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INTRODUCTION

No one has seemed to notice a sharp divergence in two very prominent areas of legal scholarship. In statutory interpretation and constitutional theory, scholars offer very different solutions to the same core problem. The problem is basic and familiar to all: how do we justify judicial power in a post-realism age? At a time when judging is understood to be an active, creative enterprise, scholars work very hard to reconcile judicial power with democracy. Yet these same scholars overlook that the dominant responses to this problem are trending in opposite directions. In statutory interpretation, the favored solution is formalism. Scholars, lawyers, and judges alike rely on formalism to cabin judicial discretion and render judges more faithful agents of Congress. In constitutional theory, by contrast, the more common approach is to reject formalism and even embrace some amount of judicial discretion. Rather than seek to eliminate judicial discretion, many constitutional scholars rely on discretionary tools to minimize judicial intrusions into the political process.

This overlooked disparity can be explained—though not ultimately justified—by the different agency relationships at issue in statutory interpretation and constitutional law. In statutory interpretation, scholars focus on the relationship between Congress as principal and the judiciary as agent. The concern is that politically insulated judges, who are supposed to serve as Congress’s agents, will take liberties with statutory text and substitute their judgments for those of their principal. To solve this agency problem and render judges more faithful agents of Congress, scholars tend to try to cabin judicial discretion and tie judicial interpretations more
closely to statutory text. Although debate permeates the field and only a small portion of scholars directly associate themselves with the textualist movement, the broad trend in statutory interpretation has been toward cabining judicial discretion and imposing formal limits on the interpretive enterprise. Having cast the problem as a principal-agent problem, statutory scholars have gravitated toward formalism in coping with this problem.

In constitutional theory, by contrast, scholars focus less on principal-agent relationships and more on power relations among agents. Although some constitutional scholars seek to promote judicial fidelity to the Founding generation that drafted and ratified the Constitution (and others seek to promote fidelity to principle without regard to its origins), there is an increasingly popular approach that is less concerned with judicial fidelity to law or the Founders. Today, many leading scholars focus instead on limiting the power that judges enjoy over other constitutional agents: Congress, the President, state officials, and future generations of judges appointed by future political administrations. In pursuit of this goal, constitutional scholars employ strategies that, instead of cabining judicial discretion, work to ensure that judges do not cabin the discretion of other constitutional actors. In sharp contrast to the trend toward formalism in statutory scholarship, these constitutional theorists do not rely on formal legal constraints to control judicial behavior, but instead allow judges a fair amount of flexibility to structure their behavior based on extra-legal considerations. So long as judges exercise discretion in a manner that limits intrusions into the political process and leaves open as much as possible for others to decide, these constitutional scholars do not consider judicial discretion to be the problem that statutory scholars believe it to be.

Although this overlooked disparity between statutory and constitutional scholarship can be explained, I suggest that it cannot be justified. When we examine the divergent trends in statutory interpretation and constitutional theory, we find that scholars have overlooked commonalities that can be just as important as the differences. Upon closer analysis, we find that principal-agent and agent-agent problems loom large in both fields, and that formal rules and flexible tools have roles to play in both areas—even if scholars tend to emphasize one and
to overlook the other. Any coherent response to the problem of judicial power cannot focus narrowly on one aspect of the problem or on one set of solutions. When scholars ignore half of the problem and half of the available solutions, they do not simply miss out on an intellectual opportunity, but they may actually undermine their own projects. In statutory interpretation and constitutional theory alike, a one-sided approach can have the unintended effect of aggravating, rather than assuaging, the tension between judicial power and democracy.

What is most puzzling about the tendency among statutory and constitutional scholars to gravitate toward the extremes is that scholars in other adjacent fields have avoided this tendency and pursued a more balanced approach to the problem of judicial power. Consider, for example, how scholars, lawyers, and judges have approached the problems surrounding judicial power in the field of administrative law. Like statutory interpretation and constitutional theory, administrative law at its core is concerned with the tension between judicial power and democracy. After all, any time a court reviews an agency decision, it risks injecting the policy views of politically insulated judges into the political process. Yet, administrative law generally has avoided the sweeping pronouncements and sharp trends that have tended to characterize statutory and constitutional scholarship. In this respect, administrative law has something to teach scholars of statutory interpretation and constitutional theory about the value of balance. Unlike statutory and constitutional scholarship, administrative law seeks both to allocate power among agents (courts and administrative agencies) and to ensure that these agents are faithful to their principal (Congress). Moreover, in part because of its hybrid nature, administrative law has employed a variety of tools that are designed both to cabin judicial discretion and to limit judicial intrusions upon the discretion of other government actors. Formal rules and flexible tools co-exist in administrative law, revealing how each can be used to offset the other’s excesses. Administrative law’s balanced conception of the problem to be addressed, and its willingness to explore an array of potential solutions, stands in marked contrast to the one-sided manner in
which many statutory and constitutional scholars have tended
to frame problems and advance solutions.

In highlighting the pitfalls of formalism in statutory interpreta-
tion and anti-formalism in constitutional theory, this Article will
single out specific trends and scholars in both fields for criticism. In
the field of statutory interpretation, this Article will question the
trend toward textualism generally, criticize the work of Justice
Scalia\(^1\) in particular, and respond directly to John Manning’s criti-
cism of my critique of textualism in a recent exchange.\(^2\) I will argue
that textualists have placed undue emphasis on formalist strategies
designed to render judges more faithful agents of Congress. Textu-
ralism’s single-minded focus on faithful agent theory, and its exces-
sive reliance on formalism, may inadvertently enhance the power
that judges wield vis-à-vis public officials, private citizens, future
judges appointed by future political administrations, and even
Congress itself. Indeed, in its extreme form, textualism tends to ag-
grandize, rather than limit, judicial power. This Article will urge
statutory scholars to heed administrative law’s lessons and broaden
their conceptions of both the problem and the available solutions.
Such a strategy would lead scholars to embrace flexibility as an an-
tidote to the excesses of formalism, to acknowledge the dynamic
nature of statutory interpretation, and to curtail judicial power vis-
à-vis other constitutional actors.

In the field of constitutional theory, this Article will criticize the
trend toward minimalism captured by the work of Cass Sunstein
and several other prominent constitutional scholars.\(^3\) Once again

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\(^1\) See, e.g., Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law
25 (1997) [hereinafter Scalia, Matter of Interpretation]; Antonin Scalia, Judicial Def-
erence to Administrative Interpretations of Law, 1989 Duke L.J. 511, 516; Antonin
Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1178 (1989) [here-
inafter Scalia, Rule of Law]; see infra notes 105–12 and accompanying text.

\(^2\) See John F. Manning, What Divides Textualists from Purposivists?, 106 Colum. L.
Rev. 70, 75 (2006) [hereinafter Manning, Textualists from Purposivists] (critiquing
[hereinafter Molot, Textualism]).

\(^3\) See Cass R. Sunstein, One Case at a Time: Judicial Minimalism on the Supreme
Court 39–41 (1999) [hereinafter Sunstein, One Case at a Time]; Cass R. Sunstein, In-
completely Theorized Agreements, 108 Harv. L. Rev. 1733 (1995); Cass R. Sunstein,
On Analogical Reasoning, 106 Harv. L. Rev. 741 (1993); Cass R. Sunstein, The Su-
preme Court, 1995 Term—Foreword: Leaving Things Undecided, 110 Harv. L. Rev. 4
(1996) [hereinafter Sunstein, Leaving Things Undecided]. Sunstein is not just a lead-
using administrative law as a vantage point, this Article will suggest that constitutional minimalists have placed undue emphasis on flexible strategies designed to limit judicial intrusions into the political process. These minimalists overlook that their excessive reliance on judicial flexibility may end up weakening an important check on the power of judges and political actors. This Article will suggest that contemporary minimalists have strayed too far from their roots and, specifically, from Alexander Bickel, who gave birth to their movement but recognized the value both of judicial restraint and of judicial fidelity to law. If constitutional theorists were to heed administrative law’s lessons, they would embrace formal legal constraints as well as judicial flexibility and, in so doing, would promote judicial fidelity to law as well as judicial respect for the political process.

This Article is organized as follows. Part I will lay out the seemingly contradictory responses to strikingly similar problems in statutory interpretation and constitutional theory. In grappling with the countermajoritarian difficulty, scholars in these two fields often focus narrowly on one aspect of the problem and on one set of potential solutions. Part II then will explore how administrative law doctrine and scholarship have tended to avoid the sharp divides and one-sided approaches that often dominate statutory and constitutional scholarship. In administrative law we find a more balanced conception of the problem and a wider range of strategies to deal with it. Finally, Part III will use administrative law as a vantage point from which to criticize the scholarship on statutory interpretation and constitutional theory.

I. DIVERGENT TRENDS IN STATUTORY INTERPRETATION AND CONSTITUTIONAL THEORY

Scholars of statutory interpretation and constitutional theory grapple with the same core problem, even if they often fail to ac-

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knowledge the overlap. Both bodies of scholarship struggle to define and defend judicial power in a democracy. But if scholars are struggling with the same problem, they tend to focus on different aspects of the problem and this has led them to embrace divergent solutions. The discussion below explores the very different ways in which statutory and constitutional scholars have framed and addressed the problem of judicial power.

Before proceeding with that discussion, two caveats are in order. First, I want to be clear that the tension I explore below is between what I view as the ascendant trends in statutory and constitutional scholarship. My aim is not to catch individual theorists in an internal contradiction. To the contrary, those who favor textualism in statutory interpretation often favor originalism in constitutional interpretation. Prominent formalists like Justice Scalia are wholly consistent in this respect. So too are prominent anti-formalists like Justice Breyer internally consistent, as they tend to challenge both textualism in statutory interpretation and originalism in constitutional interpretation. In both fields, the anti-formalists gravitate away from formalism and toward pragmatism. But if individual judges and scholars may be internally consistent, the dominant trends (as I view them) are not. In my view, formalism has gained ground in statutory interpretation and lost ground in constitutional theory, and I aim to explore why that is the case. If someone is switching sides from one field to the other, it is important to understand why.

Second, in exploring what I view as a tension between dominant trends in two fields, I run the risk of oversimplifying academic debate in both. In constitutional theory, for example, one cannot map all scholarship using “formalism” as the only axis. Certainly there is a lively debate in constitutional theory between formalist originalists and anti-formalist pragmatists, but there also are Dworkinian non-originalists who advocate a search for the single best, right answer. My goal is not to offer a definitive account of either constitutional theory or statutory interpretation, but rather to paint with a broad enough brush that overarching comparisons are more easily digested. I apologize for oversimplifying and hope that my intentional willingness to do so ends up advancing, rather than detracting from, my project.
With those two caveats, I proceed below to lay out what I view as an overlooked tension between important trends in statutory interpretation and constitutional theory.

A. Cabining Judicial Discretion in Statutory Interpretation

Over the last couple of decades, scholars, judges, and lawyers have become increasingly concerned with the possibility that judges might abuse their discretion in statutory interpretation. The concern is that judges may take liberties with statutory language, stretching that language in an effort to effectuate underlying legislative purposes. The problem with such a strong purposivist approach to interpretation, scholars observe, is that it risks confusing the policy preferences of judges with those of the enacting legislature.\(^5\) Instead of enforcing Congress’s statutory bargains, purposivist judges may exercise interpretive leeway in a manner that reflects their own political biases.

In the name of legislative supremacy, scholars, judges, and lawyers have worked to cabin judicial leeway and tie statutory interpretation more closely to statutory text.\(^6\) This effort to curtail judicial leeway has been most prominent among self-proclaimed textualists. Justices Scalia and Thomas,\(^7\) Judge Easterbrook,\(^8\) and

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\(^2\) See Molot, Textualism, supra note 2, at 30–36.

\(^3\) See, e.g., Scalia, Rule of Law, supra note 1, at 1178; William N. Eskridge, Jr., Textualism, the Unknown Ideal?, 96 Mich. L. Rev. 1509, 1513 (1998) [hereinafter Eskridge, Unknown Ideal] (reviewing Scalia, Matter of Interpretation, supra note 1) (describing jurisprudence of Scalia and Thomas).

\(^4\) See Easterbrook, supra note 5, at 67–68; see also Jane S. Schacter, The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond, 51 Stan. L. Rev. 1, 3 n.3 (1998) (noting prominent textualist appeals court judges).
leading scholars such as John Manning\(^9\) and Adrian Vermeule\(^10\) have attacked purposivist interpretive strategies and made a powerful case for textualism. Where purposivism had allowed judges a great deal of flexibility to stretch legislative words in order to facilitate legislative purposes, textualism does the opposite. Textualism seeks to impose formal limits on judicial discretion and to eliminate judicial flexibility as much as possible. It is not that textualists purport to eliminate judicial leeway completely. Rather, textualists believe that by emphasizing statutory text over statutory purposes, and by excluding legislative history in particular, they can cabin that leeway and go a long way toward minimizing judicial flexibility.\(^11\)

It is not just self-proclaimed textualists who have moved toward limiting judicial discretion and hewing more closely to statutory text. Textualism’s core observations about the pitfalls of purposivist interpretation have had their effect on non-adherents and adherents alike. Few judges or scholars today embrace the strong purposivism that textualists set out to discredit two decades ago. Having highlighted the leeway inherent in a purposivist search for statutory meaning, textualists have had little trouble convincing mainstream judges and scholars of the value of cabining judicial discretion and placing a renewed emphasis on statutory text. Empirical studies by prominent scholars and judges\(^12\) and anecdotal evidence from scholars who

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\(^9\) See, e.g., Manning, Nondelegation Doctrine, supra note 5, at 684–89; Manning, Textualists from Purposivists, supra note 2, at 76.


\(^11\) See, e.g., id. at 79. William Eskridge explains:

According to the new textualists, consideration of legislative history creates greater opportunities for the exercise of judicial discretion. This discretion enhances the risk that the Court will exercise its own ‘WILL instead of JUDGMENT’ . . . . A focus on the text alone, it is argued, is a more concrete inquiry which will better constrain the tendency of judges to substitute their will for that of Congress.


\(^12\) See Eskridge, New Textualism, supra note 11, at 656 (noting in 1990 that “[i]n each year that Justice Scalia has sat on the Court, . . . his theory has exerted greater influence on the Court’s practice” and that “the Court is now somewhat less willing to refer to legislative history when the statutory text has a plain meaning”); Thomas W.
follow statutory interpretation decisions\textsuperscript{13} confirm that textualism has had a measurable impact even on judges and justices who do not include themselves among textualism’s adherents.\textsuperscript{14} Although one finds more textualist rhetoric in the opinions of Justices Scalia and Thomas than in those of other Justices, other Justices regularly join the opinions of these self-proclaimed textualists\textsuperscript{15} and even embrace textualist values in

\begin{quote}


some of their own opinions. Judges and scholars generally accept that courts should be faithful to legislative instructions

16 See, e.g., Bates v. United States, 522 U.S. 23, 29 (1997) (Ginsburg, J.) (“We ordinarily resist reading words or elements into a statute that do not appear on its face.”); Landgraf v. USI Film Prods., 511 U.S. 244, 286 (1994) (Stevens, J.) (“Statutes are seldom crafted to pursue a single goal, and compromises necessary to their enactment may require adopting means other than those that would most effectively pursue the main goal.”); Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 646–47 (1990) (Blackmun, J.) (“[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute’s primary objective must be the law.”) (emphasis and internal quotation marks omitted); Bd. of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp., 474 U.S. 361, 374 (1986) (Burger, C.J., for a unanimous Court) (“Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises. Invocation of the ‘plain purpose’ of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent.”); Am. Hosp. Ass’n v. NLRB, 499 U.S. 606, 617 (1991) (Stevens, J.) (discussed in Easterbrook, supra note 5, at 67).


and follow laws enacted through bicameralism and presentation, rather than make new laws themselves. The consensus in statutory interpretation today is to respond to the countermajoritarian difficulty with judicial power by curbing judicial discretion and hewing closely to statutory text. Indeed, even those who question textualism’s more extreme assertions have gone a long way toward accepting textualism’s core insights.  

B. Cabining Judicial Power in Constitutional Theory

In constitutional theory, by contrast, scholars focus less on ensuring that judges remain faithful to their principals—in this case those who drafted and ratified the Constitution—and more on limiting the power judges enjoy over other constitutional agents. The countermajoritarian difficulty here is primarily a product of power relations among constitutional agents, rather than between principal and agent, and the goal is to limit judicial intrusions upon the power of Congress, the President, and state governments. Rather than seeking to impose formal limits on judicial discretion, as statutory scholars have tended to do, constitutional theorists seek to prevent judges from imposing such limits on others.

1. Constitutional Theory’s Different Focus

Constitutional theory’s different focus flows in large part from two inherent differences between constitutional and statutory interpretation. First, in constitutional interpretation it is more difficult to constrain judges in the name of their principal because text and context are generally less constraining than in statutory interpretation. Second, to the extent that judges have freedom to make law themselves, the dangers associated with such lawmaking are far greater in constitutional law.

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19 See, e.g., Eskridge, All About Words, supra note 18, at 991–92 (suggesting, in a debate with Manning over faithful agent theory, that “judges interpreting statutes” were thought at the Founding to be “both agents carrying out directives laid down by the legislature and partners in the enterprise of law elaboration”) (emphasis added); William N. Eskridge, Jr. & Philip P. Frickey, Statutory Interpretation as Practical Reasoning, 42 Stan. L. Rev. 321, 340 (1990) [hereinafter Eskridge & Frickey, Practical Reasoning] (“‘[A]tributing’ purposes to ad hoc statutory deals is nothing if not judicial lawmaking.”).
That constitutional text and context are less constraining than statutory text and context is somewhat intuitive. The specificity of legislative instructions may vary from one statute to the next, depending upon how much power Congress wants to delegate to administrative agencies, on its confidence in its understanding of the problems at hand, on the political dynamics surrounding a statute’s enactment, and on the care that legislators devote to the drafting process. But if statutory texts vary widely, they are virtually always more detailed than the Constitution, which is a purposely open-ended document designed to retain its relevance over time and to accommodate new circumstances. Moreover, not only is constitutional text less constraining, but so is constitutional context. Formalists in statutory interpretation do not rely on text alone to constrain judges; they also rely upon context to help shed light on ambiguous texts. Although they do not try to get inside the heads of legislators or to scour the legislative process, formalists do try to figure out how ordinary readers at the time of enactment would have read the words employed in a statute. This inquiry into con-

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21 As Chevron explains, ambiguity in a statute could mean that Congress “consciously” neglected to address the question because it “desired” to leave the matter to the implementing agency; it could mean that Congress “simply did not consider the question”; or, it could mean that “Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency.” Chevron, U.S.A. v. Natural Res. Def. Council, 467 U.S. 837, 865 (1984).

22 See, e.g., McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) (“[W]e must never forget, that it is a constitution we are expounding.”).

23 See Easterbrook, supra note 5, at 64 (“Because interpretation is a social enterprise, because words have no natural meanings, and because their effect lies in context, we must consult these contexts.”); Eskridge, Unknown Ideal, supra note 7, at 1532 (“It is a truism that interpreting a text requires context. Scalia seeks to turn this truth to his advantage.”); Manning, Absurdity, supra note 13, at 2392–93.

temporary understandings is easier, and more constraining, for more recent enactments. For older statutes and the Constitution, context is often less constraining simply by virtue of the fact that more time has passed. To be sure, lawyers, judges, and scholars who engage in constitutional interpretation have a wealth of historical materials at their disposal. They can look to the notes of the Philadelphia Convention and state ratifying conventions, and to a variety of public exchanges during the Founding period. They also can look to prior and subsequent history to shed light on the meaning of ambiguous constitutional text. But when interpreters are called upon to apply a centuries-old document to current problems, context is likely to be much less constraining than when interpreters are called upon to apply a recent enactment, or even a less recent statute that is a product of the modern administrative era. Because textualism is an admittedly static approach to statutory interpretation—one that focuses on meaning at the time of enactment and resists evolutions in meaning over time—its strategy is much more promising with texts of more recent vintage.25

This is not to say that constitutional interpretation is always an open-ended exercise of broad discretion. Adjudication can resolve interpretive disputes and generate constitutional rules over time that are every bit as binding as precedents in the statutory context.26 But if the development of binding rules over time tends to constrain judges in constitutional matters, it renders them faithful agents of the judges who created those constitutional precedents, rather than of the Founders who actually drafted and ratified the Constitution.

Indeed, the power that early judges wield over later ones underlies a second, independent explanation for why constitutional theory has focused on agent-agent relations, rather than principal-agent relations. Any time we rely on formal rules to try to cabin judicial leeway, we affect not only the discretion of judges in cases of first impression, but also the power those judges enjoy to bind future generations of judges and political actors. If formalism may give principals more power over agents, as textualists suggest in

25 For a discussion of static versus dynamic approaches to interpretation, see infra notes 107–12 and accompanying text.
26 See, e.g., The Federalist No. 37, supra note 11, at 229.
statutory interpretation, it may also give early agents more power over subsequent agents. After all, formalist judges must announce the rules they purport to follow and, in so doing, they may bind not only themselves but also their successors.27

This problem is more significant in constitutional interpretation than in statutory interpretation because the longevity and impact of any single judicial interpretation is potentially far greater. The Constitution is an enduring document designed to last as long as our nation, not merely to address the problems of a single generation. Statutes, by contrast, often are crafted to address the problems of the day, and the statutory interpretation problems that obsess one generation may become obsolete for the next.28 More important, if times change and the people come to believe that judicial decisions need revision, it is much more difficult to overrule judicial decisions in the constitutional context. While it may be difficult to amend or repeal a statute,29 the constitutionally prescribed lawmaking procedures pale in comparison to the hurdles associated with amending the Constitution. If the Supreme Court makes a mistake interpreting the Constitution, or if the political climate changes and the people come to prefer a different interpretation, there is a distinct possibility that the problem will last for generations. Given the dangers associated with permitting a court to decide a constitutional question once and for all, it makes sense that constitutional theory would focus less on ensuring that judges are constrained by the Constitution and more on ensuring that judges do not unduly constrain other constitutional actors.

27 See Scalia, Rule of Law, supra note 1, at 1176–77.
28 As times change, it may not always be necessary for Congress to amend or repeal a statute in order to sidestep judicial interpretations. It may be that time overtakes the problem and that a statutory provision hotly contested in one generation becomes obsolete in the next, or, at the very least, that people find an alternative avenue to address the problem.
2. Constitutional Theory’s Different Strategy

Given constitutional theory’s different goals, it is not surprising that constitutional theorists also have emphasized different tools to achieve their goals. Where scholars in statutory interpretation rely on formal rules to cabin judicial discretion, scholars in constitutional theory may employ very different strategies to prevent judges from cabining the discretion of other constitutional actors. A growing number of prominent constitutional theorists are less concerned than statutory scholars with making sure that judges follow the law. They focus instead upon getting judges to tread lightly and to leave as much as possible for the political process to resolve. Where formalism has been on the rise in statutory interpretation, “minimalism” has come to dominate constitutional theory. So-called “minimalist” scholars may disagree over the extent of the problem and may vary in their prescriptions, but they seem almost uniformly to focus on the risk of judicial overreaching and the need to prevent, or at least reduce, judicial intrusions upon the political process. In sharp contrast to scholars of statutory interpretation, constitutional scholars may even embrace judicial discretion as an important part of their struggle with the countermajoritarian difficulty. So long as judges exercise their discretion in a way that limits intrusions into the political process—and that leaves some discretion to other constitutional agents—constitutional theorists view judicial flexibility as a positive, rather than a negative.

A prominent example of minimalism’s influence, and one that reveals the sharp contrast with formalism in statutory interpretation, is the work of Cass Sunstein, who coined the phrase “judicial minimalism.” Sunstein describes a minimalist approach that tends to “increase the scope for democratic deliberation about the issue at hand.” He defends a judicial practice of “saying no more than

31 See Cass R. Sunstein, Legal Reasoning and Political Conflict (1996); Sunstein, One Case at a Time, supra note 3, at 39–40; Sunstein, Leaving Things Undecided, supra note 3; see also Neal Kumar Katyal, Judges as Advicegivers, 50 Stan. L. Rev. 1709, 1713–15 (1998) (examining the relationship between Bickel’s and Sunstein’s ideas and building upon them).
32 Sunstein, One Case at a Time, supra note 3, at 39–40.
necessary to justify an outcome, and leaving as much as possible undecided” as a way to “promote more democracy and more deliberation.” More important than whether judges are bound by law is whether they exercise their discretion with due respect for the political implications of their decisions and for the freedom of political actors and future judges to adapt to the political times.

True, Sunstein does not take minimalism to such an extreme as to eliminate legal constraints from the judicial process altogether (a state of affairs that he would call “reasonlessness”). He concedes that judges must still justify outcomes using existing legal materials. But in his zeal for minimalism, Sunstein does not emphasize these legal constraints. Legal constraints may have a place in judicial decisionmaking, but for Sunstein the key to reconciling judicial power with democratic values lies in minimalism rather than adherence to law. He seems to accept legal principle grudgingly, rather than to embrace it as part of the solution to the countermajoritarian difficulty. In his view, placing too much emphasis on legal principle would foreclose too many options, and so such legal constraints should not be overemphasized. Sunstein would prefer that judges keep their options open and retain some discretion to avoid questions, to frame them narrowly, and to leave matters for future courts and future political administrations to decide. He emphasizes judicial flexibility as an integral part of his response to the countermajoritarian difficulty.

Although Sunstein may offer the most prominent example of minimalism, his work is best viewed as capturing a trend, rather than driving it. A wide array of constitutional theorists today share Sunstein’s goal of limiting judicial power over other constitutional actors, even if those scholars disagree with Sunstein (and one another) on a number of important matters. When Michael Dorf envisions “experimentalist” courts that avoid establishing binding legal principles and “rarely resolve contested questions of law in the sense of choosing one rather than another meaning of authoritative text,” he shares Sunstein’s project of limiting judicial control over

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33 Id. at 3–4.
34 See id. at 9–10 (distinguishing between “reasonlessness” and “minimalism”).
35 Id.
36 See id. at 26. Sunstein defends minimalism not only as democracy-promoting, but also as a way to minimize error and decision costs in most instances. See id. at 46–60.
the decisions of political actors and other judges. Though he may resist the label, Dorf in this respect is fairly characterized as minimalist. When Michael Seidman urges judges to unsettle, rather than settle, disputes, leaving open the possibility that values will be reshuffled in future cases, he too is advancing an argument that is fairly characterized as minimalist in at least some respects, even if it differs sharply from those of other minimalists. When Rachel Barkow criticizes the erosion of the political question doctrine and of judicial deference to Congress, and when Neal Katyal calls for judges to heed Senators’ views of the Constitution, they too are seeking to limit judicial power vis-à-vis other political actors and thus are embracing versions of minimalism.

Indeed, most of the literature on the respective powers of the courts and Congress to interpret the Constitution is sympathetic to the minimalist project. When Larry Kramer laments that the Court has claimed sole authority to interpret the Constitution—and has confused “judicial supremacy” with “judicial sovereignty”—he is

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38 See id. at 887 n.36 (citing Christopher J. Peters, Assessing the New Judicial Minimalism, 100 Colum. L. Rev. 1454, 1468–69 (2000), and arguing that “C.J. Peters misclassifies [him] as a minimalist”).
39 See Louis Michael Seidman, Our Unsettled Constitution: A New Defense of Constitutionalism and Judicial Review 7–9 (2001) [hereinafter Seidman, Unsettled Constitution]; Louis Michael Seidman, Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law, 96 Yale L.J. 1006, 1008 (1987) (“The work of judges can be understood as an effort to manipulate decisionmaking contexts . . . so as to preserve continuing, unresolved tensions between our universalist and particularist urges.”). Seidman’s argument is fairly characterized as “minimalist” in only some respects. Seidman differs from most minimalists insofar as he does not seek to restrict judges in justifying their decisions. To the contrary, he embraces a role for something akin to legal principles in judicial decisionmaking. But Seidman does not embrace legal principle as a static, constraining force. Rather, Seidman views judicial justifications of decisions as reflecting normative choices that are subject to revision in future cases. See Molot, Principled Minimalism, supra note 30, at 1780.
41 See Neal Kumar Katyal, Legislative Constitutional Interpretation, 50 Duke L.J. 1335, 1339–46 (2001) (arguing that judges are not sufficiently influenced by political views, that Senators during Supreme Court confirmation hearings should offer their views on constitutional interpretation, and that all nine Justices should pay attention to the Senate’s interpretations).
advancing a minimalist position. When Reva Siegel and Robert Post criticize the Court for “seek[ing] to exclude Congress from the process of constitutional lawmaking” and “regard[ing] the integrity of our system of constitutional rights as dependent upon its complete insulation from the contamination of politics,” they are making a minimalist argument as well. And, of course, scholars like Mark Tushnet, who have long argued for the abolition of constitutional judicial review, are minimalist.

Indeed, they are in important respects the forerunners of contemporary minimalism.

Although these scholars may disagree on very important levels, they all share an emphasis on leaving as much as possible to the political process or, at least, to future judges appointed by future political administrations. One might try to limit judicial power by cab-

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42 See Larry D. Kramer, *Marbury* and the Retreat from Judicial Supremacy, 20 Const. Comment. 205, 206–26 (2003) (criticizing the “new mythology in which judicial supremacy is treated as the logical and inexorable endpoint of a beneficent progress”); Larry D. Kramer, The Supreme Court, 2000 Term—Foreword: We the Court, 115 Harv. L. Rev. 4, 13 (2001) (“There is . . . a world of difference between having the last word and having the only word.”).


44 See Mark Tushnet, Taking the Constitution Away from the Courts (1999).

45 But cf. infra notes 115–19 (noting Bickel’s influence on contemporary minimalists). As Christopher Peters points out, there are many other scholars who can be classified as “minimalist” in the sense that they seek to promote inter-branch dialogue instead of judicial supremacy on constitutional issues. See Peters, supra note 38, at 1466–76 (discussing Robert A. Burt, The Constitution in Conflict (1992); Neal Devins, The Democracy-Forcing Constitution, 97 Mich. L. Rev. 1971 (1999) (reviewing Sunstein, One Case at a Time, supra note 3); Richard H. Fallon, Jr., The Supreme Court, 1996 Term—Foreword: Implementing the Constitution, 111 Harv. L. Rev. 54 (1997); Katyal, supra note 31).

46 Minimalism has been employed by both liberal and conservative judges, and liberal and conservative scholars. See Louis Michael Seidman, Romer’s Radicalism: The Unexpected Revival of Warren Court Activism, 1996 Sup. Ct. Rev. 67, 87 (1997) (“Both liberals and conservatives can regularly be found arguing for activism and for restraint in various contexts.”). Someone seeking to defend affirmative action, for example, might employ minimalist arguments against “heightened scrutiny in equal protection jurisprudence.” Stephen M. Griffin, Judicial Supremacy and Equal Protection in a Democracy of Rights, 4 U. Pa. J. Const. L. 281, 281 (2002). Or, as Suzanna Sherry has pointed out, conservatives may employ “majoritarian defense[s] of minimalism” to rally “against the Supreme Court’s relatively aggressive protection of individual rights.” Suzanna Sherry, An Originalist Understanding of Minimalism, 88 Nw. U. L. Rev. 175, 175 (1993) (commenting on Michael J. Perry, The Constitution, the Courts, and the Question of Minimalism, 88 Nw. U. L. Rev. 84 (1993)).
ining judicial discretion and requiring strict adherence to legal rules, as textualists have done in statutory interpretation and some originalists have done in constitutional theory. But this approach has not been as successful or as popular in constitutional theory as in statutory interpretation. In constitutional theory, scholars worry less about judicial discretion to stray from the Founders’ commands and more about judicial power to cabin the discretion of other constitutional agents. Far from being the problem that it is in statutory interpretation, judicial flexibility in constitutional theory is often embraced as part of the solution.

II. A Moderate Counterexample: Administrative Law

If scholars in statutory interpretation and constitutional theory are right to employ different strategies in their pursuit of different goals, the contrast between these fields and the adjacent public law field of administrative law raises questions about whether these scholars have been too single-minded in their focus. Where statutory scholars rely on formal legal constraints to assuage principal-agent problems and constitutional scholars rely on judicial flexibility to alleviate agent-agent problems, administrative law doctrine and scholarship employ both sets of strategies to tackle both sets of problems. The discussion below will explore administrative law’s hybrid nature, before turning back to explore the lessons it offers for scholars of statutory interpretation and constitutional theory.

A. Two Sets of Goals

Administrative law is something of a hybrid between statutory interpretation and constitutional law insofar as it is concerned both with relationships among agents and with the relationship between principal and agent. Much of administrative law focuses on the respective powers of agencies and courts. Every time a court reviews an agency decision, it must decide on the boundaries between judicial and administrative power. Yet, because agencies get their authority from Congress, judicial review of agency decisions focuses as well on ensuring that agencies serve Congress faithfully. In ad-

Cf. Scalia, The Rule of Law, supra note 1, at 1176–77 (advocating discretion-cabining approach in all sorts of judicial decisionmaking).
ministrative law, fidelity to the principal looms just as large as the distribution of power among Congress’s agents.

These two axes are very much interrelated, and can sometimes be in tension. The allocation of power between courts and agencies inevitably affects the allocation of power between agencies and Congress as well. Where judges intensify their review of agency actions—ensuring that agencies comply with substantive statutes and with the procedural requirements of the Administrative Procedure Act (“APA”)—judges not only enhance their own power vis-à-vis agencies but also enhance Congress’s power as well. Congress may seek to control law administration via a variety of avenues—including the budget process, the appointments process, and informal agency oversight at the committee level—but judicial review is one of the primary avenues for making sure that agencies respect legislative commands. When judges weaken this check on agency power, they not only transfer power from unaccountable judges to politically accountable agencies, but also make it more difficult for Congress to control agency action.

B. Two Sets of Strategies

Given administrative law’s concern with both principal-agent and agent-agent relationships, it makes sense that administrative law would employ both formal rules and flexible tools to tackle these problems. Indeed, administrative law illustrates not only that the two sets of strategies can be employed in tandem, but also that they can be structured and combined in a variety of ways, some-

48 See Matthew D. McCubbins et al., Administrative Procedures as Instruments of Political Control, 3 J.L. Econ. & Org. 243, 244 (1987) (“[P]rocedures can be used to enfranchise important constituents in agency decisionmaking processes, thereby assuring that agencies are responsive to their interests.”); Jonathan T. Molot, Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation, 96 Nw. U. L. Rev. 1239, 1275–92 (2002) [hereinafter Molot, Reexamining Marbury].

times even promoting fidelity to law and due respect for other constitutional agents at the same time. Whether one is primarily concerned with principal-agent relations (as many statutory scholars are) or agent-agent relations (as many constitutional scholars are) administrative law teaches us that formal rules and flexible tools can both be of use.

1. **Formal Rules**

The most prominent development in administrative law in the closing decades of the twentieth century was the development of a formal framework governing judicial review of the substance of agency decisions. The law governing judicial review of agency interpretations of statutes evolved from a rather ad hoc, case-by-case approach to a more formal structure established by the Supreme Court in *Chevron v. Natural Resources Defense Council*.\(^{50}\) Indeed, when one examines the evolution of the *Chevron* doctrine, one sees a trend toward formalism that has much in common with the trend toward formalism in the statutory interpretation literature described above.\(^{51}\) Yet *Chevron*’s formal rule is geared not just to promote fidelity to Congress—the primary goal in the statutory interpretation literature—but also to limit judicial power vis-à-vis other constitutional agents.

*Chevron* did not invent judicial deference, but rather routinized it. As early as 1809, Chief Justice Marshall recognized a judicial practice of deferring to executive interpretations on some matters; he noted that “[i]f the question” before the court “had been doubtful, the court would have respected the uniform construction which it is understood has been given by the treasury department of the United States upon similar questions.”\(^{52}\) As the administrative state

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\(^{51}\) Not surprisingly, one of *Chevron*’s strongest defenders is Justice Scalia. See Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L.J. 511, 516 [hereinafter Scalia, Judicial Deference]; see also Ronald M. Levin, The Anatomy of *Chevron*: Step Two Reconsidered, 72 Chi.-Kent L. Rev. 1253, 1258 (1997) (“What [Justice Scalia] liked about *Chevron* was the universality or near universality of its framework, a vast improvement over what he regarded as the unpredictable state of prior law.”).

developed over the course of the nineteenth century, moreover, judicial deference became more common, and in the aftermath of the New Deal, judicial expressions of deference to administrators became stronger still. Indeed, many scholars view the 1944 case of NLRB v. Hearst Publications, Inc. as a strong precursor for what the Court eventually would do in Chevron.

But if deference became more common after the New Deal, it was not yet routine. Judicial review of administrative decisions in the decades following the New Deal depended upon a variety of factors that would lead judges to be more or less deferential to administrators’ interpretations of statutory provisions. In deciding how much to credit administrators’ views, courts would ask such questions as whether Congress had expressed an intent to delegate the question at hand, whether the question was one that would

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53 Monaghan, supra note 52, at 15 (citing United States v. Mo. Pac. R.R. Co., 278 U.S. 269, 278–80 (1929)) (“As the nineteenth century wore on, and public administration became a larger and larger component of the American governmental system, judicial expressions of deference increased.”).

54 322 U.S. 111 (1944).


57 See Thomas W. Merrill, Judicial Deference to Executive Precedent, 101 Yale L.J. 969, 972–75 (1992) [hereinafter Merrill, Judicial Deference] (describing the “Pre-Chevron” “Multiple Factors Regime”); cf. Stephen Breyer, Judicial Review of Questions of Law and Policy, 38 Admin. L. Rev. 363, 372 (1986) (finding in pre-Chevron case law “two answers to the question” of why courts should defer and arguing that “[o]ne answer rests upon an agency’s better knowledge of congressional intent” while the “other rests upon Congress’ intent that courts give an agency [sic] legal interpretations special weight, an intent that (where Congress is silent) courts may impute on the basis of various ‘practical’ circumstances”).
benefit from agency expertise, and whether the timing of the agency interpretation suggested a fealty to Congress’s intent.\footnote{58 See Merrill, Judicial Deference, supra note 57, at 973–74 (citing numerous sources for these propositions and ultimately observing that “[n]o attempt was made to connect the various factors together”).}

If, for example, Congress indicated, explicitly or implicitly, that it wanted an administrative agency to resolve a particular matter, the Court would respect Congress’s wishes and defer to the agency as the superior agent of Congress.\footnote{59 See Heckler v. Campbell, 461 U.S. 458, 466 (1983); Herweg v. Ray, 455 U.S. 265, 274–75 (1982); Breyer, supra note 57, at 372; Merrill, Judicial Deference, supra note 57, at 973; Molot, Judicial Perspective, supra note 49, at 70.} If Congress had not expressed any such intent, the Court still might assume that the agency would be the more effective agent for Congress if, for example, the question fell within the agency’s special subject matter expertise,\footnote{60 See Aluminum Co. of Am. v. Cent. Lincoln Peoples’ Util. Dist., 467 U.S. 380, 390 (1984); Haig v. Agee, 453 U.S. 280, 291 (1981); NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 348 (1953); Jaffe, supra note 56, at 576–85; Breyer, supra note 57, at 370; Merrill, Judicial Deference, supra note 57, at 973.} or the agency had participated recently in the formulation of the statutory program now subject to interpretation.\footnote{61 See Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 142 (1976) (noting that an EEOC guideline was not a contemporaneous interpretation of statute); Udall v. Tallman, 380 U.S. 1, 16 (1965) (noting that agency interpretation represents “‘a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion[,] of making the parts work efficiently and smoothly while they are yet untried and new’” (quoting Power Reactor Co. v. Int’l Union of Electricians, 367 U.S. 396, 408 (1961))); Merrill, Judicial Deference, supra note 57, at 974; Jim Rossi, Respecting Deference: Conceptualizing Skidmore Deference Within the Architecture of Chevron, 42 Wm. & Mary L. Rev. 1105, 1136 (2001) (discussing Gilbert).} If, however, there was no special reason for the Court to defer, then it would interpret the statute itself.\footnote{62 See Jaffe, supra note 56, at 577 (“But the assumption that expertness is relevant can, if mechanically invoked, become ludicrous.”); Merrill, Judicial Deference, supra note 57, at 972; Molot, Judicial Perspective, supra note 49, at 70.} Under this multi-factored, contextual regime—described recently by the Court as “Skidmore deference,”\footnote{63 In Mead and Christensen, the Court may have created some confusion by equating the pre-Chevron regime with the Court’s approach in the 1944 decision of Skidmore v. Swift & Co., 323 U.S. 134 (1944). See United States v. Mead Corp., 533 U.S. 218, 234–35 (2001); Christensen v. Harris County, 529 U.S. 576, 587 (2000) (“[I]nterpretations contained in formats such as opinion letters are ‘entitled to respect’ under our decision in Skidmore v. Swift & Co., but only to the extent that those interpretations have ‘the power to persuade.’” (quoting Skidmore, 323 U.S. at 140)). As Jim Rossi has pointed out, Skidmore “had little grip on the mind of the administrative lawyer in the
interpret a statute itself, depending upon whether it found the agency to be a more or less effective agent of Congress in the case at hand. The Court framed the deference question as a principal-agent problem and focused on allocating power to whichever entity would be the superior agent of Congress.

Designed to promote fidelity to the principal, the Court’s multi-factored inquiry did a very poor job allocating power among agents. The uncertainty inherent in the pre-Chevron approach gave judges a great deal of leeway to displace the decisions of administrative agencies. Indeed, some scholars suspected that the regime was so flexible that a court could first decide whether it liked an agency rule, and then justify a deferential or non-deferential standard of review under the prevailing multi-factored regime. As Justice Scalia has pointed out, the pre-Chevron, case-by-case approach to deference “was assuredly a font of uncertainty and litigation.”

In Chevron, the Court shifted gears, finally acknowledging that its doctrine should be structured not just to promote fidelity to a principal, but also to limit judicial power vis-à-vis Congress’s other agents. The Chevron Court for the first time based judicial defer-

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1950s or 1960s” and “one of the leading treatises of the era, Professor Louis Jaffe’s Judicial Control of Administrative Action, does not cite to Skidmore a single time in its 720 pages of text.” Rossi, supra note 61, at 1129.

Skidmore’s “power to persuade” captures some but not all of the reasons why courts might have deferred to agencies under the pre-Chevron approach. See Merrill, Judicial Deference, supra note 57, at 973–74; cf. Manning, Judicial Deference, supra note 55, at 686 (associating “[t]he Supreme Court’s decision in Skidmore v. Swift & Co.” with “a nonbinding version of deference that accounts for an agency’s expert judgment when the agency is not exercising delegated interpretive lawmaking power”). The pre-Chevron multi-factored approach to deference is just as often associated with the Supreme Court’s decisions in NLRB v. Hearst Publications, Inc. and Packard Motor Car Co. v. NLRB (cases in serious tension with one another) as with Skidmore. See, e.g., Jaffe, supra note 56, at 558–64; Breyer, supra note 57, at 365–67. That the Court may be somewhat uncertain over the relationship between Skidmore and the broader pre-Chevron approach to deference is evident from the different positions taken in the various opinions in Christensen. See Rossi, supra note 61, at 1111 (“The majority and two dissenting opinions in Christensen take no fewer than three distinct approaches to applying Skidmore ‘deference.’”); see also Peter L. Strauss, Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element, 53 Admin. L. Rev. 803, 834 (2001) (highlighting difference between versions of Skidmore deference set forth in Mead and Christensen).

44 See Molot, Judicial Perspective, supra note 49, at 84–85.

45 Scalia, Judicial Deference, supra note 51, at 516; see also Levin, supra note 51, at 1258 (describing Justice Scalia’s criticism of the “the unpredictable state of prior law”).
ence on the political accountability of agencies in their own right, rather than on their superior ability to implement Congress’s legislative instructions. Unlike judges, who “must, in some cases, reconcile competing political interests, but not on the basis of the judges’ personal policy preferences,” the Court explained, administrators “may . . . properly rely upon the incumbent administration’s views of wise policy to inform its judgments.”

“[I]t is entirely appropriate,” the Court reasoned, “for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.”

To prevent politically insulated judges from substituting their views for those of politically accountable agencies, the Court discarded its malleable, multi-factored approach and substituted a more constraining, more formal test. Step I of the Chevron framework continues to rely on judges to ensure that agents are faithful to their principal, but the judge’s role in promoting fidelity is limited by Chevron to enforcing Congress’s clear statutory commands. At Chevron Step I, a court is supposed to ask “whether Congress has directly spoken to the precise question at issue.” “If the intent of Congress is clear,” Chevron instructs, “that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” Where a statute does not clearly prohibit an agency’s action, however, the court proceeds to Chevron Step II, at which point it merely monitors the agency’s interpretation for reasonableness: “if the statute is . . . ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”

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67 467 U.S. at 865–66.

68 See Merrill, Judicial Deference, supra note 57, at 976–77; Molot, Judicial Perspective, supra note 49, at 84–85.

69 467 U.S. at 842.

70 Id. at 843–43.

71 Id. at 843.
enforcing clear statutory commands and by framing Step II rather
derferentially, \textit{Chevron} makes it much more difficult for politically
unaccountable judges to displace the decisions of politically ac-
ccountable agencies.

In the decades following \textit{Chevron}, the Court further elaborated
on the \textit{Chevron} framework, clearing up some of the uncertainty
that surrounded it when it was first handed down and reinforcing
its formal nature. \textsuperscript{73} In \textit{United States v. Mead}, for example, the Court
eliminated some (but not all) of the confusion regarding \textit{Chevron}'s
boundaries, explaining that \textit{Chevron} applies where agencies exer-
cise delegated lawmaking authority, typically through notice-and-
comment rulemaking or formal adjudication. \textsuperscript{74} Moreover, where
\textit{Chevron} does apply, the Court shifted in the years after \textit{Chevron}
from asking whether Congress has addressed the “question at is-
 sue” or “formed a specific intention” on that issue to asking instead
whether the statutory text is “clear” or has a “plain meaning.”
This shift in emphasis toward the text of a statute furthered \textit{Chev-
ron}'s goal of bringing some order to what historically had been a

\textsuperscript{72} Although the Step II inquiry into the reasonableness of the agency interpretation
is not without any bite, see infra notes 79–80 and accompanying text, agency lawyers
generally know that if they can survive Step I, they are much less likely to be reversed
under \textit{Chevron}.

\textsuperscript{73} Although \textit{Chevron}'s formal rule narrowed judicial discretion significantly, this
new regime was not without its own ambiguities and uncertainties. Scholars and
judges have spent the last two decades working out \textit{Chevron}'s meaning and engaging
in ongoing debates over when it should apply and how it should be applied. See, e.g.,
Gary S. Lawson, Outcome, Procedure and Process: Agency Duties of Explanation for
Legal Conclusions, 48 Rutgers L. Rev. 313 (1996) [hereinafter Lawson, Outcome,
Procedure and Process]; Gary S. Lawson, Reconceptualizing \textit{Chevron} and Discretion:
A Comment on Levin and Rubin, 72 Chi.-Kent L. Rev. 1377 (1997); Levin, supra note
51, at 1259 (“[T]he principal question about judicial deference to administrative con-
structions has become, not whether the courts can live with \textit{Chevron}, but how they
can domesticate it for everyday use.”).

\textsuperscript{74} See \textit{Mead}, 533 U.S. at 234–35 (2001); Thomas W. Merrill & Kristin E. Hickman,
J., dissenting) (“The Court has largely replaced \textit{Chevron} . . . with that test most be-
loved by a court unwilling to be held to rules (and most feared by litigants who want
to know what to expect): th’ol’ ‘totality of the circumstances’ test.’’). The Court could
have further eliminated uncertainty by drawing a clearer line between more formal
actions like notice and comment rulemaking and formal adjudication and less formal
actions like policy statements and interpretive rules.

\textsuperscript{75} Merrill, Judicial Defe
rence, supra note 57, at 990–91 (citing numerous cases); Merrill, Textualism and \textit{Chevron}, supra note 12, at 366–73.
rather messy, contextual search for legislative intent.\textsuperscript{76} It also highlights the parallels between \textit{Chevron}'s formal rule and the trend toward formal rules in the statutory interpretation literature.

Appeals courts and scholars recently have used \textit{Chevron}'s formal structure to clean up not only the messy, contextual approach to agency interpretations of statutes that had prevailed in prior decades, but also a rather unpredictable approach to judicial review of agency policy. Ironically, at around the time that the Court had become \textit{more} deferential to agencies on matters of law, which is traditionally an area of judicial competence, the Court also had become seemingly \textit{less} deferential to agencies on matters of policy, where agencies seem to be on firmer footing.\textsuperscript{77} In the early 1980s, in \textit{Motor Vehicle Manufacturers Association of the United States v. State Farm Mutual Automobile Insurance Co.} and related cases, the Supreme Court and D.C. Circuit developed “hard look” review, under which judges would probe administrative exercises of delegated lawmaking authority to ensure that administrators engaged in “reasoned decisionmaking.”\textsuperscript{78} More recently, however, courts and scholars have sought to regularize “hard look” review by incorporating it into the \textit{Chevron} framework.\textsuperscript{79} As \textit{Chevron} Step II


\textsuperscript{77} See Breyer, supra note 57, at 372 (highlighting irony).


\textsuperscript{79} See Kenneth Culp Davis & Richard J. Pierce, Jr., \textit{Administrative Law Treatise} § 7.4, at 237–38 (Supp. 1999) (“Many… opinions avoid the unnecessary confusion created by engaging in both the application of \textit{Chevron} step two and an application of \textit{State Farm} by asking the single question whether the agency has stated reasons in support of its interpretation of a statute sufficient to convince the court that the agency’s interpretation is reasonable.”); Levin, supra note 51, at 1263–66; Laurence
requires judges to evaluate agency decisions for reasonableness, courts and scholars sensibly have included in that inquiry an examination of the agency’s reasoning process to ensure that the agency engaged in reasoned decisionmaking. 80 By including State Farm review in Step II of the Chevron framework—and making it simply part of a rather deferential inquiry into agency reasonableness—some courts have sought to tame policy review. They have sought to cabin judicial discretion in reviewing matters of law and policy alike, incorporating both into Chevron’s formal framework for substantive review of agency decisions.

2. Judicial Flexibility as a Supplement to Formal Rules

Although portions of administrative law have relied on formal rules to cabin judicial discretion and power, other equally important administrative law doctrines have evolved that bear a much closer resemblance to the more flexible, minimalist tools embraced by scholars in constitutional theory. Whereas Chevron doctrine presents judges with a rather stark choice between affirming and overruling an agency action,81 these other doctrines can be used to

80 See Lawson, Outcome, Procedure and Process, supra note 73, at 326 (observing that “even when an agency has chosen an interpretation of a statute that is reasonable under Chevron, firmly settled principles of administrative review independently require a careful examination of the process or method by which the agency formulated its reasonable interpretation”) (emphasis omitted).

soften judicial review and offer judges a middle course. Instead of
telling an agency that it may or may not reach a particular substan-
tive outcome, courts have at their disposal a variety of procedural
doctrines that empower them to send matters back to agencies to
do over again.

The procedural doctrines that courts have developed in the
course of reviewing agency rules find their roots in the APA. Un-
der Section 553 of the APA, agencies making rules pursuant to leg-
islative delegations must: (1) provide “notice” of the rulemaking,
(2) afford “interested persons an opportunity to participate in the
rule making,” and (3) “incorporate in the rules adopted a concise
general statement of their basis and purpose.” Courts have inter-
preted each of these three provisions expansively, affording them-
selves a variety of ways to overturn agency action without forever
preventing the agency from reaching the substantive result it de-
sires.

Where an agency issues a final rule that conflicts with a pro-
posed rule the agency announced when it first gave notice of its
rulemaking proceeding, a court need not decide once and for all
whether the rule is legitimate. Instead, the court can reverse on the
narrow ground of inadequate notice and send the matter back to
the agency to do over again. The same is true of rules that rest on
evidence that was not adequately shared with participants in the rulemaking. Once again, courts can send the matter back to the agency for further proceedings on the ground that “[t]o suppress meaningful comment by failure to disclose the basic data relied upon is akin to rejecting comment altogether.” And courts may rely on a similar strategy where participants in the rulemaking process have highlighted a tension between the agency’s proposed rule and the relevant statute. A court need not resolve this conflict, but instead can reverse on the narrower ground that the agency itself failed to respond adequately to the commenting party’s contentions. Rather than saying there is no way to reconcile the rule and the statute, the court can say more modestly that the agency has failed to offer an adequate reconciliation.

The flexibility inherent in these procedural doctrines offers judges tools of review that bear a striking resemblance to the minimalist tools constitutional scholars have embraced in recent decades. The prime directive of constitutional minimalism, after all, is to decide as little as possible and to postpone resolution of questions that need not be definitively resolved. Rather than strike down a law as facially unconstitutional and foreclose a legislature from ever hoping to enact such a law again, a minimalist judge is
supposed to narrow his or her holding and leave open the possibility that legislators could accomplish some of their substantive goals if they can cure the original law’s constitutional defects. So, too, may a court in an administrative matter strike down a rule in a way that allows the agency some future flexibility to achieve its political or policy goals. Instead of holding that a rule is flatly prohibited by a governing statute, a court may hold that the rule is in tension with that statute and instruct the agency to do a better job reconciling the two. The agency might have to respond more directly to the submissions of interested parties, to come up with additional evidence supporting its claim that the rule actually addresses the problem that the statute was enacted to address, or to offer a better rationale as to why the rule effectuates the statute’s underlying purposes. But if the agency faces a daunting challenge in such circumstances, its options have not been entirely foreclosed by the judicial ruling. Like a minimalist ruling in constitutional law, a procedural ruling in administrative law postpones ultimate resolution and “increase[s] the scope for continuing democratic deliberation on the problem at hand.”

C. Variations on and Interactions Between the Two Strategies

Administrative law offers a useful comparison to statutory interpretation and constitutional theory, not only because it contains formal rules analogous to those found in statutory interpretation and more flexible, minimalist tools analogous to those in constitutional theory, but also because each set of tools can be employed to have varying effects on principal-agent and agent-agent relations, and each can be used to offset the excesses of the other.

1. Variations on Each Set of Strategies

Administrative law reveals that formal rules and flexible tools may be employed in a variety of ways, some tending to cabin judicial discretion or power and others tending to expand judicial discretion or power. Depending upon how they are pursued, each set of strategies can have varying effects on principal-agent and agent-agent relations.

**Sunstein, One Case at a Time, supra note 3, at 39–40.**
Consider, for example, the different ways in which judges may approach *Chevron*. When *Chevron* was first handed down, it certainly curtailed judicial discretion and shifted interpretive authority from courts to agencies. But in the years since, courts sometimes have applied *Chevron* quite aggressively and sometimes have applied it quite deferentially. Where a court works hard to find statutory clarity at *Chevron* Step I, it ends up not only substituting its judgment for that of the relevant agency, but also fixing statutory meaning for all time and enhancing its power vis-à-vis future courts and future political administrations. Where, in contrast, *Chevron*’s rule leads a court to defer to an agency, it leaves the matter for the agency to decide, not just this time, but on future occasions as well. Deferential applications of *Chevron* end up leaving more unresolved and allowing agencies a great deal of flexibility not just to pursue their favored interpretations, but also to revisit and revise those interpretations in the future, as circumstances change and the political climate shifts. Administrative law thus teaches us that formal rules can be employed either to enhance or cabin judicial power vis-à-vis other agents.

The same sort of variation can be found in judicial applications of administrative law’s more flexible procedural doctrines. Sometimes, flexible tools can be employed to minimize judicial intrusions into the political process and leave as much as possible to other government agents. As noted above, instead of striking down an agency rule on substantive grounds for all time, a court may choose the less intrusive, more flexible approach of sending the matter back to the agency to explain its reasoning or to cure some other procedural defect. Other times, however, courts may employ flexible procedural doctrines quite aggressively so as to enhance

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91 See *Molot, Judicial Perspective*, supra note 49, at 87–89 (describing aggressive application of *Chevron* Step I).

92 See supra notes 66–72 and accompanying text.

93 Where agencies change course, they must, however, provide a reasoned explanation for the change. See Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970).
their own power. Indeed, just as the pre-Chevron multi-factored regime for substantive review allowed judges a great deal of discretion to overrule agencies wherever they chose, so too can judges take advantage of the flexibility in contemporary procedural doctrine to substitute their judgments for those of administrators. Where procedural doctrines are applied aggressively and unpredictably, they can end up transferring a great deal of power from agencies to courts.

2. The Combined Effect of Formal Rules and Flexible Tools

Moreover, administrative law is of interest to scholars in adjacent fields, not only because formal rules and flexible tools can each be used with varying effects, but also because the two sets of approaches can be combined in various ways. Indeed, where judges pay close attention to the consequences for principal-agent and agent-agent relations, they may use formal rules and flexible tools to offset each other’s excesses and achieve a healthy balance between promoting fidelity to principals and respect for other constitutional agents. Given that formal rules and flexible tools may sometimes be employed to aggrandize rather than limit judicial power, it is quite important that each set of tools be available to limit the excesses of the other.

Although one set of tools is labeled “substantive” and the other “procedural,” all administrative law scholars know just how much Chevron doctrine and procedural review under the APA overlap. When a court holds under the APA that an agency has failed to explain adequately how its rule is compatible with Congress’s statutory instructions, is this ruling entirely procedural? When a

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94 See infra notes 96–101 and accompanying text (discussing ways administrative law has addressed this problem).

95 That procedural review allows judges more flexibility than Chevron doctrine is confirmed by a prominent study of the D.C. Circuit’s review of agency decisions in environmental matters, which found ideologically driven voting to be much more prevalent in procedural matters. Richard L. Revesz, Environmental Regulation, Ideology, and the D.C. Circuit, 83 Va. L. Rev. 1717, 1717, 1729, 1750 (1997). While “in statutory challenges” governed by Chevron “there is no support” for the hypothesis that political ideology drives judicial voting, “[i]deological voting is more pronounced with respect to procedural challenges.” Id. at 1717, 1729, 1750. But cf. Molot, Reexamining Marbury, supra note 48, at 1272 n.154 (noting some variations on Chevron Step II that might count as “procedural” under Revesz’s framework).
court holds under the APA that an agency lacks record evidence to support its conclusion that a rule will effectuate Congress’s purposes, is that really procedural? Although these rulings fall within what has been dubbed “procedural” review, they rest on substantive judgments about a statute’s meaning or purposes and the compatibility of the agency rule with the statute’s substance.96

What this means, then, is that a judge who has questions about the substance of an agency rule may ask not only whether it violates clear statutory instructions under *Chevron*, but also whether any lesser tension between the rule and the relevant statute is sufficiently strong as to raise questions about the agency’s evidentiary support or its rationale for the decision. That administrative law offers judges a less drastic alternative to *Chevron*’s binary choice between affirming and reversing agency decisions may help alleviate the countermajoritarian difficulty with judicial power. A court inclined to respect the political process and to tread lightly will generally defer to agencies on substance under *Chevron*. *Chevron*’s formal limits serve to check judicial power in administrative matters just as scholars of statutory interpretation believe that formal rules can check judicial power in non-administrative matters. Yet, there is an additional outlet for flexibility that can guard against judicial excesses even in those cases where a court might be inclined to strike down an agency ruling under *Chevron*. Rather than declare the rule to be violative of the relevant statute, a court may resort to less drastic procedural rulings, striking down the rule but sending the matter back to the agency for a potential cure.

Of course, there is the risk that the formal and flexible avenues for review may work in just the opposite manner, so as to ratchet up, rather than tone down, judicial intrusions upon the political process. A court suspicious of the political process and confident of its own policy views may use the two sets of review in tandem to increase the odds of a reversal. Such a court might see procedural doctrines not as a less drastic means to reverse where it is contemplating reversal on substantive grounds under *Chevron*, but rather as a way to strike down an agency rule that clearly warrants defer-

ence under *Chevron*. Such a court would use the more flexible tools not to soften judicial review, but rather to side-step formal limits on its power and intensify judicial review.

But if flexible tools can be used to intensify, rather than soften, the impact of judicial review on substantive grounds, the administrative law solution to this problem is not to eliminate judicial flexibility entirely, but rather to impose some formal limits on judicial discretion. Just as flexible tools can soften the impact of formal rules, so too can formal constraints guard against the excesses of judicial flexibility. A good example of this phenomenon is found in *Vermont Yankee*, which cabined judicial discretion in procedural review much the way *Chevron* cabined judicial discretion in substantive review.

In the 1960s and 1970s, courts enamored with procedural review of agency action developed the flexible procedural doctrines described above. For most of that period, the Supreme Court stood by and watched as lower courts expanded judicial review on procedural grounds. Indeed, during this period a debate developed between Judge Bazelon and Judge Leventhal of the D.C. Circuit over the relative virtues of substantive versus procedural review of agency decisions. Judge Bazelon, the leading advocate of judicial flexibility to create new procedural doctrines, pointed out that judges were poorly equipped to second-guess the substance of agency policy decisions and believed that judges were much better equipped to make sure that agencies followed proper procedures. Rather than adhere strictly to the APA’s formal instructions, Judge Bazelon wanted to tailor judicial review flexibly to meet the judiciary’s institutional strengths. He thought judges were best equipped to make sure that agency procedures supplied administrators with adequate information to be able to reach sound substantive decisions.

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98 See *Ethyl Corp. v. EPA*, 541 F.2d 1, 66 (D.C. Cir. 1976) (en banc) (Bazelon, C.J., concurring) (“[T]he best way for courts to guard against unreasonable . . . administrative decisions is not . . . themselves to scrutinize the technical merits . . . [but to] establish a decision-making process that assures a reasoned decision . . . .”) (internal quotation marks omitted).
Judge Leventhal responded that, under the APA, courts are responsible for making sure that agencies respect the substantive bounds of their statutory authority and do not reach substantively unreasonable decisions. Rather than tailor doctrines flexibly to match the judiciary’s institutional strengths, Judge Leventhal recommended that judges abide by the formal instructions set forth in the APA. 99

For most of the 1960s and 1970s, the Supreme Court permitted lower federal courts to follow Judge Bazelon’s advice. Courts of appeal created the new procedural doctrines described above, which allowed them flexibility to intervene in the administrative process where they felt best equipped to do so. But by the late 1970s, the Supreme Court finally intervened and placed limits on this move toward flexibility. The Court sided with Judge Leventhal, holding that courts could only go so far in stretching the APA to accommodate new procedural doctrines. The Court in Vermont Yankee cautioned “reviewing courts against engrafting their own notions of proper procedures upon agencies entrusted with substantive functions by Congress.” 100 Vermont Yankee did not overrule the existing case law fleshing out the APA’s “notice,” “opportunity to participate,” and “statement of . . . basis and purpose” requirements, but it did prevent courts from imposing additional procedures beyond those required by Congress. 101 Vermont Yankee by no means prevented courts from using procedural doctrines to ratchet up what would otherwise be relatively deferential review under Chevron, but it went a long way toward alleviating that problem. Rather than relying on flexible tools or formal rules alone, administrative law doctrine employs one to combat the excesses of the other.

99 See id. at 69 (Leventhal, J., concurring) (stating that judges must assure, on substantive review, “conformance to statutory standards and requirements of rationality,” acquiring “whatever technical background is necessary”).
100 Vt. Yankee, 435 U.S. at 525.
101 See id. at 523–24; see also Strauss, Changing Times, supra note 83, at 1393 (characterizing Vermont Yankee as a case that “involved a lower court’s effort to give the [APA] meaning outside any reasonable possibility offered by the text, rather than a more general refusal to accommodate that text to contemporary understandings”).
III. LESSONS FOR STATUTORY INTERPRETATION AND CONSTITUTIONAL THEORY

The administrative law example casts a different light on the divergent trends in statutory interpretation and constitutional theory. If statutory and constitutional scholars are right to emphasize different aspects of the countermajoritarian difficulty, and to emphasize different judicial strategies as well, their focus in recent years has become too narrow. In statutory interpretation, constitutional theory, and administrative law alike, principal-agent problems and agent-agent relations both loom large. And in all three fields, formal rules and flexible tools both have a role to play. Different emphases and different balances may be appropriate in different contexts, but I suggest that balance is critical in all three fields.

The discussion below points out that statutory and constitutional scholars have not simply missed an opportunity by focusing on just half of the problem and half of the available solutions. The manner in which these scholars frame the problem and seek to solve it may inadvertently aggrandize judicial power and aggravate, rather than alleviate, the countermajoritarian difficulty that they are trying to solve.

A. Toward a Broader Conception of the Problem

Statutory scholars may be right to focus on principal-agent relationships and constitutional theorists may be right to emphasize agent-agent relationships, but the administrative law model raises questions about whether each set of scholars is too quick to overlook the importance of the other relationships involved. The discussion below faults both sets of scholars for their narrow focus and urges them to follow the administrative law model and expand their conceptions of the problem at hand.

1. Relationships Among Agents in Statutory Interpretation

Administrative law’s willingness to consider both principal-agent and agent-agent relationships raises serious questions about the wisdom of modern textualism’s single-minded emphasis on faithful agent theory. Administrative statutes are not the only statutes with long enough lives to create worries about judicial power over other agents. To be sure, the APA is akin to a constitutional document
insofar as it governs ongoing relationships among political actors, and between political actors and the courts. Moreover, many of the substantive statutes that administrative agencies implement are designed to be flexible enough to last for generations, with agencies updating their meaning to accommodate changed circumstances. But there certainly are non-administrative statutes—implemented by private actors and government officials alike—that can have similarly long life spans. Take, for example, the Sherman Act, the interpretation of which is entrusted to courts, rather than administrative agencies. \(^{102}\) \(^{103}\) Chevron does not apply to the Sherman Act, and so judicial interpretations of it are binding on courts, private parties, and government officials. When government officials or private parties initiate lawsuits against alleged violators—as they have been doing for more than a century—they must look to judicial decisions to understand what the Act prohibits. A non-administrative statute of such lasting impact highlights the importance not only of the principal-agent relationship between Congress and the courts, but also of the power that courts have to bind subsequent courts and government officials as times change. \(^{104}\) Where a statute’s interpretation is entrusted to courts, rather than agencies, formalism’s static approach to interpretation has countermajoritarian implications. If judges make a mistake in an early decision, or if earlier decisions turn out to be politically unpopular, some amount of flexibility may be required to undo the mistake or at least assuage its problems. Empowering judges to fix statutory meaning for all time— and to bind private citizens, government officials, and future judges appointed by future political administrations—renders the law less responsive to popular will and societal change.

In criticizing textualism for its narrow focus, I do not mean to suggest that agent-agent problems are entirely lost on formalists in statutory interpretation. Justice Scalia, for one, has explored these

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\(^{103}\) See I Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 103, at 59 (2d ed. 2000) (noting that the Sherman Act vests the federal courts “with a jurisdiction to create and develop an ‘antitrust law’ in the manner of the common law courts”).

\(^{104}\) See, e.g., United States v. Nippon Paper Indus. Co., 109 F.3d 1, 9 (1st Cir. 1997) (Lynch, J., concurring) (“The Supreme Court has called the Sherman Act a ‘charter of freedom’ for the courts, with ‘a generality and adaptability comparable to that found . . . in constitutional provisions.’” (quoting Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359–60 (1933))).
problems quite elegantly in weighing the value of formal rules versus judicial flexibility in the context of judge-made law. He explains:

In a democratic system . . . the general rule of law [as contrasted with judicial “discretion” or flexibility] has special claim to preference, since it is the normal product of that branch of government most responsive to the people . . . . But . . . that particular value of having a general rule is beside the point . . . within the narrow context of law that is made by the courts.\(^{105}\)

Assuming that democracy is relevant to the principal-agent relationship between Congress and courts, but has nothing to say regarding the power of one court over another, Justice Scalia proceeds to defend rule formalism over judicial flexibility nonetheless. He thinks it desirable that earlier courts should bind later ones, so as to establish predictability in law and to ensure that similarly situated citizens are treated equally.\(^{106}\)

What Justice Scalia neglects to mention is that in statutory interpretation cases—and even common law cases—a judge’s ability to bind future judges appointed by future political administrations, and to bind private citizens and government officials as well, does have implications for democracy. Though the implications may be stronger in constitutional interpretation—where judicial decisions establish constitutional boundaries on political power—the minimalist argument for flexibility is not entirely out of place in the statutory context. Indeed, the statutory scholars who have argued in favor of dynamic, rather than static, approaches to statutory interpretation understand this value.\(^{107}\) The dynamic interpretive approaches embraced by scholars like Guido Calabresi,\(^{108}\) William

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\(^{105}\) Scalia, Rule of Law, supra note 1, at 1176 (emphasis omitted).

\(^{106}\) Id. at 1177–79.


\(^{108}\) See Calabresi, supra note 18, at 2 (advocating evolving common law approach to the interpretation of statutes).
Ambivalence About Formalism

Eskridge,109 Alexander Aleinikoff,110 and Peter Strauss111 take into account both the power of an enacting Congress to control subsequent law application and the continuing evolution of statutory meaning long after statutory words are enacted into law. Allowing some flexibility to update statutory interpretation over time is desirable not just because it facilitates error correction, as Justice Scalia concedes,112 but also because it permits the law to accommodate social and political change. An emphasis on flexibility helps to prevent one set of judges appointed by one generation of political actors to freeze the law for all time.

Indeed, flexibility arguably is more important in the interpretation of non-administrative statutes than it is in the interpretation of administrative statutes. Recall that in the administrative context, Chevron’s formal rule allows agencies a great deal of room to update their interpretations as times change. The deference built into Chevron’s formal framework frees agencies not just to interpret statutes, but also to reinterpret them as political administrations change.113 In non-administrative matters that fall beyond Chevron’s rule, in contrast, formalism lacks this flexible outlet and tends to freeze statutory interpretation. Under a static approach to interpretation, the meaning of a non-administrative statute becomes entrenched and quite difficult to change. When we compare scholarship on statutory interpretation outside the administrative state with scholarship on administrative law, we find that textualism’s case for static interpretation fails to appreciate the democratic implications of the agent-agent problems that occupy scholars of ad-

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109 See Eskridge, Dynamic Statutory Interpretation, supra note 107 (advancing a dynamic approach to statutory interpretation over a static one); Eskridge & Frickey, Practical Reasoning, supra note 19, at 381 (“[W]hen Congress enacts a statute and empowers an agency, the courts, or both to ‘interpret’ the statute, it sends its historically situated text off on a dynamic enterprise. There is no way around that.”).
110 See Aleinikoff, supra note 107, at 21–22 (advancing a “nautical” approach to statutory interpretation over an “archeological” approach).
111 See Strauss, Common Law and Statutes, supra note 18, at 227–28; Strauss, Statutes That Are Not Static, supra note 107, at 768–69; cf. Strauss, Resegregating, supra note 14, at 437, 440 (noting “contrast” between treating “legislation as static judgment” and treating it “as an element in the continuing evolution of law’s fabric” but cautioning that either a “textualist” or an “intentionalist” may “use her preferred tools in the service of giving relatively static meaning to a statute”).
112 See Scalia, Rule of Law, supra note 1, at 1176–79.
113 See supra notes 66–72 and accompanying text.
ministrative law. In their quest to render judges more faithful agents of Congress, textualists overlook that they may be empowering judges to aggrandize their own authority at the expense of other constitutional actors.

2. Principal-Agent Relations in Constitutional Theory

So too does constitutional theory have something to learn from administrative law’s handling of principal-agent and agent-agent problems. In particular, administrative law suggests that constitutional theory has been too quick to exclude principal-agent problems from its analysis. If minimalism’s emphasis on leaving matters unresolved succeeds in limiting judicial power over other constitutional actors, it may inadvertently fail to keep these other constitutional actors within the bounds of their legal authority. Minimalist scholars risk overlooking the importance of ensuring that constitutional agents are faithful to their principals and pay due respect to the constitutional framework from which they derive their power.\(^{114}\)

When Alexander Bickel gave birth to modern minimalism more than four decades ago, he offered a blended solution to what he dubbed the countermajoritarian difficulty.\(^{115}\) To be sure, contemporary minimalists emphasize Bickel’s advocacy of restraint, and in particular the way he encouraged the Supreme Court to employ discretionary tools like the certiorari power and prudential justiciability doctrines to postpone resolving disputes and avoid intruding upon the political sphere.\(^{116}\) Bickel is well known for his suggestion that the Court could alleviate the countermajoritarian

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\(^{114}\) Because of the remoteness of the Founding, fidelity in constitutional law is often more about fidelity to a “principle” than fidelity to a “principal.” Rather than focusing on the individuals who drafted and ratified the Constitution, we focus on the legal principles that those individuals included in the Constitution. The same can be said, however, about statutory interpretation. Although statutory enactments often are less remote, and we may know a great deal about the aims of individual members of Congress, nonetheless the best way for a judge to respect the power of Congress—and to be its faithful agent—is to obey the legal principles that Congress enacts into law.

\(^{115}\) See Bickel, Least Dangerous Branch, supra note 4, at 16.

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difficulty by refusing to intervene in politically heated controversies that were not yet appropriate candidates for judicial resolution.

But if Bickel is famous for his advocacy of the “passive virtues” and judicial prudence, Bickel emphasized a second attribute of judicial power that was equally important—the role of legal principle in judicial decisions.\textsuperscript{117} Bickel explained that “government should serve not only what we conceive from time to time to be our immediate material needs but also certain enduring values. This in part is what is meant by government under law.”\textsuperscript{118} Bickel saw the Supreme Court as the “institution of our government” best positioned to “be the pronouncer and guardian of such values.”\textsuperscript{119} Although Bickel relied on judicial discretion to keep the courts out of many disputes, he relied upon legal principle, and not judicial discretion, to guide judicial resolutions of the disputes they did not postpone.

By emphasizing judicial flexibility in the name of minimalism, and ignoring the responsibility of judges to ensure compliance with law, scholars may inadvertently relieve judges of some of their traditional obligation to ensure that all agents of government respect constitutional boundaries on their power. If judges become too preoccupied with treading lightly and avoiding undue intrusions into the political process, they will fail to fulfill this constitutional duty. Their commitment to maintaining respectful relationships

\textsuperscript{117} See Neil Duxbury, Patterns of American Jurisprudence 284 (1995) (“Bickel, like Wechsler, demonstrates a faith in rational consensus. Neutral principles, he insists, are a prerequisite to the ‘elaboration of any general justification of judicial review as a process for the injection into representative government of a system of enduring basic values.’” (quoting Bickel, Least Dangerous Branch, supra note 4, at 51) (footnote omitted)); Anthony T. Kronman, Alexander Bickel’s Philosophy of Prudence, 94 Yale L.J. 1567, 1569 (1985) (“One should not infer from this that Bickel believed either law or politics to be unprincipled. On the contrary, it was Bickel’s emphatic view that ‘we cannot live, much less govern, without some “uniform rule and scheme of life,” without principles, however provisionally and skeptically held.’” (quoting Alexander M. Bickel, Constitutionalism and the Political Process, in The Morality of Consent 1, 25 (1975))).

\textsuperscript{118} Bickel, Least Dangerous Branch, supra note 4, at 24.

\textsuperscript{119} Id.; see Kronman, supra note 117, at 1577 (“There is, therefore, a sense in which our social ideals, the ‘enduring values’ we aspire to attain despite their occasional conflict with our existing needs, are in the special, though not exclusive, custody of the Court—the ‘pronouncer and guardian of such values.’” (quoting Bickel, Least Dangerous Branch, supra note 4, at 24)).
among constitutional agents may interfere with their responsibility for ensuring that the agents remain faithful to the commands of their principal. Just as judges in administrative cases must review agency actions to ensure fidelity to Congress as principal, so too must judges in constitutional cases ensure that political actors respect the constitutional boundaries of their authority. Administrative law teaches us that we need not, and indeed should not, focus entirely on principal-agent or agent-agent relationships alone, but rather should include both in our analysis. Moreover, as I explore below, administrative law offers a variety of strategies—some more formal and some more flexible—that may be employed by constitutional scholars who seek to instill in judges a respect for the law, as well as a respect for the political process.  

B. Toward a Broader Conception of the Potential Solutions  
The administrative law example is relevant to statutory interpretation and constitutional theory not only because it frames their collective problems more broadly, but also because it offers a broader range of solutions. Even if statutory scholars were to continue focusing narrowly on principal-agent problems and constitutional theorists were to continue emphasizing agent-agent relations, administrative law suggests that each set of scholars should employ both formal rules and flexible tools in addressing these problems. By placing undue emphasis on only one set of solutions, these scholars may inadvertently aggravate, rather than assuage, the problems that surround judicial power.

120 See infra notes 145–53 and accompanying text. There is an interesting parallel between the Leventhal-Bazelon debate in administrative law, see supra notes 97–101 and accompanying text, and the debate in constitutional theory between Bickel and John Hart Ely, who rejected Bickel’s notion that judges have any special insight into enduring constitutional values and emphasized instead the judiciary’s ability to monitor the procedures by which political officials govern and thereby to ensure that our government operates consistently with our constitutional commitment to popular self-government. John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 101–04 (1980). In administrative law and constitutional law alike, one may question whether judges are better equipped to enforce substantive values or to monitor the procedures by which political officials weigh those substantive values. But as the discussion below will suggest, there is a strong argument that judges in both fields can, and should, do a bit of both. See infra notes 121–53 and accompanying text.
1 Flexibility as a Needed Antidote for Formalism’s Excesses in Statutory Interpretation

Formalism without a flexible outlet can be quite dangerous, both in administrative matters and in statutory matters outside the administrative context. Recall that in administrative matters, Chevron’s formal rule can sometimes be applied aggressively, rather than deferentially. Where a court tends to find clarity in statutory instructions, and to believe that its own preferred reading is the only reasonable reading, this will lead the court to overrule administrative decisions more often and to expand its own power vis-à-vis agencies. In the administrative context, such aggressive applications of Chevron can have the unintended consequence of lodging more power with judges, rather than less.121

The dangers of aggressive formalism are just as strong in statutory interpretation outside the administrative context. Indeed, these dangers are reflected in two recent moves among aggressive textualists. First, textualists of late have tended to draw a sharp distinction between two different types of statutory context, one of which they favor strongly. In a recent exchange, John Manning provided the clearest articulation to date of a distinction that textualists implicitly have drawn, but never before explained, between “semantic” and “policy” context.122 The semantic context that textualists favor includes dictionary definitions, the use of identical language in other statutory provisions, and “textual” or “linguistic” canons of construction that have nothing to do with statutory purposes or societal effects.123 The disfavored “policy context” includes contextual sources that are more substantive in nature, such as the policy consequences of a particular interpretation, the potential effects on related bodies of law, and canons of construction that reflect substantive aspirations such as justice, efficiency, or rational-

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121 See supra notes 89–93 and accompanying text.
122 See Manning, Textualists from Purposivists, supra note 2, at 76.
123 See Eskridge, Unknown Ideal, supra note 7, at 1532; Manning, Textualists from Purposivists, supra note 2, at 92–93; Molot, Textualism, supra note 2, at 45–46. “Textual” or “linguistic” canons are to be distinguished from more “substantive” canons. See, e.g., William N. Eskridge et al., Cases and Materials on Legislation: Statutes and the Creation of Public Policy 801 (3d ed. 2001); Eskridge, Unknown Ideal, supra note 7, at 1542; David L. Shapiro, Continuity and Change in Statutory Interpretation, 67 N. Y. U. L. Rev. 921, 934 (1992); Vermeule, Interpretive Choice, supra note 10, at 85.
This distinction is not, in and of itself, a problem, as it does not, at least in theory, entirely preclude consideration of policy consequences and statutory purposes in every case. In cases where favored textualist strategies fail to yield a clear statutory meaning, these textualists, at least in theory, would permit a judge to consider statutory purposes and policy consequences just as purposivists might. Only where favored textualist tools produce statutory clarity would this end the inquiry and prevent any consideration of statutory purposes or policy consequences.

Aggressive textualism becomes extreme, however, when this first strategy is combined with a second one. Aggressive textualists do not merely treat consideration of statutory purposes and policy consequences as a last resort, but, further, tend to employ textualist strategies in such a way as to ensure that this last resort is rarely necessary. These textualists, notably Justice Scalia, use textualist interpretive tools not just to resolve statutory ambiguity, but to eliminate it. Thomas Merrill explains: “The textualist judge treats questions of interpretation like a puzzle to which it is assumed there is one right answer. The task is to assemble the various pieces of linguistic data, dictionary definitions, and canons into the best (most coherent, most explanatory) account of the meaning of the statute.” What is notable about this “active, creative approach to interpretation” is not that textualists expect it to produce a better answer than an intentionalist or purposivist approach, but rather that they rely on textualist interpretive tools to eliminate ambiguity and thereby to yield a single correct answer. Indeed, largely for this reason critical scholars have distinguished between textualist approaches to statutory interpretation and what they call “hyper-textualism,” which “find[s] linguistic precision where it does not

124 See Eskridge, Unknown Ideal, supra note 7, at 1532; Manning, Textualists from Purposivists, supra note 2, at 92–93.
127 Merrill, Textualism and Chevron, supra note 12, at 372 (quoted in Molot, Textualism, supra note 2, at 46).
128 Merrill, Textualism and Chevron, supra note 12, at 372 (quoted in Molot, Textualism, supra note 2, at 46).
129 See Herz, supra note 20, at 198 (cited in Molot, Textualism, supra note 2, at 46).
exist, and rel[ies] exclusively on the abstract meaning of a particular word or phrase [to eliminate ambiguity] even when other evidence suggests strongly that Congress intended a result inconsistent with that usage.\footnote{130}

When these two aggressive textualist strategies are combined and rule formalism is taken to such an extreme as to try to deny or ignore judicial discretion, textualists may end up inadvertently expanding that discretion and, in so doing, rendering judges less faithful agents of Congress. It is not that textualist tools themselves are inherently more manipulable than purposivist tools. Textualism has made a credible, albeit contestable,\footnote{131} argument that they are not. However, as textualist scholars and judges begin to believe that textualist tools can be employed not just to resolve statutory ambiguity, but also to eliminate it, the opportunities for judicial creativity and abuse increase dramatically. By placing so much emphasis on the distinction between clarity and ambiguity, and by rushing to find clarity and thereby exclude consideration of statutory purposes, aggressive textualism may undermine one of textualism’s principal benefits—its purported ability to cabin judicial discretion and thereby render judges more faithful to the laws actually enacted by Congress.\footnote{132} Just as aggressive purposivism can be manipulated so as to achieve a judge’s desired outcome, so too is aggressive textualism highly manipulable. Indeed, the textualist’s opportunities for manipulation are enhanced because he may manipulate not only his textualist interpretive tools, but also the clarity/ambiguity hurdle that he is seeking to clear. Just like an aggressive formalist applying \textit{Chevron} in administrative law, an aggressive textualist judge in non-administrative cases may not only employ formalist tools aggressively, but may actually move the finish line. When judges define textualism in a way that places heavy reliance on the clarity/ambiguity distinction, and that uses textualist tools aggressively to produce statutory clarity, they tend

\footnote{130}{Pierce, New Hypertextualism, supra note 20, at 752 (\textit{quoted in} Molot, Textualism, supra note 2, at 46).}
\footnote{131}{See, e.g., Eskridge, Unknown Ideal, supra note 7, at 1515, 1535, 1547; Sunstein, Interpreting Statutes, supra note 18, at 438; Zeppos, supra note 18, at 1323.}
\footnote{132}{See supra note 11 and accompanying text.}
to aggravate, rather than alleviate, the problem of judicial leeway.\footnote{Moreover, aggressive textualism does not just elevate judges to the status of partners, as aggressive purposivism sometimes did. It goes one step further by turning them into uncooperative, rather than cooperative, partners. See Eskridge, Unknown Ideal, supra note 7, at 1548–49.}

The most promising solution to this problem of overly aggressive rule formalism is one analogous to that found in administrative law: namely, to acknowledge and even embrace some amount of ambiguity in law and flexibility in interpretation. In administrative law, there are two flexible outlets that assuage the harshness of \textit{Chevron}'s clarity/ambiguity divide. First, as noted above, there are a host of flexible procedural doctrines that permit judges to avoid some of the hardest substantive choices.\footnote{See supra notes 83–88 and accompanying text.} Where \textit{Chevron}'s clarity/ambiguity divide is too sharp and judges would be forced to af-

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firm or reverse an agency decision for all time, judges may soften this sharp divide and send the matter back to the agency on procedural grounds. *Chevron*’s formal line-drawing is made palatable largely because of these other, more flexible doctrines of review. Second, and more important, there is the fact that most judges are humble enough not to confuse their own preferred readings of a statute with the only reasonable reading available. When judges apply *Chevron* modestly, rather than aggressively, they intervene and overrule agency action only when statutory instructions are truly clear or agency decisions are truly unreasonable. Modest judges do not manufacture statutory clarity or deny the ambiguity inherent in most legislative enactments. In the hands of a modest judge, *Chevron* doctrine acknowledges that there is ambiguity in law and flexibility inherent in the interpretive enterprise.

Just as flexibility can assuage the dangers of aggressive applications of *Chevron*, so too can flexibility assuage the dangers of aggressive formalism outside the administrative context. Although some textualists seem bent on manipulating rule formalism to try to manufacture statutory clarity, the textualist movement is not so inherently one-sided. Just as *Chevron*’s formal rule can be applied modestly, so too can textualism be applied in a way that acknowledges statutory ambiguity and allows a role for flexibility in interpretation. Indeed, that is at core what distinguishes modern textualism from the older, more extreme, “plain meaning school” version of textualism.¹³⁵ Plain meaning school adherents in the early twentieth century generally agreed with pre-realist purposivists that there was a “right” answer in statutory interpretation.¹³⁶ They simply disagreed over how to get to that right answer, with purposivists favoring context over text and textualists looking exclusively to text.

Modern textualism, in contrast, is a post-realist movement that has relied on realist insights to highlight the excesses of strong purposivism and to convince mainstream judges and scholars of purposivism’s dangers.¹³⁷ In a post-realist age, textualists have had little problem highlighting the creativity inherent in an aggressive judi-

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¹³⁵ See Molot, Textualism, supra note 2, at 34–35.
¹³⁶ See id. at 34.
¹³⁷ See id. at 48–49.
cial search for legislative intent or statutory purposes. Indeed, textualists have had an easy time casting doubt on judicial claims to be implementing Congress’s true intent or even a statute’s underlying purposes. Yet, precisely because modern textualism has realist roots, textualists cannot in good faith claim that statutory texts have an inherent meaning that can be gleaned without any consideration of context. Rather, modern textualists generally must accept the contemporary notion that language only has meaning when considered in context and must acknowledge the creativity inherent in the interpretive enterprise.

The most appealing course for textualists is to reject extremist rhetoric, to respect textualism’s realist roots, and to acknowledge and even embrace some amount of judicial flexibility. Just as judges in administrative cases need not work so hard to find statutory clarity and overrule agency action, textualist judges and scholars need not pass off their own preferred readings of a statute as the single, correct answer (particularly where there are strong purposivist indications that Congress may have intended otherwise). Instead, judges and scholars should candidly acknowledge the work that they do in interpretation and the influence of policy consequences upon that work. Interpreters can strive for transparency in interpretation through candor, rather than just formal simplicity.

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138 See id.
139 See Easterbrook, supra note 5, at 64 (“Because interpretation is a social enterprise, because words have no natural meanings, and because their effect lies in context, we must consult these contexts.”); Eskridge, Unknown Ideal, supra note 7, at 1532 (“It is a truism that interpreting a text requires context. Scalia seeks to turn this truth to his advantage.”); Manning, Absurdity, supra note 13, at 2392–93.
140 Cf. Eskridge & Frickey, Practical Reasoning, supra note 19, at 364 (noting “the Court’s tendency to overstate arguments supporting its results and to understate the importance of evolutive factors”).
141 See Molot, Reexamining Marbury, supra note 48, at 1332. For arguments that simplicity in judicial approach—and adherence to clear doctrinal rules—offers the most promising path to judicial consistency and transparency, see, for example, John F. Manning, Textualism and the Equity of the Statute, 101 Colum. L. Rev. 1, 58, 96 (2001); Vermeule, Interpretive Choice, supra note 10, at 85–86, 140–43; Vermeule, Holy Trinity Church, supra note 13, at 1833–38. For arguments that transparency in interpretation can be achieved only through candid acknowledgment of interpretation’s complexity, see, for example, Eskridge, Dynamic Statutory Interpretation, supra note 107, at 276.
avoid the pitfalls that arise when formalism is pursued aggressively, and without a flexible outlet.

A balanced version of textualism would reject the two moves employed by aggressive textualists to accentuate their differences with non-adherents. A moderate textualist would never use textualist tools to manufacture statutory clarity when reasonable people, examining all contextual sources, might disagree about a statute’s meaning. Indeed, moderate textualists would reject recent efforts to draw an arbitrary line between clarity and ambiguity in the first place. Rather than purporting to exclude purpose completely where textualist cues point strongly in one direction, a moderate textualist would canvas all contextual sources available before reaching a final conclusion regarding a statute’s application in the case at hand. This is not to say that a moderate textualist would permit policy considerations routinely to trump text, as strong purposivists historically have done. Rather, he would look to text and textualist clues first and give them great weight. If textualist tools point strongly in one direction, this would render policy consequences and statutory purposes much less important. Indeed, where textualist tools point strongly in one direction, only the most powerful evidence of statutory purposes and policy consequences could dislodge the textualist interpretation—as would be the case, for example, in cases of absurdity. But where textualist tools do not point strongly either way, purposivist tools would loom larger and might ultimately determine the outcome of the case.

An aggressive textualist might object to such efforts to permit judicial flexibility to flourish alongside legal constraint on the ground that judges may employ formal rules and flexible tools together to aggrandize, rather than minimize, their role. But, as in administrative law, the solution to this is to cabin judicial flexibility, not to ignore it. Just as judicial flexibility has been bounded by legal constraints in administrative law, so too can formal rules limit

142 Although Professor Manning suggests that my approach is “more holistic than that of modern textualism,” Manning, Textualists from Purposivists, supra note 2, at 75, I do not think that this more “holistic” approach is inconsistent with modern textualism. One can just as easily characterize the difference as one between moderate and aggressive versions of textualism, rather than as a distinction between textualism and purposivism.

143 See generally Manning, Absurdity, supra note 13 (describing and rejecting absurdity doctrine).
judicial flexibility in statutory interpretation beyond the administrative context. Moderate textualism would place enough weight on text and semantic cues to exclude some purposivist interpretations completely and to counsel strongly against others. If moderate textualists would not be willing to rely on formal rules to produce clarity and eliminate judicial leeway, they would at least be willing to rely on formal constraints to cabin that leeway. And if some judges might abuse their flexibility rather than use it wisely, this is a problem with any approach to interpretation. Indeed, as noted above, aggressive textualism is just as likely to fuel judicial abuse and aggrandizement as aggressive purposivism. The best course, and the one least likely to facilitate judicial excess, is the course of moderation and balance.

2. The Value of Cabining Judicial Discretion in Constitutional Law

Just as administrative law may teach statutory scholars to expand their traditional arsenal of tools, it should also lead constitutional theorists to employ additional strategies. Even where constitutional theorists focus exclusively on limiting judicial intrusions into the political process, the administrative law example suggests that they should employ formal constraints as well as judicial flexibility in their struggle with the countermajoritarian difficulty. The discussion below explores how extreme versions of minimalism may inadvertently weaken an important check on judicial power vis-à-vis those other political actors.

144 See Eskridge, Unknown Ideal, supra note 7, at 1549 (“All interpretive methodologies . . . present the willful judge with discretionary choices . . . . [I]t is less productive to focus on the willful judge and more productive to focus on the cooperative judge, as the prototype: not only are most judges cooperative rather than willful, but the assumption of cooperativeness is more consistent with the philosophy underlying Article III and may itself contribute to a judicial culture where willfulness is stigmatized. Most importantly, judges like other state officials are concretely constrained by practice—the feedback they get from Congress, lower courts, agencies, and the citizenry.”) (emphasis omitted); Posner, Statutory Interpretation, supra note 133, at 817 (arguing that although “the irresponsible judge will twist any approach to yield the outcomes that he desires and the stupid judge will do the same thing unconsciously,” judges who are not stupid or irresponsible will do something more than that); Strauss, Common Law and Statutes, supra note 18, at 254 (“In general, the relationship between court and legislature is a cooperative one. Both are elements of government and committed to its success. The legislature’s superior claim to generate governing law entails this relationship.”).
That judicial discretion can be exercised in a way that aggravates, as well as limits, judicial intrusions into the political process is clear from the administrative law example. Consider the pre-\textit{Chevron}, multi-factored approach to deference. The flexibility inherent in that framework permitted judges to substitute their judgments for those of administrators.\textsuperscript{145} The same danger arose in procedural review, where judges could use flexible procedural doctrines either to soften their substantive review and send matters back to agencies or else to ratchet up their review and invalidate agency actions more often.\textsuperscript{146} And recall that administrative law’s cure to the problem of too much judicial flexibility was to impose some formal limits on judicial discretion. \textit{Chevron} routinized the messy pre-\textit{Chevron} approach to substantive review,\textsuperscript{147} and \textit{Vermont Yankee} likewise imposed formal limits on judicial discretion in procedural review.\textsuperscript{148}

Constitutional theory poses similar risks of judicial overreaching and offers similar potential remedies. As in administrative law, unchecked judicial flexibility in constitutional review creates a risk of judicial overreaching, even where it is accompanied by a background understanding that judges should tread lightly, proceed cautiously, and exercise restraint. And, just as in administrative law, the best way to handle this risk is by imposing some formal limits on judicial discretion.

In its extreme form, contemporary minimalism sends the wrong message to judges when it suggests that they can reach their preferred outcomes in pending cases so long as they confine their holdings to those cases. To the extent that constitutional theorists emphasize judicial flexibility in the name of minimalism, and ignore the manner in which law constrains judges, these scholars may inadvertently relieve judges of some of their traditional obligation to reconcile their decisions with existing legal materials. If we instead tell judges that they cannot reach those desired outcomes if they do not first justify their decisions based on existing legal materials, we end up with an additional check on judicial power. Indeed, Herbert Wechsler, whose neutral-principles theory has long been

\textsuperscript{145} See supra notes 56–65 and accompanying text.\textsuperscript{146} See supra notes 83–88 and accompanying text.\textsuperscript{147} See supra notes 66–72 and accompanying text.\textsuperscript{148} See supra notes 97–101 and accompanying text.
considered to be at odds with Bickel’s model of prudence and restraint, highlighted how principle itself can be a source of restraint.\textsuperscript{149} Wechsler observed that in the absence of a principle to support their positions, judges cannot interfere with government action, no matter how lightly they tread or how much they leave unresolved.\textsuperscript{150} “When no sufficient reasons . . . can be assigned for overturning value choices of the other branches of the Government or of a state,” Wechsler explained, “these choices must, of course, survive.”\textsuperscript{151}

The legal constraints on judges may not seem as powerful today as they did in a pre-realist age, but they certainly retain some force.\textsuperscript{152} We can emphasize these constraints on judicial leeway or else ignore them. Overzealous advocacy of minimalism risks ignoring them and inadvertently removing an important protection against judicial excess.\textsuperscript{153} The requirement that judges ground their decisions in legal principle imposes an additional check beyond what minimalists would impose and guards against the excesses of judicial discretion.

Fortunately, most of the scholars whom I label minimalist do not directly reject a balanced version of minimalism along the lines of the one I embrace here. Recall that Cass Sunstein, for example, distinguishes minimalism from reasonlessness and acknowledges some role for legal principle in constitutional judicial review.\textsuperscript{154} The problem with the positions advanced by contemporary minimalists like Sunstein lies in their willingness to underemphasize principle and to overlook its value.\textsuperscript{155} Although they do not directly reject the


\textsuperscript{150} See id.; see also Duxbury, supra note 117, at 274 (“The appeal for neutral principles of constitutional law was . . . an appeal for institutional competence and judicial restraint.”).

\textsuperscript{151} Wechsler, supra note 149, at 19.

\textsuperscript{152} For an analysis of the institutional forces that lead judges both to respect legal constraints and to tread lightly, see Molot, Principled Minimalism, supra note 30, at 1782–1801.

\textsuperscript{153} See Duxbury, supra note 117, at 274 (associating “neutral principles” with “judicial restraint”).

\textsuperscript{154} See supra notes 34–36 and accompanying text.

\textsuperscript{155} To be fair, Seidman embraces the traditional notion that judges should trace their decisions to deeper legal values. See Seidman, Unsettled Constitution, supra note 39,
importance of legal constraints on judges, they do not often embrace those constraints.

In suggesting that scholars should follow the administrative law example and pay more attention to legal principles and formal constraints, I am essentially suggesting that minimalism should return to its roots and to Bickel. While Sunstein and other minimalists may be right to emphasize that prudence can play a role not only in the decision to accept a case (as Bickel suggested), but also in a court’s handling of it, they are wrong to overlook Bickel’s emphasis on law. Minimalism’s core mission of limiting judicial intrusions into the political sphere is by no means new, and it is by no means incompatible with older, more traditional theories that emphasize judicial adherence to law. Minimalist-type arguments have long influenced both judicial practice and legal theory, and the case for limiting judicial intervention in the political process has always co-existed with an emphasis on constraining judges whenever they do intervene.\footnote{Whereas Bickel’s “passive virtues” are exercised when a court refuses to assume jurisdiction, Sunstein describes a minimalist approach that tends to “increase the scope for continuing democratic deliberation on the problem at hand” even in those cases that courts do review. Sunstein, One Case at a Time, supra note 3, at 39–40; see also Molot, Principled Minimalism, supra note 30, at 1784 n.125.}

Indeed, Bickel is not the only constitutional theorist ever to employ formal constraints as part of an argument for judicial restraint, and I do not mean to elevate Bickel’s specific approach over others. Another possibility worth mentioning, in part because it resembles contemporary administrative review, is the model of constitutional judicial review advanced by James Thayer more than a century ago.\footnote{James B. Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129, 144 (1893).} Thayer’s approach to constitutional review is quite similar to the standard of review that prevails today in administrative law under \textit{Chevron}. Just as \textit{Chevron} instructs courts to overrule agency interpretations that violate clear statutory instructions, but to defer to reasonable interpretations of ambiguous statutes, so too did Thayer embrace a clear error rule that would have required courts to strike down clearly unconstitutional statutes but to defer
to those that are reasonable. Through a formal, but deferential, rule of constitutional review, Thayer sought to check judicial power over the political branches.

I do not mean to weigh in on the specific question of how scholars should incorporate formal constraints into contemporary minimalist theory. Whether it would be best to begin with Bickel, Thayer, or some other approach is beyond the scope of this Article. But if the comparison to administrative law cannot give constitutional scholars a specific roadmap for blending formal constraints and judicial flexibility, it strongly suggests that they should alter their current course and pursue this path. Just as in administrative law and statutory interpretation, the best course in constitutional law is a moderate one that relies on judicial flexibility and formal constraint alike, rather than pitting one against the other.

CONCLUSION

Given the parallel problems that scholars confront in statutory interpretation, administrative law, and constitutional theory, one would expect to find parallel solutions as well. Yet when we examine these three sets of literature, we find vastly different rhetoric. Scholars of statutory interpretation use formal rules to solve principal-agent problems, constitutional theorists employ discretionary, minimalist tools to mediate agent-agent relationships, and administrative law is something of a hybrid between the two. This Article has criticized the one-sided approaches embraced by formalists in statutory interpretation and minimalists in constitutional theory, embracing instead the more balanced approach found in adminis-

\[159\) Id.

\[160\) If scholars were to begin with Bickel, but to advocate restraint even in the course of deciding cases, they might do so by distinguishing cases of first impression from cases in well-developed areas of law. Courts ideally would tread lightly in cases of first impression and develop coherent legal principles incrementally over time. By treading lightly in early cases, courts would allow themselves some maneuvering room to grapple with unforeseen circumstances in later cases, and would allow the political branches some maneuvering room as well. But, as case law evolved, so too would well-defined legal principles develop, and those principles would become increasingly constraining as they are fleshed out. Over time, formal rules would emerge that would cabin judicial leeway and offer yet another source of reassurance to those concerned with the countermajoritarian difficulty. Judges might tread lightly in cases of first impression, but they would follow the law in cases that are less novel.
trative law. Although solutions must be tailored to each context, any coherent response to the countermajoritarian difficulty in any of these three fields must address both principal-agent and agent-agent relationships and must incorporate both formal constraints and judicial flexibility. This Article suggests that statutory and constitutional scholars have been too narrow in their focus. Scholars in both fields should broaden their conception of the problem of judicial power and consider a wider range of potential solutions.