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Also, No

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Recommended Citation

Ethan J. Leib, *Also, No*, 53 *Tusla L. Rev.* 268 (2018)

Available at: https://ir.lawnet.fordham.edu/faculty_scholarship/882

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ALSO, NO

Ethan J. Leib*

ADRIAN VERMEULE, *LAW'S ABNEGATION: FROM LAW'S EMPIRE TO THE ADMINISTRATIVE STATE* (HARVARD UNIVERSITY PRESS 2016). PP. 272. HARDCOVER \$39.95.

[T]he dwarf murmured contemptuously[:] time itself is a circle.
 “You spirit of gravity,” [Zarathustra] said angrily, “do not make things too easy for yourself!”

–Friedrich Nietzsche, *Thus Spoke Zarathustra*¹

In Zarathustra’s first recounting of the so-called doctrine of eternal recurrence, it is his dwarf companion who first gives expression to the idea that everything will forever repeat, leading always to the same life. The dwarf, however, fails to appreciate just what an “abysmal thought” this doctrine is² – and seems not to understand the psychological and normative commitments adherence to the doctrine would require. When the animals with which Zarathustra surrounds himself later in the book joyfully recount the eternal recurrence to him – “eternally the same house . . . is built” – Zarathustra is disgusted by their complacency: “O you buffoons and barrel organs! . . . [H]ave you already made a hurdy-gurdy song of this?”³ Although Zarathustra eventually embraces the doctrine by the end of *Thus Spoke Zarathustra*, he learns that accepting the eternal return cannot be accomplished without great suffering, effort, and anxiety.⁴ Zarathustra, in fact, knows that teaching the doctrine is his “greatest danger and sickness.”⁵ To be sure, many

* John D. Calamari Distinguished Professor of Law, Fordham Law School. Thanks to Nestor Davidson, David Dyzenhaus, Abner Greene, Philip Hamburger, Andrew Kent, Gary Lawson, Henry Monaghan, Jeffrey Pojanowski, and David Ponet for help on this Review. For inspiration on the title, see Adrian Vermeule, *No*, 93 TEX. L. REV. 1547 (2015).

1. FRIEDRICH NIETZSCHE, *THUS SPOKE ZARATHUSTRA*, reprinted in *THE PORTABLE NIETZSCHE* 270 (Walter Kaufmann ed. & trans., 1982) [hereinafter NIETZSCHE]. I will not muck with Kaufmann’s canonical translation notwithstanding its potential offensiveness to modern ears; for what it is worth, the Thomas Common translation also renders Zarathustra’s companion here as a “dwarf.” See FRIEDRICH NIETZSCHE, *THUS SPOKE ZARATHUSTRA: A BOOK FOR ALL AND NO ONE* (Thomas Common trans., 1892).

2. NIETZSCHE, *supra* note 1, at 328.

3. *Id.* at 329–30.

4. *Id.* at 340–43.

5. *Id.* at 332. For more on Zarathustra’s darker rendition of the doctrine of eternal recurrence distinguishing

commentators doubt whether Zarathustra's embrace of the doctrine is meant to be taken at face value as a cosmological theory. Rather, it seems not to be a serious descriptive account of the way the world is, but a way to come to terms with our fate and live authentically.⁶

Adrian Vermeule embraces a doctrine of eternal recurrence of deference to the administrative state in *Law's Abnegation*.⁷ But one can reasonably worry that Vermeule's version is too similar to the simplistic and complacent version expounded by Zarathustra's dwarf and his animals. This Review suggests that administrative law is not just a set of doctrines and practices that lead inexorably to deference to the administrative state but that it is also a set of anxieties and ambivalences about bureaucratic control in liberal democracies. Those anxieties and ambivalences are the law that eternally recurs along with deference; and that law more authentically fits and justifies our administrative law.

* * *

Vermeule's *Law's Abnegation* is a very good read, and it is easy to tell what he is aiming to argue on almost every page. Even though it is a synthetic work, weaving together ten different journal articles,⁸ three of which were co-authored – with different co-authors, to boot – the book has an integrity, a singular voice, and an admirably focused line of argument. Taking its point of departure from Ronald Dworkin's failure to come to terms with the reality that most public law is made by the administrative state,⁹ Vermeule offers an internal legal perspective on how judges and lawyers, rather than being a fount of principle in administrative law, have marginalized themselves through doctrines and practices of deference. It is, Vermeule argues, very hard to square “courts [as] the capitals of law's empire, and judges [as] its princes,”¹⁰ in Dworkin's famous formulation, with courts' and judges' seeming abnegation in their deferential judgments about the administrative state.

This is a striking and important intervention. Legal theory surely needs to catch up with what are not terribly new developments in our constitutional and public law system. At least since the New Deal – and probably before, too – the structure of our separation of powers and the judiciary's more marginal role in legal norm development has been apparent; the philosophy of law has not made the administrative state the “inescapable subject” it should be.¹¹ Although Vermeule has some fun at Dworkin's expense – offering his internal theory of administrative law as a Dworkinian “fit and justification” story – this

it from the version embraced by the dwarf and the animals, see 2 MARTIN HEIDEGGER, *NIETZSCHE: THE ETERNAL RECURRENCE OF THE SAME* (1984).

6. See generally LAWRENCE J. HATAB, *NIETZSCHE'S LIFE SENTENCE: COMING TO TERMS WITH ETERNAL RECURRENCE* (2004); ALEXANDER NEHAMAS, *NIETZSCHE: LIFE AS LITERATURE* (1985).

7. ADRIAN VERMEULE, *LAW'S ABNEGATION: FROM LAW'S EMPIRE TO THE ADMINISTRATIVE STATE* (2016).

8. For a list of the source articles, see *id.* at 248.

9. *Id.* at 3. The failure of legal theory and philosophy of law more generally to take the administrative state seriously is also a central theme in Nestor M. Davidson & Ethan J. Leib, *Regleprudence – at OIRA and Beyond*, 103 GEO. L.J. 259 (2015).

10. RONALD DWORKIN, *LAW'S EMPIRE* 407 (1986).

11. VERMEULE, *supra* note 7, at 3.

oversight is not Dworkin's alone. As I have highlighted elsewhere, none of the contemporary major compendia of jurisprudence offer any sustained thinking about the administrative state or administrative law.¹²

Vermeule's efforts in *Law's Abnegation* are therefore quite welcome – all the more because his theorizing is neither too abstracted from actual doctrine and practices, nor is it external in the way a political scientist or an institutional theorist might approach the same kinds of questions. His is a reconstructive or interpretivist effort from within administrative law to articulate its core principle the way administrative lawyers would make the best sense of them.

The core principle Vermeule finds everywhere he looks is the eternal recurrence of deference by courts to administrative agency decisions. From one perspective, this is wholly uncontroversial. If a law professor were asked to teach administrative law on one leg to new students, she would surely emphasize high agency win rates against all manner of challenges: whether a litigant is challenging the type or scope of delegation the legislature gave the agency; the agency's policy choice within its delegation; the form the agency chose to promulgate its policy (rulemaking or adjudication); the agency's understanding of the statutes it enforces; the agency's understanding of its own regulations; or the agency's assessment of its own jurisdiction under its organic statute, lawyers probably ought to tell their clients that the agency has a big advantage because courts tend to defer to agencies. Indeed, the administrative law course walks through each of these kinds of challenges to administrative decision-making – often using a few cases that buck the trend – to train lawyers both to know that deference is likely and to learn the outer limits of deference.

Vermeule's argumentative move is to take this relatively uncontroversial description of the set of rules courts have developed and suggest that they are necessarily recurrent, almost essential, effectively denying that they are path-dependent or part of a pendulum or a cycle. Hence, a doctrine of eternal recurrence. Not only does the internal logic of administrative law properly marginalize the non-delegation doctrine, but even if law's empire returned us back to the proverbial three branches from the founding, as his interlocutors Gary Lawson and Philip Hamburger seem to prefer,¹³ we would find ourselves eventually back where we are: with a vital and complex administrative state that gets a lot of lawmaking authority with tons of deference to its decisions. Administrative law will always lead back to its own going-under,¹⁴ abnegating its oversight through high levels of deference. This is his account of administrative law “working itself pure:”¹⁵ that

12. See Davidson & Leib, *supra* note 9, at 313 n.258 (citing A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY, at v–viii (Dennis Patterson ed., 1996); THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW, at vii–viii (Jules Coleman & Scott Shapiro eds., 2002); and THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW, at ix–xii (Andrei Marmor ed., 2012)).

13. See, e.g., Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994); PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014). See Adrian Vermeule, *No*, 93 TEX. L. REV. 1547, 1547 (2015), for Vermeule's reaction to Hamburger.

14. Vermeule does not like the language of “overcoming,” so I use a more Nietzschean term here. VERMEULE, *supra* note 7, at 209.

15. This formulation appears multiple times in the book. See *id.* at 22, 24.

“the arc of law bends toward deference.”¹⁶

So is this the dwarf’s doctrine of eternal recurrence or is it Zarathustra’s? Certainly, it is hard to know what exactly would constitute proof that deference is the resting state rather than simply a part of an ongoing cycle. But Neil Gorsuch just found his way onto the Supreme Court. He is perhaps most notable for his views about judicial review of the administrative state, and he seems committed to using his perch to push back on doctrines of deference, helping to revive the moribund non-delegation doctrine.¹⁷ There is also reason to think Justices Alito and Thomas are persuadable, whether for pragmatic or originalist motivations, that doctrines of deference have gone too far.¹⁸ And with the obvious likelihood that the administrative state will be taking positions on policy and statutory interpretation over at least the next four years that will deeply offend the liberal wing of the Supreme Court, it is hard to believe that circumstances are not ripe for the largest retrenchment on doctrines of deference that we have seen in most of our lifetimes.¹⁹ It will surprise no one that deference bends to politics;²⁰ although that is external rather than internal to legal reasoning, it may have a real effect on the internal shape of law to come. Perhaps history will vindicate Vermeule here and we will still see deference prevail as the last word always, time and again. But I think we have substantial reason to think it has not quite yet been written.

Even what has been written is not quite as univocal as comes through in Vermeule’s book. To wit, if you look only at formal law, Vermeule’s basic description of deference all-the-way-down looks plausible. And if you look only at agency win-rates, you might

16. This formulation also appears several times in the book. *E.g., id.* at 12. Several reviewers have noticed that there is substantial repetition in the book. No one has made a joke yet, however, about the repetitions’ relationship to the core thesis of eternal recurrence therein.

17. *See, e.g.,* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142 (10th Cir. 2016).

18. *See, e.g.,* Perez v. Mortg. Bankers Ass’n, 135 S. Ct. 1199, 1210 (2015) (Alito, J., concurring); Michigan v. EPA, 135 S. Ct. 2699, 2712–14 (2015) (Thomas, J., concurring); Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507, 2529 (2015) (Thomas, J., dissenting); Wellness Int’l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1961 (2015) (Thomas, J., dissenting). Vermeule acknowledges this wing of the current Court, but remains confident that “there is no indication whatsoever that the Court as a body has any interest in overruling *Chevron*.” *See* VERMEULE, *supra* note 8, at 224 n.21. “The center holds.” *Id.* at 31.

19. I tend to agree with Vermeule that it is a mistake to make too much of Roberts’ use of the “major questions” doctrine in *King v. Burwell*, 135 S. Ct. 2480, 2488–89 (2015), as an end-run around deference doctrines. *See* VERMEULE, *supra* note 7, at 31. Only a few very salient and politically important cases are likely to get this treatment – and the idea that the IRS’s interpretation of one word was going to control the fate of the whole statutory scheme of Obamacare was reason enough for the Court to reassert its imperial posture. Thus, although Alito and Thomas seem likely to follow Gorsuch in undoing deference doctrines, I am less sure about Roberts. His reservations (with Alito and Kennedy) about deferring to an agency’s own interpretation of its “jurisdiction” in *City of Arlington v. FCC*, 569 U.S. 290, 316 (2013) (Roberts, C.J., dissenting) seems to come shy of a substantial effort to unwind the core posture of deference. But add that to his “major questions” decision in *King* and his concurrence in *Kansas v. Colorado*, 556 U.S. 98 (2009), in which he writes to emphasize the Court’s right to control cases within its original jurisdiction even when Congress purports to limit or regulate judicial power, and maybe there are real hints that Roberts could grow closer to Gorsuch’s anti-deference preference over time.

20. *See generally* William N. Eskridge, Jr. & Lauren Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1154 tbl.20 (2008); Thomas Miles & Cass Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation*, 73 U. CHI. L. REV. 823 (2006).

2018

ALSO, NO

271

find Vermeule's thesis hard to deny.²¹ But plenty of empirical work shows that much of deference doctrine gets ignored, as judges reassert their own relevance, sometimes for political reasons and sometimes for good, institutional reasons having to do with law's integrity. Any law student knows that the *Chevron* doctrine would tell a court to defer to an agency effort in statutory interpretation, so long as Congress seems to have delegated the decision to the agency (whether implicitly or explicitly), the relevant statute is ambiguous, and the interpretation the agency is offering seems to be within a range of permissibility or reasonableness.²² And yet, one of the most elaborate counting exercises of *Chevron*-eligible cases in the Supreme Court finds that the Supreme Court has applied either no deference or some stance of "anti-deference" to the interpretation proffered by an agency more than sixty percent of the time.²³ What this means is that the law on the ground is somewhat more ambivalent than Vermeule tells us. It is not just in the oddball or high-stakes case that the Court forgets *Chevron*; it forgets it more than it applies it.

Even if we move from *Chevron* to the kinds of policy review the Court affords in its so-called "hard-look" doctrine, a slightly less univocal presentation is possible than the one Vermeule offers. Let us take Vermeule's counting exercise in this book to be correct – and concede that up to ninety-two percent of the cases have the Court deferring to the agency's policy choice even while it purports to be engaging in "hard-look" review.²⁴ Does this mean law professors are wrong to train their students with the *State Farm* case²⁵ – the canonical cite (and site?) for "hard-look" review – and instead should train them with the more deferential *Baltimore Gas* decided the same term? Should we be instead talking about Vermeule's "thin rationality review"²⁶ and stop kidding ourselves with calling it "hard-look" review? Maybe. Vermeule is not crazy. But his argument here is overly simplistic: it seems to me part of what our students eventually will get paid for is to spot and win the eight percent of cases that are up for grabs. Truly understanding why and when courts will reassert meaningful review seems like a core part of the tuition that goes into administrative law training.

More than that, the risk of losing – in a non-negligible number of cases – must have some disciplining effect on agencies that have to be somewhat risk averse, given how much work goes into their day-to-day functioning. Knowing you can lose one in ten times you are challenged probably functions to make your work more careful. Giving up the charade and calling it "*Baltimore Gas* review" probably is an invitation for carelessness.

The training that we offer administrative lawyers of the future seems to require tuning our students into the law's essential ambivalence about the administrative state. When we ask the question what is the law of the courts when it comes to reviewing

21. For good measure, the book contains Vermeule's own empirical work on agency win-rates in APA review cases. He finds agencies win between eighty-seven and ninety-two percent of the time. See VERMEULE, *supra* note 8, at 190–96.

22. See *Chevron USA, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *United States v. Mead Corp.*, 533 U.S. 218 (2001).

23. See Eskridge & Baer, *supra* note 20, at 1100 tbl.1.

24. See VERMEULE, *supra* note 7, at 190–96.

25. See *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983); *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87 (1983).

26. See VERMEULE, *supra* note 7, at 155–90.

agencies, we can recite black letter law and follow it up with some statistics about what really happens when courts apply that doctrine. That is what Vermeule takes himself to be doing in this internal point of view project. But it seems that it is much better training and much better internal theorizing to find a way to appreciate the deep anxieties and rifts around which the doctrine and cases actually dance.

When we ask what is the law of the administrative state, it would be just as positivist and internal to say that we denizens of a modern democracy have substantial anxiety about the legitimacy of the administrative state. Although we know it is silly to enforce a non-delegation doctrine very aggressively, it is part of our constitutional and democratic DNA, as it were, to worry about too extensive delegation to the unelected part of our government that really does not get an article of its own in our Constitution like the other branches. Although we know it is foolhardy to ask judges to understand all the complex technical and scientific data with which agencies need to struggle on a day-to-day basis, we also know it is misguided to rubber stamp everything they do. We respect their expertise but we worry about capture. We respect that there is some accountability through the executive but we also know about accountability occlusion and that it is hard for voters to trace where these policy decisions get made when they come from the bureaucracy. We like centralization of the bureaucracy in an electorally accountable actor but we are concerned that too unitary an executive branch derogates from the very expertise that gives it much of its credibility because partisan political reasons are bad reasons, generally speaking, for assuring the pursuit of the best interests of the people. We expect legislatures will sometimes delegate hard questions but we cannot believe that core social and political questions that take center stage in our politics can be shoved into the mouse holes of the *Federal Register* or the *Code of Federal Regulations*. We know courts will perform poorly if they engage in serious substantive review but we also know that thin procedural review can sometimes be too anemic to catch what goes wrong inside the bureaucracy. In short, any effort to teach the law from its own internal point of view needs to highlight the serious anxieties and ambivalences that produce the caselaw in administrative law. Explaining the variance is ultimately a more pressing project – and more illuminating about the “considerations internal to law”²⁷ – than explaining that there is deference all around us.²⁸

If this is right as an account of law’s relationship to the administrative state, it is essentially wrong or misleading to conclude only that “the arc of the administrative state bends toward deference.”²⁹ A way to see this is to rethink two of the interpretations that Vermeule offers in the book: both his reading of *Auer*³⁰ deference and his reading of *Chenery*³¹ look very different if my account of the internal perspective on administrative law is a better description of *real* administrative law than his overly simplistic and complacent account of eternal recurrence.

27. *Id.* at 209.

28. This is to say nothing about what the “administrative state” looks like at the state and local level, where deference doctrines do not simply track the federal scheme – and the non-delegation doctrine tends to have more vitality. See generally Nestor M. Davidson, *Localist Administrative Law*, 126 YALE L.J. 564 (2017).

29. VERMEULE, *supra* note 7, at 216.

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

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

Auer deference is as straightforward as it is controversial. It holds that courts will defer to an agency's interpretation of its own legislative rules when they are ambiguous.³² In some ways, it looks like a fractal of *Chevron* doctrine and the justifications are not dissimilar either.³³ But it is black letter law – and empirically true at the Supreme Court – that *Auer* deference is a form of super-deference, stronger than *Chevron* itself.³⁴

Vermeule's defense of *Auer* in the book is very clever. Since he thinks deference as a general posture is basically unavoidable for the judiciary, it follows that any rearguard effort to come shy of deferring to agencies' interpretations of their own regulations would be incoherent and futile. There is nothing especially inappropriate from a "separation-of-powers-without-idolatry"³⁵ perspective with having an agency promulgate a legislative rule with notice-and-comment rulemaking and following up with interpretive rules that do not require notice-and-comment procedures to clarify any ambiguities in the legislative rule; both rules would deserve deference for much the same reasons. All of those rules are part and parcel of "carrying out or completing a legislative plan – 'carrying [it] into execution,' to adapt the words of the Constitution."³⁶ It is not that a purposefully ambiguous legislative rule "in effect enables agencies to 'delegate' power to themselves,"³⁷ but that it is a timing decision on the part of the agency about when to fill out the details of a regulatory scheme: ambiguities are just as likely to permit a future administration to make the policy as they are opportunities for the administration making the legislative rule. In summary, for Vermeule, "the overall quantum of statutory power is not expanded but instead *allocated* between present and future."³⁸

From one perspective, the recent changeover in administrations that occurred after the publication date of Vermeule's book makes his point nicely. Whatever unilateral agency action the Obama Administration took outside of notice-and-comment rulemaking in clarifying its agencies' own regulations were very easily reversible by the new Trump administration. We should not worry so much about *Auer* deference precisely because the interpretative rules that are mere clarifications of underlying legislative rules can so easily be changed. And what may have looked like power-grabs by agencies under President Obama now reveal themselves just to be opportunities for President Trump.

Yet Vermeule's perspective here is not just internal to administrative law but to his own commitment to the sort of eternal recurrence of deference he is arguing for throughout the book. From a more nuanced perspective of just what counts as law, what recurs (and what should recur) is anxiety and ambivalence about too much deference. At least part of the justification for deference comes from a judicial sense that right kinds of procedures are what is producing policy. Central to the legitimation of the administrative state is not just the delegation agencies receive, their presumptive expertise, their flexibility and

32. *Auer*, 519 U.S. at 463.

33. VERMEULE, *supra* note 7, at 75.

34. See Richard J. Pierce, Jr. & Joshua Weiss, *An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules*, 63 ADMIN. L. REV. 515 (2011).

35. VERMEULE, *supra* note 7, at 56–86.

36. *Id.* at 78.

37. *Id.* at 79–80.

38. *Id.* at 80.

capacity for dynamic responses to changes in society, and their democratic credibility (as compared with judges). Administrative process matters – and has always mattered as a way to contain and mediate a deep anxiety not just about arrogation of power by agencies to themselves but also about whether agencies are using the wrong kinds of reasons when they make their decisions.

Thus, judicial efforts to encourage agencies to use notice-and-comment rulemaking is not just rote enforcement of the Administrative Procedure Act.³⁹ Process helps judges feel more confident that agencies are orienting their deliberations to the kinds of considerations that are relevant under the statute and not acting out of inappropriate motivations.⁴⁰ This is why *Auer* does and should inspire anxiety: it seems to offer *especial* deference in a range of contexts where there is substantially less administrative process than in a conventional case requiring *Chevron* deference. Thus, Vermeule both fails to explain the current doctrine’s commitment to super-deference (he simply refuses to accept the black letter law that *Auer* is considered to be a stronger deference doctrine than *Chevron* itself)⁴¹ and discounts what is a much more anxious and unstable comportment of the judiciary to this doctrine. The higher law here “worked pure” – seeing itself as a tangle of anxiety and ambivalence about the right amount of administrative process – may well produce the undoing of *Auer* soon enough.⁴²

Justice Scalia was probably right that *Auer* creates poor incentives for agencies.⁴³ Notwithstanding Vermeule’s insightful point about the attendant risks for agencies that promulgate ambiguous legislative regulations with the hope of getting super-deference

39. 5 U.S.C. § 553 (2016).

40. On the demand that agencies act for the right kinds of reasons, see Ethan J. Leib & Stephen R. Galoob, *Fiduciary Political Theory: A Critique*, 125 YALE L.J. 1820, 1861–65 (2016). That article makes a more sustained effort to defend Vermeule’s approach but ultimately finds *Michigan v. EPA*, 135 S. Ct. 2699 (2015), and *Judulang v. Holder*, 565 U.S. 42 (2011), hard to reconcile with Vermeule’s denigration of the requirement that agencies be conscientious about the reasons they use to make their policies.

41. VERMEULE, *supra* note 7, at 79–80 (calling the doctrinal differences in deference levels to be “dubious” and “metaphysical”).

42. *Id.* at 83–84. Indeed, this means we will be left with *Skidmore*-based “deference” for agency interpretations of their own regulations. See *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Yes, *Skidmore* “deference” is a bit of a misnomer. But there is plenty reason to be very concerned that agencies will end up using *ad hoc* and motivated reasoning in such interpretive contexts – making decisions for the wrong kinds of reasons – and that courts should be engaging in more scrutiny here. Jeff Pojanowski is working on an illuminating history of *Auer v. Robbins*, 519 U.S. 452 (1997), revealing its roots in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). These roots may show that *Skidmore* was the right frame for agency interpretations of their own regulations all along. See Jeffrey A. Pojanowski, *Revisiting Seminole Rock*, 15 GEO. J. L. & PUB. POL’Y (forthcoming 2018).

43. Scalia’s resistance to *Auer* probably can be traced back to his dissent in *United States v. Mead*, 533 U.S. 218, 246 (2001) (Scalia, J., dissenting) (“Agencies will now have high incentive to rush out barebones, ambiguous rules construing statutory ambiguities, which they can then in turn further clarify through informal rulings entitled to judicial respect.”), but appeared in more recent cases like *Perez v. Mortgage Bankers Association*, 135 S. Ct. 1199, 1212–13 (2015) (Scalia, J., concurring in the judgment), and *Decker v. Northwest Environmental Defense Center*, 133 S. Ct. 1326, 1339 (2013) (Scalia, J., concurring in part and dissenting in part). Vermeule is successful in his effort to defend *Auer* against the formalistic separation-of-powers challenge from *Perez* but is less successful against the more pragmatic challenge I specify above. That pragmatic challenge was first laid out in John Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996), a paper subsequently relied upon and cited by Scalia in *Mead* and by Alito in *Perez*.

2018

ALSO, NO

275

later for their interpretive regulations, it remains true that *Auer* creates incentives for agencies not to subject their regulations to the full hearing and input that notice-and-comment rulemaking would provide them.⁴⁴ Not only might that conduce to less thought-through decisions, but there is less check on agencies deciding for the right kinds of reasons, less of a way for courts to sniff foul play. That those decisions are easy to reverse in subsequent administrations (or after learning from experience) is cold comfort: longstanding interpretive regulations have their own inertia – and poorly considered policies with a four or eight-year shelf-life can still do plenty of harm, not to mention the entitlement effects they can create by resetting baselines. In short, the “timing” story Vermeule offers to defend *Auer* does not fully mitigate the kinds of worries plenty of people are right to have about the doctrine. The real law of the administrative state – anxiety and ambivalence about too much deference with too little process to smoke out whether an agency is using the right kinds of reasons – probably creates an arc against *Auer* deference.⁴⁵

The worry about *ad hoc* reasoning by agencies is also evident in another of the core administrative law doctrines at the center of Vermeule’s account: *SEC v. Chenery*.⁴⁶ Vermeule summarizes the *Chenery* doctrine as “a fundamental principle of administrative law” in which “agency action can be upheld, if at all, only on the rationale the agency itself articulated when taking action” and not on “*post hoc* rationalizations” after the fact.⁴⁷ Although the justification for *Chenery* is sometimes predicated on non-delegation concerns, as it demands a reasoned exercise of lawmaking power especially when it is delegated away to less politically accountable actors, Vermeule is underwhelmed: as he sees it, that constitutionalizes the doctrine without really justifying it – and the ban on *post hoc* reasons does not seem principally concerned with allocations of power across institutions, which is at the core of non-delegation norms.⁴⁸ Instead, Vermeule offers another clever interpretation and justification of extant law: *Chenery* “affect[s] the timing of reason-giving by the agency.”⁴⁹ This, he claims, is further evidence of law’s abnegation: because reason-generation will have to occur before litigation, “*Chenery* in effect ensures that nonlawyers will always have an important *ex ante* role in shaping the agency’s official position.”⁵⁰ The law of the administrative state is there, on Vermeule’s account, to keep law and lawyers marginalized in agency decision-making.

Vermeule is right to question the non-delegation story about *Chenery* and he is right that it probably does not hold up on its own without more explanation. But his story seems gerrymandered to fit his abnegation theory. Indeed, administrative law’s anxiety about whether agencies are making policy for the right reasons – in light of its anxiety about the

44. *Auer*, 519 U.S. at 463–64.

45. Indeed, the writing seems on the wall for *Auer* especially since four justices have signed opinions against it. See *Decker*, 133 S. Ct. at 1338 (Roberts, C.J., concurring); *Id.* at 1338 (Alito, J., concurring); *Perez*, 135 S. Ct. at 1213 (Thomas, J., concurring); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 518 (1994) (Ginsburg, J., dissenting). And it is hard to see Gorsuch as a fan in light of all of his skepticism about the administrative state more generally. See *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

46. 318 U.S. 80 (1943).

47. VERMEULE, *supra* note 7, at 198.

48. *Id.* at 199.

49. *Id.*

50. *Id.*

legitimacy of the administrative state as such, its ambivalence about whether courts could ever have enough expertise to make substantive judgments about which reasons are the best reasons, and its worry that agency decision-making is captured by the very people who are supposed to be regulated in the best interest of the people – explains *Chenery* better than Vermeule’s abnegation account. To wit (and ironically), not allowing *post hoc* rationalizations does not sideline lawyers at all; it just affects the timing of when lawyers will be involved! Under *Chenery*, now lawyers will be in the policy-making apparatus from day one instead of from the day a lawsuit is filed. And an implicit aspiration of *Chenery* is probably to police the hearts and minds in the agency to reinforce a culture of justification there even if not only by lawyers.⁵¹ As in many contexts where judges are supposed to be enforcing a fiduciary obligation of proper comportment to decisions taken in beneficiaries’ best interest, law does not exactly abnegate itself. Rather, it uses its rhetorical and signaling power to help channel the discretion agency fiduciaries have without micromanaging that deliberation itself.⁵² This isn’t “thin rationality review” but exhortation to act for the right kinds of reasons while remaining modest about claiming to know what the best interests of beneficiaries actually are. Policing the wrong kinds of reasons at the extreme is good enough and consistent with administrative law’s ambivalences and anxieties. Smoking out bullshit is not abnegation; it is a form of engagement that is humble and is a reminder that self-dealing will be refused effect in the courts.

* * *

Ultimately, Vermeule’s eternal recurrence doctrine either looks like a self-fulfilling prophecy or it is too simplistic and complacent to accept. A more sophisticated doctrine that would make Zarathustra proud must be much more attuned to the way in which eternal recurrence of deference is actually an abysmal thought. It is so because we should have anxiety and ambivalence about the administrative state – and these anxieties and ambivalences are as much the law of the administrative state as is deference all-the-way-down.

Indeed, in light of Vermeule’s influential positive theory of statutory interpretation – in which courts rely upon evidence of congressional intent, then disavow such reliance because it is too easy to manipulate intent in the congressional record once legislators and staff see that courts are peeking at legislative history, only to rely upon it once again once it is no longer manipulated⁵³ – one might wonder whether Vermeule should have considered a similar possibility for cycling in administrative law. Such an account might still be called an eternal recurrence theory. But it would be one that better tracks the deep positive law, which is *both* doctrines of deference and concomitant terror that we are

51. *Id. See, e.g., SEC v. Chenery Corp.*, 318 U.S. 80 (1943).

52. I explore the fiduciary rendering of administrative law in Leib & Galoob, *supra* note 40, at 1854–68. Another review of Vermeule’s book explores a fiduciary model of judging that also rejects complicity with law’s abnegation. *See* Evan Bernick, *Lions Under the Bureaucracy*, 18 FED. SOC. REV. 1 (2017), available at <http://www.fed-soc.org/publications/detail/lions-under-the-bureaucracy-defending-judicial-deference-to-the-administrative-state>.

53. *See* Adrian Vermeule, *The Cycles of Statutory Interpretation*, 68 U. CHI. L. REV. 149 (2001).

2018

ALSO, NO

277

giving up law's empire, which enables us to reassert law always and again to mitigate the most abysmal thought.