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OF DIALOGUE—AND DEMOCRACY—IN ADMINISTRATIVE LAW

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Constitutional law scholars[1] have analogized judicial review to "dialogue" between courts and other institutions, an account some echo for judicial review in administrative law.[2] Professor Emily Hammond Meazell's excellent Article, *Deference and Dialogue in Administrative Law*,[3] extends a dialogic account of judicial review to serial judicial appeals of agency decisions, which involve iterative calls for judicial intervention over periods that can span decades. No doubt, "dialogue"—roughly defined as a conversation "enabl[ing] deliberation toward a common end"[4]—captures some of what occurs in judicial review of agency decisions. An appeal of an agency decision can result in a back-and-forth, in which both an agency and reviewing court engage in a discussion grounded in commonly understood goals. Professor Meazell's serial appeal case studies are fascinating and provide administrative law a fertile angle for assessing the kinds of substantive issues that arise in judicial review, especially the role of deference in arbitrary and capricious review.

Still, a dialogic approach to judicial review in administrative law faces some challenges. Judicial review is notoriously burdensome for both interest groups and agencies, presents a risk of delay, and at the extreme may undermine statutory objectives. Without doubt, iterative judicial challenges multiply and prolong these costs. Professor Meazell's Article

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[1] See, e.g., Barry Friedman, Dialogue and Judicial Review, 91 Mich. L. Rev. 577, 653–80 (1993) (advancing account of judicial review grounded in dialogue for constitutional matters).

[2] See, e.g., Christopher F. Edley, Jr., Administrative Law: Rethinking Judicial Control of Bureaucracy 201 (1990) (arguing courts and agencies should have "a dialogue about whether and how the political discretion to avoid costly regulation is constrained by law and science"); Mark Seidenfeld, A Civic Republican Justification for the Bureaucratic State, 105 Harv. L. Rev. 1511, 1550 (1992) (discussing how judicial review promotes "meaningful dialogue between court and agency in which the court stands in for the knowledgeable citizen").

[3] 111 Colum. L. Rev. 1722 (2011) [hereinafter Meazell, Deference and Dialogue].

[4] Id. at 1724 n.4.

acknowledges and addresses many of these challenges. She assesses the important connection between dialogue and judicial remedies which can determine whether an agency is able to respond to a court's reversal, or instead is forced to begin the regulatory process all over again. She also offers a number of recommendations to improve the legitimacy of a dialogic approach to judicial review of substantive matters. These include a strong endorsement of remands without vacation, along with the warning that courts reviewing agency decisions avoid mindlessly defaulting to the kind of deferential "rationality" review that predominates in constitutional law. When courts do engage in more aggressive review, she also recommends that they generally limit themselves to reviewing the reasons given by agencies rather than judicially constructed rationales that might support an agency decision. At face value, such recommendations seem uncontroversial and are quite consistent with the mainstream view of many administrative law scholars, as well as well-established doctrines such as hard look review and the *Chenery* principle.[5]

As Professor Meazell's Article illustrates, dialogue's descriptive power may be at its height in the serial litigation context. However, in this brief response, I raise two important issues that dialogic accounts of judicial review in administrative law have not sufficiently addressed: namely, both the "what" and the "who" of dialogue. The "what" refers to the nature of the agency decision being reviewed, how that decision was made within an agency's organizational structure, and, perhaps most importantly, whether any meaningful decision was made at all. The significance of the "what" of dialogue to judicial review is that different kinds of agency decisions implicate different types of issues on appeal and, ultimately, might engender different responses from courts regarding whether a dialogue with the agency is even worth having in the first instance. Equally significant, to the extent judicial review is a kind of dialogue, "who" is a reviewing court speaking with? Judicial review certainly involves the agency and a reviewing court engaging a particular class of cases pertaining to an issue that may be appealed, but it also is not limited to a cozy court-agency conversation.[6] Especially in the context of serial

[5] See SEC v. Chenery Corp. (Chenery II), 332 U.S. 194, 196 (1947) ("[A] reviewing court . . . must judge the propriety of [agency] action solely by the grounds invoked by the agency."); SEC v. Chenery Corp. (Chenery I), 318 U.S. 80, 87 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action would be based."). For further discussion, see Kevin M. Stack, The Constitutional Foundations of *Chenery*, 116 Yale L.J. 952 (2007).

[6] Even where dialogue is agency-court limited, and does not involve any other institutions, a reviewing court could be speaking to other circuits or panels as well as to an agency. In this sense, as occurs in the context of constitutional litigation (such as recent challenges to national health legislation), a development of legal principles within the judiciary could also influence this path of dialogue, independent of any extra-judicial response. While this might have implications for how broadly or narrowly courts write their opinions, Professor Meazell and other advocates of dialogue in constitutional and administrative law advance a more ambitious role for dialogue that transcends the judiciary.

litigation, dialogue can involve other institutions; to the extent multiple congresses and presidents may also be aware of issues being reviewed by courts, opportunities for political intervention may play as significant a role as judicial review both for an agency and for theories of legitimacy as administrative law.

I. THE "WHAT" AND THE REVIEWABILITY BLIND SPOT

Elsewhere, Professor Meazell has shown how substantive judicial review encourages agencies to translate their scientific and technical findings into sophisticated lay terms, leading her to warn about the downsides of judicial deference in reviewing agency scientific and technical decisions.[7] It seems uncontroversial that judicial review provides courts and agencies a platform on which to talk to each other in a common language, but *Deference and Dialogue in Administrative Law* provides a much thicker account of dialogue as an approach to judicial review in the risk regulation context, and especially for serial litigation case families. In addition to translation, dialogue involves mutual understanding, ongoing conversation and engagement and, perhaps most importantly, an openness to learning by both agencies and courts. So understood, dialogue holds some promise to improve agency decisions in these contexts.

Like others who endorse dialogue as an approach to judicial review, Professor Meazell focuses on the value of dialogue for procedural and substantive review of agency decisions. Her emphasis on how this sometimes occurs through remands without vacation of the agency decision describes a subset of important reversals, although it may not explain many other cases where *agencies* vacate the agency decision altogether. Moreover, by emphasizing remands following substantive or procedural review, the dialogic account of judicial review in administrative law courts suffers from a blind spot regarding reviewability, or whether substantive review is available in the first instance. A reviewability determination might be a part of dialogue—particularly where a reviewing court invites an agency to do more to address an issue—but, more troubling, it also can be a vehicle for both agencies and courts to opt out of or delay dialogue. Consider that many of Professor Meazell's lead examples involve early challenges to agency decisions in which litigants asked courts to review a delay in an agency's decisionmaking, which frequently is framed as review of agency inaction. If a court chooses to review the matter, this could well invite a dialogue through the remedy of remand. Instead, if a court were to treat the matter of inaction as unreviewable, as occurs across a range of agency regulatory

[7] Emily Hammond Meazell, Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science, 109 Mich. L. Rev. 733 (2011).

enforcement and budget priority decisions,[8] presumably no dialogue at all would occur between agencies and courts.

More fundamentally, reviewability doctrines raise basic questions related to the normative usefulness of dialogue in the first instance. Professor Meazell is astutely aware of the burdens of judicial review, including its costs, the prospect for delay, and how review can undermine statutory objectives, and she takes seriously the dysfunctions these might present.[9] Given the dialogic account's focus on procedural and substantive review in administrative law, however, common legal issues involving reviewability remain unaddressed. Two particular legal issues that cut across recurring doctrinal issues that arise in Professor Meazell's examples have historically been plagued by some reviewability limitations on substantive judicial review: persistent agency inaction—as in recurring failure to meet a statutory deadline—and preenforcement review of agency rules—as occurs when a court is asked to review an agency regulation or policy position after it is adopted but prior to its application. The dialogic account seems to presumptively assume reviewability, creating a blind spot in the dialogic account for important doctrines related to agency inaction and preenforcement review.

As to an agency's ability to potentially opt out of dialogue, reviewability doctrines such as exhaustion and finality provide agency decisionmakers a variety of ways to bypass judicial review, depending on the procedural form an agency chooses to make its decision. Agency inaction, as may occur in failure to enforce or in the context of an agency's delays in adopting regulations, has provided perhaps one of the most visible historical examples of agency decisions evading review.[10] Professor Meazell's examples illustrate how in many instances statutory deadlines can provide litigants a basis for convincing a court to review agency failure to adopt regulations. Yet it is noteworthy that in many of these serial litigation case families, the initial decision to entertain review was not driven entirely by courts or agencies but was tied to a statutory deadline that Congress adopted as a way to enable potential judicial

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[8] See Lincoln v. Vigil, 508 U.S. 182, 193 (1993) (treating as unreviewable agency's decision to discontinue funding for program out of its lump sum appropriation); Heckler v. Chaney, 470 U.S. 821, 837–38 (1985) (finding agency enforcement decision "committed to agency discretion by law" under section 701(a)(2) of the Administrative Procedure Act (APA)).

[9] See discussion in Meazell, Deference and Dialogue, supra note 3, at 1780–84 (discussing problematic aspects of dialogue).

[10] See, e.g., Lisa Schultz Bressman, Judicial Review of Agency Inaction: An Arbitrariness Approach, 79 N.Y.U. L. Rev. 1657, 1658 (2004) (noting "Supreme Court's reluctance to allow judicial review of [agency] inaction"); Michael D. Sant'Ambrogio, Agency Delays: How a Principal-Agent Approach Can Inform Judicial and Executive Branch Review of Agency Foot-Dragging, 79 Geo. Wash. L. Rev. 1381, 1388 (2011) ("The weak and ad hoc judicial review of agency delays creates opportunities for agencies . . . to thwart legislative mandates."); Cass R. Sunstein, Judicial Review of Agency Inaction After *Heckler v. Chaney*, 52 U. Chi. L. Rev. 653, 653 (1985) (describing agency inaction "traditionally shielded . . . from judicial review").

involvement in the matter in the first instances. Absent a congressional deadline, or at least some requirement to adopt rules, it is much less likely that such review would have been available.[11] Moreover, even where an agency does choose to act and opts to make a decision in the form of a tentative policy statement, rather than adopt a binding commitment in a notice-and-comment rule, the agency's preenforcement decisions may not be characterized as ripe for review and could evade the substantive scrutiny of courts altogether.[12] Under existing doctrine, such procedural choices may allow an agency to avoid, or at least delay, substantive judicial review.

Reviewability doctrines can also provide a court a convenient way to skirt dialogue with an agency altogether, by finding that the nature of the claimed harm or injury is weak (as may occur with a finding of no standing) or by holding that it does not have much to offer in terms of the substance of review or the remedy (as may occur, for example, if a reviewing court determines that a matter is committed to agency discretion by law under the APA).[13] Thus, even when an agency does opt to make a decision in a form that is reviewable, a court still could have some ability to avoid hearing appeals of certain agency decisions. Courts face incentives to avoid review of many agency decisions. To begin, federal judges have limited resources and it is probably fair to say that most judges have little appetite for the kinds of technical and scientific issues that many agency appeals present—especially the kinds of complex and technical risk issues Professor Meazell emphasizes in her Article. Even where judges do have an appetite for such issues, they may see institutional advantages to having an agency do more to develop a record or address an issue before a court weighs in.

Some of Professor Meazell's examples highlight this reviewability blind spot. OSHA's original delay in setting standards for the carcinogen known as hexavalent chromium initially resulted in no judicial review at all, creating the practical effect of deference to OSHA's priority setting even though no court had applied substantive review standards. The practical result here is analogous to a remand, but it is unclear whether a reviewability determination is predialogue or is subject to critique through the dialogical account of judicial review. If reviewability is

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[11] In some instances agency failure to take action such as adopting a regulation may be reviewable even where Congress did not adopt a specific deadline, based on reasons an agency gives and their connection to the statutory program being addressed. See, e.g., Massachusetts v. EPA, 549 U.S. 497, 528–35 (2007) (reviewing EPA failure to adopt rule, in part because past findings agency had made would have required some agency action under applicable statute).

[12] For a critique of this aspect of reviewability doctrine, see Mark Seidenfeld, Substituting Substantive for Procedural Review of Guidance Documents, 90 Tex. L. Rev. 331, 332 (2011) ("[T]hose who favor giving agencies more leeway to use guidance documents have the better argument.").

[13] See supra note 8 (referencing cases on section 701(1)(2) of APA).

predialogue, then both agencies and courts have some fairly powerful ways of opting out of the dialogic process altogether that might undermine some of the normative goals dialogue purports to advance. Perhaps that is a necessary extradialogic safety valve given the high costs judicial review presents, but this seems to throw the baby out with the bathwater if it leaves both agencies and courts ways of ending dialogue or avoiding it altogether through persistent delay. If reviewability is predialogue, a dialogic account of judicial review does not have any basic way of critiquing an agency or court decision that evades review, and fails to explain a major component of judicial review doctrine, including many decisions that produce the practical effect of deference.

Alternatively, a reviewability determination could be treated as a part of the normative account dialogue that informs judicial review. I find this approach more appealing than treating reviewability as a predialogic safety valve, and I suspect Professor Meazell would as well. However, incorporating reviewability into a dialogic account of judicial review has important implications for administrative law that go far beyond arbitrary and capricious and other substantive standards of review. Where an agency makes a decision that is unreviewable, or where a court refuses to entertain review of an agency decision or policy, the agency position stands and the end product mimics the result of rational basis review. If the result of de facto deference persists, the kind of dialogue a robust judicial review requires could be impeded, but more time for making a policy decision could also present an opportunity for greater learning for the agency, consistent with a dialogic approach. Professor Meazell's Article focuses primarily on how dialogue can inform substantive review standards under section 706 of the APA, such as the arbitrary or capricious standard, and remedies such as remands without vacation. Serial litigation also would seem to provide an excellent opportunity to assess how reviewability—including treatment of agency inaction and preenforcement decisions such as tentative policy statements—promote or impede dialogic values. At least in constitutional law, where the dialogic account of judicial review has had some normative success, the doctrinal implications of dialogue have been extended to basic predicate decisions regarding whether a court will decide a matter.[14] My sense is that Professor Meazell intends such decisions to also be dialogic in administrative law, but given that the bulk of the focus of her Article (like many other dialogic approaches to judicial review) addresses substantive standards of review, such as review under the basic arbitrary and capricious standard, reviewability remains a blind spot for dialogic accounts and there is some need for future work to address the doctrinal

[14] The classic, to which Professor Meazell refers, is Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (1962). Bickel advances an account of judicial minimalism based on "passive virtues" and envisions courts staying out of many important substantive questions involving the U.S. Constitution's meaning. Id. at 199–200.

and normative implications of dialogue for it. Dialogue might describe some aspects of procedural and substantive review, but at a minimum dialogue needs to be able to explain how declining review via the reviewability doctrine enhances or decreases dialogue—especially given the prominence of the passive virtues that are used to advance dialogue in constitutional law.

II. THE "WHO" OF REVIEW AND THE NEED TO CONFRONT POLITICS IN SUBSTANTIVE REVIEW

Modern dialogic accounts of judicial review in constitutional law are also tied to a normative account of democracy known as "popular sovereignty," which provides answers to questions of constitutional meaning by looking to an electoral process that gauges "the will of the people."[15] The "shared ends" of the conversation between courts and agencies in administrative law are trickier. Most scholars who focus on court-agency dialogue in substantive judicial review of agencies emphasize science and expertise, along with reasoned decisionmaking regarding shared ends, as legitimating agency decisions. But the larger question of how an agency and court are engaging in dialogue and how this relates to theories of legitimacy in administrative law receives short shrift in references to dialogue as a basis for judicial review of agencies. For example, one dialogic benefit of judicial review is not the conversation between the agency and a court after an agency has defined its regulatory course of action, but how the very possibility of judicial review might encourage agencies to take more seriously public participation before committing to a course of action in the first place.[16] In this sense, the real dialogue may not be between agencies and courts, but between agencies and interest groups.

Moreover, dialogue may have a larger audience among political institutions in the conversation about shared ends. As Professor Meazell's examples illustrate, dialogue seems to be most descriptively powerful in contexts where agency decisions undergo more iterations in response to review and as longer periods of time pass during the appellate process. Yet normatively, scenarios involving iterative appeals and protracted time periods of a decade or more are likely to present the kinds of issues where politics has multiple opportunities to influence agency decisions, through

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[15] For an example of a dialogic approach to judicial review advanced against the backdrop of a larger political theory of popular sovereignty, see Barry Friedman, The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution (2009). See also Cass R. Sunstein, The Supreme Court, 1995 Term, Foreword: Leaving Things Undecided, 110 Harv. L. Rev. 4, 33 (1996) (recognizing how dialogic rules are "democracy-forcing").

[16] See Richard Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1667, 1723–60 (1975) (emphasizing how judicial review can advance interest representation model of agency legitimacy).

the possibilities of congressional or executive branch intervention. Ironically, in those cases where the dialogic account appears to have the greatest descriptive traction—instances where agencies face multiple appeals and a long time span of back-and-forth between courts and agencies—the increased relevance and likelihood of political intervention could weaken dialogue's normative traction in legitimating agency decisions. As is illustrated by the examples of Endangered Species Act's listing the flat-tailed horned lizard or the Mexican spotted owl, the presence of dialogue may not really depend on the substance of any agency's decision at all, but on whether an agency is constrained by congressionally-mandated deadlines or procedures in making their decisions. Such deadlines and procedures certainly may give participants the ability to improve the quality of an agency's decision through legalistic judicial appeals consistent with court-agency dialogue, but they also may be fire alarms or other control instruments that have been planted by political principals such as Congress or the President to monitor the agency's decisions.[17]

Another set of examples, involving the setting of regulatory standards by agencies, also highlights the significance of judicial review as an opportunity for courts to not only speak to an agency but also to speak to Congress or other political actors. OSHA's setting of permissible exposure limits for workplace toxins, such as the carcinogen known as hexavalent chromium, was plagued by delays that spanned presidents of different political parties and multiple elections for congressional members. Consistency in the agency's ultimate failure to make any decision might have helped courts to sort out the extent to which politics or something else was driving the process, and also may have given presidents and multiple congresses many invitations to intervene if the agency's position was inconsistent with the pulse of the political principals who delegated authority to OSHA in the first instance. Professor Meazell expresses disappointment that OSHA's ultimate adoption of hexavalent chromium standards fell short of a "real dialogue" to the extent they did not address or reference judicial opinions that reversed previous agency decisions.[18] Yet, against the backdrop of multiple political criticisms of OSHA for failing to regulate workplace safety in the 1990s, the agency may have been more concerned with engaging in a conversation with Congress, perhaps as a

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[17] See Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, Administrative Procedures as Instruments of Political Control, 3 J.L. Econ. & Org. 243, 254 (1987) ("If procedures do affect outcomes, political officials have available to them another tool for inducing bureaucratic compliance."); Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies, 75 Va. L. Rev. 431, 468–81 (1989) (arguing that ex ante procedural limits are most effective way for political actors to control agencies).

[18] Meazell, Deference and Dialogue, supra note 3, at 1759.

way of warding off additional legislation that would interfere with agency discretion to set priorities.[19]

Another case family involving long-standing delays in the adoption of regulatory standards under the Clean Air Act also highlights the significance of Congress. The Clean Air Act was amended in 1990 and has been the subject of numerous congressional discussions, including numerous discussions related to the regulation of emissions from power plants and at least one bill that passed the House of Representatives. While one concern may be that the EPA moved at a snail's pace in adopting standards regarding the NO_x-PSD program following the D.C. Circuit's 1990 rejection of that approach,[20] in the fifteen year period in which the agency "did nothing"[21] a Democratic President took office, a Republican President replaced him, and multiple congresses had the opportunity to consider the issue. The D.C. Circuit's suggested hypothetical approach to EPA addressing the issue in 1990—an approach Professor Meazell critiques as potentially "overstep[ping] the judicial role in administrative law"[22]—signaled to key political principals the possibility of a court upholding potential NO_x-PSD standards. In the following fifteen years, the D.C. Circuit's suggested approach was never rejected by Congress, and this could have given the EPA some assurance that the court's approach would not face a veto or political intervention by key political principals.

Incorporating interest group politics and political actors like Congress and the President into a dialogic account of judicial review in administrative law will be no easy task, as politics raises many difficult questions of its own for administrative law. While many scholars see courts as focusing on neutral reasons related to an agency's technical or scientific judgment to help legitimate an agency's decisions, politics can also play some legitimating role. Indeed, some scholars such as Kathryn Watts have argued that politics should play an even more direct role under section 706's arbitrary or capricious review of agency decisions.[23] Extending dialogue to such substantive accounts is controversial and would require attention to the significance of positions taken by both Congress and the White House in judicial review. Yet even if politics is not

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[19] For example, the topic of OSHA's consistent failure standards was discussed in a congressional hearing in 2007. Is OSHA Working for Working People?: Hearing Before the Subcomm. on Employment & Workplace Safety of the S. Comm. on Health, Education, Labor, & Pensions, 110th Cong. (2007), available at http://www.gpo.gov/fdsys/pkg/CHRG-110shrg35165/pdf/CHRG-110shrg35165.pdf.

[20] Envtl. Def. Fund v. EPA, 898 F.2d 183 (D.C. Cir. 1990).

[21] Meazell, Deference and Dialogue, supra note 3, at 1771.

[22] Id. at 1786.

[23] See Kathryn A. Watts, Proposing a Place for Politics in Arbitrary and Capricious Review, 119 Yale L.J. 2, 8 (2009) ("[W]hat count as 'valid' reasons under arbitrary and capricious review should be expanded to include certain political influences from the President, other executive officials, and members of Congress.").

an explicit consideration in arbitrary or capricious review, it still may have some indirect role in normative assessments of substantive review. Lisa Bressman, for instance, advances an approach to judicial review that sees courts as attempting to mediate the decisions of political actors, at least for procedural questions and issues related to statutory interpretation.[24] If a dialogic account of judicial review in administrative law serves a similar normative purpose to that in constitutional law, any robust theory of judicial review needs to address not only dialogue as improving scientific and technical judgments but also the role of interest group and institutional politics in legitimating agency decisions.

Confronting the role of politics in judicial review is not only of theoretical interest for administrative law; it also will influence what recommendations can be drawn for doctrines related to substantive judicial review. For example, consider the use of judicially-constructed reasons to support an agency's decision. Where the use of such reasons by a court results in rejection of an agency's decision and remand, they do not violate the basic principle of *Chenery*, since the agency still retains the power to make a choice on remand and to either adopt or engage those reasons. Where the reasons involve an issue related to statutory meaning, a court may be saving all litigants time by helping both litigants and an agency to see what is and is not permissible under a statute, as understood by a court. If what is being reviewed is a policy choice, and the court is not convinced that the rationale provided by the agency meets the arbitrary and capricious standard, a court might also be helping both litigants and the agency by providing some reasoning that, in the court's view, would meet the arbitrary and capricious standard. This does not bind the agency to that reasoning on remand, but it does let litigants and the agency, as well as Congress, know what the court thinks would pass muster. Especially to the extent that politics has a legitimizing role within the dialogic account of judicial review, the kinds of hypothetical reasons Professor Meazell warns courts to generally avoid in writing their opinions are not necessarily inconsistent with a dialogic account of judicial review in administrative law—particularly if they serve some kind of signaling function for an agency, the President, or Congress.

III. DIALOGUE'S ASSUMPTIONS ABOUT DEMOCRACY

In its fascinating case studies of serial litigation, *Dialogue and Deference in Administrative Law* presents an important challenge for administrative law, and, in particular, for theories of judicial review. But

[24] See Lisa Schultz Bressman, Deference and Democracy, 75 Geo. Wash. L. Rev. 761, 764–65 (2007) (arguing that Court refusal to accord deference to agencies is motivated by democratic concerns about political non-accountability of other actors); Lisa Schultz Bressman, Procedures as Politics in Administrative Law, 107 Colum. L. Rev. 1749, 1752–53 (2007) ("The Court has produced rules that bring agencies in line with the constitutional structure by negotiating the political forces in the administrative process.").

the normative traction of dialogue for judicial review in administrative law will depend on the kinds of agency decisions actually being engaged as a part of the dialogue (specifically, whether courts have any basis for participating in them at all), and when courts actually do speak through judicial decisions, who courts and agencies think that they are speaking to when they opt to engage in dialogue. Dialogue certainly may make mutual conversation possible, but some court-agency conversations probably are not worth having at all while other conversations may be more about improving public participation in the agency decisionmaking process, or about the agency or court signaling something to invite possible action by Congress or the President, than a cozy ongoing chat between a court and an agency. The very idea of judicial review in administrative law eschews judges endorsing the substantive goals behind regulation, making the notion of "shared ends" in dialogue a bit of a misfit for administrative law. Even if it does make sense to speak of courts as being able to engage in a conversation with an agency about shared substantive ends, any robust normative theory of judicial review must also confront politics and the basic understanding of democracy that legitimates the decisions of administrative agencies.

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