" is to point out that some of them may be overblown. So, for example, it is not entirely clear if the problems associated with the *State Farm* framework of "ossification" are always true. Some evidence suggests that agencies in the United States at least, and in the context of US administrative law, are not severely ossified from pursuing their goals.[394] As to the review of initiation claims under *Massachusetts v. EPA*: here too it is easy to exaggerate. For example, while courts endorsing a private law perspective might be problematic, we should not necessarily assume that this is how courts would always behave. We are familiar with the possibility that courts would endorse a more public law or institutional reform lens.[395]

Moreover, the claim that horizontal effect (either direct or indirect) is sufficient and makes the expanded focus on initiation claims redundant or unnecessary is not entirely convincing. For one, not all systems are committed to direct or indirect horizontal effect, partly for reasons connected to federalism and complexity. The United States is an obvious example here. For these systems, the expanded potential of reviewing initiation claims expansively may be especially important. It leaves them within a frame of "state action" but gives bite to the idea that state action is ultimately a "residual category"[396] that can be eliminated the more governments regulate.

But even in systems that are already committed to indirect or direct horizontal effect, the administrative law model might be valuable. The development of the administrative state suggests limits on courts working under horizontal effect. In a nutshell, what the development of the administrative state taught us is that regulation and legislation might be better ways to address societal problems than common law lawmaking. That same rationale might be appropriate for the constitutional rights context as well. Even if some are still skeptical and believe that legislation and regulation are not always to be preferred over common-law judging, the administrative law model might still be worthwhile. At a minimum, it diversifies the tools that governments possess to address constitutional concerns. Horizontal effect and initiation claims could be viewed as supplementary or complementary. And governments might be able to consider which of these mechanisms would be better and when.

A final response to the concern of "too much" is to point out that the administrative law model might have resources to deal with the costs associated with it. That is, there are ways to potentially make sure that the administrative law

394. *See, e.g.*, Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 MICH. L. REV. 1355 (2016).

395. The common cite here is Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

396. MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 207–10 (2009).

model does not overprotect rights. As to the concerns related to the operation of the *State Farm* framework and the reasoned decision-making requirement, we know from practice in the United States that these can come in multiple varieties. On one hand, there's a "hard look" version of this framework which instructs judges to be highly suspicious of governments and encourages them to robustly review their reasoning processes.[397] At the same time, however, *State Farm* and the reasoned decision-making framework can also come in a much more toned-down version, colloquially known as "soft glance,"[398] "light touch,"[399] or "thin rationality review."[400] In this version, courts operate from a much less suspicious position and even let decision-makers enjoy the benefit of "every reasonable doubt."[401] What this potentially variability of intensity of the *State Farm* framework and the reasoned decision-making requirement suggests is that systems might deliberately determine in what contexts it makes sense to see one of these varieties or another. In this way, systems would be able to control the costs associated with this framework or distribute these costs along the domain of cases. So, for example, systems can opt to institutionalize either "soft look" or "hard look" across the board if that is what seems to them desirable within the administrative law model. Alternatively, systems might be more deliberate and decide in advance which rights (or manifestations of rights) should be regularly exposed to "hard look" and which to "soft look." In fact, they might even experiment and dynamically change the frameworks with time. All of this can of course be achieved either through amending the relevant texts that are the foundation of rights adjudication or through the *Chevron* stage of the administrative law model, to the extent that such move would represent a "reasonable" interpretation of the right in question.

As to the "too much" concern as it applies to the review of initiation claims under *Massachusetts v. EPA* and the "anti-abdication" principle, here, too, there may be doctrinal responses. First, there's nothing that prevents both politics and courts from creating "screeners" for the kinds of initiation claims that they would allow to be heard to address concerns of overboard and extreme "totality." Such screeners can look at features like the quality of the initiation claim, its substance, or even its popular support (for example, if there's been a public petition with a lot of signatories).[402] Second, practice in administrative law also suggests that the review for initiation claims can change with context, very much like how we have

397. *See* Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970); Harold Leventhal, *Environmental Decisionmaking and the Role of Courts*, 122 U. PA. L. REV. 509, 511 (1974).

398. Grant v. Shalala, 989 F.2d 1332, 1345, 1359 (5th Cir. 1993) (Higginbotham, J., dissenting).

399. Sharkey, *supra* note 207, at 2383.

400. *See* Gersen & Vermeule, *supra* note 394.

401. Cass R. Sunstein, *The Arithmetic of Arsenic*, 90 GEO L.J. 2255, 2293 (2002).

402. *Cf.* Macon Phillips, *We the People: Announcing White House Petitions & How They Work*, WHITE HOUSE BLOG, Sept. 1, 2011.

seen before with *State Farm*'s "hard look" and "soft glance" versions.[403] This means that systems once again would be able to structure more responsibly when more robust and less robust review of initiation claims would occur, in large part to address the costs of unnecessary "totality."

C. *Administrative Law Outside Administrative Law*

(*) The concern. A final concern that administrative law raises is what can be called the "administrative law outside administrative law" concern. After all, the model calls for the application of doctrines that originate from administrative law, and particularly federal US administrative law, to institutions that substantially differ from those regulated directly by that field of law. As a result, the tools of administrative law might be thought of as unsuitable in this context and in fact extremely costly.

Consider, for example, legislative bodies that the administrative law model would emphatically regulate in systems that embrace it. These bodies obviously diverge from administrative agencies in various respects. In the United States, Congress operates within a system based on bicameralism and presentment.[404] It contains many legislators, committees, and other legislative officeholders that do not have clear parallels in administrative agencies.[405] And this enormity and complexity of legislative bodies exists elsewhere, too.[406] Moreover, the costs of judicial intervention and supplying remedies with respect to legislative products might be much higher when compared to the costs associated with intervention with agencies' decision-making. For one, separation-of-powers' concerns are more emphasized in this context given the nature and status of legislative bodies compared to administrative agencies. For another, legislatures might be much slower to respond to judicial interventions compared to executive bodies precisely because of their unique features.

Though the gap is probably starkest between agencies and legislative bodies, differences also exist between agencies and other executive bodies that would also be regulated by the administrative law model if systems would indeed opt for it to construct their constitutional rights adjudication. For instance, not all executive bodies have processes in place for producing reasons and building records, which the model would now require them to do (especially because of the *State Farm* framework and the requirement of reasoned decision-making). And, these executive bodies also may not have "petitioning" procedures in place, which might be reasonably thought of as needed to address the expansion in focus and

403. *See*, *e.g.*, Sunstein & Vermeule, *supra* note 198.

404. U.S. CONST. art. I § 7, cl. 2.

405. For the differences and how agencies are in fact often involved in writing congressional statutes, *see generally* Christopher J. Walker, *Legislating in the Shadows*, 165 U. PA. L. REV. 1377 (2017).

406. For a survey of different legislative processes across systems, *see* Ulrich Karpen, *Comparative Law: Perspectives of Legislation*, 6 LEGISPRUDENCE 149 (2015).

scope of initiation claims that the administrative law model would potentially bring with it (because of *Massachusetts v. EPA* and the "anti-abdication" principle). This is true for the United States where there are now important divergences between how federal, state, and local administrative agencies tend to work. But there are very likely to be similar differences in other systems as well.

What is more, and more importantly, the laws that currently apply to different executive bodies may also differ from what would be required of them under the administrative law model. So, for example, in the United States, there are now important divergences in the legal requirements that apply to *federal* agencies and those that apply to state and local agencies. This is so partly because of the current narrow scope of constitutional procedural due process law.[407] But it is also a result of some important differences that exist between the federal APA and state, and, to the extent they exist, local APAs.[408] If we move beyond the United States this mismatch between the administrative law model and current legal conditions might even be more intense. Indeed, it is far from clear if other systems' administrative law at all requires reason giving and allows initiation claims to the same extent as US law does. In fact, at least with respect to some jurisdictions, there is a reason to think that such a requirement does not fully exist (for example, some common law systems still do not recognize a general reason-giving duty by agencies in their own administrative law;[409] and some systems do not draw on rulemaking processes to the same extent as the United States.)

(*) Responses. The concern arising from extending administrative law outside of administrative law, both in the United States and outside the United States, surely seems compelling. But like all the other concerns I have addressed before, it should not be taken as prohibitive. There are valid responses to the concerns.

To begin, the fact that some revisions and changes in decision-making practices would have to occur because of the administrative law model does not in itself tell us that the changes are undesirable. Maybe they are. So, for example, if, as I have suggested, the reasoned decision-making requirement is beneficial both in general and given the rise of administrative and policy states, then requiring institutions, such as legislatures and executive bodies, to create more and better records and supply more and better reasons than they are used to do now, or that current law requires of them to supply, may be an overall improvement. Indeed, we should not take present law as a hard benchmark of normativity, both in the United States and elsewhere. And to the extent that some

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407. As mentioned above, *supra* note 134, at present constitutional procedural due process doesn't apply to quasi legislative procedures.

408. *See, e.g.*, Arthur Earl Bonfield, *The Federal APA and State Administrative Law*, 72 VA. L. REV. 297 (1986); Casey Adams, *Note—Home Rules: The Case for Local Administrative Procedure*, 87 FORDHAM L. REV. 629 (2018).

409. For such indication in the context of the United Kingdom, *see* Mark Elliott, *Has the Common Law Duty to Give Reasons Come of Age Yet?* (2012) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2041362.

period of adjustment would be required to allow the change to occur more smoothly rather than abruptly, this seems like something that could be provided for in a form of transitional arrangements.

Having said that, it is hard to deny that some differences do raise more significant concerns and would not be sufficiently addressed by transitional arrangements alone. For example, while the idea of enhancing reasoning and gathering of facts by legislatures may be in principle worthwhile, it is at best unclear how much judicial review can truly encourage it at a reasonable cost. Scholarship in the United States in response to the tightening of regulation over congressional process by courts as part of the "new federalism" case law has raised serious concerns about whether it is responsible for courts to look at legislatures like they look at administrative agencies.[410] The key idea is that it is really hard to regulate how legislatures reason and the attempt to do so may prove futile (e.g., legislators will simply insert reasons into the record without actually being motivated by what is being inserted). Moreover, the costs of faulty intervention with legislative products are quite serious, given the already mentioned separation-of-powers concerns and the difficulties of legislative work (including assembly of a coalition). These costs are perhaps worthwhile when really important, "preferred" rights are at question, but perhaps not so more generally. Or, conversely, and to connect this point to previous discussions about rights' cultures in Part IV, these costs might be worthwhile for systems that end up being less concerned about rights inflation and the need to leave ample room for pluralist politics.[411]

As for other institutions beyond legislatures: here, too, transitional arrangements probably cannot solve everything. There may be budgetary and other capacity issues that might reasonably prevent institutions from being ideal reasoners and fact gatherers as the administrative law model might be thought to expect of them. And these institutions might also work more informally and have other elements that "compensate" for the lack of process rigorousness. For example, in the United States some executive officials at the state and local level are elected and work more directly with constituents than the standard picture

410. *See, e.g.*, Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New 'On the Record' Constitutional Review of Statutes*, 86 CORNELL L. REV. 328 (2001); William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 Stan. L. Rev. 87 (2001); Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707 (2002).

411. Indeed, in Europe, and especially in continental Europe, there is now an important trend that walks under the banner of "Legisprudence" and which exemplifies a move to more pervasive legalization of normal parliamentary processes even outside the context of infringement with highly important right. In my view, this precisely illustrates the commitment that exists in proportionality systems to less pluralistic perception of politics. *See, e.g.*, LEGISPRUDENCE: PRACTICAL REASON IN LEGISLATION (Luc J. Witgens ed., 2016). For one scholar who is puzzled about the American resistance to review of legislative procedure, partly inspired by European-style "legisprudence," *see* Ittai Bar-Siman-Tov, *The Puzzling Resistance to Judicial Review of the Legislative Process*, 91 B.U. L. REV. 1915 (2011).

under federal administrative law in the United States. And it is very likely that similar differences exist elsewhere.

All this suggests that extending administrative law outside administrative law does in fact raise sensible concerns. But, yet again, there are ways to manage these concerns within the confines of the administrative law model. As to legislatures: it seems that at least in systems that are resistant to rationalizing pluralist politics and outside the context of highly important rights—and because of the aforementioned costs and potential futility of dealing directly with legislative process—it would not be attractive to regulate reasoning process of legislatures directly and at the retail level. A more sensible way to apply the administrative law model is to focus in these cases on the reasoning of the executive that is defending the statute (or the legislative omission) itself (so long as this reasoning corresponds with a reasonable interpretation of the statute). This seems natural in many parliamentary systems, in which there is "fusion" between the legislature and the executive.[412] But it seems also sensible—at least absent specific legislative or constitutional guidance—in presidential systems.[413]

Of course, this might raise an objection that this leaves the value of "due process of lawmaking"[414] at legislatures unaddressed under the administrative law model. But this is not necessarily the case. The concern of protecting "due process of lawmaking" can be addressed more responsibly and systematically, and without the attendant concerns discussed before, in a different way. More specifically, systems might consider establishing a legislative bureaucracy[415] inside legislatures that would oversee this issue. The actions or recommendations by this new bureaucracy could then be reviewed under the administrative law model like any other executive body and without the unique concerns that arise from reviewing legislative products themselves.

Moving along to other institutions beyond legislatures: the concerns from extending the administrative law model here can be solved by some form of institutional calibration of the intensity of the review. So, for example, for executive bodies with more limited budgets and more democratic credentials, courts might relax the intensity of their review and expectations for how much their reasoning should be the "model" of the perfect reasoning institution. Conversely, for executive bodies that are more resource-rich and lacking features that compensate for the lack of procedural rigorousness, the review would be more

412. On the practice of legislative representation by the executive in Canada, *see* Kent Roach, *Not Just the Government's Lawyer: The Attorney General as Defender of the Rule of Law*, 31 QUEEN'S L.J. 598 (2006).

413. For useful discussion in this context, *see* Amanda Frost, *Congress in Courts*, 59 UCLA L. REV. 914 (2012); Vicki C. Jackson, *Congressional Standing to Sue: The Role of Courts and Congress in U.S. Constitutional Law*, 93 IND. L.J. 845 (2018).

414. Linde, *supra* note 265, at 241. For a recent discussion in a comparative context, *see* Stephen Gardbaum, *Due Process of Lawmaking Revisited*, 21 U. PA. J. CONST. L. 1 (2018).

415. *Cf.* Jesse M. Cross & Abbe R. Gluck, *The Congressional Bureaucracy*, 168 U. PA. L. REV. 1541 (2020).

intense. (And, of course, all this would have to be calibrated as well in relation to the importance of the rights in question or how valuable or vulnerable they may be).

As to the institutional form through which this calibration would take place, there are two possible options worth flagging here briefly. The first is that the calibration would be done judicially. And indeed, in the United States at least, discussions about extending federal administrative law principles to local and state bodies assume exactly this form of judicial calibration.[416] The second option is, by contrast, one of political calibration, which can be supplied either by more-direct legislative guidance or by creating an administrative agency that would itself oversee or give instruction to courts about how to conduct this form of calibration.[417]

VI. WHERE IS THE MODEL DESIRABLE (AND FEASIBLE)?

If I was able to convince readers that the administrative law model is not only distinct from proportionality and categorical reasoning but also has much to be said for it, despite legitimate concerns and costs, I will have achieved much of my goal for this Article. But the discussion need not necessarily be entirely theoretical. To provide further motivation for this new administrative law model, it would be valuable to know where it is likely to prove attractive and achievable under existing legal conditions.

And as I suggest in this Part, it is certainly possible to say something meaningful about that.

A. The United States

Most clearly, the administrative law model of constitutional rights adjudication seems well-suited for the country from which this model originates—the United States. Indeed, all the advantages of the administrative law model flagged in Part IV look particularly powerful in the American context.

For one, the contemporary United States would benefit greatly from a strong dose of political constitutionalism injected into its constitutional rights adjudication structure. After all, the United States Constitution is old and extremely difficult to amend.[418] Many of its rights' provisions are ambiguous or vague.[419] Entrusting political decision-makers with the primary responsibility of

416. *See, e.g.*, Davidson, *supra* note 128; Maria Ponomarenko, *Substance and Procedure in Local Administrative Law*, U. PA. L. REV. (2022).

417. On the proposal that was raised, at the time of the process that led to the legislation of the APA in the United States., to establish an "Office of Administrative Procedure," *see* Jeremy Rabkin, *The Origins of the APA: Misremembered and Forgotten Views*, 28 GEO. MASON L. REV. 547 (2021).

418. *See* U.S. Const. art. V. For a recent discussion, and provocation, *see* David E. Pozen & Thomas P. Schmidt, *The Puzzles and Possibilities of Article V*, 121 COLUM. L. REV. 2317 (2021).

419. *See, e.g.*, Jamal Greene, *Rule Originalism*, 116 COLUM. L. REV. 1639 (2016).

determining their meaning, scope, and applications, is highly promising for all the reasons political constitutionalists have consistently flagged and which the administrative law model, as we saw, embodies to a great extent.[420]

Furthermore, the American system would also benefit from the meta-structure of rights that the administrative law model establishes. On one hand, many of the completely sensible, even powerful reasons supporting a commitment to categorical thinking in matters of rights seem applicable in the United States. To name just one example: given how this system is large, complex, and includes extremely high variance of decision-makers (inside and outside the courts), some substantial measure of categorical thinking looks valuable as a means of maintaining an optimal degree of doctrinal complexity in matters of rights.

At the same time, it is hard to object to the claim, voiced by proponents of proportionality,[421] that categorical thinking in the United States has become excessive and is much more than what is required by the sensible reasons that support reasoning-by-category. And it is hard to object as well that this has entailed significant costs, including the loss of possibilities to protect more rights and to protect some rights, or manifestations of rights, less powerfully.

On this backdrop, the administrative law model paves a desirable path forward. On one hand, as we have seen in Parts III & IV, it would provide the American system with opportunities to unleash its hold from excessive categorical thinking and to navigate in the direction of a more optimal package between such thinking and context-specificity, instrumental reasoning, and more expansive rights (which drive the critique from proportionality's supporters). And it would do so in a careful and cautious way that is more attentive to, first, the serious, legitimate need for categorical thinking in the United States and, second, to what seems like the present-day powerful cultural commitment for reasoning on rights in categorical ways.

Bringing the reasoned decision-making technology of review from administrative law to constitutional law seems highly desirable in the United States, too. It will continue the trend of getting courts out of the way in matters of substance in rights, in line with the political constitutionalist claim, while retaining a potentially valuable judicial role for looking at governmental reasoning processes. This, in turn, will supply important process incentives for political decision-makers to make the best, most responsible decisions possible in matters of rights. And, in those contexts where the standard of reasoned decision-making would apply more flexibly rather than categorically, the administrative model would also bring all the other benefits that it has compared to proportionality, including simplicity, proximity to thinking of rights like other policy issues, attentiveness to the consistent "fact-y" nature of rights and disputes today, and the strengthening of trust in government. The kind of unique,

420. *See supra* Part IV.A.

421. *See* Jackson, *supra* note 15; Greene, *supra* note 16; STONE SWEET & MATHEWS, *supra* note 13; ALEXANDER TSESIS, FREE SPEECH IN THE BALANCE (2020).

procedural "dialogue" the reasoned decision-making standard achieves also seems powerful in the specific conditions of the United States, both given the current aversiveness to explicit judicial balancing there and because of how the United States has become accustomed to judicial supremacy (and would thus benefit from a doctrinal structure that encourages an increased sense of political ownership on matters of constitutional rights).

Finally, increasing the potential scope for and focus on initiation claims, which is another prominent feature of the administrative law model, also seems beneficial for the United States. It would enhance possibilities for decision-makers to protect more constitutional rights that have a plausible claim for coverage and expression under the US Constitution, including liberty rights, socioeconomic rights, a right to governmental protection, and, most broadly, a right to effective government. It will also help close, for the reasons we have seen, the circle of political constitutionalism itself by retaining a mechanism to push governments to consider new meanings and interpretations of rights. And the administrative law model promises a route to do all that responsibly and in forms that are attentive to the meaningful challenges, and real costs, of getting courts involved in initiation claims. As we have also seen, the review in this context is meant to be super-weak and only includes a rather extreme principle of "anti-abdication" as a backstop. Moreover, the administrative law model will not interrupt the United States' current commitment to a "state action" doctrine,[422] which seems at least partially sensible in a complicated federal system. Rather, the administrative law model's potential invigoration of judicial review for initiation claims works within the paradigm of "state action" by directing the focus to regulatory action by governments themselves and expanding (or decreasing) its scope.

Speaking from a strictly legal perspective, there is nothing that prevents the United States from embracing the administrative law model right away. Indeed, the Constitution is famously silent on the issue of judicial review. History on the subject (assuming for present purposes that it is in some sense dispositive)[423] also does not "walk a straight line."[424] *Chevron,* with its requirement of deference to reasonable interpretations limited by a requirement of "fit" with the written Constitution, seems to be the only requirement of its text.[425] Though, of course, to get the administrative law model truly running in the conditions of extremely difficult amendability that exist in the United States, the version of *Chevron* adopted at this constitutional level must strictly limit the ability of courts to rigidly

422. *See supra* notes 397 and accompanying text.

423. *See generally* DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010).

424. John F. Manning, *The Supreme Court 2013 Term—Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 2, 52 (2014).

425. *Cf.* Manning, *id*, 33–47; Thomas W. Merrill, Marbury v. Madison *as the First Great Administrative Law Decision*, 37 J. MARSHALL L. REV. 481, 521–22 (2004). And for the claim that legality itself is completely compatible with deference style *Chevron*, *see* Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1 (1983).

"fix" interpretations of rights compared to what judges are able to do and should do under the sub-constitutional version of *Chevron* (including in line with the suggestions I have alluded to before in Part V).[426]

A more serious question, in my view, is not whether this move to "administrativize" constitutional rights adjudication is legally permissible but whether it is politically feasible in the conditions that exist in the contemporary United States. As things currently stand, the answer seems to be no, and emphatically so. Present-day administrative law is now under fierce attack in the United States, both in the courts and beyond.[427] And there are strong, more than plausible speculations that the days of some crucial tenets of contemporary administrative law, including ones I build on here, and especially *Chevron*, are numbered.[428] The entire domain of administrative law may also shrink if the non-delegation doctrine, which is in many ways the entrance gate to the field itself, is about to make a comeback, as some credibly estimate.[429]

In these conditions, my proposal to administrativize constitutional rights adjudication by introducing the administrative law model would justly strike readers as fanciful. Some would say it should be pronounced dead before it is even born.

But that may be too quick. While this present "anti-administrativism"[430] is certainly strong today, it is unclear whether it is truly here to stay. Another valid possibility is that the anti-administrativism seen today is transient rather than enduring. It is merely a last move by a dying or decaying constitutional order or regime (or cycle) that might be replaced by a new order instead.[431] And this new

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426. *See supra* note 357 Part V.B.

427. *See* Metzger, *supra* note 39, 8–33.

428. *See* Kisor v. Wilkie, 139 S.Ct. 2400, 2437 (2019) (Gorsuch J., concurring). For a recent survey of the debate around *Chevron* and its potential demise, *see* Christopher J. Walker, *Attacking* Auer *and* Chevron *Deference: A Literature Review*, 16 GEO. J. L. & PUB. POL'Y. 103 (2018); Kristin E. Hickman & Aaron L. Nielson, *Narrowing* Chevron*'s Domain*, 70 DUKE L.J. 931, 933–40 (2021). And as this Article was in preparation for press, the Supreme Court has decided to grant cert in a case that puts the continued validity of Chevron directly on the Court's agenda. *See* Loper Bright Enterprises v. Raimondo, 22–451 (May 2023). Just as this Article was in final preparation to print, the Supreme Court was set to hear arguments in two cases that squarely present the question of Chevron continued validity, *Loper Bright* and *Relenetless*. For my own views on where the issue should lead, in the context of administrative law rather than constitutional law on which I focus on this paper, *see* Oren Tamir, *Our Parochial Administrative Law*, 97 S. CAL. L. REV. (forthcoming, 2024) especially Part IV.B.

429. *See* Gundy v. U.S., 139 S. Ct. 2116, 2136, 2144 (2019) (Gorsuch J., dissenting); Daniel Walters, *Decoding Nondelegation After* Gundy*: What the Experience in State Courts Tells Us About What to Expect When We're Expecting*, 71 EMORY L.J. 417 (2022). On the recent emergence of the Major Questions Doctrine which seems to reinforce some of the ideas underlying the non-delegation doctrine, *see* Tamir, *supra* note 146.

430. Metzger, *supra* note 39, at 4.

431. For these suggestions, *see generally* MARK TUSHNET, TAKING BACK THE CONSTITUTION: ACTIVIST JUDGES AND THE NEXT AGE OF AMERICAN LAW (2020); JACK M. BALKIN, THE CYCLES OF CONSTITUTIONAL TIME (2020).

constitutional order might be not only much more hospitable to the present tenets of administrative law on which the model of constitutional rights adjudication fleshed-out here crucially builds, but it could also bring these tenets "all the way up"[432] to constitutional law.[433]

Of course, it is far too soon to tell whether this new constitutional order or regime will crystalize. There are some reassuring indications in this direction, including the calls for "court reform" that have been circulating of late, gaining steam, and even leading to the establishment of a presidential commission to explore the issue (which has recently concluded its work).[434] However, there are contradictory indications as well. The important point for my purposes, though, is the existence of the possibility itself. It should not be readily assumed that the United States is doomed to live with anti-administrativism for the long term or, for that matter, with the present state of constitutional rights adjudication.

In fact, to the extent that I am right in suggesting that the administrative law model has all these virtues suggested throughout this Article, and that it can be achieved immediately without the need to resort to constitutional amendment, there are reasons to think that realizing that the administrative law model exists would in fact increase the likelihood of this positive, beneficial change, if not immediately then at least in the medium term. More specifically, the discussion above emphasizes that the administrative law model can gain support from multiple audiences and thus may serve as a kind of "fierce compromise"[435] and a place where opposing forces can "come to rest,"[436] very much like administrative law itself used to be perceived.

For example, because the administrative law model respects categorical thinking about rights and context-specificity and is hospitable to both legalistic modes of reasoning and more prescriptive modes, both sides in these debates could potentially coalesce around this model. Moreover, because the administrative law model injects a substantial dose of political constitutionalism into the context of rights adjudication while retaining a potentially meaningful place, albeit secondary and mostly procedural, for courts, the administrative law

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432. I draw this from Mila Sohoni, *Administrative Law all the Way Up*, JOTWELL, November 6th, 2020, https://adlaw.jotwell.com/administrative-law-all-the-way-up/.

433. Of course, my presentation here glosses over many important details about how constitutional orders transpire and reflect through the courts but is nonetheless compatible with the basic contours of this "regime" perspective on constitutionalism. For general discussions, *see supra* note 432.

434. For an optimistic take on the consequences of the Commission's report for the future of the reform movement, *see* Ryan D. Doerfler & Samuel Moyn, *Court Reform is Dead! Long Live Court Reform!*, THE ATLANTIC, December 12, 2021, available at https://www.theatlantic.com/ideas/archive/2021/12/commission-supreme-court-may-revive-reform/620969/.

435. George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557 (1996).

436. Wong Yang Sung v. McGrath, 339 U.S. 33, 40 (1950).

model might also draw in both those who have more Thayerian sympathies[437] and those who seek a more robust judicial role.[438] And since the opening of the gates for reviewing initiation claims under the administrative law model can be done, as we have seen in Parts III & IV, in ways that not only enhance governmental regulation but also reduces it (specifically, because of the possibility of a constitutional obligation to "look-back" and the enforcement of a nascent right to effective government)—it can potentially draw in again multiple coalitions of support from both libertarians and progressives.[439]

As is always the case with these things, only time will tell if all this is indeed possible. But there is no reason to assume or behave as though it is not. Doing so may itself have an undesirable Pygmalion effect.[440]

B. Elsewhere

All of this is about the desirability and feasibility of the administrative law model in the United States under current legal conditions. But what about outside the United States? After all, I have suggested that the administrative law model might be a truly global model of constitutional rights adjudication. More ambitiously, the model may displace the reliance on existing models, especially proportionality, given its pervasiveness in this global context.

Unfortunately, here it is harder to say with similar confidence that the administrative law model might be accomplished in full under existing legal conditions. While I have given reasons that support its normative appeal generally, not only in the United States, one point suggests caution in extending the administrative law model globally too quickly. The point is that constitutional rights adjudication in other systems, both domestic and international, operate based on a different legal foundation than that which exists in the United States, making the immediate implementation of the administrative law model tricky.

More specifically, most jurisdictions beyond the United States have general or specific limitations clauses in their relevant legal documents that substantiate their rights adjudication structures.[441] And today, these limitation clauses are understood by many to substantially limit the ability of judges to reason about rights in a categorical and legalistic ways. They require, in the relevant jargon

437. On the left, *see* Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CAL. L. REV. 1703 (2021). On the right, *see* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION (2006).

438. *See, e.g.*, Daniel Epps & Ganesh Sitaraman, *The Future of Supreme Court Reform*, 134 HARV. L. REV. F. 398 (2021).

439. On the libertarian sympathy for "lookback," *see* Christopher DeMuth, *Can the Administrative State Be Tamed?*, 8 J. LEG. ANAL. 121 (2016). For a progressive endorsement of "minimalism and experimentalism," including the value of lookbacks, *see* Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO. L.J. 53 (2011).

440. *Cf.* Vicki C. Jackson, *The (Myth of un) amendability of the U.S. Constitution and the Democratic Component of Constitutionalism*, 13 INT'L J. CONST. L. 575 (2015).

441. On limitation clauses generally, *see* Grimm, *supra* note 86, at 384–86.

often used in discussing these clauses, that limitations on rights come from "external" sources rather than "internal" ones.[442] These external sources are the more-explicitly moral, political, and empirical reasons the proportionality model draws on more systematically.

To the extent that this is indeed the prevailing legal understanding about limitation clauses that are in force today in most jurisdictions outside the United States, or the expectation that these limitation clauses have generated around them, it would clearly be difficult to implement the administrative law model fully there. As we saw, a central feature of this model is that it enables both judges and decision-makers in politics to move quite freely, and in an un-tilted or unbiased way, from adjudicating rights in more categorical and legalistic ways to adjudicating rights in more flexible and prescriptive ways (or, again in the relevant jargon, from internal to external limitations on rights).

This suggests therefore that the possibility of considering the embrace of the administrative law model in full in other places outside the United States would likely need to await an amendment in the legal documents—constitutional or otherwise—that are the foundation for these places' structures of constitutional rights adjudication.[443] And, indeed, to the extent that the administrative law model does have general appeal, as I have claimed, an important question that this model puts on the agenda of both comparative constitutional law scholars and constitutional drafters is whether, going forward, limitation clauses (either general or specific) and perhaps contrary to what many believe has become a staple of modern constitutionalism and part of the so-called "postwar paradigm" of constitutional rights,[444] are at all needed and desirable. Maybe the perception that the lack of a general limitation clause in the US Constitution is a bug rather than a feature should be flipped on its head. Alternatively, a fruitful path for scholars and drafters to consider in the future, given the recognition of the administrative law model and its existence beyond the binary, is how to phrase limitation clauses in a way that would guarantee that no tilt between "internal" and "external" reasoning about rights would develop, as the administrative law model suggests is potentially important for a healthy legal system and culture of rights, certainly in the long term.

But while relevant amendments might be a condition for adopting the administrative law model in full outside the United States, there's nothing that should prevent systems from considering immediately adopting the administrative law model at least in part. Indeed, there seems to be nothing that holds systems from immediately considering displacing the proportionality protocol with the standard of reasoned decision-making as a tool for evaluating rights disputes.

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442. For this distinction, *see, e.g.*, Gardbaum, *supra* note 81, at 426.

443. Or at least a substantial political movement in this direction in a way that would more clearly change the equilibrium of expectation from the kind of work that limitation clauses require.

444. *See* Lorraine E. Weinrib, *The Postwar Paradigm and American Exceptionalism*, in THE MIGRATION OF CONSTITUTIONAL IDEAS 84 (Sujit Choudhry ed., 2006).

Moreover, there is nothing that should prevent systems from considering incorporating the super-weak standard of review for initiation claims as well as the principle of "anti-abdication." All are prominent features of the administrative law model. All have strong potential normative support, or so I have suggested before. And all of those do not seem to be in any obvious way blocked by the existence of limitation clauses.[445]

In fact, looking at conversations going on globally about the state of constitutional rights adjudication, one might find signs that this sort of move to partially embrace the administrative law might be exactly what the doctor ordered, certainly in some places or contexts. For example, there is now renewed discussion in jurisdictions like Israel[446] and the United Kingdom[447] about the appropriate place of the judiciary in adjudicating constitutional rights, partly because of a sense of growing and illegitimate "juristocracy."[448] Bringing in the standard of reasoned decision-making to displace proportionality and creating a more procedurally focused dialogue between courts might responsibly address the concerns voiced by both sides in these debates.

In addition, international human rights and comparative constitutional law scholars have noticed of late the rise of what has been dubbed a "procedural turn"[449] in rights adjudication, most prominently perhaps in the European Court of Human Rights but also beyond.[450] This is again partly in response to a recent concern of judicial overreach in matters of rights that has encouraged courts to move to more procedural, rather than substantive, elements in their review processes. However, it is also partly the result of the trend, noted above and related to the rise of global administrative or policy states, of increased "fact-y-ness" in

445. A qualification here may be that some constitutional texts specifically refer to proportionality. *Cf.* Grimm, *supra* note 86, 388. However, it seems that for the reasons mentioned in Part IV, the reasoned decision-making standard *can* be squared with these textual provisions, though I forgo elaborating the precise analysis here.

446. *See, e.g.*, Yonah Jeremy Bob, *Sa'ar Rolls Out Push for Separation of Powers in Israel Gov't*, The Jerusalem Post, June 23, 2021, https://www.jpost.com/israel-news/politics-and-diplomacy/saar-rolls-out-push-for-separation-of-powers-in-israels-govt-671840

447. There are currently processes for discussing reforms to the key rights instrument in the United Kingdom, the Human Rights Act 1998. *See* HUMAN RIGHTS ACT REFORM: A MODERN BILL OF RIGHTS, A CONSULTATION TO REFORM THE HUMAN RIGHTS ACT 1998, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040409/human-rights-reform-consultation.pdf. For recent surveys of the developments, from scholars who are generally inhospitable to them or weary about them, *see* Stephen Gardbaum, *Does the UK Need a Modern Bill of Rights?*, CONSTITUTIONAL LAW MATTERS, March 17th, 2022, https://constitutionallawmatters.org/2022/03/does-the-uk-need-a-modern-bill-of-rights-by-stephen-gardbaum/; Tom Hickman, *A UK Bill of Rights?*, 44 LONDON REV. OF BOOKS, March 24th, 2022, https://www.lrb.co.uk/the-paper/v44/n06/tom-hickman/a-uk-bill-of-rights?fbclid=IwAR2rA_YcCMLJ-UDSSzc2yiwjszc7qa9gPcA0M0PQJv8fSJz08dgcwvVnzWs.

448. HIRSCHL, *supra* note 41.

449. Arnardóttir, *supra* note 42.

450. For a compilation of essays focusing on this development in European international human rights law and (to a lesser extent) domestically, *see* PROCEDURAL REVIEW IN EUROPEAN FUNDAMENTAL RIGHTS CASES (Janneke Gerards & Eva Brems eds., 2017).

constitutional rights adjudication.[451] The reasoned decision-making standard might have something important to contribute to ongoing discussions about how to extend this "procedural turn," for instance by supplying more doctrinal structure to the way courts have so far carried it out (including what to look for in a well-supported and adequate governmental reasoning process). My more skeptical notes about the possibility of applying process review to legislative bodies and the suggestion for establishing a legislative bureaucracy in charge of "legislative due process," discussed in Part V,[452] might moreover contribute to ongoing debates in this context.

Finally, the COVID-19 pandemic has put on the radar of constitutional courts, scholars, and practitioners around the world the problems of governmental "underreach"[453] and not only overreach. That is, that a deep contemporary constitutional concern is not only and even primarily a concern with putting limitations on governments—which is, of course, the classic constitutional obsession—but rather one about making sure that governments effectively operate to address the issues of the day. The potential for the expanded focus that comes with the administrative law model to initiation claims, which, as we have seen, is absent from present models, could provide lawyers and courts with responsible tools to address precisely these concerns.

CONCLUSION

Administrative law is sometimes regarded as "the poor relation of public law; the hard-working, unglamorous cousin laboring in the shadow of constitutional law."[454] Other US scholars have described administrative law as "boring,"[455] as a field not fitting "for sissies,"[456] and which students tend to "dislike,"[457] even extremely so. Administrative law has a similarly awful reputation well beyond the United States also.[458]

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451. *See, e.g.*, Alberto Alemanno, *The Emergence of the Evidence-Based Reflex: A Response to Bar-Siman-Tov's Semiprocedural Review*, 1 THEORY & PRAC. OF LEGIS. 327 (2015).

452. *See supra* Part V.C.

453. *See* Pozen & Scheppele, *supra* note 43.

454. Tom Ginsburg, *Written Constitutions and the Administrative State: On the Constitutional Character of Administrative Law*, in COMPARATIVE ADMINISTRATIVE LAW 60, 60 (Susan Rose Ackerman, Peter L. Lindseth & Blake Emerson eds., 2018).

455. William Funk, *My Ideal 'Casebook' or What's Wrong with Administrative Law Education and How to Fix It*, 38 BRANDEIS L.J. 247 (2000).

456. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 511.

457. Sidney A. Shapiro, *The Top Ten Reasons that Law Students Dislike Administrative Law and What Can (and Should) Be Done About Them?*, 38 BRANDEIS L.J. 351 (2000).

458. *See, e.g.*, David Dyzenhaus, *Dignity in Administrative Law: Judicial Deference in a Culture of Justification*, 17 REV. CONST. STUD. 87, 88 (2012) (describing the pervasive belief that Canadian administrative law is "boring").

In a way, my claim in this Article has been that there's nothing further than the truth than that. Administrative law is far from boring or marginal. And it is not only a shadowy law marching behind constitutional law. Properly calibrated and adapted, the field of US administrative law's "province"[459] or "empire"[460] can be extremely wide. As I argued here, this field can stretch all the way up to constitutional law and help inspire a new model of constitutional rights adjudication that substantially diverges from the present hegemonic models of proportionality and categorical reasoning.

My goal here was largely to introduce this new administrative law model for the first time. I also highlighted this model's key strengths and weaknesses as well as suggested where it might be appropriate and feasible already today, whether in full (the United States) or more piecemeal (beyond the United States). Given the novelty of this model, the discussion here, while high on word count, was still preliminary in nature. Operationalizing the administrative law model and giving more nuance and content to its various components generally and in specific settings would require further work, which I hope this Article will inspire both within the United States and more globally. For now, though, what does seem clear is that going forward, the administrative law model certainly deserves a permanent place in the constitutional toolkit. Whereas in the past the world of constitutional rights adjudication could have been accurately described as stuck in a binary, we have now hopefully moved beyond.

459. THE PROVINCE OF ADMINISTRATIVE LAW (Michael Taggart ed., 1997).

460. Jacob E. Gersen, *Foreword—Administrative Law's Shadow*, 88 GEO. WASH. L. REV. 1071 (2020).