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Response

Administrative Law's Asymmetries of Statutory Origin

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I. Introduction

Administrative law is constantly being scrutinized—and criticized—for the ways agencies can undermine their own legitimacy. Particularly strong threads of this criticism relate to agency capture,¹ the use of less participatory decision-making tools,² and strategic avoidance of judicial review.³ The concern is that over time, agency policy will shift in the direction of its regulated entities, undermining the interests of statutory beneficiaries.⁴ There is a vast body of literature related to this concern, but one finds thoughtful treatment of two intriguing, fresh examples in Professor Melissa Wasserman's *Deference Asymmetries: Distortions in the Evolution of Regulatory Law*.⁵ I am pleased to offer this response.

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1. See generally RENA STEINZOR ET AL., CTR. FOR PROGRESSIVE REFORM, BEHIND CLOSED DOORS AT THE WHITE HOUSE (2011) (documenting regulated industry dominance in meetings with the Office of Information and Regulatory Affairs); Wendy Wagner et al., *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 123 (2011) (observing systemic imbalance in rulemaking process, with regulated industry engaging far more frequently than public interest groups).

2. See, e.g., Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 408 (2007) (“[B]y issuing a guidance document, an agency can obtain a rule-like effect while minimizing political oversight and avoiding the procedural discipline, public participation, and judicial accountability required by the APA.”).

3. *Id.*

4. See, e.g., Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1682–83 (1975).

5. Melissa F. Wasserman, *Deference Asymmetries: Distortions in the Evolution of Regulatory Law*, 93 TEXAS L. REV. 625 (2015).

Professor Wasserman's intriguing hypothesis is that administrative law tilts in a pro-regulated-entity direction because of a skewed application of deference regimes.⁶ She relies on three mechanisms for this result. First, the right of review from agency decision making can be asymmetric.⁷ For example, applicants for Social Security benefits may seek judicial review of the Social Security Administration's (SSA) denial of benefits, but there is no entity that can challenge the SSA's decision to grant benefits.⁸ As a result, the agency's own policy may develop in a direction favoring applicants.⁹

Second, agencies' mandates sometimes require different adjudicatory procedures for internally reviewing different actions.¹⁰ For example, the Patent and Trademark Office (PTO) has a very informal procedure for reviewing patent denials—with underlying statutory interpretations that would likely not be *Chevron*-eligible¹¹—while it must use a formal procedure for reviewing patent grants—with underlying statutory interpretations that should arguably be *Chevron*-eligible.¹² Thus, the PTO's statutory interpretations in favor of patentability are more likely to receive deferential treatment while interpretations not in favor of patentability are less likely to receive deferential treatment.¹³ All else being equal, over time judicial doctrine may therefore skew in favor of patentability if we assume that the agency will more likely be upheld under *Chevron* deference than under a lesser scheme like *Skidmore*.¹⁴

Finally, agencies' constituents do not seek review of agency decisions symmetrically. For example, regulated entities are much more likely to challenge the Environmental Protection Agency's (EPA) actions than environmental groups.¹⁵ Professor Wasserman provides an overview of various possible explanations for this observation, ranging from disparate resources, to hurdles to review like standing, to the implications of classic capture theory.¹⁶ Thus, as many have documented, there is a lack of

6. *Id.* at 627.

7. *Id.* at 655–58.

8. *Id.* at 656–57.

9. *Id.* at 657.

10. *Id.* at 658.

11. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). For a full overview of *Chevron* deference, see Emily Hammond et al., *Judicial Review of Statutory Issues Under the Chevron Doctrine*, in *JUDICIAL REVIEW OF ADMINISTRATIVE AGENCIES* (forthcoming 2015) (manuscript on file with author).

12. *See* Wasserman, *supra* note 5, at 658–61. I agree with, and for purposes of this Response adopt, Professor Wasserman's analysis regarding *Chevron* eligibility.

13. *Id.* at 661.

14. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); *see* *United States v. Mead Corp.*, 533 U.S. 218, 234–35 (2001) (holding that even if agency interpretations are not *Chevron*-eligible, they are reviewed under the *Skidmore* standard).

15. *See* Wasserman, *supra* note 5, at 666 n.129 (collecting sources).

16. *See id.* at 667–69 & nn.131–40 (collecting sources).

pluralistic representation in the courts that reinforces the tendency of agency decision making to tilt in the favor of its regulated industries.¹⁷

Of these three mechanisms, the second is Professor Wasserman's keenest contribution. Indeed, it is an asymmetry made all the more fascinating because it is a result of congressional design, as I will explore in more detail below. Professor Wasserman's analysis also provides a helpful perspective on the interaction of agency adjudications and deference regimes—a topic that has yet to receive comprehensive treatment in the literature. And it provides a new context for thinking about agency-specific precedents and their place in administrative law.¹⁸

In this response, I engage the second mechanism and, to some extent, the first.¹⁹ I explore the following train of thought. First, I elaborate the proposition that fidelity to statute is of utmost importance to assessing agency behavior. But what is the meaning of fidelity to statute? How are we to assess a court's *or* an agency's view of legislative purpose? One enduring challenge of administrative law is that we cannot presume that a court's preferred construction of a statute is any closer to a "true" interpretation than that of an agency. In fact, there is simply no objective truth in this regard. Relieved of the obligation to identify such a thing, we should view deference regimes not as uncovering such a truth but as facilitating protection against bureaucratic drift, among other things. When Congress itself establishes a statutory scheme that includes deference asymmetries, it is revealing a preference that any drift takes place in a particular direction. From a normative administrative law standpoint, this is not particularly bothersome.²⁰ Indeed, it is helpful for Congress to be so specific. On the other hand, Congress may not be aware of the interaction between statutory asymmetries and other administrative law dysfunctions. Professor Wasserman has aptly set the stage for further examination of this final point.

17. *Id.*

18. See generally Robert E. Levy & Robert L. Glicksman, *Agency-Specific Precedents*, 89 TEXAS L. REV. 499 (2011) (suggesting ways that judicial review develops specific precedents unique to the particular agency being reviewed).

19. As for the third mechanism, I do not understand Professor Wasserman to be arguing that courts somehow are selective about deference regimes as a result of, or in a way that interacts with, disproportionate rates of appeal. As an empirical question, that possibility is likely extremely difficult to test. See *infra* Part III (describing the difficulty of establishing objective standards).

20. As I emphasize in Part III, this is not to say that asymmetries may not be troubling from a normative *policy* standpoint. See *infra* Part III. But for purposes of pure administrative law, I attempt to be neutral in this regard.

II. Fidelity to Statute

An agency's statutory mandate is its lifeblood. A defective mandate can undo an agency's existence,²¹ reveal its work to have been *ultra vires*,²² and indicate instability in the relationships between the three branches.²³ So serious a judicial holding is extremely rare, and administrative law has developed a number of means for avoiding such a result while promoting legitimacy-enhancing values such as participation, deliberation, transparency, and reason-giving.²⁴ Moreover, whether a court approaches substantive review through a *Chevron*-type²⁵ or arbitrary-and-capricious-type²⁶ lens, fidelity to statute is mandatory.

Examples abound. Consider *Massachusetts v. EPA*,²⁷ in which the Court held arbitrary-and-capricious EPA's denial of a petition for rulemaking to regulate new motor vehicle emissions under the Clean Air Act. The agency's failing was its "reasoning divorced from the statutory text."²⁸ Or take *AT&T Corporation v. Iowa Utilities Board*,²⁹ the first case in which an

21. *Cf.* *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 492 (2010) (holding that dual for-cause limitations on the removal of the Public Company Accounting Oversight Board violated separation of powers but were severable).

22. *Cf.* *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 486 (2001) (rejecting a nondelegation challenge to certain provisions of the Clean Air Act).

23. *See* *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 538 (1935) (striking down New Deal legislation on nondelegation grounds); *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 426 (1935) (same).

24. *See* *Indus. Union Dep't v. Am. Petroleum Inst.*, 448 U.S. 607, 646 (1980) (plurality decision) (favoring a construction of statute that avoided nondelegation concerns); Lisa Schultz Bressman, *Disciplining Delegation After Whitman v. American Trucking Ass'ns*, 87 CORNELL L. REV. 452, 460 (2002) (highlighting various democratic values of the administrative state, including accountability, fairness, rationality, and regularity); Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575, 1588 (2001) (constructing comprehensive typology in constitutional law context); Emily Hammond & David L. Markell, *Administrative Proxies for Judicial Review: Building Legitimacy from the Inside-Out*, 37 HARV. ENVTL. L. REV. 313, 321–27 (2013) (describing how judicial review enhances agency legitimacy by furthering administrative law values); Emily Hammond Meazell, *Deference and Dialogue in Administrative Law*, 111 COLUM. L. REV. 1722, 1729 (2011) (noting role of courts in furthering such values); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 316–17 (2000).

25. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984); *see* 5 U.S.C. § 706(2)(C) (2012) (court shall set aside agency action if the agency acted "in excess of statutory jurisdiction").

26. 5 U.S.C. § 706(2)(A) (requiring a court to set aside an agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

27. 549 U.S. 497 (2007).

28. *Id.* at 532; *cf. id.* at 552–53, 558–60 (Scalia, J., dissenting) (offering alternative analysis that would have relied on *Chevron*).

29. 525 U.S. 366 (1999).

agency lost at *Chevron*'s step two before the Supreme Court.³⁰ There, the Court rejected an aspect of the Federal Communication Commission's (FCC) order implementing the 1996 Telecommunications Act because it was "not in accord with the ordinary and fair meaning" of the statutory terms, it read an important provision out of the statute, and it evidenced a misunderstanding of another provision of the statute.³¹

Even within the most deferential standards of review, courts will first ensure agencies have acted within the authority granted to them. *Chevron* illustrates: at step one, the courts' *de novo* inquiry as to whether Congress has spoken to the precise issue effectuates this requirement.³² But there is nothing magical or unique about the *Chevron* formulation for illustrating the point: even *Auer*³³ deference, arguably of a greater degree than *Chevron* for agencies' interpretations of their own regulations, nevertheless is at least partially rooted in the intent of Congress derived from the statutory mandate.³⁴ The overarching point is that an agency must comply with its statutory mandate to achieve substantive legitimacy.³⁵

III. A Futile Search for Objective Meaning?

The difficulty with this requirement is in its implementation. In particular, how does one assess—in an objective way—whether an agency's policy choice³⁶ comports with the objective intent of the legislature? The problem, of course, is that legislative intent is usually not so readily discernable. Even decisions made at step one of *Chevron* are open to argument.

The classic case *FDA v. Brown & Williamson Tobacco Corporation*³⁷ illustrates the difficulty in determining just what the statutory mandate means. There, of course, the Court held that the FDA lacked authority to

30. In the relevant portion of this opinion, the Court does not cite *Chevron. Id.* at 386–92. The Court's language, however, implies a holding based on step two and has been so understood by others. See *id.* at 392; Hammond et al., *supra* note 11 (manuscript at 28–29).

31. *Iowa Utils. Bd.*, 525 U.S. at 389–92.

32. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984) ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.")

33. *Auer v. Robbins*, 519 U.S. 452 (1997).

34. See Matthew C. Stephenson & Miri Pogoriler, *Seminole Rock's Domain*, 79 GEO. WASH. L. REV. 1449, 1456–57 (2011) (describing the legislative intent justification for *Seminole Rock*, also known as *Auer*, deference).

35. Hammond & Markell, *supra* note 24, at 326; Sidney A. Shapiro & Ronald F. Wright, *The Future of the Administrative Presidency: Turning Administrative Law Inside-Out*, 65 U. MIAMI L. REV. 577, 592 (2011).

36. I use the term "policy choice" broadly, encompassing agencies' decisions within their discretion whether achieved through statutory interpretation or through other means of decision making.

37. 529 U.S. 120 (2000).

regulate tobacco advertising to minors despite statutory text appearing to permit just that.³⁸ Interpretation that appears to contravene express terms of statute reveals two things: first, even when departing from express statutory terms, the Court places its emphasis on statutory fidelity.³⁹ Second, this analysis makes stark a reason for criticism of the courts generally: Is this results-oriented reasoning? How can we know if the courts themselves are truly able to divine legislative purpose? Congress's subsequent decision to amend the Food, Drug, and Cosmetics Act to achieve the result rejected by the Court only makes these questions more provocative.

These points lead to one of the areas where I would be interested to see empirical testing of Professor Wasserman's hypothesis. As described in *Deference Asymmetries*, SSA's adjudicatory decisions are open to judicial review only by applicants who have been denied benefits.⁴⁰ Professor Wasserman argues that this scheme incentivizes SSA to develop its policy in a pro-beneficiary direction, to avoid judicial review.⁴¹ But how does this hypothesis interact with judicial review? If the agency receives *Chevron* deference when it denies benefits to an applicant, would that result counteract such a tilt, at least somewhat? The question is not hypothetical: the Supreme Court recently upheld SSA's denial of benefits using a *Chevron* analysis in *Astrue v. Capato ex rel. B.N.C.*⁴²

IV. The Role of Deference Regimes in Guarding Against Drift

Indeed, the tilt in policy may be viewed as part of a larger issue of administrative law: bureaucratic drift. Over time, agencies may depart from Congress's intended purpose.⁴³ A solid body of literature engages this issue,⁴⁴ and much of it relies on judicial review as an important check.⁴⁵ But

38. *See id.* at 162 (Breyer, J., dissenting) (“[T]obacco products . . . fall within the scope of this statutory definition, read literally.”).

39. The *Brown & Williamson* majority went to great lengths to discern Congress's intent whether the FDA was to have interpretive authority. *Id.* at 133–59 (majority opinion) (describing, among other things, implications of tobacco regulation within the overall statutory scheme and Congress's activities over 35 years with respect to tobacco, including effective ratification of FDA's position that it lacked such regulatory authority).

40. Wasserman, *supra* note 5, at 656–57.

41. *Id.* at 657.

42. 132 S. Ct. 2021 (2012).

43. The example of the Yucca Mountain Project and both the Department of Energy's and the Nuclear Regulatory Commission's (NRC's) unwillingness to give effect to the Nuclear Waste Policy Act provides a stark demonstration. *See In re Aiken Cnty.*, 725 F.3d 255 (D.C. Cir. 2013) (issuing writ of mandamus against NRC); Emily Hammond Meazell, *Presidential Control, Expertise, and the Deference Dilemma*, 61 DUKE L.J. 1763, 1783–86 (2012) (describing facts) [hereinafter Hammond, *Presidential Control, Expertise, and the Deference Dilemma*].

44. Matthew D. McCubbins, Roger G. Noll, and Barry R. Weingast, known collectively as “McNollgast,” have authored several of the classics. *See, e.g.*, Matthew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987);

as Professor Bressman has noted: “If reviewing courts can impose their own preferences, they may simply swap one principal-agent problem (between Congress and agency) for another (between Congress and courts).”⁴⁶ This point relates to the problem described above; given a lack of objective statutory meaning, it is nearly impossible to say with certainty that a court has best implemented that meaning.

Thus, deference regimes are important because they *mediate* the relationship between agencies and the legislature.⁴⁷ Courts review agencies’ reasoning at the time the decision was made,⁴⁸ on the record,⁴⁹ and—at their best—provide detailed opinions that further permit monitoring by Congress and other stakeholders.⁵⁰ In that sense, we rely on deference regimes not so much because they guarantee an objectively “correct” outcome every time, but because they facilitate broader legitimizing values central to government functioning.

V. The Role of Legislative Specificity

Deference regimes interface with congressional activity in much more important ways, however. As a starting point, consider Professor Richard Pierce’s conceptualization of *Chevron* as a nondelegation decision.⁵¹ The doctrine incentivizes Congress to legislate with specificity if it wishes to avoid open-ended agency discretion, thereby avoiding the need for judicial elaboration of the nondelegation doctrine.⁵² This approach is a possible way of understanding the decision in *Utility Air Regulatory Group v. EPA*,⁵³ in which the Court gave effect to unusually precise statutory language in the face of understated nondelegation concerns.⁵⁴

Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989).

45. See, e.g., Hammond & Markell, *supra* note 24, at 325 (collecting sources and explaining why judicial review furthers external accountability and legitimacy). Institutional design may also provide protection, as in the case of independent agencies. See Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEXAS L. REV. 15, 72–78 (2010) (describing such design choices); Hammond, *Presidential Control, Expertise, and the Deference Dilemma*, *supra* note 43, at 1778–79 (describing design purposes behind independent agencies).

46. Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1777 (2007).

47. *Id.* at 1776–77.

48. SEC v. *Chenery Corp.* (*Chenery I*), 318 U.S. 80, 95 (1943).

49. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414–15 (1971).

50. Emily Hammond Meazell, *Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science*, 109 MICH. L. REV. 733, 778–79 (2011).

51. See Richard J. Pierce, Jr., *Reconciling Chevron and Stare Decisis*, 85 GEO. L.J. 2225, 2230–32 (1997).

52. *Id.* at 2231–33.

53. 134 S. Ct. 2427 (2014).

54. I develop this analysis more fully elsewhere. See generally Emily Hammond, *Chevron’s Generality Principles*, 83 FORDHAM L. REV. 655 (2014).

Legislative design also informs the degree of deference to be afforded, in ways that go beyond *Mead*'s grounding of *Chevron* deference in legislative intent.⁵⁵ For example, Congress sometimes specifies the relationships between agencies and addresses the deference implications for the chosen arrangement.⁵⁶ Even more interestingly, Congress sometimes specifies the precise level of deference courts are to afford.⁵⁷ The conclusion is relatively straightforward: under general principles of administrative law, congressional intent and the primacy of statute reign supreme.

If that is true, we might ask why the mechanisms Professor Wasserman highlights—statutory differences in the availability of appeals and statutory differences in agencies' internal appeals procedures—are troubling. If they tend to skew substantive law in a particular direction over time, perhaps we should be unconcerned because that is precisely the result Congress wanted. Indeed, recent empirical work reveals legislative drafters to be cognizant of the deference regimes when they draft.⁵⁸ And even if the drafters were not, the point is that a tilt is part of the very fabric of the statute. Take the example of SSA applicants' ability to appeal only denials of benefits. Characterizing those applicants as regulated entities⁵⁹ misses the fact that they are the direct statutory beneficiaries. In setting up the appeal scheme as it has, Congress is evidencing an intent to err on the side of providing benefits.

The example of the PTO's new statutorily authorized procedures fares no differently, even if the concept of a statutory beneficiary is not so obvious in the patent context. Importantly, the Leahy-Smith America Invents Act (AIA) "provided the first major overhaul to the patent system in sixty years" and stands to transition the PTO into the world of modern administrative law.⁶⁰

55. See *United States v. Mead Corp.*, 533 U.S. 218 (2001). Of course, there is great disagreement among scholars whether the legislative intent foundation is satisfactory. For an excellent critique and exploration of other rationales, see Mark Seidenfeld, *Chevron's Foundation*, 86 NOTRE DAME L. REV. 273 (2011).

56. See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1022(b)(4)(B), 124 Stat. 1376, 1981 (2010) (codified at 12 U.S.C. § 5512(b)(4)(B) (2012)) (subjecting the Consumer Financial Protection Bureau (CFPB) to oversight by the Financial Stability Oversight Council, but for purposes of judicial review, treating the CFPB as the sole agency with interpretive authority); Hammond, *Presidential Control, Expertise, and the Deference Dilemma*, *supra* note 43, at 1792–93.

57. See Kent Barnett, *Codifying Chevmore*, 89 N.Y.U. L. REV. (forthcoming 2015).

58. See Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 994 (2013) ("[M]any of the so-called fictions of congressional delegation in the Court's cases may not be fictions at all."):

59. To be fair, Professor Wasserman carefully defines what she means by using this terminology. Wasserman, *supra* note 5, at 655 n.90. But the usage matters because it obscures the very purpose behind the differences in the availability of appeals.

60. Melissa F. Wasserman, *The Changing Guard of Patent Law: Chevron Deference for the PTO*, 54 WM. & MARY L. REV. 1959, 1964 (2013).

From an administrative law standpoint, the new mechanism appears to show congressional intent to distinguish between granting and denying patents in such a way as to place more scrutiny on granting. By being very detailed in the procedures associated with reviewing patent grants, it seems that Congress is particularly concerned about false positives—that is, grants made in error. Congress seems relatively less concerned about false negatives—that is, denials made in error. Importantly, specifying procedures for agency review of patent grants places the hard work on the agency, which has the comparative expertise relative to courts and is the more efficient decision maker. If judicial review following this procedure employs *Chevron* deference, all the better—once again, it reflects congressional intent about the relative roles of courts and the agency.⁶¹

Furthermore, this example illustrates a deference regime in action as moderating the relationship between the agency and Congress. Although *Chevron* at step two provides more deference than a *de novo* regime, concerns about drift are ameliorated because the agency has engaged in a much more detailed, formal process that provides avenues for stakeholder participation, formal means of decision making and reason-giving, and a transparent, closed record.⁶² These procedures facilitate external monitoring that can further guard against drift by, among other things, enabling stakeholders to alert the legislature if policy gets too far off track.

VI. Concluding Thoughts

These asymmetries are of statutory origin. That alone is a reason to take comfort—from an administrative law perspective—that these mechanisms are not necessarily indicative of any serious dysfunction. From a policy perspective, one's view might be different. But, to paraphrase from *Chevron*, that battle can be waged in Congress.⁶³

Although I may be less concerned than others about deference asymmetries of statutory origin, I conclude by emphasizing a different insight provided by *Deference Asymmetries*. Professor Wasserman's inclusion of the third mechanism—different rates of review—suggests that there is important future work to be done in assessing how statutory asymmetries interact with the many dysfunctions of administrative law. And by identifying two mechanisms deserving of close attention, *Deference*

61. It is critical to recognize that the Board may reverse an examiner's initial decision to grant a patent using the formal adjudicatory procedures Professor Wasserman outlines. Wasserman, *supra* note 5, at 664–65. Thus, both grants and denials of patents may be reviewed using a *Chevron* scheme. Only if it turns out that grants resulting from this process are appealed in much greater numbers than denials would the difference between the grant-review process and the denial-review process result in markedly different deference regimes.

62. See *id.* at 661 n.117 (noting that the PTO has adopted the APA formal adjudicatory requirements found in § 554 and §§ 556–557 for these proceedings).

63. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 864 (1984).

Asymmetries provides an enlightening springboard for future scholarly, judicial, and legislative attention.