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Catherine M. Sharkey

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THE ADMINISTRATIVE STATE AND THE COMMON LAW: REGULATORY SUBSTITUTES OR COMPLEMENTS?

Catherine M. Sharkey*

ABSTRACT

The modern administrative state looms larger than ever, and grows at an ever-accelerating pace. Federal agencies have proliferated in virtually every significant regulatory domain. U.S. government spending on federal regulatory activity in 2014 is estimated to have been \$49.8 billion. Federal agencies now employ approximately 284,000 people, and the Code of Federal Regulations now weighs in at over 175,000 pages. Not everyone is pleased with these developments.

Four such individuals—Chief Justice Roberts, Justices Thomas, Alito, and the late Justice Scalia—have expressed their displeasure, indeed their alarm, with consistency, clarity, and vigor. They warn that the rise of administrative agencies, and the attendant ascendance of doctrines of mandatory judicial deference to agency interpretations of federal law, signals no less than the end of our government’s separation-of-powers structure, and our right to live our lives without fear of bureaucratic encroachment at every turn. Their opinions and dissents sounding this theme reverberate with seemingly unprecedented urgency in the face of a never-before-encountered threat.

As it turns out, however, the same alarm bell was sounded decades ago—by Roscoe Pound. Pound viewed administrative action as lawless, capricious, and marred by prejudice. He warned that agencies were self-interested, too powerful, and ever grasping for even more power.

After outlining the uncannily similar attitude towards agencies expressed by Pound and our Supreme Court’s conservative core, this Article probes how those views diverge. For Pound, the ideal regulatory alternative to agency action was the common law of torts, which he characterized as the last bastion of a democratic society. This is decidedly not the view of the conservative core. Their antagonism towards the common law of torts, which apparently runs

* Crystal Eastman Professor of Law, New York University School of Law. Amanda Sterling (NYU 2016) provided excellent research assistance.

even deeper than their hostility towards agencies, is on full display in their federal preemption decisions. How, then, to fill the regulatory void the conservative core seems to leave agape? This Article proposes one possible path to the answer.

Drawing inspiration from the views of Pound himself, as well as the work of Guido Calabresi, this Article proposes that courts should adopt an altogether new approach, one whereby they effectively incorporate input from federal agencies, while at the same time ensuring that such agencies do not overreach. This need not entail the wholesale rejection of agency interpretive authority espoused by the conservative core in its non-preemption decisions. Instead, and as even Pound recognized, courts can and should exercise oversight to ensure that agency interpretations and conclusions are backed by responsible rulemaking procedures and empirical support. This approach can lead to an effective tort–agency partnership, where the administrative state and common law can operate as regulatory complements.

INTRODUCTION

The growth of the national government is perhaps the most significant feature of the past century. Concomitant with this expansion is the growth of the Executive Branch, which “now wields vast power and touches almost every aspect of daily life.”¹ There has been a “dramatic shift in power over the last 50 years from Congress to the Executive.”² That “shift [has been] effected through the administrative agencies.”³ The emergence of administrative agencies as a “fourth branch” of American government has had dramatic repercussions on the evolution of the common law of torts, and the further expansion of the administrative state calls for innovative responses.⁴ Federal

¹ *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010).

² *City of Arlington v. FCC*, 133 S. Ct. 1863, 1886 (2013) (Roberts, C.J., dissenting).

³ *Id.*

⁴ The “fourth branch” of American government has a long history. See JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* (2012). But its current rate of growth is unprecedented. The New Deal was a watershed moment, and over the last half-century—particularly during the last fifteen years—federal agencies have proliferated in virtually every significant regulatory domain. See generally *id.* (examining the foundation and evolution of administrative law in the United States); CHARLES MURRAY, *BY THE PEOPLE: REBUILDING LIBERTY WITHOUT PERMISSION* (2015) (tracing the rise of the administrative state and summarizing the major doctrines that govern it); CASS R. SUNSTEIN, *THE COST–BENEFIT STATE: THE FUTURE OF REGULATORY PROTECTION* (2002) (discussing the rapid development of the fourth branch following the New Deal). Between 1960 and 2014, government spending on federal regulatory activity skyrocketed from \$2.87 billion (adjusted for inflation) to an estimated \$49.8 billion. SUSAN DUDLEY & MELINDA WARREN, *WEIDENBAUM CTR. ON THE ECON., GOV'T &*

preemption of state tort law—whereby, for example, a regulation promulgated by a federal agency ousts competing state tort law claims—is a salient illustration of how agency regulation supersedes (or even subverts) regulation by tort litigation.⁵

The conventional view is that the administrative state poses a threat to the common law of torts and, to the extent that the fourth branch is resisted or dismantled, common law torts will flourish once again.⁶ Indeed, for this symposium I was asked to address two provocative questions: Has the administrative state replaced our common law tort system in the United States? And, in the wake of preemption, is our status as a common law country now a thing of the past?

Perhaps not coincidentally (given the Pound Institute's cosponsorship of the symposium), Roscoe Pound is typically invoked as one who—with great

PUB. POLICY & GEORGE WASHINGTON UNIV. REGULATORY STUDIES CTR., SEQUESTER'S IMPACT ON REGULATORY AGENCIES MODEST: AN ANALYSIS OF THE U.S. BUDGET FOR FISCAL YEARS 2013 AND 2014, at 25 tbl.A-5 (2013), http://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/2014_Regulators_Budget.pdf. Staffing associated with this activity increased from approximately 57,000 full-time-equivalent employees to roughly 284,000. *Id.* at 26 tbl.a-6. And the Code of Federal Regulations (a proxy for regulatory activity, albeit an imperfect one) has expanded from just short of 23,000 pages to a massive 175,000-plus pages. *Code of Federal Regulations: Total Pages 1938-1949, Total Volumes and Pages 1950-2014*, OFF. FED. REG. (2015), <https://www.federalregister.gov/uploads/2015/05/Code-of-Federal-Regulations-Total-Pages-and-Volumes-1938-2014.pdf>. It may well be, moreover, that we will look back on the early twenty-first century as another surge in regulatory expansion.

⁵ See generally Brian Galle & Mark Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933 (2008) (discussing the “regulatory federalism issues” that arise from preemption of state law, including the common law of tort, in the administrative agency context); Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 NW. U. L. REV. 695 (2008) (critiquing modern cases in which agency regulations have been held to preempt state law); Peter H. Schuck, *FDA Preemption of State Tort Law in Drug Regulation: Finding the Sweet Spot*, 13 ROGER WILLIAMS U. L. REV. 73 (2008) (exploring the conflict between federal agency authority and state tort law through the lens of preemptive FDA regulations); Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449 (2008) [hereinafter Sharkey, *Products Liability Preemption*] (examining the agency preemption issue in the context of products liability law); Catherine M. Sharkey, *Tort-Agency Partnerships in an Age of Preemption*, 15 THEORETICAL INQUIRIES L. 359 (2014) [hereinafter Sharkey, *Tort-Agency Partnerships*] (endorsing a new model that would enable both federal agencies and state tort law to operate in the health and safety “enforcement preemption” context).

⁶ Cf. Richard A. Epstein, *Why the Modern Administrative State Is Inconsistent with the Rule of Law*, 3 N.Y.U. J.L. & LIBERTY 491, 494 (2008) (observing that “systematic forms of regulation,” such as that established by the modern administrative state, introduce the danger “that legislatures will dismantle worthwhile common law conceptions”); Schuck, *supra* note 5, at 73–76 (observing the institutional competition between tort law and administrative regulations); Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DEPAUL L. REV. 227, 227–29 (2007) (discussing the conflict between the administrative state and the common law of torts).

chagrin—would answer both questions in the affirmative.⁷ Particularly in the later stages of his life and work, Pound evolved into a bitter critic of the New Deal and the growth of the administrative state. In a precursor to the warnings about executive overreach articulated by today’s “conservative core” on the Supreme Court, Pound inveighed against the dangerous accretion of centralized power and the expansion of a discretionary Executive Branch, which he claimed—as have Chief Justice Roberts and Justices Scalia, Thomas, and Alito—threaten our balanced government and endanger the liberty of individual Americans.⁸

Roscoe Pound’s rants against the administrative state reverberate in recent times in the passionate prose of Chief Justice Roberts and Justices Scalia, Alito and (especially) Thomas. As critics of the New Deal and the administrative state, Pound and these conservative core Justices envision a glorified nineteenth-century version of American government and rule of law, to which they yearn to return. But their wishful routes to the past diverge. Pound’s idealized vision elevates the common law of torts, forged through jury trials and adversarial legal processes, which vests regulatory power in the people and the courts, rather than in a centralized, bureaucratic system. The conservative core Justices show no such nostalgia for the common law of torts; their arguments for taming the administrative beast have a distinctly deregulatory thrust.⁹ Their position shows that resistance to the administrative state does not

⁷ See, e.g., KUNAL M. PARKER, COMMON LAW, HISTORY, AND DEMOCRACY IN AMERICA, 1790–1900: LEGAL THOUGHT BEFORE MODERNISM 285–87 (2011) (discussing Pound’s views on the subject); Mark Fenster, *The Birth of a “Logical System”*: Thurman Arnold and the Making of Modern Administrative Law, 84 OR. L. REV. 69, 80–85 (2005) (describing Pound’s attitudes toward the administrative state, as well as those of his contemporaries); James A. Gardner, *The Sociological Jurisprudence of Roscoe Pound (Part II)*, 7 VILL. L. REV. 165, 169 (1962) (“When economists, political scientists, and planners have endeavored to render greater services to the people under law and through administrative agencies adapted to this purpose, Pound has seen grave objections. In attempting to render such services, Pound warns, we have become a ‘service state’ which as it develops is a ‘super-state’ and *par excellence* a ‘bureau state.’”).

⁸ See, e.g., Roscoe Pound, *The Recrudescence of Absolutism*, 47 SEWANEE REV. 18, 27 (1939) [hereinafter Pound, *The Recrudescence of Absolutism*] (observing the need, in a legal system in which bureaucratic officials wield the authority that they do in the modern administrative state, to find a balance that is sufficiently protective of “the individual life,” as well as to “safeguard the individual against arbitrary and unreasonable exercises of [administrative officials’] power”); Roscoe Pound, *Justice According to Law*, 13 COLUM. L. REV. 696, 703 (1913) [hereinafter Pound, *Justice According to Law*] (noting the dangers to personal liberty posed by a system bearing the hallmarks of the administrative state). For further elaboration, see *infra* Part I.A.

⁹ For commentary on the “pro-business” or deregulatory inclinations of the Roberts Court, see generally Lee Epstein, William M. Landes & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431 (2013) (analyzing pro- and anti-business decisions issued by the Supreme Court in order to evaluate the role that ideology plays in these cases); *Annual Conference 2014: Administrative Law and Financial Regulation Symposium*, COLUM. L. SCH., <http://web.law.columbia.edu/constitutional->

necessarily pave the way for the flourishing of the common law of torts. A close study of recent pharmaceutical drug and medical device preemption cases demonstrates, moreover, that these Justices' hostility toward the administrative state—and, more specifically, their efforts to rein in agencies' authoritative power by curtailing doctrines that accord deference to agency interpretations of statutes and regulations—does not lead inexorably to an anti-preemption position in defense of the common law of torts.

Part I presents the conventional view that the administrative state represents an enemy of the common law of torts as regulator. Pound exemplifies the position that combines hostility toward the administrative state with a celebration of the common law of torts as substitute regulator.¹⁰ Part II presents the modern Supreme Court “conservative core” Justices' surprisingly similar attack on the administrative state, which diverges from Pound's position in its hostility toward the common law of torts, as evident in these Justices' opinions in federal preemption cases. This juxtaposition of Pound with the conservative core yields two important insights: first, the fact that the Justices' forbears tried, as mightily as do they, to stanch the growth of the administrative state suggests that the behemoth may be tamed but not defeated; second—and more significant, for purposes of this Article—it does not follow that resistance to the administrative state, standing alone, necessarily creates an environment in which the common law of torts will flourish. Certainly, this is not the aim of the current detractors of the administrative state who sit on the Supreme Court today.

Part III gestures toward a new vision of tort law in the twenty-first century. Pound¹¹—and, later, Guido Calabresi¹²—recognized statutes as the primary challengers to judicial power. Today, that position is occupied by the

governance/events/annual-conference-2014 (last visited Jan. 11, 2016) (presenting information relating to financial regulation and administrative law); Adam Liptak, *Corporations Find a Friend in the Supreme Court*, N.Y. TIMES (May 4, 2013), <http://www.nytimes.com/2013/05/05/business/pro-business-decisions-are-defining-this-supreme-court.html> (reporting on the Roberts Court's jurisprudence in cases involving business interests). Some have argued, however, that this “pro-business” tendency is misconceived. *See, e.g.*, Jonathan H. Adler, *Business and the Roberts Court Revisited (Again)*, VOLOKH CONSPIRACY (May 6, 2013, 11:20 PM), <http://volokh.com/2013/05/06/business-and-the-roberts-court-revisited-again/> (challenging the aforementioned study by Epstein, Landes, and Posner).

¹⁰ *See infra* notes 27–33 and accompanying text.

¹¹ *See generally* Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383 (1908) (evaluating the merits of statutory and judge-made law).

¹² GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 5 (1982) (“[S]tarting with the Progressive Era but with increasing rapidity since the New Deal, we have become a nation governed by written laws.”).

regulatory state and its dominant federal agencies. Pound and Calabresi resisted, however, a turn toward an attitude that since has been termed “common-law chauvinism.”¹³ Calabresi, moreover, promoted colloquy between the courts and legislatures, envisioning a “legislative–judicial dialogue that seeks to make modern lawmaking as responsive to the need for continuity and change as common law adjudication was said to have been in another age.”¹⁴ Given the vastly important—and, seemingly, largely fixed—role of the fourth branch in the modern system of American government,¹⁵ our twenty-first-century challenge is to harness judicial oversight to promote that colloquy between courts and federal agencies.

I. ROSCOE POUND AND THE TWENTIETH-CENTURY ADMINISTRATIVE STATE’S THREAT TO REGULATION BY COMMON LAW

A conventional view posits federal health and safety regulation and tort liability as regulatory substitutes.¹⁶ The growth of the administrative state poses a threat to the common law of torts, on this view, because it will replace the *ex post*, decentralized form of private regulation via litigation with *ex ante*, centralized public administrative rules.¹⁷ Pound is an effective poster child for this position, as he coupled a deep, bitter hostility toward growing administrative power with an equal passion for the common law form of regulation.

¹³ JOHN FABIAN WITT, PATRIOTS AND COSMOPOLITANS: HIDDEN HISTORIES OF AMERICAN LAW 257 (2007) (discussing Pound’s work and “common-law chauvinism”); *see also* CALABRESI, *supra* note 12, at 164 (addressing the role of the common law in light of the statutory proliferation of the early twentieth century); Pound, *supra* note 11, at 403–06 (identifying statutory law as “the more truly democratic” legal form, and suggesting that courts abandon their “attitude of antipathy toward legislative innovation”).

¹⁴ CALABRESI, *supra* note 12, at 129.

¹⁵ *See, e.g.*, CHRISTOPHER F. EDLEY, JR., ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY 216 (1990) (“Doctrine and scholarship repeat endlessly the battle to legitimate the administrative state, when fifty years have established beyond peradventure that big government is here to stay.”); Mariano-Florentino Cuéllar, *Administrative War*, 82 GEO. WASH. L. REV. 1343 (2014) (tracing the evolution and entrenchment of the fourth branch); Gillian E. Metzger, *Administrative Law, Public Administration, and the Administrative Conference of the United States*, 83 GEO. WASH. L. REV. 1517, 1517–18 (2015) (discussing how the administrative state has become a fixture in modern American government).

¹⁶ *See* Richard A. Posner, *Regulation (Agencies) Versus Litigation (Courts): An Analytical Framework*, in REGULATION VERSUS LITIGATION: PERSPECTIVES FROM ECONOMICS AND LAW 11 (Daniel P. Kessler ed., 2011); Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. LEGAL STUD. 357, 358–64 (1984).

¹⁷ *See* Shavell, *supra* note 16, at 358–64; *see also, e.g.*, Alexandra B. Klass, *Common Law and Federalism in the Age of the Regulatory State*, 92 IOWA L. REV. 545 (2007) (describing the danger to tort law posed by the rise of the administrative state, looking to the environmental law context as an example of this dynamic); David S. Rubenstein, *The Paradox of Administrative Preemption*, 38 HARV. J.L. & PUB. POL’Y 267 (2015) (examining the administrative state’s power to oust state tort law through preemptive regulations).

A. *Hostility Toward the Administrative State*

In the mid-twentieth century, Pound became an especially acerbic critic of the New Deal and the expanding administrative state.¹⁸ He made spirited attacks on what he perceived to be the lawless, biased, and self-dealing nature of agency decision-making and, from his academic perch at Harvard Law School, disseminated his views widely to the general public.¹⁹ John Witt elaborates:

Administrative action, Pound wrote in a widely discussed American Bar Association report in 1938, proceeded lawlessly, without notice to or hearings for the interested parties. Administrators seemed to make determinations according to caprice and prejudice rather than reasoned analysis of the evidence. Agencies dangerously combined rule-making, investigative, prosecutorial, and adjudicative functions, and as a result tended to construe legal questions in their own favor and against the individuals who fell within their jurisdiction. They “yield[ed] to political pressure” and “administrative convenience” at “the expense of the law,” alternating between partisan politics and “a perfunctory routine” that was almost as bad.²⁰

Pound used even more colorful language in his letters. In a 1952 letter to the secretary of the Council Against Communist Aggression (of which he served as vice-chairman), he describes American administrative agencies as a “‘veritable chamber of horrors’ filled with ‘lawless high-handedness.’”²¹ In other writings and speeches, Pound elaborates upon this scathing criticism, going so far as to compare the theoretical underpinnings of the administrative state to “the rise and vogue of dictators” outside the English-speaking world.²²

A recurring theme in Pound’s essays, speeches, and letters is the administrative state as a stand-in for the totalitarian state. Invoking the specter of autocracy, Pound argues forcefully for adjudication by common law judges on the theory that, under the alternative system dominated by administrative decision-making, “we may as well give up all pretense of being a constitutional

¹⁸ See generally MICHAEL WILLRICH, CITY OF COURTS: SOCIALIZING JUSTICE IN PROGRESSIVE ERA CHICAGO 315–16 (2003) (describing Pound’s infamous “thunderous assault on the New Deal state”).

¹⁹ *Id.*

²⁰ WITT, *supra* note 13, at 232 (alteration in original).

²¹ *Id.* at 233 (quoting Letter from Roscoe Pound, Vice Chairman, Council Against Communist Aggression, to Arthur G. McDowell, Sec’y, Council Against Communist Aggression (Dec. 30, 1952); and then quoting Letter from Roscoe Pound, Vice Chairman, Council Against Communist Aggression, to Arthur G. McDowell, Sec’y, Council Against Communist Aggression (Nov. 26, 1951)).

²² Pound, *The Recrudescence of Absolutism*, *supra* note 8, at 26.

democracy and set up an avowed dictatorship.”²³ Pound relied upon local juries to resist undemocratic exercises of power.²⁴ To Pound, trial lawyers—whom administrative agencies threatened to dislodge—represented the last bulwark against the modern totalitarian state.²⁵ These “‘uncompromising and inveterate foe[s] of absolutism’ . . . would resist the encroachments of the totalizing state ‘until communism or the millennium’ brought an end to law altogether.”²⁶

B. *Celebration of the Common Law of Torts*

While eschewing the onslaught of administration, Pound welcomed in its stead vigorous regulation by tort law, fueled by claims advanced by private litigants and their attorneys. Trial lawyers, according to Pound, would restore democracy.²⁷

Likening trial lawyers to “[c]ommon-law lawyers such as Sir Edward Coke [who] had fought off the despotism of the Stuart monarchs in the seventeenth century,” Pound charges them with the daunting task of defending the common law system of torts against encroachment by the administrative state.²⁸ Invoking the figure of Coke, Pound draws repeated parallels between

²³ WITT, *supra* note 13, at 232 (quoting DAVID WIGDOR, *ROSCOE POUND: PHILOSOPHER OF LAW* 274 (1974)).

²⁴ See Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 18 (1910) (“The will of the state at large imposed on a reluctant community . . . find[s] the same obstacle in the local jury that formerly confronted kings and ministers.”).

²⁵ See Pound, *The Recrudescence of Absolutism*, *supra* note 8, at 27–28 (identifying litigation—and the threat thereof—as a critical check on oppressive exercises of administrative power); see also Roscoe Pound, *Executive Justice*, 55 AM. L. REG. 137, 144 (1907) [hereinafter Pound, *Executive Justice*] (identifying litigation as the primary vehicle for the “[t]he administration of justice, properly so called” (quoting JOHN W. SALMOND, *THE FIRST PRINCIPLES OF JURISPRUDENCE* 75 (London, Stevens & Haynes Law Publishers 1893))); Roscoe Pound, Address by Professor Roscoe Pound Before New Hampshire Bar Association: The Revival of Personal Government (June 30, 1917) (observing that “we must have recourse to lawyers” in order to ensure effective government).

²⁶ WITT, *supra* note 13, at 253 (quoting Roscoe Pound, *The Reader’s Digest Article*, 15 NAT’L ASS’N CLAIMANTS’ COMPENSATION ATT’YS L.J. 21, 23–28 (1955)).

²⁷ *Id.* Pound did not always champion the trial lawyer as the guardian of the integrity of the legal system—indeed, he attracted attention early in his career for his criticism of the adversarial system and trial attorney profession, which he believed rendered the judge “a mere umpire” and “disfigure[d] our judicial administration at every point.” See Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729, 738 (1906); see also DANIEL R. ERNST, *TOCQUEVILLE’S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940*, at 109–10 (2014) (discussing the reaction to Pound’s early criticism of the modern court system). What is key, here, is how his position evolved—namely, his later vitriolic attack on the administrative state was inspired, at least in part, by his desire to see the flourishing of the common law of torts and its participants, the trial lawyers.

²⁸ WITT, *supra* note 13, at 252.

seventeenth-century England and the New Deal-era administrative state.²⁹ In one particularly relevant address delivered at Harvard in 1920, he argues:

Not the least task of the common-law lawyers of the future will be to impose a legal yoke upon [those] commissions [charged with administrative agency action], as Coke and his fellows did upon the organs of executive justice in Tudor and Stuart England, and to reshape and develop the materials of our common law as efficient instruments of justice in the twentieth century so that reversion to oriental methods no longer seems necessary.³⁰

Pound joined forces with the plaintiffs' bar to resist the behemoth administrative state, and these lawyers apparently proved "as useful for Pound as he was for them."³¹ To this end, Pound worked with Melvin Belli and a plaintiffs' attorney organization called the National Association of Claimants' Compensation Attorneys (a precursor to the modern American Association of Justice) to fight bureaucratic encroachment upon the sphere traditionally occupied by the common law of torts.³² In resisting the rise of the administrative state—particularly the increased use of administrative compensation schemes—these trial attorneys "fought hard, and often successfully, to preserve the tort system with its unlimited damages, its juries, its 'adequate awards,' and its contingency fees, against all administrative challengers."³³

²⁹ See, e.g., Pound, *The Recrudescence of Absolutism*, *supra* note 8, at 25–26 (drawing a parallel between seventeenth-century England and the New Deal-era administrative state). Even in his earlier work, seventeenth-century England (and Sir Coke in particular) was a substantial preoccupation of Pound. See, e.g., Pound, *supra* note 11, at 390–400 (drawing upon principles that emerged during Coke's seventeenth-century England to argue for the primacy of the common law); Pound, *Executive Justice*, *supra* note 25, at 144 (quoting Coke's conceptions of judicial authority in making a point about the role of the courts in the modern administrative state).

³⁰ ROSCOE POUND, *THE LAW SCHOOL AND THE COMMON LAW* 19 (1920); see also, e.g., Roscoe Pound et al., *Report on the Special Committee on Administrative Law*, 63 ANN. REP. A.B.A. 331, 352 (1938) (arguing that the administrative framework was contrary to Coke's theories and the intentions of the Framers).

³¹ WITT, *supra* note 13, at 252.

³² *Id.* at 252–53. There is some disagreement among scholars as to whether Pound's work with Belli is fairly characterized as a concerted campaign in pursuit of the two's shared goals. See Joseph A. Page, *Roscoe Pound, Melvin Belli, and the Personal-Injury Bar: The Tale of an Odd Coupling*, 26 T.M. COOLEY L. REV. 637, 652–54 (2009) (downplaying Pound's relationship with Belli and emphasizing instead his relationship with Samuel B. Horowitz, co-founder of the plaintiffs' attorney organization).

³³ WITT, *supra* note 13, at 264.

II. THE SUPREME COURT AND THE TWENTY-FIRST CENTURY THREAT OF REGULATION BY EITHER THE ADMINISTRATIVE STATE OR THE COMMON LAW

Pound's diatribes in his later work against the incursion of the administrative state on the common law judicial process bear a striking resemblance to today's Justices' alarm bells about the modern-era fourth branch. To be sure, there are some salient differences. Chief among Pound's aims was the preservation and expansion of common law torts, jury trials, and courts,³⁴ whereas the modern Justices who bemoan administrative power are no champions of common law tort. Instead, their antipathy stems from separation-of-powers concerns and, if anything, a predilection for deregulation writ large.

A. Hostility Toward the Administrative State

More than a half-century after Pound's rant against the administrative state, the modern conservative core Supreme Court Justices sound a similar theme, challenging the discretionary authority wielded by administrative agencies. With increasing verve, several Justices have decried the ever-inflating administrative state. In one recent case, Justice Scalia laments, "Too many important decisions of the Federal Government are made nowadays by unelected agency officials exercising broad lawmaking authority, rather than by the people's representatives in Congress."³⁵ Evincing even greater alarm, Chief Justice Roberts warns of "the danger posed by the growing power of the administrative state," which involves "hundreds of federal agencies poking into every nook and cranny of daily life."³⁶ And Justice Thomas has inveighed against the Progressive era "move from the individualism that had long characterized American society to the concept of a society organized for collective action."³⁷ Justice Thomas blames the Progressives for "usher[ing] in significant expansions of the administrative state, ultimately culminating in the

³⁴ See Roscoe Pound, *The Growth of Administrative Justice*, 2 WIS. L. REV. 321, 335–39 (1924). Again, my focus here is later in Pound's career, see *supra* note 27, when he came to regard the common law's role in the legal system as pivotal. See generally ROSCOE POUND, *THE SPIRIT OF THE COMMON LAW* 173–74 (1921) (reasoning that the common law and statutes each play pivotal roles in the American legal system but asserting that "on the whole, the traditional [judge-made] element is by far the more important"); WITT, *supra* note 13, at 255 (describing the development of Pound's support for the common law).

³⁵ EPA v. EME Homer City Generation, L.P., 134 S. Ct. 1584, 1610 (2014) (Scalia, J., dissenting).

³⁶ City of Arlington v. FCC, 133 S. Ct. 1863, 1879 (2013) (Roberts, C.J., dissenting).

³⁷ Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1223 n.6 (2015) (Thomas, J., concurring in the judgment).

New Deal,” spurred by a “belief that bureaucrats might more effectively govern the country than the American people.”³⁸

Unwittingly forging a link with Pound, these Justices invoke seventeenth-century English despotism as the closest analog to the administrative state. Cass Sunstein and Adrian Vermeule have termed this rhetorical trend the rise of “The New Coke”:

Those who express this concern appeal to putative principles of the Anglo-American constitutional order, particularly resistance to executive “prerogative”—the lawless despotism of the Stuart kings. And the heroic opponent of Stuart despotism is the common-law judge, symbolized by Edward Coke. Where there are newly enthroned Stuarts, there must also be a New Coke.³⁹

They claim that the Justices’ (and in particular, Justice Thomas’s) recent invective against the administrative state has been fueled by academic work, principally a provocative 2014 book by Philip Hamburger, *Is Administrative Law Unlawful?*, which “call[s] for a return to a (quite possibly imaginary) Anglo-American common-law order, cast as an alternative to Stuart tyranny founded on monarchical prerogative.”⁴⁰

While its intellectual origins may be questioned, the Justices’ newfound antipathy toward the administrative state cannot be gainsaid. In a set of administrative law decisions over the past five years—primarily addressing the scope of deference that courts should give to federal agencies’ interpretations of congressional statutes (*Chevron* deference) and to agencies’ interpretations of their own regulations (*Auer* deference)—the conservative core Justices have outlined a wide-scale attack on the administrative state.⁴¹ A series of opinions issued by the conservative core demonstrate these Justices’ deep skepticism of

³⁸ *Id.*

³⁹ Cass R. Sunstein & Adrian Vermeule, *The New Coke: On the Plural Aims of Administrative Law*, 2016 SUP. CT. REV. (forthcoming) (manuscript at 2), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2631873.

⁴⁰ *Id.* (manuscript at 7).

⁴¹ I have chosen to focus on this set of decisions impacting *Chevron* and *Auer* deference not only because they illustrate the mantra of tyranny prevention invoked by the Justices, but also because they are doctrines critical to modern preemption jurisprudence, which I will take up *infra* Part II.B. For this reason, I do not discuss what may be perhaps the most blatant invocation of the despot imagery by Justice Thomas in *Department of Transportation v. Ass’n of American Railroads*, involving the (largely defunct) non-delegation doctrine. 135 S. Ct. 1225, 1240–55 (2015) (Thomas, J., concurring in the judgment). Justice Thomas’s views here represent an outlier view, even amidst the conservative core. As characterized by Sunstein and Vermeule, Thomas’s view is that “any administrative authority to ‘bind’ private parties—no matter how interstitial the issue, how clear the policy guidance from the legislature or how specific the grant of authority—represents a revival of Stuart prerogative.” Sunstein & Vermeule, *supra* note 39 (manuscript at 16).

the theoretical underpinnings of the modern administrative state and illustrate their constant search for ways to shrink it.⁴²

I. Auer Deference at Risk

Auer deference grants agencies wide latitude to construe their own regulations,⁴³ and courts accord great weight to this type of agency interpretation.⁴⁴ According to this doctrine, the agency's interpretation will be deemed "controlling" unless the court determines that it is "plainly erroneous or inconsistent with the regulation."⁴⁵ The Supreme Court's decision in *Auer v. Robbins* built upon a much earlier case, *Bowles v. Seminole Rock & Sand Co.*, in which the Court identified an agency's interpretation of a regulation as "the ultimate criterion" for purposes of construing that regulation.⁴⁶ *Seminole Rock*, however, was decided before the passage of the Administrative Procedure Act (APA), and, indeed, long before the rise of the modern framework of judicial deference to agency interpretations.⁴⁷

The most striking attack on *Auer* deference thus far was issued by Justice Scalia, somewhat paradoxically, as he authored the *Auer* majority opinion in 1997.⁴⁸ Sixteen years later, Justice Scalia described the doctrine as "a

⁴² See *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring); *Perez*, 135 S. Ct. at 1210 (Alito, J., concurring in part and concurring in the judgment); *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326, 1338 (2013) (Roberts, C.J., concurring); *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012); *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254 (2011) (Scalia, J., concurring). See generally discussion *infra* Part II.A.1–2.

⁴³ *Auer v. Robbins*, 519 U.S. 452 (1997).

⁴⁴ See generally Cynthia Barmore, *Auer in Action: Deference After Talk America*, 76 OHIO ST. L.J. 813 (2015) (analyzing the results of a study on the ways in which the federal courts apply *Auer* in practice, which revealed that these courts defer to agencies on these questions in the overwhelming majority of cases); William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083 (2008) (examining the doctrine developed in *Auer* alongside other rules governing judicial deference to administrative agencies' actions).

⁴⁵ *Auer*, 519 U.S. at 461 (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)).

⁴⁶ 325 U.S. 410, 414 (1945).

⁴⁷ See generally Sanne H. Knudsen & Amy J. Wildermuth, *Unearthing the Lost History of Seminole Rock*, 65 EMORY L.J. 47, 52 (2015) (observing that "*Seminole Rock* began as a doctrine with significant constraints, at a vastly different moment in administrative law" and discussing the doctrine's evolution and propriety in the modern administrative state).

⁴⁸ *Auer*, 519 U.S. at 452. At issue in *Auer* was the Department of Labor's interpretation of its own regulations, which the Department had developed pursuant to the Fair Labor Standards Act of 1938. *Id.* at 454. Writing for a unanimous Court, Justice Scalia held that the agency's interpretation was entitled to deference unless that construction was "plainly erroneous or inconsistent with the regulation" it purported to interpret. *Id.* at 461 (quoting *Robertson*, 490 U.S. at 359).

dangerous permission slip for the arrogation of power.”⁴⁹ In *Decker v. Northwest Environmental Defense Center*, Justice Scalia sharply dissented from the portion of the Court’s opinion that, relying on *Auer*, deferred to the EPA’s interpretation of its own Industrial Stormwater Rule,⁵⁰ which the majority had deemed “a reasonable interpretation of [the agency’s] own regulation.”⁵¹ The thrust of Justice Scalia’s argument is that, if an agency is allowed to interpret its own regulations, it wields the power to both write the law (a legislative function) and interpret and enforce the law (an executive function), thus raising a serious separation-of-powers issue.⁵² According to Justice Scalia, this is a perilous position in light of the potential for tyranny: “When the legislative and executive powers are united in the same person, . . . there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.”⁵³

⁴⁹ *Decker v. Nw. Envntl. Def. Ctr.*, 133 S. Ct. 1326, 1341 (2013) (Scalia, J., concurring in part and dissenting in part). Sunstein and Vermeule comment that Scalia’s characterization “strikes us as one of the New Coke’s phantasmal terrors.” Sunstein & Vermeule, *supra* note 39 (manuscript at 24).

⁵⁰ 133 S. Ct. at 1339–44 (Scalia, J., concurring in part and dissenting in part).

⁵¹ *Id.* at 1330–31 (majority opinion). Two years earlier, Justice Scalia dropped hints of his about-face on *Auer* deference. In *Talk America, Inc. v. Michigan Bell Telephone Co.*, a unanimous Court approved a Federal Communications Commission interpretation relating to the agency’s own regulations, which agency officials had put forth in an amicus brief. 131 S. Ct. 2254, 2262–65 (2011). In a separate concurrence, Justice Scalia foreshadowed the view that would emerge in his later opinions, announcing:

It is comforting to know that I would reach the Court’s result even without *Auer*. For while I have in the past uncritically accepted that rule, I have become increasingly doubtful of its validity. . . . It seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well.

Id. at 2266 (Scalia, J., concurring). Justice Scalia proceeded to make a more pointed challenge to the doctrine: “We have not been asked to reconsider *Auer* in the present case. When we are, I will be receptive to doing so.” *Id.*

⁵² Justice Scalia was persuaded by the arguments raised by John Manning. *See, e.g., id.* at 2265–66 (“The defects of *Auer* deference, and the alternatives to it, are fully explored [by] Manning.” (citing John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996))). Indeed, Manning’s seminal article emerged as something of a talking point in Scalia’s attacks on *Auer* deference. *See, e.g., Decker*, 133 S. Ct. at 1341 (Scalia, J., concurring in part and dissenting in part) (citing the same Manning article for the proposition that “*Auer* is not a logical corollary to *Chevron* but a dangerous permission slip for the arrogation of power”). The conservative core has picked up this argument and advanced it in the other major recent cases in which they call *Auer* into question. *See Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1210 (2015) (Alito, J., concurring in part and concurring in the judgment) (citing the same Manning article); *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012) (same).

⁵³ *See Decker*, 133 S. Ct. at 1341 (Scalia, J., concurring in part and dissenting in part) (ellipsis in original) (quoting 11 BARON DE MONTESQUIEU, *SPIRIT OF THE LAWS* 151–52 (O. Piest ed., T. Nugent trans., 1949)); *see also Talk Am., Inc.*, 131 S. Ct. at 2266 (same). As Sunstein and Vermeule comment, “There is

In a separate concurrence, Chief Justice Roberts (joined by Justice Alito)⁵⁴ makes plain that he too would welcome the opportunity to revisit *Auer* deference—an issue he deemed “basic,” and “going to the heart of administrative law.”⁵⁵ The Chief Justice declined to opine on the substance of the doctrine, expressly reserving such discussion for “a case in which the issue is properly raised and argued.”⁵⁶ Justice Scalia, however, seized the opportunity in his heated dissent to outline the intellectual foundations for the *Auer* critique, which would soon prove persuasive to his fellow conservative core Justices.

In *Perez v. Mortgage Bankers Ass’n*,⁵⁷ Justices Scalia, Thomas, and Alito solidified their resistance to *Auer* deference. These Justices went out of their way to address the validity and likely fate of the doctrine, authoring separate concurrences to a majority opinion that hardly mentioned it. Indeed, *Perez* had little to do with *Auer* deference; the central issue before the Court was the extent to which courts could engraft additional requirements onto § 553 of the APA.⁵⁸ The Court held that courts cannot require a federal agency to undergo the notice-and-comment process detailed in § 553 of the APA to issue an interpretation of its own regulation, even when such interpretation differs substantially from one that the agency has previously adopted.⁵⁹ In a footnote, the majority rejects the argument that, because agency interpretive rules may be subject to *Auer* deference, they are in essence “legislative” rather than

something overheated, wildly disproportionate, about the New Coke’s critique of *Auer*.” Sunstein & Vermeule, *supra* note 39 (manuscript at 26).

⁵⁴ Justice Alito penned the majority opinion in an earlier case, *Christopher v. SmithKline Beecham Corp.*, which foreshadowed the Justices’ unrest regarding *Auer*. *Christopher*, 132 S. Ct. 2156. Although the majority reiterated the general *Auer* deference rule, it emphasized that there were limits as to when its deployment is appropriate. *Id.* at 2166. And in the case before it, the majority trimmed the sails of *Auer*, holding that “whatever the general merits of *Auer* deference, it is unwarranted here.” *Id.* at 2168; *see also id.* (citing Justice Scalia’s concurring opinion in *Talk America, Inc.*).

⁵⁵ *Decker*, 133 S. Ct. at 1338 (Roberts, C.J., concurring) (“[Justice Scalia’s opinion] raises serious questions about the principle set forth in [*Seminole Rock* and *Auer*]. It may be appropriate to reconsider that principle in an appropriate case.” (citations omitted)); *see also id.* at 1339 (“Questions of *Seminole Rock* and *Auer* deference arise as a matter of course on a regular basis. The bar is now aware that there is some interest in reconsidering those cases, and has available to it a concise statement of the arguments on one side of the issue.”).

⁵⁶ *Id.* at 1339.

⁵⁷ 135 S. Ct. 1199.

⁵⁸ *Id.* at 1203.

⁵⁹ *Id.* at 1206.

merely “interpretive” and thus carry the “force of law” which would require the agencies to undertake notice-and-comment rulemaking.⁶⁰

Justice Alito’s concurrence expresses sympathy for the D.C. Circuit’s ill-fated attempt to add procedural requirements to the agency’s ability to issue interpretive guidelines:

The [D.C. Circuit’s] creation of that doctrine [adding procedural requirements] may have been prompted by an understandable concern about the aggrandizement of the power of administrative agencies as a result of the combined effect of (1) the effective delegation to agencies by Congress of huge swaths of lawmaking authority, (2) the exploitation by agencies of the uncertain boundary between legislative and interpretive rules, and (3) this Court’s cases holding that courts must ordinarily defer to an agency’s interpretation of its own ambiguous regulations.⁶¹

Although brief, this concurrence firmly aligns Justice Alito with his conservative core brethren regarding *Auer*.⁶² Closing on an ominous note, Justice Alito remarks that he looks forward to a case in which the Court could consider the doctrine’s validity “through full briefing and argument.”⁶³

Justice Scalia, writing in a separate concurrence, likewise agrees with the majority that “[t]he agency is free to interpret its own regulations with or without notice and comment,” but added the proviso that “courts will decide—with no deference to the agency—whether that interpretation is correct.”⁶⁴ Justice Scalia takes this opportunity to continue his attack on *Auer*:

[T]here are weighty reasons to deny a lawgiver the power to write ambiguous laws and then be the judge of what the ambiguity means. I would therefore restore the balance originally struck by the APA with

⁶⁰ *Id.* at 1208 n.4. The majority observed: “Even in cases where an agency’s interpretation receives *Auer* deference, however, it is the court that ultimately decides whether a given regulation means what the agency says. Moreover, *Auer* deference is not an inexorable command in all cases.” *Id.* (first citing *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012), with a parenthetical regarding the limitations on the scope of *Auer* deference; and then citing *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994), with a quote about conflicting agency interpretations being entitled to less weight than consistently held views).

⁶¹ *Id.* at 1210 (Alito, J., concurring in part and concurring in the judgment).

⁶² *Id.* at 1210–11.

⁶³ *Id.* (“The opinions of Justice Scalia and Justice Thomas offer substantial reasons why the *Seminole Rock* doctrine may be incorrect. I await a case in which the validity of *Seminole Rock* may be explored through full briefing and argument.” (citation omitted)).

⁶⁴ *Id.* at 1213 (Scalia, J., concurring in the judgment).

respect to an agency's interpretation of its own regulations . . . by abandoning *Auer*.⁶⁵

Justice Thomas strikes out against *Auer* in his own opinion.⁶⁶ Characterizing *Auer* deference as “a transfer of the judge's exercise of interpretive judgment to the agency,”⁶⁷ Justice Thomas insists that courts “exercise independent judgment in determining that a regulation properly covers the conduct of regulated parties.”⁶⁸ He further specifies that “[d]efining the legal meaning of the regulation is one aspect of that determination.”⁶⁹ Lest the mortal danger to separation of powers be missed, Justice Thomas reminds:

Over a century before our War of Independence, the English Civil War catapulted the theory of the separation of powers to prominence. As political theorists of the day witnessed the conflict between the King and Parliament, and the dangers of tyrannical government posed by each, they began to call for a clear division of authority between the two.⁷⁰

The critique of *Auer* is but one prong of Justice Thomas's attack on the administrative state. It is here that Justice Thomas groups together “[m]any decisions of this Court [that] invoke agency expertise as a justification for deference,” an argument that “has its root in the support for administrative agencies that developed during the Progressive Era in this country.”⁷¹ And the Progressive Era, as we saw above, is notable (in Justice Thomas's mind) for its rejection of American “individualism,” its embrace of “a society organized for

⁶⁵ *Id.* at 1212–13 (citing *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326, 1339 (2013) (Scalia, J., concurring in part and dissenting in part)); *see also id.* at 1212 (distinguishing *Auer* from *Chevron* deference and reiterating the separation-of-powers theory that he had advanced in *United States v. Mead Corp.*, 533 U.S. 218, 243 (2001) (Scalia, J., dissenting)). Justice Scalia elaborates:

Because the agency (not Congress) drafts the substantive rules that are the object of those interpretations, giving them deference allows the agency to control the extent of its notice-and-comment-free domain. To expand this domain, the agency need only write substantive rules more broadly and vaguely, leaving plenty of gaps to be filled in later, using interpretive rules unchecked by notice and comment.

Id.

⁶⁶ *Id.* at 1214 (Thomas, J., concurring in the judgment). Only four years before *Perez*, Justice Thomas authored the majority opinion in *Talk America, Inc. v. Michigan Bell Telephone Co.*, which laid the groundwork for Justice Scalia's revolt against *Auer*. 131 S. Ct. 2254, 2257 (2011); *see also supra* note 51.

⁶⁷ *Perez*, 135 S. Ct. at 1219 (Thomas, J., concurring in the judgment).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 1215.

⁷¹ *Id.* at 1223 n.6.

collective action,” its “deep disdain for . . . popular sovereignty,” and its ushering in of the dreaded New Deal.⁷²

2. *Chevron Deference at Risk*

Chief Justice Roberts has voiced these separation-of-powers concerns in the context of *Chevron* deference. In *City of Arlington v. FCC*,⁷³ the Court, in a 6–3 opinion authored by Justice Scalia, held that *Chevron* applies to an agency’s claim to deference in interpreting its own statutory authority, refusing to carve out a no-deference zone for “jurisdictional” issues.⁷⁴ In a dissent (joined by Justices Alito and Kennedy), Chief Justice Roberts characterizes *Chevron* as “a powerful weapon in an agency’s regulatory arsenal,” and raises wider concerns regarding “the fact that the administrative agencies, as a practical matter, draw upon a potent brew of executive, legislative, and judicial power.”⁷⁵ Conceding that “[i]t would be a bit much to describe the result as ‘the very definition of tyranny,’” Chief Justice Roberts nonetheless emphasizes that “the danger posed by the growing power of the administrative state cannot be dismissed.”⁷⁶

The Chief Justice’s hostile view of *Chevron* deference is plain, but he was in the minority in *City of Arlington* (joined only by fellow conservative core Justices Thomas and Alito). When, however, the Chief Justice wrote for the majority in *King v. Burwell*⁷⁷—which involved a challenge to the Patient Protection and Affordable Care Act—he was joined by Justices Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan, who hardly are prototypical *Chevron* skeptics. In *King*, Chief Justice Roberts dispensed with *Chevron* in a sentence, stating that it was inappropriate as applied to interpretive questions

⁷² *Id.*; see also *supra* notes 37–38 and accompanying text.

⁷³ 133 S. Ct. 1863 (2013).

⁷⁴ *Id.* at 1869–70 (“The reality, laid bare, is that there is *no difference*, insofar as the validity of agency action is concerned, between an agency’s exceeding the scope of its authority (its ‘jurisdiction’) and its exceeding authorized application of authority that it unquestionably has.”). Despite the hostility that he developed toward *Auer* deference, Justice Scalia’s opinions stood firmly behind *Chevron* deference, which, by Justice Scalia’s theory, does not introduce the same danger of self-aggrandizement. See, e.g., *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1340–42 (2013) (Scalia, J., concurring in part and dissenting in part) (“While the implication of an agency power to clarify the statute is reasonable enough, there is surely no congressional implication that the agency can resolve ambiguities in its own regulations. For that would violate a fundamental principle of separation of powers—that the power to write a law and the power to interpret it cannot rest in the same hands.”).

⁷⁵ *City of Arlington*, 133 S. Ct. at 1886 (Roberts, C.J., dissenting).

⁷⁶ *Id.* at 1879 (first citing *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring); and then citing *Sackett v. EPA*, 132 S. Ct. 1367, 1374 (2012)).

⁷⁷ 135 S. Ct. 2480 (2015).

of such enormous importance.⁷⁸ While the majority criticizes neither the merits nor the wisdom of *Chevron*, the opinion nonetheless implicitly retreats from *Chevron* by limiting the doctrine's reach.⁷⁹

Justice Thomas has launched a wholesale attack on *Chevron* in recent years. In *Michigan v. EPA*,⁸⁰ the Court—per Justice Scalia—held that the emissions standards to regulate hazardous air pollutants emitted by electricity-generating facilities promulgated by the EPA under the Clean Air Act did not survive *Chevron*'s two-step test for judicial deference.⁸¹ Specifically, the majority reasons that, although “*Chevron* directs courts to accept an agency’s reasonable resolution of an ambiguity in a statute that the agency administers,” the EPA had failed to “operate within the bounds of reasonable interpretation” by interpreting the statute to allow the EPA to disregard costs when making a threshold decision about whether to regulate.⁸²

In a separate concurrence, Justice Thomas draws upon earlier critiques of *Auer* to challenge *Chevron* on separation-of-powers grounds.⁸³ Justice Thomas argues that the *Chevron* doctrine represents an abdication of courts’ constitutionally mandated role under *Marbury v. Madison*,⁸⁴ as well as an

⁷⁸ *Id.* at 2489 (“The tax credits are among the Act’s key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people. Whether those credits are available on Federal Exchanges is thus a question of deep ‘economic and political significance’ that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly.” (quoting *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014))).

⁷⁹ *See id.* at 2488–89 (dispensing with *Chevron* in fewer than two hundred words). In support of his conclusion, Chief Justice Roberts adds that it is particularly unlikely that Congress intended to delegate interpretive authority on this point to the IRS given the agency’s lack of expertise in the area of health insurance policymaking. *Id.* at 2489.

It is unclear to what extent *Burwell* represents a departure from the Court’s existing doctrine in this area. In *FDA v. Brown & Williamson Tobacco Corp.*, the Court recognized an “extraordinary cases” carve-out to the standard *Chevron* analysis. 529 U.S. 120, 159–60 (2000). But, as Michael Herz has remarked:

[*Burwell*] was a particularly robust application of the “major questions doctrine,” which holds that judicial deference is out of place with regard to hugely significant policy questions—the sort of issues that Congress should, or must, or can be presumed to, decide. Strikingly, the magnitude of the issue did not simply keep the Court in “step one” of *Chevron*, it induced the Court to jettison *Chevron* altogether.

Michael Herz, *Chevron Is Dead; Long Live Chevron*, 115 COLUM. L. REV. 1867, 1868–69 (2015).

⁸⁰ 135 S. Ct. 2699 (2015).

⁸¹ *Id.* at 2707.

⁸² *Id.* (quoting *Util. Air Regulatory Grp.*, 134 S. Ct. at 2442).

⁸³ *Id.* at 2712–14 (Thomas, J., concurring) (citing, *inter alia*, *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199 (2015) (Thomas, J., concurring in the judgment); *Dep’t of Transp. v. Ass’n of Am. R.R.*, 135 S. Ct. 1225 (2015) (Thomas, J., concurring in the judgment)).

⁸⁴ 5 U.S. (1 Cranch) 137 (1803).

unconstitutional delegation of Article I authority.⁸⁵ Indeed, the fundamental notion of deference to agency interpretations comes under fire in Thomas's opinion:

Perhaps there is some unique historical justification for deferring to federal agencies, but these cases reveal how paltry an effort we have made to understand it or to confine ourselves to its boundaries. Although we hold today that EPA exceeded even the extremely permissive limits on agency power set by our precedents, we should be alarmed that it felt sufficiently emboldened by those precedents to make the bid for deference that it did here. As in other areas of our jurisprudence concerning administrative agencies, we seem to be straying further and further from the Constitution without so much as pausing to ask why. We should stop to consider that document before blithely giving the force of law to any other agency "interpretations" of federal statutes.⁸⁶

In these recent opinions by the conservative core questioning the deference and leeway given to agency interpretations of statutes and regulations, we have the twenty-first-century version of cultural anxiety about the agglomeration of federal power and expansion of the administrative state—anxiety that first reared its head in the mid-twentieth century, in the days of Roscoe Pound.⁸⁷ But, while Pound and the modern conservative core share deep antipathy toward the administrative behemoth, they sharply diverge on the view of common law torts as a regulatory alternative. Where Pound had praise for the common law of torts, the modern conservative core displays an antagonism, the intensity of which outflanks even that reserved for deference to agency interpretation. This divergence is brought into sharp relief by the conservative core's views in cases involving federal preemption of state tort law, to which we now turn.

B. Hostility to the Common Law of Torts

Conservative core Justices—whose ire is stoked by any agency encroachment on judicial authority—are notably unfazed by agency

⁸⁵ *Michigan*, 135 S. Ct. at 2712–14.

⁸⁶ *Id.* at 2413–14 (footnote omitted) (first citing *United States v. Mead Corp.*, 533 U.S. 218, 243 (2001) (Scalia, J., dissenting); and then citing *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1310 (2015) (Thomas, J., dissenting)).

⁸⁷ *See supra* Part I.A.

encroachment on the common law of torts.⁸⁸ Preemption cases in the arenas of pharmaceuticals and medical devices are particularly illustrative of this phenomenon. Preemption, a notoriously muddled area of the law, defies conventional modes of statutory interpretation.⁸⁹ Most of the pharmaceutical cases are implied preemption cases, involving statutes that lack explicit instructions from Congress about the impact of the federal standards on state law tort claims.⁹⁰ Even when Congress does provide such express preemption provisions, as it did in the Medical Device Amendments to the federal Food, Drug, and Cosmetic Act,⁹¹ the language often is ambiguous.⁹² Thus, textual analysis—even if it is one’s preferred (or exclusive) mode of statutory interpretation—inevitably comes up short. Other guiding principles thus have emerged as aids to preemption analysis: the “presumption against preemption” default rule;⁹³ policy preferences tilting in favor of regulation by the Food and

⁸⁸ Sunstein and Vermeule provocatively depict several Supreme Court Justices’ “New Coke-style concerns over unchecked delegation and executive aggrandizement at the expense of common-law baselines.” Sunstein & Vermeule, *supra* note 39 (manuscript at 5). But they should draw a large caveat when it comes to tort. Modern conservative core Justices—with the exception of Justice Thomas—seem content to push even further back this common law baseline. *See infra* Part II.B.

⁸⁹ *See* Sharkey, *Products Liability Preemption*, *supra* note 5, at 453–54 (discussing recent shifts in preemption jurisprudence away from the conventional approach to statutory interpretation); *see also* Richard A. Epstein & Michael S. Greve, *Introduction to FEDERAL PREEMPTION: STATES’ POWERS, NATIONAL INTERESTS 1, 1–3* (Richard A. Epstein & Michael S. Greve eds., 2007) (noting both the confused state of modern preemption doctrine and the considerations beyond statutory interpretation involved in judicial decisionmaking on preemption questions); THOMAS O. MCGARITY, *THE PREEMPTION WAR: WHEN FEDERAL BUREAUCRACIES TRUMP LOCAL JURIES 107* (2008) (observing, with respect to preemption doctrine, that “[i]tigation across many fields of federal regulation has . . . yielded a great deal of inconsistent and muddled law”).

⁹⁰ *See, e.g.*, *Mut. Pharm. Co. v. Bartlett*, 133 S. Ct. 2466, 2480 (2013) (observing that “[Food, Drug, and Cosmetic Act’s] treatment of prescription drugs includes neither an express pre-emption clause . . . nor an express non-pre-emption clause”); *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2586–87 (2011) (Sotomayor, J., dissenting) (noting the lack of express preemption clause in the 1984 Hatch–Waxman Amendments to the FDCA); *Wyeth v. Levine*, 555 U.S. 555, 574 (2009) (“If Congress thought state-law suits posed an obstacle to its objectives, it surely would have enacted an express pre-emption provision [addressing prescription drug standards] at some point during the FDCA’s 70-year history.”). *See generally* Catherine M. Sharkey, *Against Freewheeling, Extratextual Obstacle Preemption: Is Justice Clarence Thomas the Lone Principled Federalist?*, 5 N.Y.U. J. L. & LIBERTY 63, 84–93 (2010) (discussing the confusion inherent in the Supreme Court’s modern implied preemption jurisprudence).

⁹¹ 21 U.S.C. § 360k(a) (2012).

⁹² *See, e.g.*, *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 321–30 (2008) (construing the scope and effect of an express preemption clause in the FDCA as modified by the Medical Device Amendments of 1976); *Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341, 352 (2001) (resolving a preemption dispute on implied preemption grounds, despite the existence of an express preemption provision in the statute at issue).

⁹³ *See, e.g.*, *Levine*, 555 U.S. at 575 (discussing and applying the presumption against preemption); *see also* Sharkey, *Products Liability Preemption*, *supra* note 5, at 455–59 (examining the force of the presumption in major modern preemption cases). *See generally* Mendelson, *supra* note 5 (arguing that the presumption against preemption should be expanded upon in cases involving administrative agencies). The presumption

Drug Administration (FDA) or via tort liability;⁹⁴ and what I have termed the “agency reference” model, whereby courts scrutinize input from the FDA regarding the optimal balance of safety regulation and tort liability, specifically examining the potential for tort claims to undermine the relevant federal regulatory goals.⁹⁵

From a jurisprudence perspective, these interpretive doctrines can point in opposite directions.⁹⁶ For example, the “presumption against preemption” might counsel against a finding of federal preemption in the areas of health and safety, which historically were regulated by the states;⁹⁷ whereas the *Chevron/Skidmore*⁹⁸ and *Auer* doctrines of agency deference might suggest, in the same case, that the court should defer to an agency’s position that its regulation preempts state law tort claims.⁹⁹ From an ideological perspective,

against preemption is said to be particularly forceful in cases in which the federal law applies to an area that traditionally has been regulated by the states. *Levine*, 555 U.S. at 565.

⁹⁴ See, e.g., *Bartlett*, 133 S. Ct. at 2485 (Sotomayor, J., dissenting) (highlighting the victim-compensation function traditionally fulfilled by common law tort claims and arguing that because the statutory provision at issue failed to serve this function, the federal standard should not be understood to preempt such claims).

⁹⁵ See Catherine M. Sharkey, *Federalism Accountability: “Agency-Forcing” Measures*, 58 DUKE L.J. 2125, 2146–55 (2009) [hereinafter Sharkey, *Federalism Accountability*] (describing the “agency reference model” of preemption jurisprudence); Catherine M. Sharkey, *State Farm “With Teeth”*: *Heightened Judicial Review in the Absence of Executive Oversight*, 89 N.Y.U. L. REV. 1589, 1639–40 (2014) [hereinafter Sharkey, *State Farm “With Teeth”*] (providing an overview of the agency reference mode of analysis); see also Kent Barnett, *Improving Agencies’ Preemption Expertise with *Chevron* Codification*, 83 FORDHAM L. REV. 587, 594–96 (2014) (discussing the “agency reference” approach).

⁹⁶ See generally Sharkey, *Products Liability Preemption*, *supra* note 5, at 484 (noting the cross-cutting nature of the various abstract considerations involved in preemption doctrine).

⁹⁷ See *Levine*, 555 U.S. at 565 n.3 (asserting that the presumption against preemption applies in cases involving state health and safety regulations); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (observing “the historic primacy of state regulation of matters of health and safety”).

⁹⁸ In *Skidmore v. Swift & Co.*—a case that preceded *Chevron* by several decades—the Supreme Court held that courts are not required to defer to administrative agencies’ interpretations of statutes that they administer, but that courts may give some weight to these interpretations on a case-by-case basis, depending in each case on “the thoroughness evident in [the interpretation’s] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” 323 U.S. 134, 140 (1944). Following the Court’s establishment of a more deferential approach to agency rulemaking in *Chevron, U.S.A., Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837 (1984), a string of cases allowed the Court to elaborate upon the *Skidmore/Chevron* dichotomy and to clarify when each kind of deference will apply. See, e.g., *United States v. Mead Corp.*, 533 U.S. 218 (2001); see also Eskridge & Baer, *supra* note 44, at 1085–88 (discussing how the Court has developed the *Skidmore/Chevron* framework).

⁹⁹ See Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 739 (2004) (“When faced with an agency interpretation addressing a statute’s preemptive effect, courts have trod unevenly in reconciling *Chevron* deference with the . . . presumption against preemption.”); Sharkey, *Products Liability Preemption*, *supra* note 5, at 491–99 (examining the interplay between the presumption against preemption and *Chevron* deference).

preemption cases often involve a clash between anti-preemption federalism values that would privilege the scope of state-level regulation, on the one hand, and pro-preemption libertarian or de-regulatory impulses that would evince a preference for one regulator over two, and that may also include an overall skepticism regarding juries, on the other.¹⁰⁰ Here, however, I am interested in exploring a different thread: the extent to which the conservative core Justices' attack on *Auer* and *Chevron* deference, and wider distaste for and distrust of the administrative state, is suspended in federal preemption cases, given the doctrines of agency deference that are implicated.

Perhaps the most striking illustration of this seeming inconsistency in the preemption context can be found in the conservative core's vehement dissent in *Wyeth v. Levine*.¹⁰¹ In that case, the Supreme Court majority, in an opinion by Justice Stevens, held that a plaintiff's state law failure-to-warn claim against brand-name pharmaceutical manufacturer Wyeth was not preempted, even though the FDA had specifically approved the warning label on the drug.¹⁰² In reaching its decision, the majority acknowledged that the FDA had stated—in a preamble to a regulation on the content and format of drug labels—that the regulation would preclude liability under state tort law.¹⁰³ Citing *Skidmore*, the majority explains that “[t]he weight we accord the agency’s explanation of state law’s impact on the federal scheme depends on its thoroughness, consistency, and persuasiveness.”¹⁰⁴ Applying this standard to the case at hand, the majority concludes that the FDA’s preemption preamble was “entitled to no weight,” emphasizing the fact that the agency had reversed its position on the preemption question,¹⁰⁵ without giving the states or interested parties any opportunity to participate in the public notice-and-comment process.¹⁰⁶

¹⁰⁰ See, e.g., *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 325 (2008) (raising serious doubts as to whether a jury would be able to assess accurately the costs and benefits of an allegedly defective medical device); Richard L. Cupp Jr., *Preemption's Rise (and Bit of a Fall) as Products Liability Reform: Wyeth, Riegel, Altria, and the Restatement (Third)'s Prescription Product Design Defect Standard*, 74 BROOK. L. REV. 727, 753–54 (2009) (exploring the role that mistrust of civil juries has played in recent Supreme Court preemption decisions); Sharkey, *State Farm “With Teeth,” supra* note 95, at 1636 (discussing the role that libertarian impulses and other abstract factors may play in preemption analysis); Ernest A. Young, “*The Ordinary Diet of the Law*”: *The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 342 (discussing these cross-cutting considerations).

¹⁰¹ 555 U.S. 555 (2009).

¹⁰² *Id.* at 581.

¹⁰³ *Id.* at 575.

¹⁰⁴ *Id.* at 577 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

¹⁰⁵ *Id.* at 581.

¹⁰⁶ *Id.* at 577. The majority elaborates:

In a very heated dissent, Justice Alito (joined by Chief Justice Roberts and Justice Scalia) emphatically rejects the majority's position, which he characterizes as "hold[ing] that a state tort jury, rather than the [FDA], is ultimately responsible for regulating warning labels for prescription drugs."¹⁰⁷ Moreover, the dissent accuses the majority of ignoring the critical question of "who—the FDA or a jury in Vermont—has the authority and responsibility for determining the 'adequacy' of [a prescription drug's] warnings."¹⁰⁸ Turning up the temperature even further, the dissent accuses the majority of "turning a common-law tort suit into a 'frontal assault' on the FDA's regulatory regime for drug labeling."¹⁰⁹

The dissent, moreover, explicitly chastises the majority for not "relying on the FDA's explanation of its own regulatory purposes"¹¹⁰ and for refusing to give weight to the agency's position. Indeed, the level of deference the dissent appears willing to give to the FDA is striking and far-reaching. The dissent claims that it is not necessary for an agency's preamble to have "force of law" in order to merit deference.¹¹¹ To the contrary, according to the dissenting Justices, the reviewing court can and should rely on "materials other than the Secretary's regulation to explain the conflict between state and federal law."¹¹²

When the FDA issued its notice of proposed rulemaking in December 2000, it explained that the rule would "not contain policies that have federalism implications or that preempt State law." In 2006, the agency finalized the rule and, without offering States or other interested parties notice or opportunity for comment, articulated a sweeping position on the FDCA's pre-emptive effect in the regulatory preamble. The agency's views on state law are inherently suspect in light of this procedural failure.

Id. (citations omitted) (quoting Requirements on Content and Format of Labeling for Human Prescription Drugs and Biologics, 65 Fed. Reg. 81,082 (Dec. 22, 2000); Requirements for Prescription Drug Product Labels, 65 Fed. Reg. 81,103 (codified at 21 C.F.R. § 201)).

¹⁰⁷ *Id.* at 604 (Alito, J., dissenting); *see also id.* at 607 ("Congress made its 'purpose' plain in authorizing the FDA—not state tort juries—to determine when and under what circumstances a drug is 'safe.'").

¹⁰⁸ *Id.* at 605. And here, the dissenting Justices claim, nearly rhetorically: "[T]he real issue is whether a state tort jury can countermand the FDA's considered judgment that [the prescription drug's] FDA-mandated warning label renders it[] . . . 'safe.'" *Id.*

¹⁰⁹ *Id.* at 606 (quoting Brief for the United States as Amicus Curiae Supporting Petitioner at 21, *Levine*, 555 U.S. 555 (No. 06-1249)).

¹¹⁰ *Id.* at 625 ("[T]he FDA's explanation of the conflict between state tort suits and the federal labeling regime, set forth in the agency's *amicus* brief, is not even mentioned in the Court's opinion. Instead of relying on the FDA's explanation of its own regulatory purposes, the Court relies on a decade-old and now-repudiated statement, which the majority finds preferable.").

¹¹¹ *Id.* at 623.

¹¹² *Id.* (observing prior instances in which members of the Court had "emphasiz[ed] that the FDA has a 'special understanding of the likely impact of both state and federal requirements, as well as an understanding of whether (or the extent to which) state requirements may interfere with federal objectives,' and that '[t]he FDA can translate these understandings into particularized pre-emptive intentions . . . through statements in

This expansive view of deference to the underlying regulator is not easily reconciled with the conservative core's attack on the administrative state in general; indeed, it is striking when considered alongside the dissenting Justices' hostility toward *Auer* and *Skidmore/Chevron* deference in particular. Any such reading would be very difficult to reconcile with these Justices' repeated criticisms of the fourth branch, or the body of case law outside the preemption context in which they have tried to curtail administrative agencies' power.¹¹³

The conservative core's willingness to accede to the federal regulator (at least when it concerns the FDA and pharmaceuticals)—putting out of mind the administrative behemoth or any yearning to return to common law baselines—ostensibly has little to do with acceptance of the modern administrative state. Rather, as is corroborated by language in the dissent itself, the conservative core's position is best understood as a reflection of the Justices' evident hostility toward the common law of torts as a regulator in this domain:

By their very nature, juries are ill equipped to perform the FDA's cost-benefit-balancing function. . . . [J]uries tend to focus on the risk of a particular product's design or warning label that arguably contributed to a particular plaintiff's injury, not on the overall benefits of that design or label; "the patients who reaped those benefits are not represented in court." Indeed, patients like respondent are the only ones whom tort juries ever see, and for a patient like respondent—who has already suffered a tragic accident—[the drug's] risks are no longer a matter of probabilities and potentialities.

In contrast, the FDA has the benefit of the long view. Its drug-approval determinations consider the interests of all potential users of a drug, including "those who would suffer without new medical [products]" if juries in all 50 States were free to contradict the FDA's expert determinations. And the FDA conveys its warnings with one voice, rather than whipsawing the medical community with 50 (or more) potentially conflicting ones. After today's ruling, however, parochialism may prevail.¹¹⁴

"regulations, preambles, interpretive statements, and responses to comments"" (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 506 (1996) (Breyer, J., concurring in part and concurring in the judgment) (alterations in original))).

¹¹³ See *supra* Part II.A.

¹¹⁴ *Levine*, 555 U.S. at 626 (Alito, J., dissenting) (third alteration in original) (first quoting *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 325 (2008); and then quoting *id.* at 326).

This same hostility toward regulation by tort litigation permeates Justice Scalia's majority opinion in a prior medical-device preemption case, *Riegel v. Medtronic*.¹¹⁵ In that case, the Court held that the express preemption provision of the Medical Device Amendments to the Food Drug and Cosmetic Act barred common law tort claims challenging the safety and effectiveness of a medical device that had been granted pre-market approval by the FDA.¹¹⁶ Although Justice Scalia ostensibly relies on a textual analysis of the statutory preemption provision, his opinion strays far beyond this realm to various issues implicating regulatory policy—namely, tort liability as a substitute for safety regulation—and institutional design—namely, the question whether an agency or court should be the one to decide preemption questions.¹¹⁷

In this face-off, as framed by Justice Scalia, the common law of torts is a poor regulatory substitute for the “rigorous” FDA pre-market approval process, which requires that the FDA “spend[] an average of 1,200 hours reviewing each application [by the manufacturer]”; this review includes “full reports of all studies and investigations of the device’s safety and effectiveness.”¹¹⁸ Nor does the common law of torts fare well as compared to state regulatory alternatives:

A state statute, or a regulation adopted by a state agency, could at least be expected to apply cost–benefit analysis similar to that applied by the experts at the FDA: How many more lives will be saved by a device which, along with its greater effectiveness, brings a greater risk of harm? A jury, on the other hand, sees only the cost of a more dangerous design, and is not concerned with its benefits; the patients who reaped those benefits are not represented in court.¹¹⁹

Continuing in this vein, Justice Scalia speculates that “the solicitude for those injured by FDA-approved devices . . . was overcome in Congress’s estimation by solicitude for those who would suffer without new medical devices if juries were allowed to apply the tort law of 50 States to all innovations.”¹²⁰

¹¹⁵ 552 U.S. 312.

¹¹⁶ *Id.* at 330.

¹¹⁷ *Id.* at 323–30. For more discussion, see Catherine M. Sharkey, *What Riegel Portends for FDA Preemption of State Law Products Liability Claims*, 103 NW. U. L. REV. 437 (2009).

¹¹⁸ *Riegel*, 552 U.S. at 317–18.

¹¹⁹ *Id.* at 325.

¹²⁰ *Id.* at 326. This comment provokes Justice Stevens:

There is nothing in the preenactment history of the MDA suggesting that Congress thought state tort remedies had impeded the development of medical devices. Nor is there any evidence at all to suggest that Congress decided that the cost of injuries from Food and Drug

Here again, the conservative core ostensibly is able to tolerate the encroachment of the federal regulatory state, at least where the victim is the common law of torts. In *Riegel*, the majority does not expressly rely on deference to the FDA; but the deference doctrines are invoked, and there is nary a whiff of protest by the conservative core. With respect to *Chevron/Skidmore*, Justice Scalia merely notes that “[i]n the case before us, the FDA has supported the position taken by our opinion with regard to the meaning of the statute,” though it was “unnecessary to rely upon that agency view because we think the statute itself speaks clearly to the point at issue.”¹²¹ Likewise, with respect to *Auer*, Justice Scalia’s attitude towards the agency’s position would appear to be agnostic, given the clarity of the text of the statutory preemption provision.¹²² It is nevertheless noteworthy that Justice Scalia, having invoked conventional *Auer* deference,¹²³ issues no tirade against the doctrine. Yet, again, this occurs in a case in which refusing to defer to the agency would “save” the common law of torts.

Thus far, as concerns both the campaign to scale back judicial deference to agencies¹²⁴ and the exception thereto carved out for deference to the FDA in federal preemption decisions, I have treated the conservative core Justices as a unified bloc. But Justice Thomas has staked out his very own contrarian position in implied preemption cases such as *Wyeth v. Levine*—a position that vests his hostile attitudes toward agencies (both inside and outside the context of preemption cases) with a consistency that his conservative colleagues’

Administration-approved medical devices was outweighed “by solicitude for those who would suffer without new medical devices if juries were allowed to apply the tort law of 50 States to all innovations.” That is a policy argument advanced by the Court, not by Congress.

Id. at 331 (Stevens, J., concurring in part and concurring in the judgment) (quoting *id.* at 326 (majority opinion)).

¹²¹ *Id.* at 326 (majority opinion). Justice Scalia (albeit in dicta) goes further to suggest that the FDA’s position might be accorded *Skidmore* deference, and if so, then the fact that the agency had changed its earlier position would likely weaken the deference owed. *Id.* at 326–27 (“If, however, we had found the statute ambiguous and had accorded the agency’s current position deference, the dissent is correct that—inasmuch as mere *Skidmore* deference would seemingly be at issue—the degree of deference might be reduced by the fact that the agency’s earlier position was different.” (citation omitted) (citing, *inter alia*, *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944))).

¹²² *Id.* at 329–30 (“Neither accepting nor rejecting the proposition that this regulation can properly be consulted to determine the statute’s meaning; and neither accepting nor rejecting the FDA’s [interpretation of the regulation]; the regulation fails to alter our interpretation of the text insofar as the outcome of this case is concerned.”).

¹²³ *Id.* at 328 (“The agency’s reading of its own rule is entitled to substantial deference.” (citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997))).

¹²⁴ See *supra* Part II.A.

approach lacks.¹²⁵ In a separate opinion in *Levine*, Justice Thomas announced that he would no longer support implied obstacle preemption,¹²⁶ a form of federal preemption by which a court must consider whether the state law in question frustrates the “purposes and objectives” of the relevant federal regulatory scheme.¹²⁷ Justice Thomas points out that it is here, untethered from statutory text, that courts look to “Congressional and agency musings” to discern such conflicts, and he objects that these sources do not satisfy the Article I, Section Seven requirements for the enactment of federal law and thus cannot preempt state law.¹²⁸ Justice Thomas stands alone—and distinguishes himself from the conservative core—in eschewing any reliance on “agency comments, regulatory history, and agency litigating positions” in implied preemption analysis.¹²⁹ In his case, hostility to the administrative state points toward an anti-preemption direction in *Levine*; unlike the rest of the conservative core, he holds firm to the position that “no agency . . . can pre-empt a State’s judgment by merely musing about goals or intentions not found within or authorized by the statutory text.”¹³⁰

Note, however, that even here there is a chink in Justice Thomas’s resistance to the administrative state: the puzzling persistence of *Auer* deference in the preemption context. Overlooking this issue led to over-exuberance on the part of the liberal consumer groups who, in the wake of *Levine*, embraced Justice Thomas as the new standard bearer for the anti-preemption position.¹³¹ But then along came *PLIVA, Inc. v. Mensing*, in which Justice Thomas, re-joined by his fellow conservative core Justices (along with Justice Kennedy), held that state tort failure-to-warn claims

¹²⁵ See generally Sharkey, *supra* note 90 (discussing Justice Thomas’s obstacle preemption jurisprudence).

¹²⁶ Justice Thomas explained:

I have become increasingly skeptical of this Court’s “purposes and objectives” pre-emption jurisprudence. Under this approach, the Court routinely invalidates state laws based on perceived conflicts with broad federal policy objectives, legislative history, or generalized notions of congressional purposes that are not embodied within the text of federal law. Because implied pre-emption doctrines that wander far from the statutory text are inconsistent with the Constitution, I concur only in the judgment.

Wyeth v. Levine, 555 U.S. 555, 583 (2009) (Thomas, J., concurring in the judgment).

¹²⁷ See *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

¹²⁸ *Levine*, 555 U.S. at 587–88 (Thomas, J., concurring in the judgment).

¹²⁹ *Id.* at 598–99.

¹³⁰ *Id.* at 600–01.

¹³¹ See David G. Savage, *Clarence Thomas, Supreme Court Liberal?*, L.A. TIMES (Mar. 8, 2009), <http://articles.latimes.com/2009/mar/08/nation/na-thomas8>.

brought against a generic drug manufacturer were barred under the doctrine of implied *impossibility* preemption.¹³²

Central to the holding in *Mensing*—and specific to generic drug manufacturers, as opposed to brand-name manufacturers such as that involved in *Levine*—is the generic drug manufacturer’s federal duty of “sameness,” namely, the requirement that a generic drug label be exactly the same as that of the corresponding brand-name drug.¹³³ In light of this requirement, the conservative core Justices, in an opinion for the Court, held that it would be “impossible” for a generic drug manufacturer to add a warning to its label without violating federal law.¹³⁴ To reach this conclusion, the majority defers to the FDA’s interpretation regarding the agency’s obligations under its own regulations: “The FDA . . . tells us that it interprets its regulations to require that the warning labels of a brand-name drug and its generic copy must always be the same—thus, generic drug manufacturers have an ongoing federal duty of ‘sameness.’”¹³⁵ In so doing, these Justices do not hesitate to invoke *Auer* deference repeatedly, emphasizing that “[t]he FDA’s views are ‘controlling unless plainly erroneous or inconsistent with the regulation[s]’ or there is any other reason to doubt that they reflect the FDA’s fair and considered judgment.”¹³⁶

The conservative core Justices, again joined by Justice Kennedy, implicitly rallied behind *Auer* deference in a subsequent preemption case, *Mutual Pharmaceutical Co. v. Bartlett*,¹³⁷ once more showing no qualms where the

¹³² 131 S. Ct. 2567, 2577–78 (2011).

¹³³ *Id.* at 2574–75 (describing generic drug companies’ “ongoing federal duty of ‘sameness’”).

¹³⁴ *Id.* at 2578.

¹³⁵ *Id.* at 2574–75 (first citing Brief for the United States as Amicus Curiae Supporting Respondents at 16, *Mensing*, 131 S. Ct. 2567 (No. 09-993); and then citing Abbreviated New Drug Application Regulations, 57 Fed. Reg. 17,961 (Apr. 28, 1992) (“[T]he [generic drug’s] labeling must be the same as the listed drug product’s labeling because the listed drug product is the basis for [generic drug] approval.” (alterations in original))); *id.* at 2575 (“The FDA denies that the Manufacturers could have used the [process available to brand name manufacturers] to unilaterally strengthen their warning labels.”).

¹³⁶ *Id.* at 2575 (second alteration in original) (citing *Auer v. Robbins*, 519 U.S. 452, 461–62 (1997)); *see also id.* at 2575 (“We defer to the FDA’s interpretation of its [brand name labeling regulation] and generic labeling regulations. Although *Mensing* and *Demahy* offer other ways to interpret the regulations, we do not find the agency’s interpretation ‘plainly erroneous or inconsistent with the regulation.’ Nor do *Mensing* and *Demahy* suggest there is any other reason to doubt the agency’s reading.” (quoting *Auer*, 519 U.S. at 461)); *id.* at 2576 (“As with the [brand name labeling] regulation, we defer to the FDA [that federal law does not permit manufacturers to issue additional warnings via “Dear Doctor” letters]. *Mensing* and *Demahy* offer no argument that the FDA’s interpretation is plainly erroneous.” (citing *Auer*, 519 U.S. at 461)). Justice Thomas adds this significant caveat: “Although we defer to the agency’s interpretation of its regulations, we do not defer to an agency’s ultimate conclusion about whether state law should be pre-empted.” *Id.* at 2575 n.3.

¹³⁷ 133 S. Ct. 2466 (2013).

doctrine's application meant preempting common law design defect tort claims against a generic drug manufacturer. Justice Alito penned the majority opinion, which relies on federal drug regulations "as interpreted by the FDA" in deeming state law preempted.¹³⁸

When juxtaposed with the conservative core Justices' efforts to stymie the growth and influence of the administrative state by reining in agency discretion and refusing to accord deference under *Auer* and *Chevron/Skidmore*,¹³⁹ the conservative core's preemption jurisprudence is remarkable in two ways. First, the Justices apparently sublimate any hostility, or even hesitancy, toward according deference to the FDA, particularly when considering the agency's interpretation of its own regulations under *Auer*.¹⁴⁰ Second—and more controversially—it would appear that these Justices' hostility toward the common law of torts trumps even their caustic criticism of the ever-inflating administrative state.¹⁴¹ What this suggests is that the conservative core's position departs significantly from the conventional view embodied in Pound's work¹⁴²—namely, the view that staving off the administrative state inexorably leads to a flourishing of the common law. Moreover, a more constructive approach will be needed to overcome these Justices' resistance to the common law, given the conservative core's greater evident opposition to regulation via tort law.

III. A REGULATORY RECONCILIATION FOR THE TWENTY-FIRST CENTURY

The advent of the modern administrative state, and the resulting changes to the legal landscape, mandate a revised approach to the common law and to statutory interpretation. The common law of torts has undergone such fundamental reformatting before. It was changed in the twentieth century to address the trend of "statutorification," that is, legislatures' enactment of laws that changed the common law baselines. As did Roscoe Pound and Guido Calabresi, we should reject the notion of "common-law chauvinism,"¹⁴³ that is,

¹³⁸ *Id.* at 2476 (quoting *Mensing*, 131 S. Ct. at 2577).

¹³⁹ *See supra* Part II.A.

¹⁴⁰ *See Bartlett*, 133 S. Ct. at 2476; *Mensing*, 131 S. Ct. at 2574–75; *Wyeth v. Levine*, 555 U.S. 555, 625 (2009) (Alito, J., dissenting); *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 326–27 (2008).

¹⁴¹ *See supra* notes 114–24 and accompanying text (discussing the conservative core's criticism of regulation by juries in agency tort preemption cases).

¹⁴² *See supra* Part I.

¹⁴³ *See WITT, supra* note 13, at 257; *see also* CALABRESI, *supra* note 12, at 163 (disclaiming any desire for a "nostalgic restoration of courts as the primary makers of law"). Note that, with respect to Pound, this statement is a bit fraught. In his later work (explored above in Part I.A), Pound became committed to the idea

we should avoid fetishizing the common law at the expense of statutory and administrative law. Drawing inspiration from the visions of Pound and Calabresi in the twentieth century, the task before us in the twenty-first century is to chart a new course for courts—namely, one whereby they effectively incorporate input from federal agencies, while at the same time ensuring that such agencies do not overreach.

Unlike the conservative core Justices (outside the drug and medical device preemption context), I do not believe that this necessarily entails a wholesale rejection of agency interpretive authority. Instead, courts must exercise oversight over a reformatted common law landscape that incorporates significant input from federal regulatory agencies.

A. Regulatory Substitutes: Rejecting Common Law Chauvinism

The conventional take on the threat of the administrative state to the common law of torts embraces—explicitly or implicitly—a view of the administrative state and the common law as regulatory substitutes (and competitors). According to this perspective, if the administrative state is resisted, the common law will flourish in the open regulatory space. There is good reason, however, to look with skepticism upon this approach. This view not only is suspect in light of the Supreme Court’s modern federal preemption jurisprudence, as described above, but it also risks a kind of “common-law chauvinism” that is ill-suited for regulation in the twenty-first century.

Pound, in his early work at the turn of the twentieth century¹⁴⁴—somewhat ironically, given his later work¹⁴⁵—and Calabresi, more than a half-century later,¹⁴⁶ proposed a response to statutory and administrative growth. Both rejected “common-law chauvinism” and proposed a forward-looking way to integrate the reality of the increasing proliferation of statutes and regulations in the United States.

that the common law was superior and administration was evil. As Witt aptly notes: “As the Cold War set in, Pound’s critique of administration embraced ever more fervently the kinds of common-law chauvinism he had rejected decades earlier.” WITT, *supra* note 13, at 257. In this Part, I rely on the approach Pound championed in his earlier work.

¹⁴⁴ See POUND, *supra* note 34, at 175–76 (endorsing a dynamic and interactive system by which both the courts and the legislature would play critically important roles in efficient legal administration).

¹⁴⁵ See *supra* Part I.B.

¹⁴⁶ See CALABRESI, *supra* note 12.

1. *Roscoe Pound's Common Law and Legislation*

Pound's 1908 essay *Common Law and Legislation* begins: "Not the least notable characteristics of American law today are the excessive output of legislation in all our jurisdictions and the indifference, if not contempt, with which that output is regarded by courts and lawyers."¹⁴⁷ But Pound stands firm against the "fashionable" practice of "preach[ing] the superiority of judge-made law."¹⁴⁸ He recognizes that "[t]he capital fact in the mechanism of modern states is the energy of legislatures."¹⁴⁹

In his early career, Pound—later so nostalgic for the common law—was actually highly critical of the common law, and all the more so when it turned a blind eye to legislative developments. His early work questions the common law's very ability to protect health and safety in the modern industrial age.¹⁵⁰ According to Pound, the common law was "not equal to the task" of twentieth-century health and safety regulation.¹⁵¹ Moreover, he maintained that "American constitutionalism had wrongly favored common-law institutions where more efficient administrative management was required."¹⁵² Witt, having taken a close look at his writings, both formal and informal, reports:

Everywhere one turned, Pound wrote, "commissions and boards, with summary administrative and inquisitorial powers are called for, and courts are distrusted." Such modern imperatives as "public utilities, factory inspection, food inspection, tenement-house inspection, and building laws," Pound concluded, had compelled the United States to turn more and more from traditional legal institutions to new forms of "administrative prevention." In each of these areas, Pound believed, experts would be able to transform the "legal ordering of society" into "a great series of tasks of social engineering" to be "worked out in the sociological laboratory."¹⁵³

¹⁴⁷ Pound, *supra* note 11, at 383.

¹⁴⁸ *Id.* at 383–84.

¹⁴⁹ *Id.* at 403 (quoting HENRY SUMMER MAINE, *Sovereignty and Empire*, in LECTURES ON THE EARLY HISTORY OF INSTITUTIONS 371, 398 (1874)).

¹⁵⁰ See, e.g., POUND, *supra* note 34, at 190 ("A body of law which will satisfy the demands of the society of today cannot be made of the ultra-individualist materials of eighteenth-century jurisprudence and nineteenth-century common law based thereon, no matter how judges are chosen or how often they are dismissed.")

¹⁵¹ See *id.*; see also WITT, *supra* note 13, at 223.

¹⁵² WITT, *supra* note 13, at 223 (quoting Roscoe Pound, Address Before the Annual Convention of the American Bar Association (Aug. 29, 1906), in 14 AM. L. REV. 445, 445 (1906)).

¹⁵³ *Id.* at 221 (first quoting Roscoe Pound, *The Spirit of the Common Law*, 18 GREEN BAG 17, 19 (1906); then quoting Roscoe Pound, *The Administration of Justice in the Modern City*, 26 HARV. L. REV. 302, 323

Most significantly, in *Common Law and Legislation*, Pound criticizes the then-prevailing judicial practice of strictly reading statutes in derogation of the common law.¹⁵⁴ Indeed, his work on the subject is the classic criticism of nineteenth-century courts' adoption of this practice.¹⁵⁵ Pound took a revolutionary stand against the prevailing eighteenth- and nineteenth-century view that heralded common law judges as uniquely able to discern the legal framework, and that further vested those judges with essentially sole authority to change that framework when they saw fit.¹⁵⁶ Against this ingrained orthodoxy, Pound argues that statutes should be given full effect, unhampered by cramped judicial interpretation, even if they alter the common law.¹⁵⁷

2. *Guido Calabresi's A Common Law for the Age of Statutes*

Pound might be seen as the progenitor of, or at least an inspiration for, Guido Calabresi's *A Common Law for the Age of Statutes*. Calabresi opens his book, written in 1982, with this observation: "The last fifty to eighty years have seen a fundamental change in American law. In this time we have gone from a legal system dominated by the common law, divined by courts, to one in which statutes, enacted by legislatures, have become the primary source of law."¹⁵⁸ The opening chapter, "Choking on Statutes," attests to the proliferation at the time of statutory and regulatory mandates, especially in health and safety, with more than a hint of the prevailing resistance thereto by common law loyalists.¹⁵⁹

Like Pound, Calabresi rejects nostalgic wistfulness for "a return to the pure golden age of the common law, before the orgy of statute making."¹⁶⁰

(1913); and then quoting Pound, *supra* note 11, at 406–07). With respect to Pound's early work, as Witt notes, "Frankfurter and the New Dealers among his students—men like James Landis and Thomas Corcoran—continued for decades to draw on Pound's ideas to establish new administrative institutions in the American state." *Id.* at 228.

¹⁵⁴ Pound, *supra* note 11, at 387.

¹⁵⁵ See, e.g., NEIL DUXBURY, *ELEMENTS OF LEGISLATION* 38 n.46 (2013) (highlighting Pound as a proponent of this position); Guido Calabresi, *Being Honest About Being Honest Agents*, 33 HARV. J.L. & PUB. POL'Y 907, 907–08 (2010) (citing Pound in criticizing the "derogation" canon).

¹⁵⁶ See, e.g., POUND, *supra* note 34, at 190–91 (endorsing a departure from the eighteenth- and nineteenth-century elevation of the common law).

¹⁵⁷ See *id.*; see also CALABRESI, *supra* note 12, at 75 n.20 (noting Pound's approach to the role of statutes vis-à-vis the role of the common law).

¹⁵⁸ CALABRESI, *supra* note 12, at 1; see also *id.* at 5 ("[S]tarting with the Progressive Era but with increasing rapidity since the New Deal, we have become a nation governed by written laws.").

¹⁵⁹ *Id.* at 1–7.

¹⁶⁰ *Id.* at 69; see GRANT GILMORE, *THE AGES OF AMERICAN LAW* 40 (1977) ("No golden age endures forever . . ."). According to Gilmore, in the early nineteenth century, "pure Mansfieldianism flourished: not

Calabresi did not want “to turn back the clock and make courts the primary agents of lawmaking and law reform.”¹⁶¹ Instead, he reconceptualized the role of courts in light of “the slow adaptation of our whole legal-political system to a major change: the preponderance of statutory law.”¹⁶²

Following the spirit of Pound’s accommodation of legislation into the common law, Calabresi provided a new framework that aimed to recast judicial interpretation in the twentieth century to increase the courts’ capacity to deal with the “statutorification” of the American legal system.¹⁶³ He celebrates the common law, but in a reimagined form, far from the shopworn nineteenth-century version.¹⁶⁴

B. Regulatory Complements: Embracing Judicial Oversight of the Administrative State

Pound—particularly in his later work—feared the administrative behemoth,¹⁶⁵ and Calabresi, too, showed some wariness of regulation by federal agencies.¹⁶⁶ But even as Pound decried “administrative absolutism”—

only were his cases regularly cited but his lighthearted disregard for precedent, his joyous acceptance of the idea that judges are supposed to make law—the more the better—became a notable feature of our early jurisprudence.” *Id.* at 24. Nor is this nostalgia limited to this side of the Atlantic. *See, e.g.*, PATRICK DEVLIN, *SAMPLES OF LAWMAKING* 6 (1962) (“The work done by the judges of England is not now as glorious as it was.”); *see also id.* at 117 (“At its best the common law is, I think, better than any statute could be.”).

¹⁶¹ CALABRESI, *supra* note 12, at 73. He was not interested in such a “nostalgic restoration of courts as the primary makers of law, in our system.” *Id.* at 163.

¹⁶² *Id.* at 2.

¹⁶³ *Id.* at 1–2 (describing the effects of the “statutorification” of American law”).

¹⁶⁴ More specifically, Calabresi insists that a significant common law judicial function is the updating of outworn laws. Under Calabresi’s view, this is a key role for the common law: “It is no more and no less than the critical task of deciding when a retentionist or revisionist bias is appropriately applied to an existing statutory or common law rule.” *Id.* at 164 (emphasis omitted).

¹⁶⁵ There is a great deal of hostile rhetoric associated with Pound’s name. *See* WITT, *supra* note 13, at 232; *see also* WILLRICH, *supra* note 18, at 315–16 (discussing Pound’s “thunderous assault on the New Deal state”); *supra* Part I.A. This view is difficult to reconcile with Pound’s earlier embrace of the administrative state as a critical part of a legal system that could keep pace with the country’s needs following the rise of industry. *See* Pound, *supra* note 34, at 330–31 (examining the administrative state’s role in the legal system); Pound et al., *supra* note 30, at 331–34 (observing, *inter alia*, that agencies must have the authority to promulgate rules in order to effectively carry out their responsibilities); *see also* ERNST, *supra* note 27, at 135–36.

¹⁶⁶ Calabresi devotes one chapter of *A Common Law for the Age of Statutes* to the delegation of substantial authority to administrative agencies. He would give a role to agencies (albeit a limited one) to work in conjunction with courts and legislatures to renovate the law. CALABRESI, *supra* note 12, at 44–58. Nonetheless, according to Calabresi:

The very things that make administrative agencies reasonably adept at sensing current popular will—such as the existence of staff and therefore of budgetary dependence on elected officials—

and saw grave danger in unchecked agency authority—he nonetheless supported a framework by which the courts would oversee agencies through the exercise of judicial review, thereby providing the necessary check on unprincipled agency action. In this vein, Pound endorsed pre-APA legislation that would have given the courts somewhat greater oversight over the administrative state.¹⁶⁷ His chief fear, properly understood, was of unchecked discretion rather than of the entrenchment of the administrative state per se.¹⁶⁸

A similar chord is struck by some of the conservative core Supreme Court Justices. In his *City of Arlington* dissent, for example, Chief Justice Roberts posits that the antidote to the threat posed by the administrative states is a judiciary ready and willing to police agency action. Chief Justice Roberts would have courts exercise strict oversight to prevent agency overreach.¹⁶⁹

This call for enhanced judicial scrutiny, however, is drowned out amidst the wider, all-out attack on the rise of the administrative state per the modern conservative core of the Supreme Court.¹⁷⁰ Moreover, it is apparently abandoned or forgotten altogether in the context of the drug and medical-device preemption cases.¹⁷¹ This apparent carve-out, I would argue, is contrary to the principle—otherwise generally espoused by the conservative

also make them ill suited to the task of discerning principles and call into question the disinterestedness of their judgments on the rightness of a statute.

Id. at 110–11.

¹⁶⁷ *United States Court of Appeals for Administration: Hearings before a Subcomm. on the Judiciary on S. 3676*, 75th Cong. 169–86 (1938) [hereinafter *Hearings on S. 3637*] (statement of Dean Roscoe Pound, Harvard Law School); ERNST, *supra* note 27, at 135–36; Letter from Roscoe Pound, Dean, Harvard Law Sch., to Edward R. Burke, U.S. Senator (May 18, 1940), reprinted in *Logan-Walter Bill Supported by Dean Pound*, AM. L. & LAW., May 25, 1940, at 1, 6.

¹⁶⁸ *Hearings on S. 3637*, *supra* note 167, at 182 (conceiving of courts as responsible for ensuring that agencies remain within their “legal limits”); see also Mark Tushnet, *Administrative Law in the 1930s: The Supreme Court’s Accommodation of Progressive Legal Theory*, 60 DUKE L.J. 1565, 1631 n.399 (2011) (asserting that “Pound wanted ‘a simple, direct, and inexpensive mode of review’” (quoting Daniel R. Ernst, Roscoe Pound and the Administrative State 100 (unpublished manuscript) (on file with the *Duke Law Journal*))); Letter from Roscoe Pound to Edward R. Burke, *supra* note 167, at 1 (emphasizing the virtues of a “simple, expeditious, non-technical mode of review of administrative determinations”).

¹⁶⁹ *City of Arlington v. FCC*, 133 S. Ct. 1863, 1885–86 (2013) (Roberts, C.J., dissenting) (“What is afoot, according to the Court, is a judicial power-grab, with nothing less than ‘*Chevron* itself’ as ‘the ultimate target.’”). Chief Justice Roberts concedes that “[t]he Court touches on a legitimate concern: *Chevron* importantly guards against the Judiciary arrogating to itself policymaking properly left, under the separation of powers, to the Executive.” *Id.* at 1886. “But,” the Chief Justice continues, “there is another concern at play, no less firmly rooted in our constitutional structure. That is the obligation of the Judiciary not only to confine itself to its proper role, but to ensure that the other branches do so as well.” *Id.*

¹⁷⁰ See *supra* Part II.A.

¹⁷¹ See *supra* Part II.B.

core—that judicial oversight must provide an effective safeguard against overbroad exercises of agency authority.

As I have argued in a series of articles, courts should exercise particularly stringent judicial review in the context of federal preemption of the common law of torts.¹⁷² By this view, the *Levine* majority was justified in withholding deference to the FDA on the grounds that the agency’s pro-preemption position lacked empirical grounding, and that the agency failed to vet its position via the notice-and-comment procedure for administrative rulemaking.¹⁷³ Moreover, heightened judicial scrutiny of agency preemptive rules is especially necessary in light of the fact that such agency decisions are not typically subject to rigorous executive oversight.¹⁷⁴

Judicial oversight of the administrative state holds promise, too, for encouraging “tort–agency partnerships” in health and safety regulation.¹⁷⁵ Under this approach, the administrative state and the common law can operate, in certain contexts, as regulatory complements—and courts must solicit input from regulatory agencies. However, courts must then scrutinize such input to ensure that there is empirical backing for any claims that, for example, common law tort regulation cannot co-exist with administrative regulation. This system of judicial review allows for the active moderation of the interplay between federal regulations and the common law of torts, and it carries forward the progressive role that Pound and Calabresi envisioned for the courts in responding to prior major developments in the legal landscape.

CONCLUSION

In 1970, the Chief Justice of the Wisconsin Supreme Court, dissenting from a majority opinion that refused to adopt pure comparative negligence in light

¹⁷² See Sharkey, *Products Liability Preemption*, *supra* note 5, at 491–502 (describing this “agency reference” model of judicial review); Sharkey, *Federalism Accountability*, *supra* note 95, at 2178–91 (elaborating upon this framework by looking to how heightened judicial review of preemptive regulations would operate in practice); Sharkey, State Farm “*With Teeth*,” *supra* note 95, at 1634–46 (endorsing a system by which agencies’ conflict preemption determinations would be subject to more demanding judicial scrutiny).

¹⁷³ See *Wyeth v. Levine*, 555 U.S. 555 (2009). For more in-depth discussion on *Levine* and its implications for the agency reference model, see Sharkey, *Federalism Accountability*, *supra* note 95, at 2186–88; Sharkey, State Farm “*With Teeth*,” *supra* note 95, at 1638–40.

¹⁷⁴ See Sharkey, State Farm “*With Teeth*,” *supra* note 95, at 1638–40 (arguing that administrative agencies’ preemptive determinations should be subject to more stringent judicial review given the fact that they are not reviewed by the Office of Information and Regulatory Affairs).

¹⁷⁵ See generally Sharkey, *Tort-Agency Partnerships*, *supra* note 5 (proposing this new tort preemption paradigm).

of the statutory enactment of an impure (50%) version, ominously portended that “*the death of the common law is near at hand.*”¹⁷⁶ Today—nearly half a century later—the question is posed, “Is the United States Still a Common Law Country?”¹⁷⁷ Preemption of the common law is still perceived as a major threat, although the potentially preemptive sources have now expanded to include agencies as well as legislatures.

Following direction from Pound and Calabresi, we would do well to resist the modern conservative core Supreme Court Justices’ nostalgia for a pre-New Deal way of life.¹⁷⁸ The challenge ahead would seem to be to re-envision the role of courts in an age in which administrative regulations preponderate. The United States is indeed still a common law country—not its nineteenth-century version, but a distinctly twenty-first century version that is just coming into view.

¹⁷⁶ *Vincent v. Pabst Brewing Co.*, 177 N.W.2d 513, 523 (Wis. 1970) (Hallows, C.J., dissenting). Chief Justice Hallows argued that merely because the legislature had intervened to replace common law contributory negligence with a form of impure comparative negligence, “nothing in its history or in its language . . . evinces any intent to pre-empt this field of common law to the exclusion of this court.” *Id.* at 522. According to Justice Hallows: “The doctrine of contributory negligence is a child of the common law and the court can and should replace it with the doctrine of pure comparative negligence.” *Id.* at 523.

It is doubtful that either Pound or Calabresi would find convincing Chief Justice Hallows’s forewarning that the “death of the common law is near at hand” unless courts scrupulously avoid finding legislative preemption of common law activity. Pound and Calabresi recognized that the common law must include statutes as a fundamental part of its fabric, *see supra* notes 147–64 and accompanying text; the same can be said today of administrative regulations.

¹⁷⁷ The decline of the common law has been the subject of a rich body of scholarly literature in recent decades. *See, e.g.*, KYLE SCOTT, *DISMANTLING AMERICAN COMMON LAW: LIBERTY AND JUSTICE IN OUR TRANSFORMED COURTS 2* (2007) (addressing “[t]he deterioration of the common law”); Patrick O. Gudridge, *The Persistence of Classical Style*, 131 U. PA. L. REV. 663, 686–87 (1983) (“We might begin with the ‘decline’ of the common law. . . . [A]lternative sources of law have frequently displaced common law from its traditional domain.”); Klass, *supra* note 17, at 551 (“Congress, state legislatures, and administrative agencies . . . dominate large areas of the law formerly controlled by common law.”); A.C. Pritchard & Todd J. Zywicki, *Constitutions and Spontaneous Orders: A Response to Professor McGinnis*, 77 N.C. L. REV. 537, 550 (1999) (“The demise of the common-law tradition in the twentieth century has undermined faith in judges as faithful constitutional agents.”); Frederick Schauer, *The Failure of the Common Law*, 36 ARIZ. ST. L.J. 765, 781 (2004) (observing “the decline of the common law model” in America).

¹⁷⁸ Recall Justice Scalia’s lament: “Too many important decisions of the Federal Government are made nowadays by unelected agency officials exercising broad lawmaking authority, rather than by the people’s representatives in Congress.” *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1610 (2014) (Scalia, J., dissenting).