Standing In Front of the Refrigerator

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Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 **Harv. L. Rev.** __ (forthcoming 2019), available at SSRN.

"It is hard to sketch a river while sailing midstream," says Jeff Pojanowski, as he begins an article that does a remarkable job of doing just that. Pojanowski's forthcoming article offers an illuminating taxonomy of a vast array of administrative law theory and scholarship concerning the question of judicial review of agency action, which he organizes into three overarching frameworks or models. After sketching the river with aplomb, Pojanowski introduces us to a fourth model—"neoclassical administrative law"—and explains what the neoclassical framework would offer that earlier models lack. There, the image that might come to mind is not so much gazing at a river, but staring at a refrigerator. It is hard to decide what to have for dinner while standing in front of the refrigerator. A buffet's worth of pretty good leftovers is probably sitting right there—but sometimes, to really hit the spot, you just have to roll up your sleeves and make something new anyway.

Pojanowski begins by noting the well-known "cracks" in the "comfortable, overlapping consensus" (P.3) of administrative law, including from academics and from the Court. Conventional administrative law doctrine is "under fire for being both too timid and too intrusive." (P. 4.) Something new seems needed—but before getting to that new framework, Pojanowski presents a detailed sketch of three extant models.

This part of the article organizes an enormous range of administrative law doctrine and theory into three ideal-type frameworks: "administrative supremacy", "administrative skepticism", and "administrative pragmatism." The administrative supremacists, in Pojanowski's telling, display "an unapologetic embrace of the administrative state" (P. 7), advocate deference to agency interpretations "across the board" unless "Congress clearly did not want the court to defer" (P. 9), and resist hard-look review as "unwise and illegitimate." (P. 11.) The administrative skeptics are the polar opposite: they reject *Chevron* and *Auer* (P. 15), demand strict adherence to procedural constraints established by positive law (P. 16), and urge the revival of a robust non-delegation doctrine. (P. 17.) Between these two camps sit the administrative pragmatists—the "largest and…least precise category." (P. 18.) Pragmatists calibrate judicial deference to agency legal interpretation depending on the context (P. 19); they embrace a "mixture of supervision and deference" that attempts to curb agency discretion, but not overmuch (Pp. 20-21); and they endorse the balance struck by the administrative common law of hard-look review. (P. 22.) As Pojanowski usefully summarizes the three approaches, administrative supremacy "emphasizes legislative supremacy vested in agencies via congressional delegation"; administrative skepticism "emphasizes the rule of law, insisting that courts are the guardians of legal interpretation while regarding non-congressional lawmaking as ultra vires" and administrative pragmatism "seeks to integrate both values into a judicial supervised and modulated administrative state." (P. 23.)

These three frameworks would seem to so exhaust the spectrum of possible responses to the administrative state that there could not be much room left over for a fourth approach. Yet Pojanowski then turns to the task of contending that there is indeed a fourth way—neoclassical administrative law. The neoclassicist, he explains, combines the skeptic's approach to questions of legal interpretation with the supremacist's approach to questions of policymaking discretion. The neoclassicist would reject

Chevron deference as inconsistent with both the judicial role and the Administrative Procedure Act (APA) and would reject the general presumption that statutory ambiguity is an implicit delegation of interpretive authority to the agency. (Pp. 25-26.) Courts would apply a strong "Step One," while also recognizing that certain types of statutory provisions (e.g., a requirement for an "adequate margin of safety") are *not* amenable to analysis through formal legal tools and instead are delegations to agencies. (Pp. 27-28.) On policy questions, the neoclassicist would thus leave agencies great leeway: instead of vetting agency policy choices via hard-look review, a neoclassicist court would only "police the outer bounds of reasonableness when it comes to agency policymaking" (P. 31) in the style of rational-basis review. But even as judicial review of pure policy would become more accommodating, making policy in the first place would become more difficult: the neoclassicist might require that agencies return to formal rulemaking by overturning *Florida East Coast Railway*—a shift that Pojanowski acknowledges would "certainly bring a shock to the administrative system." (P. 30.)

Pojanowski then turns to elaborate the theoretical commitments of the neoclassical vision for administrative law and to explain how that vision brokers a compromise between the "competing principles of legislative supremacy and the rule of law." (P. 39.) The neoclassicist calls for renewed focus on the APA's original meaning and of governing organic statutes. (P. 35.) The neoclassical approach embraces formalism and originalism in statutory interpretation, and eschews purposivism, dynamic statutory interpretation, and the legal realism of the post-New Deal Legal Process era. (P. 34.) But perhaps the chief selling point of the neoclassical framework is what it would not do. The neoclassical stance, says Pojanowski, would avoid a full-frontal collision between current administrative law and the constitutional originalism that would "[b]low[] up the administrative state with Hamburgerian dynamite." (P. 49.) Instead, he notes, the neoclassicist would accept that the "constitutional nettle" is "too sharp to grasp today" (P. 52), and that the Court "lacks the institutional capital and perhaps even the capacity to turn the aircraft carrier around on a dime." (P. 50.) In fact, Pojanowski explains, it is "[t]his tendency to avoid large-scale constitutional engagement with the administrative state…[that] puts the 'neo' in neoclassicism." (P. 36.)

Let us return to our refrigerator. As Pojanowski is careful to signal throughout, the neoclassical framework is not a wholly new meal cooked up from wholly new ingredients. It uses many ingredients that were already in the refrigerator. But it then recombines, adds to, and plates these ingredients in a way that the current Court might find very appetizing. As Pojanowski notes, the Court's "modest constitutional holdings have not tracked its anxious rhetoric about the administrative state." (P. 33.) Pojanowski may well prove correct that the neoclassical framework, or something close to it, "may become the equilibrium resting point" (P. 33) for a "legal formalist" Supreme Court that "accepts the necessity, or at least the ongoing existence, of the administrative state Congress has constructed." (P. 53.) There are certainly inklings of the neoclassical approach in Justice Gorsuch's dissent in *Gundy v. United States*, as well as in the fractured opinions in *Kisor v. Wilkie*—both of which were decided after Pojanowski first posted his draft article, and which I hope the final published version will discuss.

In short, like his essay *Without Deference*, this article displays not only Pojanowski's deft ability to map administrative law as it is, but also his talent for imagining and explaining administrative law as it might come to be in not too long from now. Even if you do not generally devote much time to poking around in the refrigerator of administrative law theory—or perhaps especially if you do not—Pojanowski's article is thus well worth a read, as it offers a basis for anticipating what the Court may serve up to us in the coming years.

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