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DIALOGUE, DEFERRED AND DIFFERENTIATED

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INTRODUCTION

When agency actions are challenged in court multiple times in an iterative fashion, the resulting dialogue offers insights into the features of the court/agency relationship that are not necessarily apparent in other contexts. In *Deference and Dialogue in Administrative Law*,¹ I examine a number of serial cases and develop a dialogic account of the resulting back-and-forth exchanges. In his thoughtful response, *Of Dialogue—and Democracy—in Administrative Law*,² Professor Jim Rossi offers additional considerations for developing a fuller account of dialogue in administrative law. I am delighted by Professor Rossi's interest in a scholarly dialogue, and provide this reply in that spirit.

Professor Rossi organizes his response around two issues. First, he asks how doctrines that preclude judicial review altogether fit into my account of the relationship between courts and agencies. Second, he suggests that the role of politics and other actors ought to be part of a more holistic conception of dialogue in the administrative state. He concludes that some conversations may not be worth having, while others may be more about engaging other potential participants in a broader political dialogue.

Before addressing Professor Rossi's response, it may be useful to consider what *Deference and Dialogue* does and does not do. What it does is examine serial litigation to glean insights for the court/agency relationship more generally. The scope of the article is limited to agency actions that underwent judicial scrutiny more than once, but, contrary to Professor Rossi's suggestion, it is not limited to substantive review.³

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1. Emily Hammond Mezell, *Deference and Dialogue in Administrative Law*, 111 Colum. L. Rev. 1722 (2011) [hereinafter Mezell, *Deference and Dialogue*]

2. Jim Rossi, *Of Dialogue—and Democracy—in Administrative Law*, 112 Colum. L. Rev. Sidebar 147 (2012).

3. *Id.*

Instead, the project examines each iteration for signals that the agency and court send to one another about their views of the scientific and technical issues, their views of the appropriate applications of the relevant law, and their observations about any previous iterations of the same issue. These iterations include review of agency procedure as well as substance.

This analysis achieves several things. First, it shows that serial litigation can be quite dialogic, and the Article explores that characterization by drawing on the constitutional law literature on dialogue between courts and legislatures. Second, it provides insights into risk regulation more generally, where facts may evolve and agencies as well as courts are challenged to incorporate new information into their decisionmaking. Third, and relatedly, the study of serial litigation offers a new perspective from which to consider the role of scientific uncertainty in risk regulation, and particularly, for testing the courts' ability to translate information about scientific uncertainty for more generalist consumers of administrative law.⁴ Finally, the serial cases—assessed using dialogue as a normative construct—allow a deeper understanding of the relationship between the legitimizing role of judicial review and the many deference doctrines that pervade administrative law.

The best contribution of Professor Rossi's response is its ultimate question: How can we use the concept of dialogue more fully in administrative law? As indicated above, *Deference and Dialogue* focuses on agency actions that underwent judicial review more than once. But Professor Rossi and I agree that the notion of dialogue is worth considering beyond that arena.⁵ Dialogue—which I use in a normative sense meaning “a process of learning and understanding that enables deliberation toward a common end”⁶—is both a feature of, and a worthy aspiration for, administrative law broadly conceived. As between courts and agencies, dialogue can occur even in the absence of iterative review,⁷ and even when a conversation is ultimately deferred. And one of the reasons administrative law is such a rich field for study is its capacity for many meaningful dialogues outside of the judicial sphere.⁸ Below, I offer some thoughts on each.

4. This translation hypothesis is developed in Emily Hammond Mezell, *Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science*, 109 *Mich. L. Rev.* 733, 748–50 (2011) [hereinafter Mezell, *Super Deference*].

5. E.g., Mezell, *Deference and Dialogue*, *supra* note 1, at 1728–29 n.21.

6. *Id.* at 1724 n.4.

7. *Id.*

8. See, e.g., 5 U.S.C. § 553(c) (2006) (requiring opportunity to comment on proposed rules); *id.* § 553(e) (providing “right to petition for the issuance, amendment or repeal of a rule”); David L. Markell & Emily Hammond Mezell, *Petitions, Process, and Administrative Legitimacy* (forthcoming) (manuscript on file with author) (evaluating process whereby interested parties may petition EPA to withdraw state authority to implement various environmental statutes); Mezell, *Super Deference*, *supra* note 4, at 749–50 (arguing for judicial role in providing information to generalist consumers of administrative law, including Congress, interested parties, and the press).

I. DIALOGUE AND REVIEWABILITY DETERMINATIONS

The case families discussed in *Deference and Dialogue* by definition tend to center on reviewable agency actions; even so, the Article does not presume reviewability.⁹ Rather, a number of the examples reveal the difficulties attendant in initiating a dialogue where reviewability doctrines may apply. In particular, persistent agency inaction is a troubling feature of many of the examples presented.¹⁰ Although these examples did not ultimately avoid review, the relationship of reviewability doctrines to dialogue is worth further consideration.

Professor Rossi expresses concern that both courts and agencies can behave strategically, taking advantage of reviewability doctrines for the purpose of avoiding dialogue. With respect to judicial behavior, this argument is reminiscent of the criticisms of dialogic rules in the constitutional law arena, where scholars have suggested that second-look doctrines are too manipulable and therefore open to strategic utilization.¹¹ My own belief is that most judges work hard to avoid sham decisionmaking.¹² Even if this were not true, the reviewability doctrines serve important functions, not the least of which is moving the dialogue to a different sphere¹³—a point to which I shall return in the next Section.

The analogy to constitutional dialogue is admittedly imperfect. Rather than focusing on judicial review of the constitutionality of legislative (or agency) actions,¹⁴ *Deference and Dialogue* considers how judicial review

9. Cf. Rossi, *supra* note 2, at 149–50.

10. See, e.g., Meazell, *Deference and Dialogue*, *supra* note 1, at 1743–53 (discussing Endangered Species Act case families); *id.* at 1753–60 (discussing Occupational Safety and Health Act case family); *id.* at 1769–72 (discussing NO_x-PSD Clean Air Act case family).

11. See *id.* at 1778 (describing second-look, or semisubstantive, rules); see generally Dan T. Coenen, The Pros and Cons of Politically Reversible “Semisubstantive” Constitutional Rules, 77 *Fordham L. Rev.* 2835 (2009) (offering defense of semisubstantive rules and taxonomy of critiques); Mark Tushnet, Subconstitutional Constitutional Law: Supplement, Sham, or Substitute?, 42 *Wm. & Mary L. Rev.* 1871, 1876 (2001) (“Sometimes invoking subconstitutional rules is a sham . . .”).

12. There is, of course, a body of literature developing the attitudinal model of judicial review, which posits that appellate judges are heavily influenced by their political preferences. See, e.g., Thomas J. Miles & Cass R. Sunstein, The New Legal Realism, 75 *U. Chi. L. Rev.* 831 (2008) (discussing empirical work on judicial behavior). As pointed out by others, however, much of the empirical work in this area does not necessarily account for the importance judges place on adherence to precedent and collegial decisionmaking. See Harry T. Edwards & Michael A. Livermore, Pitfalls of Empirical Studies That Attempt to Understand the Factors Affecting Appellate Decisionmaking, 58 *Duke L.J.* 1895, 1902 (2009) (“Rather, what we believe is that, on an appellate court that adheres to collegial principles, the applicable law, controlling precedent, and the collegial deliberative process in appellate decisionmaking are the primary determinants of case outcomes.”).

13. Coenen, *supra* note 11, at 2867 (“The key point is clear: constitutional doctrines that give political officials—rather than judicial officials—the last word on how to resolve hotly contested constitutional questions seem distinctly undeserving of labels such as unconstrained, uncontrollable, and overreaching.”).

14. See 5 U.S.C. § 706(2)(A) (2006) (permitting courts to hold unlawful agency action that is “contrary to constitutional right”); see generally Gillian E. Metzger, Ordinary Administrative Law as Constitutional Common Law, 110 *Colum. L. Rev.* 479 (2010)

itself operates as a constitutional legitimizer. The reasoned-decisionmaking requirement and its corollary that a court will review an agency's reasoning only at the time the agency made its decision are critically tied to the legitimacy of the administrative state.¹⁵ That is, substantive judicial review of agency action asks more of agencies than of legislatures because agencies operate under broad delegations of authority outside the strict three-branch structure of the Constitution.¹⁶ The reason to be wary of judicial remands that suggest hypothetical legitimate reasons for agencies to have acted (particularly those made in absence of vacatur) is that they undermine this constitutional framework by mimicking minimum-rationality review.¹⁷

When courts decline to review agency actions on jurisdictional, prudential, or constitutional grounds, I wonder if the analysis may be different. Certainly the end result is that the agency's action remains in place. Because minimum-rationality review rarely invalidates the status quo, Professor Rossi's observation that reviewability doctrines are similar is well-taken. But reviewability doctrines do important work. At their strongest, they protect different constitutional values; the standing requirement provides a good example.¹⁸ And even where courts determine, for example, that an agency action is unreviewable as a jurisdictional matter because it is committed to discretion by law,¹⁹ a number of constitutionally tied principles are at play. First, of course, is

(describing agencies' roles in developing constitutional law); cf. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 114–17 (1976) (striking down Civil Service Commission's ban on governmental employment of lawful resident aliens because Commission was not proper entity to promulgate ban given weighty interests at stake).

15. Meazell, *Deference and Dialogue*, supra note 1, at 1735–36; see Kevin M. Stack, *The Constitutional Foundations of Chenery*, 116 Yale L.J. 952, 1000 (2007); Peter L. Strauss, *Legislation That Isn't—Attending to Rulemaking's "Democracy Deficit"*, 98 Calif. L. Rev. 1351, 1356–57 (2010).

16. Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 Duke L.J. 387, 440 (arguing that heightened scrutiny of agency decisions is tied to agencies' unique place outside tripartite constitutional structure).

17. E.g., Meazell, *Deference and Dialogue*, supra note 1, at 1782. As I also note, however, judicial advice-giving may serve other salutary purposes. *Id.* at 1774–80; see also *infra* text accompanying notes 50–51 (considering broader dialogic impacts of court/agency relationship).

18. U.S. Const. art. III, § 2 (extending federal court jurisdiction to "cases" and "controversies"); *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007) ("[T]he gist of the question of standing' is whether petitioners have 'such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination.'" (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962))). In making this point, I save for another day a discussion of the normative implications of current standing doctrine. See generally Heather Elliott, *The Functions of Standing*, 61 Stan. L. Rev. 459 (2008) (identifying three separation-of-powers values standing doctrine is meant to serve, and arguing current doctrine fails to effectively serve those values).

19. 5 U.S.C. § 701(2); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (stating "committed to agency discretion" exception applies only when there is no law to apply); see generally *Heckler v. Chaney*, 470 U.S. 821 (1985) (holding agency enforcement decision within discretion where there was no law to apply).

the courts' implementation of congressional preferences as set forth in the APA, which amounts to a straightforward recognition of the role of the Article I branch in making law.²⁰ Second are separation-of-powers values directed at the Article II branch, where courts are reluctant to intervene in areas of pure policy and priority-setting if they lack meaningful standards against which to judge the agency's behavior.²¹ Even if courts were to use such doctrines strategically, they would be serving important values and providing justifications for doing so.²²

Further, judicial opinions declining to exercise jurisdiction can still contribute to the court/agency dialogue. Consider, for instance, the possibilities for judicial review if an agency fails to respond to a petition for rulemaking. Although section 706(1) of the APA permits a court to require a response,²³ courts often decline to intervene because they are hesitant to interfere with agency priorities.²⁴ This hesitation may be particularly acute where agencies rely on scientific uncertainty as the reason for delay.²⁵ Yet a decision not to issue a writ of mandamus does not necessarily preclude dialogue. Courts have the opportunity to signal their understanding of the scientific and legal issues at play in the underlying requested action even while declining to impose a mandate.²⁶ Professor Rossi acknowledges as much when he notes that a reviewability determination in itself can be part of a dialogue.²⁷ Further, subsequent challenges based on continuing delays are both possible and likely to be more closely scrutinized.²⁸

What of an agency's incentives to strategically avoid dialogue with the courts? It is true that most agencies are well within their discretion to

20. U.S. Const. art. I, § 1 (vesting legislative powers in Congress).

21. *Chaney*, 470 U.S. at 831–32.

22. Chad M. Oldfather, Writing, Cognition, and the Nature of the Judicial Function, 96 *Geo. L.J.* 1283, 1317 (2008) (describing functions of written judicial opinions in imposing disciplined decisionmaking process, facilitating precedent system, and legitimating judicial decisions).

23. 5 U.S.C. § 706(1) (2006) (courts shall “compel agency action unlawfully withheld or unreasonably delayed”).

24. Meazell, Deference and Dialogue, *supra* note 1, at 1730–31; see *Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 79–80 (D.C. Cir. 1984) (setting forth factors for assessing claims of agency delay); see also *Oil, Chem. & Atomic Workers Union v. OSHA*, 145 F.3d 120, 123–24 (3d Cir. 1998) (giving deference to “quintessential discretion of the [agency] to allocate . . . resources and set its priorities”).

25. See, e.g., *Pub. Citizen Health Res. Grp. v. Brock*, 823 F.2d 626, 629 (D.C. Cir. 1987) (“OSHA not only possesses enormous technical expertise we lack, but must juggle competing rulemaking demands on its limited scientific and legal staff.”).

26. See, e.g., Meazell, Deference and Dialogue, *supra* note 1, at 1754 (describing *Hexavalent Chromium* case family, in which agency was sued for unreasonably delaying rulemaking).

27. Rossi, *supra* note 2, at 152 (“Alternatively [to being ‘predialogue’], a reviewability determination could be treated as part of the normative account of dialogue that informs judicial review.”).

28. See, e.g., *Pub. Citizen Health Res. Grp. v. Chao*, 314 F.3d 143 (3d Cir. 2002) (exhibiting far less deference to agency priority-setting on second unreasonable delay challenge, and requiring agency to engage in rulemaking).

choose courses of action that are less likely to be reviewable.²⁹ They can certainly create policy in ways that are difficult to review,³⁰ decline to enforce regulations,³¹ and, as mentioned already, delay taking action.³² Professor Rossi is right to express concern about persistent agency inaction.³³ A number of the dialogic cases reveal that persistent inaction is prevalent even with respect to agency behavior that does ultimately come before a court. For example, agencies may delay addressing matters on remand for years, leaving in place a regulation that was invalidated on review;³⁴ or they may promise to engage in rulemaking but fail to do so by their own proposed deadlines.³⁵ Indeed, scenarios such as these suggest a number of best practices with respect to court-agency dialogue that I detail in the Article.³⁶

From the agencies' points of view, however, there may be legitimate reasons for their courses of action. Consider again a delayed response to a petition. The agency may have determined that the issue is not yet ready for dialogue—perhaps the issue needs further study, or the political climate is in flux, or the agency is simply allocating its limited resources to areas of higher priority.³⁷ Admittedly, the limited availability of judicial review permits agencies to take calculated risks in ignoring petitions or otherwise failing to act. After all, a petitioner may never sue, and even if there is a suit, agencies generally withstand review on such grounds. But I conceive of the court/agency dialogue as attempting a balance between Bickellian values and the need to legitimize the fourth branch.³⁸ Based on this understanding, the reviewability doctrines do have a place in a dialogic account of administrative law.

29. *SEC v. Chenery Corp. (Chenery II)*, 332 U.S. 194, 203 (1947) (agency's choice of procedures lies within its informed discretion).

30. See Mark Seidenfeld, *Substituting Substantive for Procedural Review of Guidance Documents*, 90 *Tex. L. Rev.* 331, 343–44 (2011) (describing mechanisms by which guidance documents can evade judicial review).

31. *Heckler v. Chaney*, 470 U.S. 821 (1985).

32. For an analysis of the constitutional implications of permitting agencies to modulate the ability of judicial review via choice of procedures, see generally Bryan Clark & Amanda C. Leiter, *Regulatory Hide and Seek: What Agencies Can (and Can't) Do to Limit Judicial Review*, 52 *B.C. L. Rev.* 1687 (2011).

33. Rossi, *supra* note 2, at 150 (describing case families in *Deference and Dialogue* as “plagued by . . . persistent agency inaction—as in recurring failure to meet a statutory deadline”).

34. Meazell, *Deference and Dialogue*, *supra* note 1, at 1770–71 (discussing NO_x-PSD Clean Air Act case family).

35. *Id.* at 1754 (discussing *Hexavalent Chromium* case family).

36. *Id.* at 1784–87.

37. See *id.* at 1783–84 & nn.398–401 (collecting examples of various valid reasons agencies may choose not to act following remand).

38. Professor Rossi is thus correct when he notes that I intend reviewability doctrines to fit within a dialogic account of administrative law. Rossi, *supra* note 2, at 152 & n.14 (citing Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962)); see Meazell, *Deference and Dialogue*, *supra* note 1, at 1777–79 (relying on constitutional law literature on dialogue and extending account to reach predicate reviewability decisions).

II. SHIFTING DIALOGUE ELSEWHERE

In considering the role of judicial review in administrative law, it is helpful to be explicit about its legitimizing force. As mentioned earlier, the *Chenery* and hard-look doctrines' demand that agencies explain themselves serves constitutional legitimacy.³⁹ These doctrines also serve the traditional administrative law values of participation, deliberation, and transparency. As Professor Rossi explains, the "very possibility of judicial review might encourage agencies to take more seriously public participation before committing to a course of action in the first place."⁴⁰ Others have elaborated: Hard-look review incentivizes deliberation, while the record requirement facilitates transparency.⁴¹

However, Professor Rossi seems interested in two other legitimacy-related points—both rooted in democratic values. First, he questions whether *Deference and Dialogue* reaches beyond the court/agency relationship to account for the possibility that other institutional actors might participate in dialogue. Second, he raises the issue of whether judicial review of agency action could somehow expressly consider the role of politics in agency decisionmaking. I am admittedly skeptical about the latter issue, and have detailed my reasoning elsewhere.⁴²

As for the former issue, my hope is that the account presented in *Deference and Dialogue* supports the possibility—indeed, the desirability—of other discussants.⁴³ To be sure, in none of the case families presented did Congress step in with a statute to formally add to the dialogue.⁴⁴ But certainly a benefit of dialogic judicial opinions and

39. See *supra* text accompanying notes 14–16.

40. Rossi, *supra* note 2, at 153.

41. Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. Rev. 1657, 1691 (2004) (calling judicial review "the principal tool for prompting agencies to undertake reason-giving and standard-setting"); Glen Staszewski, *Reason-Giving and Accountability*, 93 Minn. L. Rev. 1253, 1278–84 (2009) (describing value of requiring public officials in democracy to give reasoned explanations for their decisions).

42. See Emily Hammond Meazell, *Presidential Control, Expertise, and the Deference Dilemma*, 61 Duke L.J. 1763, 1769 (2012) (expressing preference for judicial review that relies on fidelity to statutory mandate). For a full account of the current scholarly debate, and a well-reasoned rejection of incorporating attention to politics into substantive review, see Mark Seidenfeld, *The Irrelevance of Politics in Hard-Look Review*, 89 Wash. U. L. Rev. (forthcoming 2012) (criticizing proposals for giving politics greater role in judicial review).

43. See, e.g., Meazell, *supra* note 1, at 1780 ("[W]hen an agency clearly explains itself and how its actions relate to a previous court order . . . interested parties, Congress, and the courts can more easily understand and respond to their reasoning."). With respect to scientific and technical information, the possibility of a broader dialogue is at the heart of Meazell, *Super Deference*, *supra* note 4 (developing translation hypothesis).

44. In at least one case family, this was true despite the agency's strong signals that it believed the statutory mandate—as interpreted by the courts—was unworkable. See *Endangered and Threatened Wildlife and Plants; Final Designation of Critical Habitat for the Mexican Spotted Owl*, 69 Fed. Reg. 53,182, 53,182 (Aug. 31, 2004) (codified as amended at 50 C.F.R. pt. 17) ("[T]he Service has found that the designation of statutory critical habitat provides little additional protection to most listed species, while consuming significant amounts of available conservation resources."); see also *Regulating Greenhouse Gas Emissions Under the Clean Air Act*, 73 Fed. Reg. 44,354, 44,355 (July 30, 2008) (expressing

agency records is the transparency each can provide about a particular matter, which can in turn facilitate understanding and participation from other institutions or interested parties. Professor Rossi's mention of congressional oversight conducted through hearings is only one of many opportunities in this regard.⁴⁵

In fact, this point raises a final matter that administrative law scholarship has done little to address. Judicial review is a core legitimizing of the administrative state. But it is not the only source of agencies' legitimacy, and perhaps we should ask whether it is even the most important. There are a number of opportunities for dialogue even in the absence of judicial review: A petitioner unhappy with an agency's reticence can approach Congress, the press, or the agency itself to raise concerns.

Consider, for example, the mechanism whereby interested parties can petition EPA to withdraw states' authorization to implement many of the major environmental statutes.⁴⁶ EPA's responses to such petitions typically evade review,⁴⁷ but the petitions can nevertheless trigger productive dialogues between EPA and interested parties, EPA and the relevant state, and EPA and other federal agencies.⁴⁸ This and other fire-alarm procedures facilitate different kinds of dialogue that can lead to meaningful outcomes.⁴⁹

Dialogue might also be deepened in these other forums, particularly with respect to the complex scientific and technical issues that are at the heart of risk regulation. Courts are constrained in their institutional

EPA's view, on remand from *Massachusetts v. EPA*, 549 U.S. 497 (2007), that "the Clean Air Act, an outdated law originally enacted to control regional pollutants that cause direct health effects, is ill-suited for the task of regulating global greenhouse gases.").

45. As Professor Rossi notes, Professor Bressman has further detailed how a number of administrative law doctrines facilitate broader dialogue, particularly with respect to Congress, in Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 *Colum. L. Rev.* 1749 (2007); see Rossi, *supra* note 2, at 156. By identifying this example, I do not mean to suggest that hearings are a panacea—only that they do provide an extra-judicial forum for further dialogue.

46. For a description of this process, as well as an empirical analysis and normative framework, see Markell & Meazell, *supra* note 8.

47. Most courts hold a decision whether to withdraw to be within EPA's enforcement discretion. See *id.*; see, e.g., *Tex. Disposal Sys. Landfill Inc. v. EPA*, 377 Fed. Appx. 406, 408 (5th Cir. 2010) (holding EPA's decision not to initiate withdrawal of Texas RCRA program was exercise of unreviewable enforcement discretion); *Del. Cnty. Safe Drinking Water Coal. v. McGinty*, No. 07-1782, 2007 WL 4225580, at *5 (E.D. Pa. Nov. 27, 2007) ("EPA has no non-discretionary duty to withdraw approval of state [National Pollutant Discharge Elimination System] programs."); *Sierra Club v. EPA*, 377 F. Supp. 2d 1205, 1208 (N.D. Fla. 2005) ("A citizens' suit to enforce such discretionary duties is not available.").

48. See generally Markell & Meazell, *supra* note 8.

49. See, e.g., Notice of Deficiency for Clean Air Act Operating Permits Program in Oregon, 63 Fed. Reg. 65,783 (Nov. 30, 1998) (issuing Notice of Deficiency on grounds raised by citizen petition). Furthermore, interested persons may prefer different procedures depending on the issues at stake. See David L. Markell, Tom Tyler, & Sarah F. Brosnan, *What Has Love Got to Do with It?: Sentimental Attachments and Legal Decision-Making*, 56 *Vill. L. Rev.* (forthcoming 2012) (presenting results of study suggesting public procedural preferences shift depending on values and interests at stake).

capabilities, in their deference doctrines, and in their reviewability doctrines⁵⁰ such that any dialogue with an agency is necessarily formalistic, drawing primarily from the record and the parties' briefs. To be sure, courts bring a number of institutional strengths to the conversation as well. Nevertheless, the possibility of rich dialogues in other forums—where wide varieties of information are available and procedures are less formal—is both an attractive and important legitimizing component of effective governance.⁵¹

CONCLUSION

In the end, Professor Rossi and I agree that democratic norms are critical to legitimizing the fourth branch. A dialogic approach to the court/agency relationship provides enhanced opportunities not only for incentivizing participation, deliberation, and transparency within agencies, but also for providing information to be used in extra-judicial dialogues. When court/agency conversations are deferred, the opportunities for dialogue in other forums are all the more important. Dialogue, broadly situated throughout civil society, carries the potential to inform and improve the operation of the administrative state.

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50. See generally Mezell, *Super Deference*, supra note 4 (critiquing super deference to agency actions made at frontiers of science).

51. These forums, too, have their weaknesses. For what is only a sampling, see John H. Knox & David L. Markell, *Evaluating Citizen Petition Procedures: Lessons from an Analysis of the NAFTA Environmental Commission*, 47 *Tex. Int'l L.J.* (forthcoming 2012) (critiquing NAFTA Environmental Commission's citizen petitions process for, inter alia, delays and unfair bias in favor of governments); Mezell, *Deference and Dialogue*, supra note 1, at 1784 n.402 (collecting sources related to high costs of congressional and presidential oversight); Seidenfeld, supra note 42, at 10 (describing interest-group capture critique of administrative state); Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 *Duke L.J.* 1321, 1325 (2010) (documenting "excessive use of information and related information costs as a means of gaining control over regulatory decisionmaking in informal rulemakings"); Wendy E. Wagner, *Congress, Science, and Environmental Policy*, 1999 *U. Ill. L. Rev.* 181 (critiquing congressional overreliance on science in developing environmental laws).