FROM FIRST-BEST TO LEAST-WORST: AN ANTI-IDEALIST DEFENCE OF JUDICIAL REVIEW

HRISHI GORADIA*

Anglophone constitutional law scholarship has long argued about the institution of judicial review and the legitimacy of different methods of statutory interpretation. A prominent argument against independent judicial review has emerged, suggesting that the merits of any interpretive methodology depend less upon its philosophical aspirations (eg, to rights, to separation of powers) and more upon how realistically it accommodates the imperfect capacities of the decision-makers who will ultimately carry it out.

Investigating the institutional features that shape performance of the judicial function, this article catalogues the key vectors of uncertainty faced by judges, and proposes technical rules to guide the more cautious statutory interpreter. Exploring the synergies between decision theory, public choice theory and behavioural economics, this author adopts the anti-idealism of previous scholars but arrives at an obverse conclusion: that the very human problem of uncertainty necessitates, rather than obviates, retention of statutory interpretation squarely within the judicial function.

I INTRODUCTION

When ascertaining the meaning of statutory texts, judges engage in *interpretive choice* – the selection of an interpretive methodology from an array of alternatives.[1] The study of interpretive choice and statutory interpretation experienced something of an 'intellectual renaissance' in the United States ('US') in the 1990s, galvanised by the jurisprudence of Justice Scalia of the US Supreme Court.[2] A review of the

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1 See Adrian Vermeule, *Judging under Uncertainty: An Institutional Theory of Legal Interpretation* (Harvard University Press, 2006) 66–7 ('*Judging under Uncertainty*'); Abbe R Gluck, 'Justice Scalia's Unfinished Business in Statutory Interpretation: Where Textualism's Formalism Gave Up' (2017) 92(5) *Notre Dame Law Review* 2053, 2055, 2059 ('Unfinished Business in Statutory Interpretation').

2 See, eg, *Conroy v Aniskoff*, 507 US 511, 519 (1993) (Scalia J) ('*Conroy*'); *Finley v United States*, 490 US 545, 556 (Scalia J) (1989); Antonin Scalia, 'Originalism: The Lesser Evil' (1989) 57(3) *University*

scholarship indicates the emergence of a global school of anti-idealist legal theory – a pessimistic 'turn' in theorising how statutes should be interpreted – characterised by an emphasis on the relative strengths and weaknesses of institutional actors.[3] At the vanguard of this developing school of thought were prominent theorists such as Cass Sunstein, Christine Jolls, Richard Thaler and Neil Komesar, who placed an emphasis on empirics in '[imposing] discipline' on the assumptions involved in traditional theories of judging and ultimately advocated for forms of 'judicial minimalism'.[4] Sunstein, Jolls and Thaler found it 'especially odd' that legal scholarship lacked 'sustained and comprehensive economic analysis … informed by insights about *actual* human [behaviour]' – descriptive insights with a clear normative corollary about how institutional designers ought to allocate functions among the different branches of government.[5]

Among such anti-idealists was (and remains) Professor Adrian Vermeule, asserting that the merits of any interpretive theory turn not upon its philosophical aspirations, but rather the extent to which it accommodates the true capacities of the interpreters who carry it out.[6] Vermeule eschews the traditional question of 'what is the *best* way for judges to interpret legislation?' in favour of the more pessimistic enquiry 'what is the *least-worst* way that fallible, epistemically-limited, counter-majoritarian judges *can* interpret legislation?' In answering this question, he presents an anti-idealist theory that shifts the bulk of interpretive authority from judges to executive agencies, effectively eliminating judicial review of administrative action in cases of statutory ambiguity. Whilst Vermeule is but one theorist within the broader school of anti-idealist accounts of the judicial function, the rigorously inter-disciplinary and highly-developed nature of his theories – and indeed the jarring nature of his conclusions and proposals – have enabled him to occupy perhaps the most prominent position within anti-idealist theory globally.

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of Cincinnati Law Review 849, 862–3. See also Cass R Sunstein, 'Must Formalism be Defended Empirically?' (Working Paper No 70, Coase-Sandor Institute for Law and Economics, University of Chicago Law School, March 1999) 7 <https://doi.org/10.2139/ssrn.155435> ('Defended Empirically'); Adrian Vermeule, 'Legislative History and the Limits of Judicial Competence: The Untold Story of *Holy Trinity Church*' (1998) 50(6) *Stanford Law Review* 1833, 1857 <https://doi.org/10.2307/1229242> ('Judicial Competence'); Vermeule, *Judging under Uncertainty* (n 1) 41, 253.

3 See, eg, Cass R Sunstein and Adrian Vermeule, 'Interpretation and Institutions' (2003) 101(4) *Michigan Law Review* 885, 920 <https://doi.org/10.2307/1290510>. See also Vermeule, *Judging under Uncertainty* (n 1) 71; Edward L Rubin, 'Law and Legislation in the Administrative State' (1989) 89(3) *Columbia Law Review* 369, 391 <https://doi.org/10.2307/1122862> ('Administrative State'), proposing a 'pragmatic' approach involving 'self-reflection'; Jerry L Mashaw, 'Prodelegation: Why Administrators Should Make Political Decisions' (1985) 1(1) *Journal of Law, Economics, and Organization* 81, 81 <https://doi.org/10.1093/oxfordjournals.jleo.a036891>.

4 Cass R Sunstein, Christine Jolls and Richard H Thaler, 'A Behavioral Approach to Law and Economics' (1998) 50 *Stanford Law Review* 1471, 1489 <https://doi.org/10.2307/1229304>; Cass R Sunstein, 'Beyond Judicial Minimalism' (Public Law and Legal Theory Working Paper No 237, University of Chicago Law School, September 2008). See also Neil K Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* (University of Chicago Press, 1994) 5–6.

5 Sunstein, Jolls and Thaler (n 4) 1473 (emphasis added).

6 See Adrian Vermeule, 'Interpretation, Empiricism, and the Closure Problem' (1999) 66(3) *University of Chicago Law Review* 698, 698–700 <https://doi.org/10.2307/1600424> ('Closure Problem'); Vermeule, *Judging under Uncertainty* (n 1) 30, 107.

This article argues that strong-form independent judicial review of executive action is defensible on theoretically consistent, least-worst, anti-idealist institutional grounds. Just as anti-idealist scholars like Vermeule question the capacities of judges to mount a case *against* judicial review, this article adopts a similar scepticism[7] in contending that the cognitive motivational pulls upon administrators and the structural features of the executive branch *justify* judicial oversight. For even if administrators do in theory possess superior technocratic abilities, anti-idealist scholars like Vermeule have to date failed to adequately consider 'the real life complexity of what goes on in our brain' – something that ought to be an indispensable consideration for institutional designers.[8] This article, at its core, is a muscular defence of the legitimacy of independent judicial review of administrative action – a clear and concerted target of Vermeulian scholarship and much of the work within the broader anti-idealist school of thought. In light of Justice Stephen Gageler's (as his Honour then was) invocation of Vermeule and behavioural economics, this article seeks to enrich the ongoing interdisciplinary discussion among Australian judges regarding the 'structural features' that shape performance of the judicial function.[9] This type of comparative institutional analysis continues to receive meaningful attention from the legal academy in Australia, with recent scholarship providing additional intellectual depth by focusing on more nuanced conceptions of judicial capacity and acknowledging that the Australian judiciary operates within institutional limitations.[10] The broader implications of interdisciplinary behavioural insights for institutional design, an area to-date 'under-theorised with scant comparative and generalisable explorations', are also increasingly garnering attention.[11] The global relevance and significance of these topics has also been acknowledged: the Chief Justice of the Supreme Court of India – the Hon Dr Dhananjaya Yeshwant Chandrachud – for example, was prompted by recent Australian work to invite further engagement with the topic of institutional limitations within his own jurisdiction, moving beyond the dichotomies of traditional theories of judging that view the judiciary as 'either heroes or political stooges'.[12] Indeed, anti-idealist assessments of institutional competence and questions about the legitimacy of judicial review transcend the immediate United States context of scholars like Vermeule and Sunstein.

Part II of this article explains the anti-idealist argument that judicial review is illegitimate on institutional grounds. It presents Vermeule's diagnosis that judges

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7 See, eg, Jamie Blaker, 'The High Court's Minimalism in Statutory Interpretation' (2019) 40(2) *Adelaide Law Review* 539, 545.

8 Robert French, 'Rationality and Reason in Administrative Law: Would a Roll of the Dice Be Just as Good?' (Annual Lecture, Australian Academy of Law, 29 November 2017) 1.

9 See Justice Stephen Gageler, 'Just Versus Quick: Constructivist and Ecological Rationality in a Common Law System' (2022) 45(2) *Melbourne University Law Review* 830, 830. See generally ibid.

10 See generally Rosalind Dixon, *Responsive Judicial Review: Democracy and Dysfunction in the Modern Age* (Oxford University Press, 2023) <https://doi.org/10.1093/oso/9780192865779.001.0001>.

11 See, eg, Ishani Mukherjee and Assel Mussagulova, *Designing Behavioural Insights for Policy: Processes, Capacities and Institutions* (Cambridge University Press, 2024) <https://doi.org/10.1017/9781009264464>.

12 Chief Justice Dhananjaya Y Chandrachud, 'Book Review: Responsive Judicial Review' (2022) 34(2) *National Law School of India Review* 18, 20. See Dixon (n 10) 20–1.

make interpretive choices using *heuristics* under 'severe uncertainty' and outlines his proposed anti-idealist solution – a formalist method of 'no frills textualism' intended to: (a) cure uncertainty in judging; and (b) reduce the time and effort associated with statutory interpretation ('decision costs').[13] This Part also reviews the arguments posed to-date by critics of the theories proffered by Vermeule, each of whom afford him a rather uncharitable reading. It concludes with a more significant argument – an extension of existing criticisms – that his proposed system of agency deference neither reduces uncertainty nor attenuates net decision costs.

Part III – the analytical core of this article – applies the pessimism of public choice theory and concepts from behavioural economics to each possible statutory interpreter (the judiciary and the executive), examining each institution's respective internal 'ecological' features.[14] Ultimately, this Part adopts a distinctly anti-idealist, Vermeulian lens to reach a distinctly *anti*-Vermeulian conclusion: administrators face a range of perverse motivational pulls and are systemically disincentivised from self-applying politically costly limits to statutory powers, in ways and to an extent that judges are not.[15] Axiomatically, if an interpretive regime recommends deference to agencies that are structurally disincentivised from imposing politically costly statutory limits to their own power, then it is endorsing a corrupt form of interpretive decision-making. This not only justifies but necessitates judicial review and retention of the interpretive function within the judicial branch.

Part IV concludes this article by proposing a set of technical interpretive rules for the anti-idealist judicial reviewer to apply – an alternative solution to attenuate the problem of uncertainty. This Part argues that the most plausible response to the problem of uncertainty is a 'tiered' method of statutory interpretation akin to a carefully sequenced variant of the orthodox common law method, accompanied by a regime of methodological *stare decisis*.

II THE PROBLEM OF UNCERTAINTY: AN ANTI-IDEALIST ATTACK ON JUDICIAL REVIEW

Perhaps what sets Vermeule most significantly apart from earlier anti-idealist scholars is his detailed, novel exposition of the 'problem of uncertainty' that plagues judicial decision-making. Vermeule's central diagnosis is that judges operate under conditions of severe uncertainty when interpreting statutes due to epistemic limitations, resource constraints and a propensity for interpretive

13 See, eg, Adrian Vermeule, *The Constitution of Risk* (Cambridge University Press, 2014) 190 <https://doi.org/10.1017/CBO9781107338906> ('*Constitution of Risk*'). Heuristics reduce 'complex tasks … to simpler judgmental operations': Amos Tversky and Daniel Kahneman, 'Judgment under Uncertainty: Heuristics and Biases' (1974) 185(4157) *Science* 1124, 1124–6 <https://doi.org/10.1126/science.185.4157.1124>. See also William N Eskridge Jr, 'Book Review: No Frills Textualism' (2006) 119(7) *Harvard Law Review* 2041 ('No Frills Textualism').

14 Vernon L Smith, 'Constructivist and Ecological Rationality in Economics' (2003) 93(3) *American Economic Review* 465, 471 <https://doi.org/10.1257/000282803322156954>; Gageler (n 9) 836.

15 See, eg, David B Spence and Frank Cross, 'A Public Choice Case for the Administrative State' (2000) 89 *Georgetown Law Journal* 97, 99.

error.[16] In light of this problem of uncertainty, he argues that the use of interpretive methodologies which go beyond the statutory text yield merely conjectural benefits whilst incurring enormous costs.[17] Applying a decision-theoretic lens, Vermeule ultimately advocates for a parsimonious form of 'plain meaning' textualism to begin the interpretive process.[18] Where the statutory text is ambiguous, however, he posits a pro-deferential theory whereby interpretive authority is reallocated to administrative agencies.[19] While Vermeulian theories, like others within the broader anti-idealist scholarship, attack all modes of statutory interpretation by judges, his primary target is judicial review of administrative action purportedly made under statutory powers.

Vermeule's work has been described by some as 'important' and 'wonderfully multi-disciplinary', and by others as simply 'mistaken'.[20] This Part argues that his *diagnosis* of the problem of uncertainty in judging – if not his prescribed *solution* – is a 'striking' and immensely valuable contribution to legal theory that interpretation theorists and institutional designers would be remiss to overlook.[21]

A An Illustrative Hypothetical to Ground the Abstract

As Vermeule's highly conceptual theories are difficult to understand in the abstract – it is this sophistication that perhaps most distinguishes his scholarship from earlier anti-idealist theorising – the following hypothetical case serves as a practical accompaniment. Its fact pattern bears resemblance to that of *Brown v Board of Education of Topeka* ('*Brown*'),[22] the hallmark US Supreme Court decision in which racial segregation in American public schools was held to be unlawful. It is this case that Vermeule uses as an example to help enunciate his arguments, and – jarringly – he ultimately contends that the Supreme Court erred in reaching its decision.[23] Acknowledging that the facts in *Brown* concerned constitutional interpretation (rather than Vermeule's primary target in *statutory* interpretation), the facts of the hypothetical case below are premised upon *Brown* in order to present a more cogent picture of his argument, applied in the Australian context.

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16 See Elizabeth Garrett and Adrian Vermeule, 'Institutional Design of a Thayerian Congress' (2001) 50(5) *Duke Law Journal* 1277, 1280 <https://doi.org/10.2307/1373023>; Vermeule, *Judging under Uncertainty* (n 1) 173, 189–90. See also Jonathan R Siegel, 'Judicial Interpretation in the Cost-Benefit Crucible' (2007) 92 *Minnesota Law Review* 387, 389.

17 Jacob Gersen and Adrian Vermeule, 'Thin Rationality Review' (2016) 114(8) *Michigan Law Review* 1355, 1385.

18 Vermeule, *Judging under Uncertainty* (n 1) 211; Eskridge, 'No Frills Textualism' (n 13) 2043.

19 'Vermeulian' deference exceeds *Chevron* deference by requiring deference to agencies even where the legislature has not specifically delegated powers to that agency. See *Chevron USA Inc v Natural Resources Defense Council Inc*, 467 US 837, 866 (1984) ('*Chevron*').

20 See the book review of Vermeule, *Judging under Uncertainty* (n 1) provided by JE Finn and Frederick Schauer: 'Judging under Uncertainty: An Institutional Theory of Legal Interpretation', *Harvard University Press* (Web Page) <https://www.hup.harvard.edu/books/9780674022102>. William H Pryor Jr, 'Against Living Common Goodism' (2022) 23 *Federalist Society Review* 24, 26. See also Caleb Nelson, 'Statutory Interpretation and Decision Theory' (2007) 74 *University of Chicago Law Review* 329, 329.

21 Nelson (n 20) 329; Colin Farrelly, 'The Institutional Theory of Interpretation' (2008) 58(2) *University of Toronto Law Journal* 217, 218 <https://doi.org/10.1353/tlj.0.0003>.

22 347 US 483 (1954) ('*Brown*'). See also Garrett and Vermeule (n 16) 1295.

23 Vermeule, *Judging under Uncertainty* (n 1) 280–1.

Consider the following fact pattern of the hypothetical *Talua's case*:

> Following the release of NAPLAN results, a key focus for communities in Western New South Wales ('NSW') is their 'long tail' of exceptionally poor educational outcomes. The bottom quartile of public middle-school students in this region achieved results in the bottom 5% on a state-wide basis. Media coverage details that the vast majority of students in this bottom quartile in Western NSW are Indigenous, and also that many schools are 'rife' with student misbehaviour issues. The NSW Minister for Education and the state Department of Education face significant pressure from teachers' unions and parent associations to take action, specifically by moving the bottom 25% of students to separate schools. Under sustained pressure, the NSW Department of Education begins to designate public schools in Western NSW as either 'state schools' or 'learning centres'. Learning centres, catering to the bottom quartile of students, are invariably smaller in size, less well-resourced and located in more remote locations away from populous regional centres.
>
> Jessie Talua – the parent of an Indigenous student who is allocated to a 'learning centre' after scoring in the 24th percentile – institutes proceedings in the Supreme Court of New South Wales, seeking judicial review of the NSW Department of Education's actions. Ms Talua claims that the agency's designation of public schools contravenes section 34(5) of the *Education Act 1990* (NSW) ('*Education Act*'), which provides that '[a] child is not to be refused admission to a government school because of the child's race or religion'.[24]
>
> During proceedings, the NSW Department of Education submits an agency view that section 34(5) of the *Education Act* should be interpreted narrowly as prohibiting the exclusion of students *directly* on the basis of race. The Department argues its policy did not involve the allocation of students *because* of race or indigeneity – students were allocated only on the basis of NAPLAN results. However, the presiding NSW Supreme Court judge elects without hesitation to look beyond the text of the provision in question to ascertain legislative intent, examining section 6 of the same *Education Act*, which states that the intention of Parliament is the 'promotion of a high standard of education … without discrimination on the ground of sex, race or religion'.[25] Her Honour then examines the overall legislative regime regarding discrimination in NSW, observing that the definitional section 7 of the *Anti-Discrimination Act 1977* (NSW) ('*Anti-Discrimination Act*') expressly includes *indirect* discrimination.[26] The judge also chooses to look to the Second Reading Speech, which indicates a desire for Indigenous students to feel included in the public education system (with reference to a history of marginalisation).[27]
>
> The NSW Supreme Court ultimately adopts a more expansive interpretation of section 34(5) of the *Education Act*, rejecting the agency's narrow characterisation. Finding in favour of Ms Talua, it holds that the Department of Education's policy of designating a child to a 'learning centre' (like Jessie Talua) amounts to a refusal of admission to a state school because of a child's race, thereby exceeding the powers conferred on it by the Act.

24 *Education Act 1990* (NSW) s 34(5) ('*Education Act*').

25 Ibid s 6(1)(b).

26 *Anti-Discrimination Act 1977* (NSW) s 7 ('*Anti-Discrimination Act*').

27 New South Wales, *Parliamentary Debates*, Legislative Assembly, 29 March 1990, 1343–8 (Dr Terry Metherell).

B Vermeule's Diagnosis of Uncertainty in Judicial Review

Just as he 'revels in the counterintuitive' by asserting the US Supreme Court erred in *Brown* in disallowing racial segregation in primary schools, Vermeule would argue the hypothetical NSW Supreme Court was wrong to decide in favour of the plaintiff Ms Talua.[28] Adopting his perspective, the presiding NSW Supreme Court judge had no certain basis for her interpretive choices – namely, examining an eclectic mix[29] of holistic and legislative history sources to elicit meaning – and thus the Court's decision was 'necessarily arbitrary'.[30] The *Talua* Court, he would argue, should have instead accepted the Department of Education's narrow interpretation that the allocation of students was not exclusionary because of race. This is undoubtedly a jarring conclusion but, Vermeule would argue, not without sound theoretical grounds.

Vermeule's theory of uncertainty has three primary tenets: (1) the inadequacy of existing 'first-best' accounts of statutory interpretation given their blindness to institutional realities – 'institutional nirvana fallacy'; (2) the need for an operationally-focused theory of interpretation that accounts for relative institutional decision-making capacities; and (3) the epistemic incapacities of judges that result in unavoidable uncertainty so long as the interpretive function rests with the judiciary.[31]

1 'First-Best' Theories of Interpretation and the Problem of Institutional Blindness

First and foremost, in line with other prominent anti-idealist theorists such as Sunstein and Komesar, Vermeule directs his criticism towards traditional high-level, conceptual theories of statutory interpretation. He does so on the grounds that they are ignorant towards the capacity constraints of real-world interpreters.

(a) Vermeule's Target: Conceptual or Aspirational Theories of Statutory Interpretation

Statutory interpretation scholarship is replete with a great diversity of interpretive theories or methodologies, each with their own monikers as well as proponents and opponents within academia and on the bench.[32] In general, each theory provides guidance for how judges should go about making interpretive choices. When judges are faced with an array of interpretive options, they must decide among interpretive methods which individually have different goals. The theory of interpretation to which that judge 'subscribes' provides guidance on

28 Nelson (n 20) 329.

29 Eclectic in that meaning was derived from a non-sequential examination of a 'triumvirate of text, context and purpose'. See John Basten and Michael Gvozdenovic, 'Can Context Mutilate Text?' (2022) 96(6) *Australian Law Journal* 392, 394.

30 Gersen and Vermeule (n 17) 1386.

31 Vermeule, *Judging under Uncertainty* (n 1) 11, 157–60.

32 See Blaker (n 7) 542. See, eg, the 'mischief rule' enunciated in *Tasmania v Commonwealth* (1904) 1 CLR 329, 359 (Barton J) and the 'strict and complete legalism' approach explained in *A-G (Cth) ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, 17 (Barwick CJ).

which goal they should aspire for.[33] Vermeule explains that 'first-best' theories of interpretation are typically 'concerned with the ultimate normative aims of legal interpretation'[34] – whether that be a philosophical commitment to self-government (democracy), to rights or to some other 'abstract end'.[35] For instance, by instinctively referring to materials of legislative history to ascertain meaning, the judge in the hypothetical *Talua's case* likely sought to advance a first-best conceptual commitment to *democratic* ideals of legislative supremacy (as required by the relevant interpretation Act).[36]

(b) 'Institutional Blindness'[37]

Vermeule emphatically rejects such first-best theories of interpretation on the basis that they ignore the real-world, institutional capacities of interpreters. He claims traditional statutory interpretation scholars have instead naively prescribed interpretive guides, assuming that they can and will be perfectly executed by 'omniscient and omnicompetent' judges.[38]

Vermeule catalogues different types of institutional blindness, the most common of which he refers to as 'asymmetrical institutionalism'.[39] He reflects upon the prominent interpretive theories of Dworkin,[40] Eskridge,[41] Manning[42] and Hart,[43] diagnosing each with a condition of one-eyed blindness for taking an excessively-optimistic 'nirvana' view of the decision-making capacities of one institution while painting a 'worst-case picture' of another.[44] For instance, Vermeule suggests that the theories of Dworkin and Eskridge – which both allow judges considerable interpretive discretion or 'dynamism' – 'says far too little about the virtues and the imperfections of judges'.[45] Their high-level abstract ambitions detach them from the myriad of important constraints that burden real-world judicial interpreters.

Vermeule claims that common 'democratic' theories which champion high-level ideals like self-government (and mandate an 'archaeological' discovery of

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33 Adrian Vermeule, 'Interpretive Choice' (2000) 75(1) *New York University Law Review* 74, 74 ('Interpretive Choice'); Vermeule, 'Closure Problem' (n 6) 698.

34 Vermeule, *Judging Under Uncertainty* (n 1) 147.

35 Richard Ekins, 'Interpretive Choice in Statutory Interpretation' (2014) 59(1) *American Journal of Jurisprudence* 1, 1 <https://doi.org/10.1093/ajj/auu008>.

36 *Interpretation Act 1987* (NSW) ss 33–4, which is equivalent to the *Acts Interpretation Act 1901* (Cth) ss 15AA–AB ('*Acts Interpretation Act*'). See Farrelly (n 21) 217.

37 Vermeule, *Judging under Uncertainty* (n 1) 16–17.

38 Nelson (n 20) 330.

39 Vermeule, *Judging under Uncertainty* (n 1) 17, 40–1.

40 Ibid 27–9; Ronald Dworkin, *Law's Empire* (Belknap Press, 1986) 184–204. See also Sunstein and Vermeule (n 3) 902.

41 Vermeule, *Judging under Uncertainty* (n 1) 41–9; William N Eskridge Jr, *Dynamic Statutory Interpretation* (Harvard University Press, 1994) 48–80 ('*Dynamic Statutory Interpretation*').

42 Vermeule, *Judging under Uncertainty* (n 1) 29–32; John F Manning, 'Deriving Rules of Statutory Interpretation from the Constitution' (2001) 101(7) *Columbia Law Review* 1648 <https://doi.org/10.2307/1123810>.

43 Vermeule, *Judging under Uncertainty* (n 1) 24–7.

44 Ibid 17.

45 Ibid 28. See Dworkin (n 40) ix, 184–204 for Dworkin's 'integrity' theory of interpretation; Eskridge, *Dynamic Statutory Interpretation* (n 41) for the theory of judicial 'dynamism'.

legislative purpose) *also* assume a stylised picture of the judiciary.[46] Vermeule would criticise the NSW Supreme Court judge in the hypothetical *Talua's case* as being guilty of this 'nirvana fallacy', ignorantly assuming her own political insulation as a *virtue* rather than a *vice* of her ability to accurately interpret statutes.[47]

2 The Need for a 'Second-Best' Theory of Statutory Interpretation

Vermeule's key contention regarding the utility of traditional first-best theories aligns with other anti-idealist scholars. High-level, normative commitments about democracy or the nature of the law, he claims, are 'pitched too high' and thus 'fatally abstract': traditional theories of interpretation are necessarily incomplete as they serve only to select the ambition or *end* of the interpretive process rather than prescribing the *means* to realising such ends.[48] Komesar, for example, labels this 'single institutionalism' – where courts are entrusted with policing other branches under a first-best theory of judging, without actually considering whether the judiciary is well-suited to that role in the first place.[49] Vermeule laments that legal theory has championed the importance of abstract philosophising about conceptual ambitions like purposivism or intentionalism, instead of determining *realistic* rules to best realise those ambitions.[50]

Accordingly, Vermeule advocates for an anti-idealist lens, whereby interpretation theories are recast along 'resolutely institutional and empirical lines' and the degree of interpretive discretion granted to institutional decision-makers is contingent upon their respective capacities.[51] He suggests that prior scholarship, even by previous anti-idealist scholars, has been insufficiently attentive to such empiricism, and that legal theorists will fail to reach useful operational conclusions about how judges should interpret statutes unless they focus, empirically, on the true capacities of judicial interpreters.[52] In advocating for a realistic, 'second-best' theory of interpretation and prescribing an '*operating-level*' interpretive methodology, Vermeulian scholarship tips its hat to broader 'judicial pragmatism' movements of the 1990s.[53] The theories of Richard Posner and Sunstein, for instance, gave primacy to practical considerations and the tempered aspirations of 'best *results*' over 'absolutist or deontological precepts'.[54] Indeed, the jurisprudence

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46 William N Eskridge Jr, 'Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation' (1988) *Virginia Law Review* 74(2) 275, 297, 301 <https://doi.org/10.2307/1073145> ('Without Romance'); Vermeule, *Judging under Uncertainty* (n 1) 17–18.

47 Adrian Vermeule, *Law and the Limits of Reason* (Oxford University Press, 2009) 183 <https://doi.org/10.1093/acprof:oso/9780195383768.001.0001>. See also Frank B Cross, 'Pragmatic Pathologies of Judicial Review of Administrative Rulemaking' (2000) 78(4) *North Carolina Law Review* 1013, 1029.

48 Vermeule, *Judging under Uncertainty* (n 1) 32, 42, 44, 63, 71.

49 Komesar (n 4) 5–6.

50 Vermeule, *Judging under Uncertainty* (n 1) 67. See also Cross (n 47) 1015.

51 Vermeule, *Judging under Uncertainty* (n 1) 61.

52 Ibid.

53 Ibid 38 (emphasis added), 58. See, eg, Richard A Posner, *The Problematics of Moral and Legal Theory* (Harvard University Press, 1999) 227–39, espousing a 'pragmatic approach to law'.

54 Cross (n 47) 1016–17 (emphasis added). See Cass R Sunstein, *A Constitution of Many Minds* (Princeton University Press, 2011) 19–32; Jeff King, *Judging Social Rights* (Cambridge University Press, 2012) 133 <https://doi.org/10.1017/CBO9781139051750>.

of 'institutional competence' and this form of legal empiricism can be traced back to the 1950s.[55]

3 Judicial Incapacity

Vermeule's operationally-focused, second-best theory of interpretation has as its lodestar a pessimistic view of judges' capacity to make interpretive decisions. This fallibility stems from three 'institutional' limitations of judges – epistemic limitations, resource constraints, and capacity for error. The hypothetical judge conjured by Dworkin in his seminal text *Taking Rights Seriously* is 'a lawyer of superhuman skill, learning, patience and acumen' named Judge Hercules.[56] Anti-idealists like Sunstein and Vermeule suppose that first-best theories of judging 'might predictably do worse … in the hands of [real-life] judges who do not resemble Hercules'.[57]

(a) Epistemic Limitations

Vermeule asserts that the questions relevant to the choice of interpretive method (questions he himself urged theorists to ask) are 'transcientific' and thus effectively unanswerable.[58] He raises an example of a common legal empirical enquiry – whether the death penalty deters crime – citing physics research to note that though this question 'can be stated in the language of science', it is one which is 'unanswerable by science'.[59] In a similar way, the questions upon which interpretive choices turn, involving a possibly indefinitely 'large … web of interlocking relationships' and actors, are 'often empirical in principle yet unanswerable in practice' and thus cannot be answered with certainty.[60]

Therefore, Vermeule highlights that at the time of making interpretive decisions, judges do not have enough information about the real-world consequences of various interpretive methods to make fully informed choices.[61] He questions whether judges and theorists have any basis for believing that their selected interpretive method brings about more favourable interpretive outcomes – according to whatever their chosen first-best theory determines to be 'favourable'. For instance, he would challenge the hypothetical judge in *Talua's case* to justify why exactly her reliance on one extrinsic source (the Second Reading Speech)

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55 King (n 54) 133. See, eg, Henry M Hart Jr and Albert M Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (1958) (unpublished, copy on file with author).

56 See Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977) 105–30. See also Sunstein and Vermeule (n 3) 905–6.

57 Sunstein and Vermeule (n 3) 944.

58 Vermeule, 'Closure Problem' (n 6) 701. See Alvin M Weinberg, *Nuclear Reactions: Science and Trans-Science* (American Institute of Physics, 1992) 4.

59 Vermeule, 'Closure Problem' (n 6) 701 n 7, quoting Weinberg (n 58) 4.

60 Vermeule, 'Closure Problem' (n 6) 699; King (n 54) 190. See also Lon L Fuller and Kenneth I Winston, 'The Forms and Limits of Adjudication' (1978) 92(2) *Harvard Law Review* 353, 398 <https://doi.org/10.2307/1340368>; Cross (n 47) 1029.

61 Adrian Vermeule, 'Judicial Review and Institutional Choice' (2002) 43(4) *William and Mary Law Review* 1557, 1654 ('Judicial Review'); Sunstein and Vermeule (n 3) 914; Vermeule, *Judging under Uncertainty* (n 1) 192.

would *help* rather than hinder her in determining true legislative intent; he suspects that her 'justification' would rely more on intuition than any empirical grounds.[62] He critiques Posner's theory of 'imaginative reconstruction' on the basis that there is no reason to believe that human judges (who may reconstruct capably or poorly) will veer closer to correctly 'reimagining' legislative intent than judges who simply apply the statute's plain meaning.[63]

Vermeule adds that there is no reason to believe that 'more information always and necessarily produces more accurate decisionmaking [sic]' than less information.[64] Indeed, consulting one extra piece of legislative history may in fact be 'distortive, inflammatory, or burdensome' when considered by a judge that is neither omniscient nor omnicompetent.[65]

(b) Resource Constraints

Even if it were cognitively possible to make *certain* choices when deciding between an array of interpretive methods, Vermeule contends that courts lack the resources that would be required to do so. This point has been emphasised by other anti-idealist theorists such as Berger, who asserts that judges' 'infatuation with vigorous judicial review fails to account for limited judicial capacities'.[66] The hypothetical NSW Supreme Court judge in *Talua's case* may have selected to consult the Second Reading Speech to ascertain the meaning of section 34(5) of the *Education Act*, but even a 'partial list of materials that might appear in a legislative history' includes draft bills, subsequent drafts, Senate Committee reports, Parliamentary Committee reports, transcripts of committee hearings, explanatory memoranda and Parliamentary debates.[67] Vermeule contends, therefore, that reasonable 'limitations of [the court's] investigative resources' mean the informational burden required for judges to make a *certain* choice (between suggested interpretive *sources*, let alone overarching interpretive methodologies) is practically unobtainable.[68]

(c) Capacity for Error

Furthermore, even if epistemic limitations *could* be overcome and the resources *were* available to do so, Vermeule argues that judges are 'susceptible to a variety of errors' when interpreting statutes.[69] His later scholarship commonly refers back to his detailed critique of the US Supreme Court case *Church of the Holy Trinity v United States*,[70] in which he contends the Court *misread* legislative history when

62 See Siegel (n 16) 405; Vermeule, 'Judicial Competence' (n 2) 1833; Gluck, 'Unfinished Business in Statutory Interpretation' (n 1) 2059; Vermeule, 'Closure Problem' (n 6) 698–9.
63 Vermeule, *Judging under Uncertainty* (n 1) 52–3.
64 Vermeule, 'Judicial Competence' (n 2) 1864.
65 Ibid.
66 Eric Berger, 'Comparative Capacity and Competence' [2020] (2) *Wisconsin Law Review* 215, 225.
67 Vermeule, 'Judicial Competence' (n 2) 1872.
68 Vermeule, 'Closure Problem' (n 6) 699; Vermeule, 'Judicial Review' (n 61) 1558.
69 Vermeule, *Judging under Uncertainty* (n 1) 87, 107.
70 143 US 457 (1892).

seeking to give effect to legislative intent.[71] He argues that not only did the Court fail to consult legislative history to its fullest extent (due to resource constraints), but it mistook the significance of the material it *did* have.[72] Citing work by Vermeule's contemporary Cass Sunstein, Chief Justice Gageler highlights that 'humans are … prone to make random errors, leading to an unwanted variability in judgments'.[73] This is either because an individual judge's capacity is 'suboptimal on occasion' or because 'not every appointment to the judiciary could ever be expected to be of the quality of Sir Matthew Hale' (let alone Dworkin's 'superhuman' Judge Hercules).[74]

Examining common interpretive methods involving consultation of legislative history, Vermeule notes that its 'distinctively voluminous and heterogeneous' nature exacerbates the risk of judicial error.[75] Indeed, Justice Scalia famously wrote that judicial reliance on legislative history is a 'waste of research time and ink' and is 'on the whole … more likely to confuse than to clarify'.[76] The anti-idealist might, therefore, find the judge in the hypothetical *Talua's case* particularly susceptible to error: given the entire suite of legislative history for the *Education Act* is very large, the sole selection of the Second Reading Speech to ascertain the intentions behind section 34(5) may well have been a case of 'entering a crowded room and looking around for one's friends'.[77]

4 Decision-Making under Conditions of Uncertainty

As such, Vermeule's diagnosis is that fallible judges, when tasked with making interpretive choices, invariably do so under conditions of *severe uncertainty*. He describes this 'brute uncertainty' as arising where decisions are premised upon epistemically unattainable assessments.[78]

This problem of uncertainty that plagues judicial statutory interpretation is perhaps worthy of an even more comprehensive decision-theoretic portrayal than Vermeule himself provides. When making decisions of interpretive choice, the NSW Supreme Court judge in *Talua's case* would have faced uncertainty across four main vectors (unable to answer any of the following enquiries with any degree of certainty):

1. Option set uncertainty: How many candidate interpretive methods should be considered? And if the chosen method involves a consultation of

71 Vermeule, 'Judicial Competence' (n 2) 1837, 1858.

72 Ibid 1866, 1887.

73 Gageler (n 9) 835, discussing Daniel Kahneman, Olivier Sibony and Cass R Sunstein, *Noise: A Flaw in Human Judgment* (William Collins, 2021).

74 Gageler (n 9) 835, 846.

75 Vermeule, 'Judicial Competence' (n 2) 1867, 1872. See also Richard J Pierce Jr, 'The Role of the Judiciary in Implementing an Agency Theory of Government' (1989) 64(6) *New York University Law Review* 1239, 1258; Vermeule, *Judging under Uncertainty* (n 1) 87, 107.

76 *Conroy* (n 2) 519 (Scalia J).

77 Vermeule, 'Judicial Competence' (n 2) 1874. For a recent High Court example, see Basten and Gvozdenovic (n 29) 394 – suggesting 'a surprising degree of emphasis was given' to a limited selection of extrinsic materials in *R v A2* (2019) 269 CLR 507, 523–4 [43] ('*R v A2*').

78 Adrian Vermeule, 'Rationally Arbitrary Decisions (in Administrative Law)' (Working Paper No 13-24, Harvard Public Law and Legal Theory Research Paper Series, March 2013) 7 <https://doi.org/10.2139/ssrn.2239155> ('Rationally Arbitrary Decisions').

legislative history to discover 'purpose', then which of the sources put forth by the parties should be considered?

2. Payoff uncertainty: What is the potential value of any one possible interpretive method? What is the probability of realising that value if that method and its corresponding interpretive source(s) are chosen?
3. Interaction uncertainty: If the Court elects to consult both the Second Reading Speech and Parliamentary Committee reports, how are payoffs to be weighed against each other – especially cases where each source elicits different versions of legislative purpose?
4. Decision uncertainty: What is the payoff associated with *not* making a new interpretive choice regarding section 34(5) of the *Education Act*, and instead relying on previous interpretations or deferring to the Department's view?

Despite raising a novel criticism of judicial review, Vermeule does not labour to explain exactly why uncertainty is undesirable per se. He is instead content to emphasise that there is presently the least capable actor carrying out the interpretive function, and that conditions of uncertainty would be less severe if interpretation lay with an alternative institutional actor.[79] Nonetheless, it is worth enunciating why it is problematic for the judiciary to be undertaking statutory interpretation under conditions of uncertainty when reviewing administrative action.

(a) Bounded Rationality and Use of Heuristics

When interpretive choices are the product of an inherently incomplete analysis (due to judges' epistemic limitations), these decisions may be described as heuristics.[80] Constituting a cognitive 'shortcut' to a desired first-best interpretive 'goal', a heuristic in these circumstances represents a 'very important departure of actual behaviour from the model of objective rationality'.[81] The concept of heuristic decision-making was introduced by Herbert Simon, who suggested that the finiteness of human cognitive abilities and our limited computational skills necessitated such shortcuts as a way of '[minimising] the sum of decision costs and error costs'.[82] Jacob Gersen's extensive work on rationality uses different terminology to describe the same phenomenon: he describes the decision-making process of *satisficing*, a 'strategy of rational a-rationality' that lacks any justification in first-order reason but which is deemed 'good enough'.[83] Applied to the hypothetical *Talua's case*, the NSW Supreme Court likely 'satisficed' by using the content of the Second Reading Speech as a proxy (heuristic) for legislative purpose, and legislative purpose as a proxy for their overall first-best ideal of

79 See Eskridge, 'No Frills Textualism' (n 13) 2053; Siegel (n 16) 392.

80 See Tversky and Kahneman (n 13) 1124.

81 Gerd Gigerenzer, 'The Adaptive Toolbox' in Gerd Gigerenzer and Reinhard Selten (eds), *Bounded Rationality: The Adaptive Toolbox* (Massachusetts Institute of Technology Press, 2001) 37 <https://doi.org/10.7551/mitpress/1654.001.0001>; Herbert A Simon, *Administrative Behavior: A Study of Decision-Making Processes in Administrative Organization* (Macmillan, 1945) 67.

82 See generally Herbert A Simon, 'A Behavioral Model of Rational Choice' (1955) 69(1) *Quarterly Journal of Economics* 99 <https://doi.org/10.2307/1884852>. See also Sunstein, Jolls and Thaler (n 4) 1477.

83 Gersen and Vermeule (n 17) 1390. On the decision-theoretic principle of 'satisficing', see at 1389.

democratic self-government. As Gersen suggests, 'an observer may well complain "why did you stop there, not somewhere else?"'.[84]

Vermeule similarly argues that this merely 'bounded' form of rationality is a problematic feature of interpretive choice from the bench: interpretive methodologies should not require judges to perform tasks that they require cognitive shortcuts to complete.[85] Previous theorists have argued, for example, that 'sound' decision-making is essential to judicial legitimacy, given public belief in the courts as 'a forum of reason, rational argumentation, and neutral principles'.[86] The public demands and indeed expects a 'kind of unbounded, ideal rationality'.[87] Decision-making under conditions of uncertainty using heuristics that are merely *boundedly* rational goes some way to eroding that legitimacy.

(b) Democratic Deficit

Further, the idea that judicial interpretations are plagued with uncertainty compounds the existing argument that judicial review blocks democratic outcomes. Oversight by unelected judges is increasingly being seen in academia as 'an unwelcome aberration of democracy',[88] and it is undoubtedly unsettling that judges who set their own first-best 'goalposts' may be resorting to convenient heuristics to erect an 'illusion of validity' and rationality.[89]

Even judges who *do* aspire to higher-level (first-best) ends of legislative supremacy can nonetheless produce democratic shortfalls in cases where their conception of what it means to advance legislative intent differs from what Parliament actually would have wanted.[90] To contextualise, the fact that the hypothetical NSW Supreme Court judge genuinely aspired to give effect to the enacting Parliament's desires does not mean a democratic deficit is avoided. For, as explained in the foregoing sections, there is no empirically-grounded reason to believe that the consultation of one Second Reading Speech brought the Court any closer or further from their first-best objective of discovering 'true' legislative intent. Indeed, even a first-best theory focusing on legislative supremacy can go democratically 'awry if judges *wrongly* identify the principles and purposes to which the law is then made to cohere'.[91]

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84 Ibid 1390.

85 See Gigerenzer (n 81) 13.

86 Hart and Sacks (n 55) 102. See also King (n 54) 133; Brian M Barry, *How Judges Judge: Empirical Insights into Judicial Decision Making* (Routledge, 2021) 1.

87 Gersen and Vermeule (n 17) 1361.

88 See, eg, Slavisa Tasic, 'The Pitfalls of Legislative and Executive Policymaking Compared to Judge-Made Law' (2016) 31(4) *Journal of Private Enterprise* 43, 54.

89 Tversky and Kahneman (n 13) 1126.

90 Despite many 'first-best' theories clearly espousing a search for legislative intention, note *Lacey v A-G (Qld)* (2011) 242 CLR 573, 591–2 [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) ('*Lacey*'), where the High Court found that legislative intention 'is not an objective collective mental state. Such a state is a fiction which serves no useful purpose.'

91 Siegel (n 16) 393 (emphasis added).

As such, in highlighting the problem of uncertainty endemic in judging, Vermeule goes some distance in illustrating how 'first-best' interpretive theories and the traditional judicial review function risk becoming ungrounded.

C Vermeule's Parsimonious Solution

Vermeule borrows from decision theory to develop a 'solution' for this problem of uncertainty in the form of an alternative theory of interpretation – one unique amongst the broader school of anti-idealist theorists.[92] He promulgates a two-rule 'operating-level formalism', which prescribes a 'weak repertoire of techniques for practical reasoning'.[93] He proposes that this assertively anti-idealist, 'austere vision of the judicial role' will (a) eliminate uncertainty from the interpretive process and (b) result in significant decision-cost savings.[94]

1 Rule One: Bare Textualism

The first rule of the proposed formalism prescribes that where the statutory text at hand is clear and specific, judges should apply its surface meaning and ignore all other considerations or interpretive methods.[95] Vermeule suggests that though not all texts are self-interpreting, where the text is unambiguous on its face, judges should accept a method that produces 'good enough' results rather than implementing more ambitious interpretive methods that incur certain costs but yield no certain benefit.[96]

Vermeule acknowledges that some literal interpretations of statutory text resulting under this 'bare textualism' may produce 'absurd results'.[97] However, he argues that those who criticise him on this basis must consider the 'dynamic effects' of interdependent and responsive institutions. Specifically, he envisages that the *legislature* would enact correcting statutory amendments where absurdities arise.[98]

2 Rule Two: Agency Deference

Secondly, the proposed anti-idealist method prescribes that where the statutory text at hand is intrinsically ambiguous, the best possible decision available to judges is to assign interpretive authority to an alternative institutional decision-maker – namely administrative agencies.[99] Applied to *Talua's case*, a Vermeulian court would likely respond to the 'surface-level gap or ambiguity' in section 34(5) of the *Education Act* (regarding the text '*because of a child's race*') by deferring interpretive authority to the NSW Department of Education – without itself

92 Vermeule, 'Interpretive Choice' (n 33) 77.
93 Vermeule, *Judging under Uncertainty* (n 1) 29, 38, 76–7, 171; Vermeule, 'Judicial Review' (n 61) 1558; Vermeule, *Constitution of Risk* (n 13) 6; Siegel (n 16) 389.
94 Siegel (n 16) 389.
95 Vermeule, *Judging under Uncertainty* (n 1) 43–4.
96 Ibid 179–81 on 'satisficing' as a decision-theoretic technique.
97 Sunstein and Vermeule (n 3) 892.
98 Ibid.
99 Vermeule, *Judging under Uncertainty* (n 1) 206–7.

attempting to use 'traditional tools of construction'.[100] While the NSW Department of Education does indeed have substantive rulemaking responsibilities under the *Education Act*, Vermeule supports the dissent of Scalia J in *United States v Mead Corporation* that formal delegation by the legislature is not necessary for an agency to be able to provide a valid interpretation of a given statute.[101] As such, under his 'expanded version of *Chevron* deference',[102] it would be quite rare for judges to actually confront questions of statutory interpretation where no agency's perspectives deserve deference.

The notion of administrative *technocratic expertise* has been a key concept in 'the most epic battles fought between law and administration' and supports the case against strong-form judicial review made by anti-idealist theorists.[103] For example, Andrew Coan draws inspiration from Komesar as well as early Vermeulian writings in contending that, in part due to the relative constraints faced by the judiciary, courts '*should* leave most decisions to other institutional actors'.[104] However, Vermeule appears to press harder than other opponents of judicial review, rejecting all other conventional 'democratic' justifications for deference (which highlight an implicit delegation of power from the legislature to agencies) in favour of solely practical or empirical considerations.[105] Aileen Kavanagh contemplates that deference to the political branches may be justified in three main situations: where there is a deficit of (a) institutional competence; (b) technical expertise; or (c) institutional or democratic legitimacy.[106] Vermeule, however, seeks to justify his version of hyper-deference through (a) and (b) only.

Deference is a 'second-best' approach to interpretation. Judicial incapacities and conditions of uncertainty mean that the judges cannot obtain 'perfect efficiency' by truly and rationally achieving their first-best aims.[107] The second-best outcome is not, then, to attempt to 'approximate' first-best efficiency through imperfect heuristics (while incurring significant costs of time and effort) but rather to do nothing and defer to another more capable interpreter. Vermeule argues that administrative agencies *are* that more capable interpreter, operating under less severe conditions of decision-making uncertainty.[108]

Vermeulian theory advances four key reasons to believe that agencies operate under less uncertainty than judges when interpreting statutes. Firstly, with respect to *technical knowledge*, he points out that judges are generalists while agencies

100 Ibid 207.
101 533 US 218, 239 (Scalia J) (2001). See ibid 215.
102 See *Chevron* (n 19).
103 King (n 54) 211, 234.
104 Andrew Coan, *Rationing the Constitution: How Judicial Capacity Shapes Supreme Court Decision-Making* (Harvard University Press, 2019) 189 (emphasis in original) <https://doi.org/10.4159/9780674239180>.
105 Vermeule, *Judging under Uncertainty* (n 1) 30, 107.
106 Aileen Kavanagh, 'Deference or Defiance?: The Limits of the Judicial Role in Constitutional Adjudication' in Grant Huscroft (ed), *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge University Press, 2008) 184, 190 <https://doi.org/10.1017/CBO9780511511042.010>.
107 Sunstein and Vermeule (n 3) 914.
108 Vermeule, *Judging under Uncertainty* (n 1) 208–9.

have access to deep expertise in administering statutes.[109] Secondly, specialist agencies are 'systematically more responsive and accountable' to the political process, so are in a superior position to understand *legislative dynamics* – a key advantage when consulting legislative history.[110] Thirdly, Vermeule argues agencies have larger budgets and thus *greater resources* at their disposal, allowing them to practically 'delve more deeply' into interpretive sources put forth by litigants.[111] Finally, the day-to-day *experience* of immersion in the relevant subject-area of law provides agency decision-makers 'tacit knowledge' of the matrix of considerations that inhere in 'polycentric' decisions of interpretive choice.[112]

On account of these epistemic advantages, bureaucrats in the Vermeulian paradigm are not constricted to the same formalist rules or 'cheap set' of interpretive methods as Vermeulian judges.[113] Whilst uncertainty means that *judges* cannot produce any predictable benefits through the use of more complex methodologies (such as consulting legislative history), the decision-theoretic calculus is different for agencies; Vermeule suggests agency-wielded interpretive methodologies have a 'positive expected value'.[114] He would thus argue that the NSW Department of Education in *Talua's case* were in a far better position than the presiding judge to both examine legislative history and understand how the suite of NSW discrimination provisions fit together.

Vermeule's anti-idealist regime ultimately employs 'sophisticated-sounding tools to reach a crude-sounding conclusion': whenever an alternative interpreter is available in the form of an Executive decision-maker, judges should give them authority to resolve statutory ambiguity.[115] Effectively doing away with judicial review of executive actions where there is ambiguity on the face, Vermeule acknowledges that his restrictive institutionalism would render judges mere 'humble' functionaries, subtracting the fun out of academic theorising in the field of statutory interpretation.[116] He asserts with bravado, however, that his simple formalist rules precipitate the best decisions available to real-world, *human* institutions.

D Practical Critiques of Vermeule's Proposal

This section outlines two criticisms that have been raised to-date against Vermeule's proposed regime, both from within the broader school of anti-idealist

109 Ibid 209, 215. See also Jonathan S Masur and Eric A Posner, 'Cost-Benefit Analysis and the Judicial Role' (2018) 85(4) *University of Chicago Law Review* 935, 937–940; Eric A Posner, 'Does Political Bias in the Judiciary Matter?: Implications of Judicial Bias Studies for Legal and Constitutional Reform' (2008) 75(2) *University of Chicago Law Review* 853, 874 <https://doi.org/10.2139/ssrn.1082055> ('Political Bias'); Ilya Somin, 'Libertarianism and Judicial Deference' (2013) 16(2) *Chapman Law Review* 293, 300; Barry (n 86) 211; Vermeule, 'Rationally Arbitrary Decisions' (n 78) 4.

110 Vermeule, *Judging under Uncertainty* (n 1) 210; Posner, 'Political Bias' (n 109) 867, 874.

111 Vermeule, *Judging under Uncertainty* (n 1) 209–10. See Nelson (n 20) 340.

112 Gersen and Vermeule (n 17) 1396.

113 Vermeule, *Judging under Uncertainty* (n 1) 212–14.

114 See Nelson (n 20) 355.

115 Ibid 340.

116 Vermeule, *Judging under Uncertainty* (n 1) 229.

thought and outside it. Each of these critiques relate to practical difficulties with the proposed model, however both seem to either overlook nuances in his prescriptions or cast them in a considerably uncharitable light.

1 Distinguishing Unambiguous and Ambiguous Statutes

Firstly, Farrelly and Siegel both criticise Vermeule's theory for requiring a distinction between 'clear and specific' and 'vague and ambiguous' statutory texts.[117] This distinction is key to his model, since it determines when judges should adopt a textualist methodology and when they should defer to agency interpreters. Farrelly argues that 'if a sufficient range of texts occupy a grey area … this would raise potential problems for Vermeule's formalism'.[118] Others also lament the use of a standard of plain meaning in statutory interpretation scholarship.[119]

However, Vermeule directly pre-empts this criticism, clarifying that judges ought to defer to agencies whenever the statutory text contains any '*reasonable* basis for interpretive dispute'.[120] Given the objective of agency deference is to mitigate uncertainty, the threshold most relevant to Vermeule's anti-idealistic judges is the existence of a reasonable degree of ambiguity. In such cases, the text would be sufficiently ambiguous to outgrow 'plain meaning' textualism and require agency deference. Further, Vermeulians could argue that if *absolute certainty* were required where uncertainty exists, the result would be an infinite regress.

2 Ensuring Judicial Compliance

Secondly, Eskridge argues that even if the proposed 'no frills textualism' were adopted by the courts, it is unlikely that judges would be 'adventurous enough to adopt [it] … rigorously'.[121] Eskridge supposes that when conducting an interpretive process, Vermeulian judges would not be able to resist 'peeking' at disapproved sources of legislative history.[122]. He argues that these judges, 'closeting' normative influences (prompted by a covert 'understanding' of legislative purpose), would then simply 'shop for support' in dictionaries and other sources approved under the 'plain meaning' rule.[123] Ultimately, this would produce an 'unfortunate charade' whereby the costs saved by eschewing non-textual methods of interpretation are replaced by costly 'duelling' over dictionary meanings.[124] Ekins raises a similar criticism, arguing that in all cases the clear meaning of statutory texts is 'found and maintained only by smuggling in considerations' that go beyond sources contemplated by 'bare textualism'.[125]

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117 Farrelly (n 21) 226. See also Siegel (n 16) 418.
118 Farrelly (n 21) 226.
119 See King (n 54) 176.
120 Vermeule, *Judging under Uncertainty* (n 1) 233 (emphasis added).
121 Eskridge, 'No Frills Textualism' (n 13) 2055–6.
122 Ibid 2055.
123 Ibid 2056.
124 Ibid.
125 Ekins (n 35) 13. Ekins doubts whether there is a stable foundation for bare textualism at all, questioning 'clear meaning' as a concept: at 12–13.

Whilst this is a more substantial practical criticism, it nevertheless rests on a rather uncharitable portrayal of the proposed model, wherein Vermeulian judges are not very Vermeulian at all. A natural response in defence of the proposed regime would be that in a functioning Vermeulian paradigm, judges would not 'peek' at disapproved sources to avoid absurdity – instead, they would simply enforce the surface meaning of the unambiguous text and leave it to a responsive legislature to enact desired statutory corrections. However, given that Vermeule himself – like other anti-idealist scholars – is focused on the practicalities of judging carried on by human judges, he may have to concede to Eskridge and Ekins that disapproved sources of statutory meaning could potentially sneak their way into Vermeulian courts.

Nonetheless, each of these criticisms takes his proposed solution at its weakest, picking relatively 'low-hanging fruit' related to practicalities and implementation. The next section raises two more substantial, theoretical critiques that attack the foundations of the Vermeulian paradigm.

E Further Issues with Agency Deference

There are a number of fundamental issues that detract from the persuasiveness of Vermeule's proposal on a conceptual level. This Part raises two more substantial criticisms (extensions of existing critiques) directed towards the *efficacy* of his interpretive method, arguing that it lays no reliable claim to either eliminating conditions of uncertainty nor attenuating decision costs on a net basis. In other words, Vermeule's formalist solution is impaired by the very interpretive ailments it is trying to cure.

1 No Less Uncertain

At the core of the proposed anti-idealist regime is statutory construction carried out by agency interpreters, who are permitted (indeed, encouraged) to utilise a full range of interpretive methodologies.[126] While Vermeule acknowledges that agency interpreters are neither omniscient nor omnicompetent, a fundamental tenet of his model is the assertion that their relatively superior institutional capacities result in *less severe* conditions of uncertainty during decision-making. There is, however, no reason to believe that agencies have greater capabilities in the context of interpretive choice, and ultimately Vermeule is guilty of the same institutional 'nirvana fallacy' he ascribes to an entire history of 'first-best' interpretive scholarship. For as observed by Berger, the judicial branch's competence is not 'uniquely suspect'.[127]

Firstly, agency decision-makers face the same epistemic challenges as their counterparts on the bench. In his work admonishing 'hard look' rationality review of agency decision-making, Vermeule himself acknowledges 'the limitations of agency rationality', especially when making decisions 'shrouded in uncertainty'.[128]

126 See, eg, Vermeule, 'Interpretive Choice' (n 34) 79, 128.
127 Berger (n 66) 216.
128 Gersen and Vermeule (n 17) 1360, 1402.

He suggests that uncertainty is a 'chronic condition of agency policymaking', since bureaucrats 'make decisions under constraints of scarce time, information and resources'.[129] In his other work, Vermeule recognises that the resulting problems of uncertainty are transcientific ones that 'no human actor' can avoid.[130] An important implication is that the epistemic incapacities judges face when answering questions of interpretive choice are not ones amenable to remedy by some incremental improvement in technocratic ability or administrative experience. The formation of a fully 'epistemically justified' view over the value of different interpretive choices is indeed beyond human limits.[131]

Secondly, compared to judges, agency decision-makers face an equal or greater possibility of *error* when making interpretive decisions. It need not be laboured that the majority of judges – chosen from the most senior ranks of the legal profession – tend to be highly experienced and intelligent, having undertaken decades of both theoretical and practical training.[132] This is a key advantage when deliberating upon polycentric problems like those of interpretive choice. Perhaps more significant, however, is Vermeule's own criticism of the traditional 'many-minds argument', a theory that groups of decision makers (like in administrative agencies) make better decisions than individuals.[133] Quoting *Federalist No 58*, he asserts that 'an increase in the number of minds … causes a reduction in the quality of each mind'.[134] Even if the many minds of a bureaucratic agency *do* produce a superior decision, that decision will eventually '[come] to rest on the desk of a single [chief] mind' who must interpret it before issuing a final interpretation.[135] In this way, Vermeule *himself* enunciates key reasons to believe that agency offices are at least as prone to error as the judicial bench. Furthermore, as articulated by Chief Justice Gageler, the requirement of judges to give reasons – and thus partake in 'very slow thinking' – reduces the chance of making errors or producing decisions contaminated with 'blind spots'.[136] Agency decision-makers generally do not face the same requirements to give comprehensive reasons at the time of decision-making and are thus perhaps even *more* susceptible than judges to producing (very human) errors of judgment.

Examining his literature as a whole, there are grounds to accuse Vermeule of 'asymmetrical institutionalism' in the form of *agency* nirvana.[137] He appears to rely on 'armchair' beliefs about institutional capacities as intensely as the interpretation theorists he excoriates, overlooking key considerations that provide reason to believe that administrators are at least as fallible as judges. Ergo, uncertainty is at

129 Ibid 1357, 1390–1.
130 Vermeule, 'Rationally Arbitrary Decisions' (n 78) 4. See also Vermeule, 'Closure Problem' (n 6) 701.
131 Vermeule, 'Rationally Arbitrary Decisions' (n 78) 13–14.
132 See King (n 54) 61.
133 See generally Adrian Vermeule, 'Many-Minds Arguments in Legal Theory' (2009) 1(1) *Journal of Legal Analysis* 1 <https://doi.org/10.4159/jla.v1i1.7> ('Many-Minds Arguments').
134 Ibid 26 [62], quoting James Madison, 'No 58: Madison' in Clinton Rossiter (ed), *The Federalist Papers* (New American Library, 1961) 356, 360.
135 Vermeule, 'Many-Minds Arguments' (n 133) 34–5 suggests that at this point, 'a kind of epistemic slack arises'.
136 Gageler (n 9) 842, 846; King (n 54) 165, 167, 263. See generally Daniel Kahneman, *Thinking, Fast and Slow* (Penguin Press, 2012).
137 Vermeule, *Judging under Uncertainty* (n 1) 233.

least *neutral* between judicial and agency interpreters – eliminating it as a decisive advantage of Vermeule's proposed method.

Further, his proposed method also introduces *additional* uncertainty into the overall decision-making process through its use of an 'anchoring' heuristic.[138] A 'common ploy' for advocates of legal formalism, Vermeule's judges employ an anchoring or 'master' heuristic through their decisions to defer to agency bodies; these are decisions that are themselves made under uncertainty.[139] Just as he characterises the consultation of legislative history as a mere heuristic for first-best ambitions of *legislative* supremacy, his act of deference to administrators is a similar 'shortcut' to advance his own high-level conceptual commitment to *agency* supremacy.

In effect, seeking equally conjectural benefits as other theorists, Vermeule's method replaces judges' substantive interpretive heuristics with a 'procedural' heuristic – simply handballing the problem of uncertainty onwards to agencies who will then pick up where the judiciary left off.

2 Increased Costs

If agencies do not necessarily make decisions under any lesser conditions of uncertainty than judges, then the only reason why agency heuristics would be preferable to judicial heuristics would be because agencies encounter fewer decision costs. However, cost-saving at the bench may indeed result in greater *net* costs to the legal system and statutory process at large.

There are a number of costs that would arise as a corollary to Vermeule's anti-idealist regime – each of which he neglects to address. Firstly, as previously raised, he defends the first ('plain meaning') rule of his method by arguing that possible absurdities arising from literal interpretation will be corrected by the legislature; he encourages his critics to consider the 'dynamic' or 'system effects' of interacting institutions.[140] In response to this, Eskridge accuses him of having an unduly romanticised conception of the legislature as attentive, resourceful and responsive enough to perform the ambitious corrective function he envisages.[141] Looking beyond Eskridge's retort and assuming the legislature *does* behave in the way he intends, Vermeule nonetheless appears to overlook the enormous cost (and opportunity cost) involved in Parliament carrying out a corrective function in respect of absurdities that the court could have remedied itself. Anticipating this criticism, Vermeule suggests Parliament would actually *save* on costs currently associated with correcting erroneous judicial determinations of legislative purpose.[142] In doing so, however, he assumes a highly asymmetrical assessment of institutional capacities, vastly overstating the frequency of judicial error relative to the number of statutes from which absurdities would undoubtedly arise under his literal 'bare textualism'.

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138 See Barry (n 86) 37.

139 See King (n 54) 262 on the use of 'anchoring heuristics' by formalist theorists.

140 See, eg, Adrian Vermeule, 'System Effects and the Constitution' (Discussion Paper No 642, John M Olin Center for Law, Economics, and Business, July 2009) 1, 3 ('System Effects').

141 See Eskridge, 'No Frills Textualism' (n 13) 30.

142 Vermeule, *Judging under Uncertainty* (n 1) 27.

Another 'dynamic effect' contributing to additional costs under the proposed model is the likely change in Parliament's drafting technique.[143] Anticipating the need to spend time correcting absurdities, the legislature would likely incur greater up-front costs in the statutory drafting process, seeking to create more descriptive, code-like laws amenable to textualist judicial interpretation. Vermeule himself recognises that the 'most striking fact about Congress is its severely constricted agenda' and 'tight deliberative constraints of time and information'.[144] His own proposal, however, appears to reduce costs for the judiciary whilst pushing them 'dynamically' onto that already inundated legislature.

Further – a point raised by Eskridge – Vermeule's institutional cost-benefit calculus also fails to consider the 'loss-of-legitimacy costs' associated with a judiciary that intentionally enforces absurd results.[145] Adopting this argument, *even if* his 'aggressive textualism' resulted in net cost savings across the judiciary, legislature and executive, the legal system as a whole would incur enormous *social costs* and '[haemorrhage] legitimacy' quickly.[146]

Whilst the 'dynamic' incremental costs highlighted in this section admittedly cannot be quantified with empirical evidence, neither can Vermeule's conjectured cost-savings. Ultimately, however, there are a number of intuitive reasons to believe that a regime of 'plain meaning' textualism and agency deference would not produce *net* cost savings in the medium or long-term – thus eliminating costs too as a decisive advantage of the proposed method.

F Taking Stock

Vermeulian anti-ideal theory advances two fundamental justifications for its favoured interpretive method: (1) that textualism combined with agency deference allocates interpretive tasks to the most epistemically capable institutional decision-maker, thus ameliorating the problem of uncertainty; and (2) that such a regime results in 'enormous' cost savings.[147] Whilst these are important practical goals worth pursuing, this Part has argued there is no reason to believe the efficacy of Vermeule's anti-idealist method in achieving either of them. Arguably, there is reason to believe the opposite.

III AN ANTI-IDEALIST DEFENCE OF JUDICIAL REVIEW

This Part argues that judicial review of executive action is defensible on theoretically-consistent, least-worst institutional grounds. It proposes that even if Vermeule's formalism *were* practically feasible and even if it *were* effective in reducing uncertainty (defeating the practical and theoretical criticisms raised in Part II), there is still reason for the judiciary to retain its independent, norm-creating

143 This likely 'system effect' is contemplated by Siegel: see Siegel (n 16) 416.
144 Garrett and Vermeule (n 16) 1290.
145 See Eskridge, 'No Frills Textualism' (n 13) 2053.
146 Ibid 2055.
147 Vermeule, *Judging under Uncertainty* (n 1) 194.

powers of statutory interpretation. To reiterate, a fundamental tenet of Vermeulian scholarship is that previous theorists wrongfully limited their institutional considerations to the first-best *ambitions* of interpreters. Vermeule proposes this is not sufficient – that it is critical to understand their institutional *capacities* to actually interpret well. This Part argues that, when viewed from his own anti-idealist watchtower, Vermeule does not go far enough: highlighting agencies' mere *capacity* for greater expertise is not sufficient to justify hyper-deference of the kind his scholarship endorses.

In order to continue the anti-idealist 'turn' set into motion by scholars such as Sunstein, Thaler and Komesar and advanced by Vermeule, it is crucial to examine the behaviour of institutional actors at an even greater level of granularity. In doing so, this Part provides anti-idealistic, practically-focused reasons to believe that, given the *motivational* pulls structurally impacting them as decision-makers, agency interpreters may not always behave at their theoretical 'maximum epistemic capacity'. These motivational pulls – internal 'ecological' institutional features that affect the cognition of decision-makers – can be understood through considerations of behavioural economics, political science and decision theory. Learnings from public choice theory,[148] in particular, provide powerful anti-idealistic grounds for rejecting the Vermeulian proposal and retaining the independent judicial review function.[149]

A Idealistic Defences of Judicial Review

Idealistic understandings of judicial review, appealing to concepts such as the separation of powers or rights-protection, are soft targets for anti-idealists like Vermeule.[150]

1 Traditional Separation of Powers Argument

In order to defeat Vermeule's anti-idealist proposal on consistent anti-idealistic grounds, it is important to understand his position as a symptom of a broader worldview – that 'conservatives should focus less on limiting government' and more on 'ensuring that the ruler has the power to rule well'.[151] For instance, he would reject defences of judicial review that rely on classic notions of 'separation of powers' or 'checks and balances'.

The 'first-best' separation of powers doctrine was invoked by the High Court in *Corporation of the City of Enfield v Development Assessment Commission* to reject *Chevron*-style judicial deference in the Australian context.[152] The Court

148 As coined by James M Buchanan and Gordon Tullock, *The Calculus of Consent* (University of Michigan, 1962) ix, xiii, 72. See also James M Buchanan, 'Public Choice: Politics Without Romance' (2003) 19(3) *Policy* 13, 13 ('Public Choice'), describing public choice theory as a 'research programme' of economics.

149 Such as the judicial review function prescribed by *Australian Constitution* s 75(v).

150 Note these 'idealist defences' are also used to defend judicial review of *legislation*.

151 Brooke Masters, 'Adrian Vermeule's Legal Theories Illuminate a Growing Rift among US Conservatives', *Financial Times* (online, 14 October 2022) <https://www.ft.com/content/5c615d7d-3b1a-47a2-86ab-34c7db363fe4>. See Adrian Vermeule, 'Beyond Originalism', *The Atlantic* (online, 31 March 2020) <https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/> ('Beyond Originalism').

152 (2000) 199 CLR 135.

found that this kind of deference involved an 'abdication of judicial responsibility' with 'undesirable consequence[s]' in light of Australian public law's conception of judicial power and its separation from the political branches.[153] Vermeule's work contemplates this traditional defence of judicial review, albeit in the American context, acknowledging that at the time of the United States' foundation, both factions 'were united on the view that the separation of powers, and various structures of checks-and-balances, were best justified as precautions against abuse of power'.[154] The response of the strong anti-idealist is predictable, however: he would reject a separation of powers defence of judicial review (like that endorsed by the Australian High Court) on the basis that it simply assumes some value in judicial oversight that is *exogenous* to the interpretive process. That is, notions of 'checks and balances' are merely 'first-best' conceptual commitments rather than practically-grounded advantages of judge-led interpretations. And, thus, the Australian Court's invocation of the separation of powers doctrine as its current justification for a strong judicial review function – and rejection of *Chevron*-style deference – would not stand up on strong anti-idealist grounds.

Further, from Vermeule's perspective, 'protections' such as the separation of powers and checks and balances are merely 'wholesale principles' of institutional design.[155] They serve only to 'create gridlock' and make it difficult for elected legislatures and democratically accountable agencies to pass necessary reform.[156] This stance reflects an overarching perspective that there is no place for counter-majoritarian judges to invoke empirically-unjustified philosophical commitments in order to circumvent the powers of the politically-accountable executive government.[157]

2 Rights-Protection Argument

In a similar vein, one could argue that a minimalist account of judicial review places the fate of fundamental rights and freedoms in the hands of the political branches, failing to adequately guard against the 'tyranny of the majority'.[158] The anti-idealist Vermeulian response is again predictable: rights protection is merely a first-best ideal, and there is reason to be sceptical about *a priori* judicial theorising about rights without empirical evidence of the connection between judicial review and successful rights protection.[159]

In response, defenders of judicial review might point out that a hyper-deferential, Vermeulian approach to cases like *Brown* and the hypothetical *Talua's case* would effectively give a green light to the racial segregation of school-children. Vermeule, however, anticipates such an argument and cautions his critics against

153 Ibid 152 [41]–[42] (Gleeson CJ, Gummow, Kirby and Hayne JJ).
154 Vermeule, *Constitution of Risk* (n 13) 31. See also Cross (n 47) 1014.
155 Vermeule, *Constitution of Risk* (n 13) 36.
156 Ibid 65–6.
157 See, eg, Vermeule, 'Beyond Originalism' (n 151).
158 See Farrelly (n 21) 217.
159 See King (n 54) 138.

employing 'case consequentialist' justifications for judicial review.[160] He laments the proclivity of theorists to 'subscribe to [a] small set of precedents', reflecting the 'faith that "I can have all the invalidations I like and none of the ones I don't" – a perfectionist faith that overlooks the fallibility of judicial institutions'.[161] Results like that of *Dred Scott v Sandford* ('*Dred Scott*') – where the US Supreme Court struck down the human rights-enforcing actions of the political branches to instead uphold slave ownership – are also the product of strong-form judicial review.[162]

As such, Vermeule argues that his set of formalist rules yields the best *net* consequences since 'judicial review can be argued to block legislative or executive measures … necessary to implement rights or to *protect* rights against private violation'.[163] He is thus untroubled by such 'libertarian' defences of judicial review, suggesting that 'inserting an additional veto point' into democratic action 'does not provide a "hedge" against legislative underprotection [sic] of fundamental rights' – it simply 'threatens *erroneous* underprotection [sic] of fundamental rights' like in *Dred Scott*.[164]

B An Anti-Idealist Defence of Judicial Review

However, there is a theoretically-consistent, anti-idealist way to *defend* strong-form judicial review. Avoiding first-best concepts like separation of powers or rights, the following section asserts the value in maintaining judicial oversight on distinctly *Vermeulian* bases. Highlighting the politically-costly nature of statutory constraints on administrative discretion, this section invokes public choice theory and behavioural economics to argue there is reason to believe that bureaucrats are (a) systematically disincentivised from applying their epistemic capacities to the fullest and (b) systematically incentivised to aggrandise their own powers in myopic, self-interested ways. Therefore, even if judges *are* epistemically inferior to their executive agency counterparts, the nature of each institution's respective 'ecological' features (and associated motivational pulls) necessitates a more comprehensive judicial interpretive function than Vermeulian theory allows.

1 Looking Beyond Capacity: Public Choice Theory and Behavioural Economics

For a long time, 'virtually unknown in legal scholarship', public choice theory has sought to explain 'rational public choice' within the institutional paradigm of the welfare state.[165] Deploying 'downright depressing' assumptions about human behaviour using concepts from economics, the public choice school – led by Buchanan and Tullock – has 'revolutionized the study of democratic decision-

160 See, eg, Vermeule, 'System Effects' (n 140) 40.
161 Vermeule, *Judging under Uncertainty* (n 1) 281, 1295.
162 60 US 393 (1857) ('*Dred Scott*'). See ibid 231.
163 Vermeule, *Constitution of Risk* (n 13) 70 (emphasis added).
164 Ibid (emphasis added), quoting Mark Tushnet, 'How Different are Waldron's and Fallon's Core Cases For and Against Judicial Review?' (2010) 30(1) *Oxford Journal of Legal Studies* 49, 61. See also King (n 54) 156.
165 Posner, 'Political Bias' (n 109) 879.

making processes'.[166] Specifically, noting the almost Vermeulian anti-idealistic language of Buchanan, public choice theory has provided an 'avenue through which a romantic and illusory set of notions about the workings of government' can be replaced with more empirically-grounded, realistic understandings.[167]

The common denominator between the public choice school of thought and anti-idealist legal theorising is the invocation of principles from behavioural economics. Indeed, it has been recognised that public choice accounts of legislation 'can work productively with behavioral accounts'.[168] The analysis of prominent behavioural economists such as Sunstein, Jolls and Thaler opposes itself to more '*standard* economic principles', which Becker summarises as the maximisation of utility, from a stable set of principles, by individuals who accumulate the optimal amount of information in a variety of markets.[169] However, as enunciated by Sunstein, Jolls and Thaler, the relevant economic enquiry is to explore 'the implications of actual (not hypothesised) human behaviour' – examining how real-life institutional actors depart from the standard economic model of *homo economicus* with their 'bounded rationality, bounded willpower, and bounded self-interest'.[170] Anti-idealist behavioural economists in the legal realm suggest that the standard assumptions of neoclassical economics will prove 'sometimes useful but often false', given decision-makers are afflicted with biases such as overoptimism and myopic temptations.[171] Indeed, they suggest that such limitations point to 'systematic (rather than random or arbitrary) departures from conventional economic models', enabling 'sound predictions and prescriptions for law' when applied to different possible institutional decision-makers.[172]

In a similar vein, public choice theory is focused on explaining *political* outcomes 'as a function of self-interested human behaviors', assuming that just as voters 'vote their pocketbooks', parliamentarians methodically pursue re-election and bureaucrats strive to advance their own careers and the size of their departmental importance and budget.[173] For public choice theorists, legislation and administrative action are effectively economic transactions in which third-party interest groups provide *demand* and politically-responsive institutions provide

166 Jerry L Mashaw, *Greed, Chaos, and Governance: Using Public Choice to Improve Public Law* (Yale University Press, 1997) 15 ('*Using Public Choice*'); William F Shughart II, 'Public Choice', *Econlib* (Encyclopedia) <https://www.econlib.org/library/Enc/PublicChoice.html#:~:text=Public%20choice%20has%20revolutionized%20the%20study%20of%20democratic%20decision%2Dmaking%20processes>. See generally Buchanan and Tullock (n 148). See also Jim Rossi, 'Public Choice Theory and the Fragmented Web of the Contemporary Administrative State' (1998) 96(6) *Michigan Law Review* 1746, 1746 <https://doi.org/10.2307/1290103>.

167 See James M Buchanan, 'Politics Without Romance: A Sketch of Positive Public Choice Theory and Its Normative Implications' in James M Buchanan and Robert D Tollison (eds), *The Theory of Public Choice* (University of Michigan Press, rev ed, 1984) 11 ('*A Sketch of Public Choice*').

168 Sunstein, Jolls and Thaler (n 4) 1543.

169 Ibid 1476 (emphasis added). See also Gary S Becker, *The Economic Approach to Human Behaviour* (University of Chicago Press, 1976) 14.

170 Sunstein, Jolls and Thaler (n 4) 1476 (emphasis omitted).

171 Ibid 1545.

172 Ibid 1477.

173 Rossi (n 166) 1752, quoting Mashaw, *Using Public Choice* (n 166) 11; Shughart (n 166). See also Spence and Cross (n 15) 102; Garrett and Vermeule (n 16) 1287.

supply.[174] Fundamentally, public choice theory diagnoses the typical bureaucrat with an inability to fully 'shift [their] psychological and moral gears' as they transition each day from their self-interested 'private' mind to their 'public' office; the transition from private to public life does not render them 'economic eunuchs'.[175] At its core, public choice theory extends notions of the profit motive from the economic world to the sphere of collective action.

Complementing public choice postulates are behavioural economists like Vernon Smith (recently cited by Chief Justice Gageler), whose 'neuroeconomics' suggests that the extent to which different institutional actors – whether judges, elected representatives, or public servants – are self-interested depends on the structure of their environment.[176] These *ecological* features of an institution refer to its 'established norms of conduct' or 'internal logic', which contribute 'important economising properties of how the brain works'.[177] Indeed, these theories allege that the decision calculus of institutional actors is 'diffused and dominated' by unconscious, automatic, neuropsychological systems manifesting in the form of *incentives, disincentives, nudges* and *motivations*.[178] In any case, whilst theories of 'ecological rationality', legal behavioural economics and public choice are distinct in origin, each provides a sceptical, anti-idealistic perspective on official behaviour that cautions against institutional design that leaves statutory interpretation in the hands of the political branches.

Anti-idealist legal scholarship, including that of Vermeule, is undoubtedly imbued with public choice and behavioural economics-type considerations. Just as public choice theorists reject the construction of idealised decision-making collectives such as 'the people' or 'the government', the anti-idealist school of thought rejects higher-level philosophies of interpretation that romanticise institutions: both seek to give primacy to institutional *realities*, even if that elicits a 'downright depressing' story.[179] Indeed, as part of his larger body of scholarship regarding government machineries, Vermeule himself explicitly contemplates 'corrupt self-dealing by officials' and 'politically influenced agencies', and suggests that agencies may 'choose suboptimal policies under the pressure of legislators [or] interest groups'.[180] Despite this, however, he does not go so far as to properly imprint his own agency interpreters with the same anti-idealistic traits or limitations he ascribes to judges. The rest of this Part seeks to demonstrate how a very Vermeulian anti-idealism can indeed support a *defence* of strong-form judicial review.

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174 See, eg, William A Niskanen, 'Bureaucrats and Politicians' (1975) 18(3) *Journal of Law and Economics* 617, 618, 633 <https://doi.org/10.1086/466829>. Eskridge, 'Without Romance' (n 46) 285; Francesco Parisi, 'Public Choice Theory from the Perspective of Law' in Charles K Rowley and Friedrich Schneider (eds), *The Encyclopedia of Public Choice* (Springer, 2004) 214, 217 <https://doi.org/10.1007/978-0-306-47828-4_18>; Buchanan and Tullock (n 148) xvi.

175 Buchanan, 'Public Choice' (n 148) 14, 17; Buchanan and Tullock (n 148) 19.

176 Gageler (n 9) 837–8. See Smith (n 14) 498.

177 Smith (n 14) 468.

178 Ibid. See also Buchanan, 'Public Choice' (n 148) 15.

179 Mashaw, *Using Public Choice* (n 166) 15.

180 Vermeule, *Constitution of Risk* (n 13) i, 23, 165.

(a) Incentives Arising from Self-Interest

As enunciated in early public choice scholarship, agency actors have a natural tendency to seek to aggrandise the powers conferred on them by the legislature.[181] Public choice theory emphasises that for self-interested agency decision-makers (crudely described in some literature as 'aggressive turf grabbers'),[182] the ability to broaden statutory powers means greater administrative discretion, maximum implementation of preferred policies, and greater scope for promotion and bureaucratic prestige.[183] Similarly, Sunstein, Jolls and Thaler observe that 'government will often be subject to cognitive and motivational problems even if it is *not* populist', 'distortions' that undermine conventional economic prescriptions.[184]

As Vermeule does, one could argue that judges are also influenced by self-interest – that 'risks of partiality and bias … arise on all sides of the relevant institutional questions'.[185] Indeed, a number of theorists have questioned 'the melange of glorification, celebration, and adoration' that is 'firmly rooted in … popular consciousness' and pervades much of academic thinking about judges.[186] They argue that judges too seek to maximise a utility function that includes both monetary and nonmonetary elements, the latter including leisure, prestige and power.[187]

However, as articulated by Chief Justice Gageler, inherent in the *ecological* rationality of the judiciary are features that dampen any perverse motivational pulls that would otherwise corrupt the cognition of these 'very human' judges.[188] For starters, judges are typically appointed from senior ranks of the independent legal profession, at a stage in a legal career 'when ambition to succeed has given way to hope of contributing to the maintenance of the system'.[189] Indeed, judges can typically easily out-earn their legislation-fixed public wages in private practice,[190] and prestige is more linked to accuracy, fairness and a reputation for writing unreversible judgments ('viewpoints … that cannot be attacked as careless or subjective') than any product of a perverse course of action.[191] It has been affirmed with 'a measure of theoretical and empirical support' that the intrinsic satisfaction or 'self-interest' of judges is aligned closely with 'judging well'.[192] Further, according to Chief Justice Gageler, the 'mere existence of the appellate process … tends to reduce the incidence

181 See, eg, Niskanen (n 174) 618; Spence and Cross (n 15) 117.
182 Eskridge, 'No Frills Textualism' (n 13) 2059.
183 Spence and Cross (n 15) 117; Eskridge, 'No Frills Textualism' (n 13) 2059.
184 Sunstein, Jolls and Thaler (n 4) 1543 (emphasis added).
185 Vermeule, *Constitution of Risk* (n 13) 110; Frederick Schauer, 'Incentives, Reputation and the Inglorious Determinants of Judicial Behaviour' (2000) 68(3) *University of Cincinnati Law Review* 615, 616–25; Barry (n 86) 186.
186 See, eg, Schauer (n 185) 615, 624; Barry (n 86) 91; Richard A Posner, 'What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)' (1993) 3 *Supreme Court Economic Review* 1, 14 <https://doi.org/10.1086/scer.3.1147064>.
187 See Barry (n 86) 91–9; Schauer (n 185) 615–25 offering a 'candid look at judicial motivation'.
188 Barry (n 86) 92. See also Gageler (n 9) 830, 834.
189 Gageler (n 9) 838.
190 See Barry (n 86) 93, 103; Robert D Cooter, 'The Objectives of Private and Public Judges' (1983) 41(1) *Public Choice* 107, 129 <https://doi.org/10.1007/BF00124053>.
191 Eskridge, 'Without Romance' (n 46) 306. See also Barry (n 86) 102.
192 Gageler (n 9) 839, citing Barry (n 86) 99–103, 109–10.

of judicial error warranting … correction'; judges are not likely to be 'happy to be told publicly by other judges that he or she has been wrong'.[193] Despite what may be of inter-and-intra departmental competition, it cannot be said that administrators' individual decisions are subject to the same entrenched and transparent structures of scrutiny.

It could be argued that judges are motivated by the prospect of promotion to higher courts, but scholars note that the process of promotion within the judicial system is 'too random to discipline judges effectively'.[194] The aforementioned 'ecological' features of the judiciary go some way in explaining why economists have not had much success in creating a theory to explain the objectives of judges.[195]

(b) Incentives Arising from the Legislature

The ecological, cognitive features of administrative agencies are also shaped by legislators, who control bureaucratic budgets and prerogatives. This is problematic even where the interpretive task at hand is ostensibly the discovery of legislative intent. Since the constituencies of elected legislators are geographically-based, individual legislators are strongly incentivised to support policies that benefit voters in their home electorates whilst being financed by taxpayers from all electorates.[196] Jerry Mashaw suggests that self-interested administrators recognise parliamentarians' electoral incentive to 'pork-barrel' in this way and '[trade] favours to powerful legislators … for aggrandizement of bureaucratic budgets or prerogatives'.[197] Indeed, a key underlying belief of public choice theorists is that the growth of the bureaucratic sector of government is best explained by 'competition between political agents for constituency support' through discriminatory transfers of wealth.[198]

In *Talua's case*, for instance, the narrow interpretation of section 34(5) of the *Education Act* advanced by Department of Education bureaucrats was likely influenced – if not entirely determined – by pressure from MPs in Western NSW electorates.[199] Public choice theorists would suppose that in pleasing these MPs, who might suffer consequences at the voting box should they not respond to calls to separate low-performing (predominantly Indigenous) students, Department of Education decision-makers acted to ensure their ongoing employment, agency budget and political support for other preferred policies.

In respect to the pressures that bear upon judges, Robert Dahl's seminal text contends that the judiciary is not entirely independent or counter-majoritarian but in reality often aligns with the dominant political coalition, especially on issues involving rights protection. Writing of the US context, Dahl observes that 'the

193 Gageler (n 9) 844–5.

194 Cooter (n 190) 129. Cooter argues that promotion, like income, is 'unrelated to measurable performance': at 107.

195 Ibid 107.

196 See Rubin, 'Administrative State' (n 3) 410; Buchanan, 'Public Choice' (n 148) 14.

197 Mashaw, 'Using Public Choice' (n 166) 21. See also Rossi (n 166) 1762.

198 See Buchanan, 'Public Choice' (n 148) 15.

199 Contrasting the 'anti-public choice theory' view that the decision was motivated by a genuine desire to improve education for lower socio-economic groups.

policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities'.[200] He notes that 'on political grounds' it is 'unrealistic to suppose that a Court whose members are recruited in the fashion of Supreme Court justices would long hold to norms of Right or Justice substantially at odds' with the political arms.[201] It is worth acknowledging, though, that whilst Australian judges are appointed by members of the executive branch like their US counterparts, Dahl's observations (as they did in the 1950s) carry greater weight in the context of the American judiciary.

However, even if Australian judges *were* politically impacted in the way Dahl describes, as observed by scholars from both the anti-idealist and public choice schools of thought, judges *nonetheless* have 'a degree of insulation from populist pressures' that members of the other branches do not.[202] Institutional features of the judiciary, such as the deliberate process of procedural rules that promote impartiality (eg, precedent or the adversarial system), mean that judges are better-protected from the perverse motivational pulls faced by decision-makers in collective organisations with electoral norms. As many have highlighted, 'agency heads … can be fired, whereas federal judges have lifetime tenure' and fixed remuneration.[203]

These 'systemic features', coupled with judges' removal from primary policy formulation and implementation, result in a judiciary that is on an institutional level not as directly or intensely responsive as the executive or legislature to ordinary politics or the 'partisan interests of political masters'.[204] For as Chief Justice Gageler suggests, to the extent that members of the political branches can be conceived of as competitors in a market for resource allocators, the aforementioned 'ecological' characteristics of the courts 'serves to shield the judge from the economic discipline that would automatically apply were [they] … a competitor in a market for legal services'.[205] It is this very nonaccountability of judges that gives them the relative freedom to make otherwise politically-costly interpretive decisions 'without falling athwart the dilemma of the ungrateful electorate': as articulated by Cooter, public judges pay a 'smaller price' relative to their counterparts within the other branches 'for not attending to the concerns of their immediate litigants'.[206] Dixon's recent text heralds a robust conception of judicial review as protecting against risks of democratic disfunction, in part arising from inertia of the executive and legislative arms to apply sensible – yet politically-costly – moderations to the scope of their own power.[207]

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200 See Robert A Dahl, 'Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker' (1957) 6(2) *Journal of Public Law* 279, 285.

201 Ibid 291.

202 Sunstein, Jolls and Thaler (n 4) 1544. See also Barry (n 88) 91–9; Schauer (n 185) 625–34 offering a 'candid look at judicial motivation'.

203 Posner, 'Political Bias' (n 109) 875. See also Schauer (n 185) 622; Cooter (n 190) 128–9. Each discusses United States federal judges.

204 Masur and Posner (n 109) 4.

205 Gageler (n 9) 847.

206 Eskridge, 'Without Romance' (n 46) 305; Cooter (n 190) 131. See also Schauer (n 185) 622–3.

207 Dixon (n 10) 14.

(c) Incentives Arising from Third Parties

Thirdly, public choice theory postulates that governmental machineries often exhibit features of 'capture' by the very interests they are meant to regulate. This 'harmful tunnel vision' on the part of agency officials means they are more likely to give in to powerful rent-seeking influences as a result of a need for industry cooperation and even a self-interested desire for 'postgovernment [sic] employment opportunities'.[208] There have been a number of other reasons proffered for the existence of agency capture, however most ultimately describe this phenomenon as a pernicious, anti-democratic and corrosive pressure on the bureaucrat's cognition.[209] Agency decision-makers in *Talua's case*, for example, likely made their interpretive decision regarding section 34(5) under enormous interest group pressure in the form of lobbying from teachers' unions and Western NSW parents' associations.[210]

Rubin seeks to apply similar public choice principles to judges: he argues that just as interest groups employ lobbyists to secure favourable bureaucratic and legislative treatment, they employ lawyers to secure favourable *judicial* treatment.[211] However, it is unlikely that the incidence and influence of group behaviour are so severe in the judicial arena as to effect any significant degree of motivational capture upon judges. For instance, the adversarial nature of court proceedings mean that judges will most often not have the same severe degree of asymmetry of perspectives as agency decision-makers. Secondly, the greater requirement on judges to provide reasons for their decisions and interpretations, which are also subject to further scrutiny on appeal and in academia, 'obscures rates of … non-expert influence'.[212] Finally, as previously mentioned, judges' fixed salary and security of tenure leave them with 'few incentives to cosy up to interest groups', who in the vast majority of situations 'can do them no good'.[213] These are key institutional features that contribute to the ecological rationality of the judiciary – key reasons to believe that judges are *less-worse* than bureaucrats in interpreting the scope of statutory powers.

2 Impact on Vermeule's Thesis

In light of public choice and behavioural economic considerations, the foundational institutional pillars of the Vermeulian paradigm – inexorable in the face of traditional 'separation of powers' or 'rights protection' type critiques – begin to weaken. The following argues that 'ecological' features of the executive

208 Eskridge, 'No Frills Textualism' (n 13) 2058; Nelson (n 20) 351. See also Buchanan, 'Public Choice' (n 148) 15.

209 See, eg, Spence and Cross (n 15) 114; David B Spence, 'Agency Discretion and the Dynamics of Procedural Reform' (1999) 59(5) *Public Administration Review* 425, 425 <https://doi.org/10.2307/977425>; Somin (n 109) 299; King (n 54) 166; Buchanan and Tullock (n 148) 286.

210 *Education Act* (n 24) s 34(5).

211 Paul H Rubin, 'Common Law and Statute Law' (1982) 11(5) *Journal of Legal Studies* 205, 207 <https://doi.org/10.1086/467698> ('Common Law'). See also Barry (n 86) 208; Cooter (n 190) 108; Vermeule, 'Judicial Competence' (n 2) 1891.

212 King (n 54) 230.

213 Eskridge, 'Without Romance' (n 46) 305.

branch disincentivise administrators from using their full epistemic capacities and from self-applying limits to their statutory powers.

(a) Corrosion of Administrators' Institutional Capacities

Whilst public choice theory does not generally specify that any kinds of power arrangements are desirable or undesirable (it does not provide a 'self-conscious normative critique'), the foregoing analysis of institutions' respective ecological features has clear normative consequences.[214] Whilst both Vermeule and Posner identify the politicisation of agencies as a *virtue* in statutory interpretation, the other side of the same coin is a susceptibility to perverse political incentives that can lead decision-making astray.[215] The ecological features of the executive branch are imprinted on each bureaucrat's individual cognition and motivations, such that what 'may nominally be about implementing [or interpreting] law, may often be based more on political doctrine and less on expert advice'.[216] Indeed, even if administrators do have greater technical ability, what good would this do if those same individuals are systemically incentivised to make decisions at suboptimal operating capacity? The US federal case of *Gilbertson v Allied Signal* provides a statement of caution against deference in these circumstances: 'Deference to the administrator's expertise is inapplicable where the administrator has failed to apply his expertise to a particular decision.'[217]

A number of scholars have provided accounts of politically-influenced agency decision-making where expertise or 'maximum epistemic capacity' is relegated behind illegitimate considerations. Some observe this kind of bureaucratic conduct in the phenomenon of 'institutional flip-flopping', where an administrator's position on a question depends on 'what particular political outcome will result'.[218] Others suggest that where expertise has given way to self-interest or rent-seeking, administrators will justify their decisions as the product of 'intuition' or 'tacit knowledge' – a 'hallmark of a cruel, Kafkaesque bureaucracy'.[219] Finally, Vermeule himself contemplates sub-optimal decision-making by agencies when he describes the 'science charade' of 'strategic use of … technocratic arguments' in service of ulterior aims despite awareness that scientific consensus has not yet gelled.[220] Indeed, it is perplexing that Vermeule – a staunch opponent of independent judicial review – even acknowledges in one publication the need for 'precautions against corrupting political influences on technocratic expertise'.[221] Solan's analysis of 'opportunistic textualism' claims that the same flip-flopping can be observed at

214 See Spence and Cross (n 15) 104.

215 See Vermeule, *Judging under Uncertainty* (n 1) 47; Posner, 'Political Bias' (n 109) 875.

216 King (n 54) 225; Carol Harlow and Richard Rawlings, *Law and Administration* (Cambridge University Press, 4th ed, 2021) 21 <https://doi.org/10.1017/9781316576496>.

217 328 F 3d 625, 632 (McConnell J for the Court) (10th Cir, 2003).

218 Eric A Posner and Cass R Sunstein, 'Institutional Flip-Flops' (2016) 94 *Texas Law Review* 485, 485, 487 <https://doi.org/10.2139/ssrn.2553285>.

219 See King (n 54) 228–30. See also Masur and Posner (n 109) 15; Vermeule, 'Rationally Arbitrary Decisions' (n 78) 19.

220 Vermeule, *Constitution of Risk* (n 13) 164.

221 Ibid 22.

the bench – as judges 'often enough subordinate their [declared] bent' towards a particular interpretative method 'when it suits' the legislative will on a case-by-case basis.[222] However, even if we take this to be true at the margins, the relative insulation of the judicial arm in Australia from the political branches makes it less likely that judges will be politically or externally influenced to flip-flop in this way.

(b) Politically Costly Moderation of Power

Not only do the relatively perverse motivational pulls reduce agency decision-makers' operating capacities, they also disincentivise bureaucrats from self-applying sensible limits to their statutory powers. This is a key danger under the Vermeulian model – one that he fails to adequately address. When an agency is permitted to determine the reach of its own jurisdiction without any oversight (by having the authority to resolve statutory ambiguities in its own favour), incentives created by self-interest, by the legislature and by interest groups will likely '[propel] the agency toward ever more expansive interpretations of the law'.[223] Per Steven Rares, '[j]udicial review is about power'; the ecological features of the executive provide grounds to believe that administrators are systematically incentivised to expand their own.[224] Axiomatically, if an interpretive regime recommends deference to agencies in cases where they refuse to impose statutory limits on themselves, then it is endorsing this corrupt form of interpretive decision-making.

In the context of *Talua's case*, the NSW Department of Education is exposed in significant ways to the political costs of failing to implement its policy of school designation: if it failed to take action to separate the schools, its Minister would likely fall out of favour with key constituencies in Western NSW. In deferring to this perverse calculus for statutory interpretation, Vermeulian deference would give effect to the Department's preferred lax interpretation of the constraints imposed by section 34(5) of the *Education Act*, extending the boundaries set by the legislature under existing law. However, since judges lack exposure to the same political repercussions, they are theoretically far more likely to apply the politically-costly limits imposed by statutes.

(c) System Effects

Vermeule postulates that any worthy theory of interpretation must take a 'systemic approach', recognising that 'the choices of legal actors are strategically interdependent' and that the best course of action for any institutional actors depends on what other actors do.[225] He diagnoses theorists who neglect system effects with 'a sophisticated form of [naivety]' – blindness to 'the consequences of [institutional] behaviour in our fallen world'.[226] This idea is not Vermeulian per

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222 Lawrence M Solan, 'Opportunistic Textualism' (2010) 158(1) *University of Pennsylvania Law Review* 225, 227–34.

223 See Spence and Cross (n 15) 113. See also Somin (n 109) 298–9, 305, 307.

224 Steven Rares, 'Judicial Review of Administrative Decisions: Should There Be a 21st Century Rethink?' (Speech, Administrative Law Masterclass University of New South Wales, 15 October 2014) 3 [7].

225 Vermeule, 'System Effects' (n 140) 1, 3. See also Vermeule, 'Judicial Review' (n 61) 1654.

226 Vermeule, 'System Effects' (n 140) 45.

se – scholars like Posner and Jeff King have articulated that institutional designers must 'understand how different levels of judicial review affect the behavior of agencies'.[227]

The system which he proposes – one which effectively eliminates the judicial oversight function in respect of agency decisions[228] – would have the effect of dramatically *exacerbating* the perverse motivational incentives discussed previously. Indeed, when one considers the net, long-term equilibrium effects of a system without a judicial review mechanism, the term 'moral hazard' springs to mind. It is reasonable to expect that if judges were to simply and systematically accept agencies' views, the perceived freedom on the part of agencies to give in to perverse incentives would only intensify. Given the ecological features of the executive branch discussed in this Part, there is good reason to believe that under a system of agency deference, there would be an even lesser deployment of expertise and an even greater tendency by emboldened administrators to adopt more expansive interpretations of legislation.

(d) The Benevolent Bureaucrat?

It might be raised, however, that a balanced institutional account must acknowledge the *positive* features of agencies' ecological rationality. Indeed, several of Vermeule's pro-deferential contemporaries have urged the need to recognise the 'civic virtue', 'public spirit' and 'desire to contribute to sound policy' that *also* shape the calculus of bureaucrats.[229] That is, not all administrators are self-interested budget maximisers and, even if they are, these motivations are not always determinative when making decisions or interpreting statutes. Even Buchanan, a founding father of public choice theory, recognises the possibility that some bureaucrats are 'differently motivated when they are choosing "for the public"' and 'act to a degree in terms of what they consider to be the general interest'.[230] Others raise that not all exercises of agency authority are made under *threat* – that politically-charged circumstances like that of *Talua's case* are the exception rather than the norm. Indeed, the economic model of behaviour reflected in public choice theory does not attempt to be a 'be-all and end-all of scientific explanation' but instead serves to highlight *one* of the many possible forces behind governmental actions.[231] Additionally, it must be acknowledged that the capacity and competence of each branch of government is not static – indeed, it varies between and within departments, courts and parliaments across jurisdictions. As cautioned by Berger, 'a deferential or undeferential general doctrine based on agencies' institutional features … risks applying generalizations about agency action to specific instances where they don't make sense'.[232]

227 See Posner, 'Political Bias' (n 109) 856; King (n 54) 142.
228 In cases involving statutory ambiguity.
229 See Spence and Cross (n 15) 100, 107; Eskridge, 'Without Romance' (n 46) 320.
230 Buchanan, 'Public Choice' (n 148) 17.
231 Ibid. See also Garrett and Vermeule (n 16) 1288.
232 Berger (n 66) 222.

Ultimately, the true *extent* to which bureaucrats are motivated (or not motivated) by perverse incentives is not something that can be proven.[233] Nonetheless, behavioural economics suggests that 'behavior is systematic and can be modeled', for even '*departures* from the standard conception of the economic agent … alter behavior in predictable ways'.[234] As articulated by Kenneth Arrow, 'there is no general principle that prevents the creation of an economic theory based on other hypotheses than that of rationality': any coherent theory of 'reactions to the stimuli appropriate in an economic context' could in theory lead to a predictable economic system.[235] Indeed, the observations of anti-idealist and public choice theorists are often 'robust, empirically documented phenomena that have reasonably precise implications for legal issues'.[236] Whilst judges do undoubtedly possess a 'wide range of abilities, work ethics, ideologies [and] temperaments', the various ecological features discussed in the comparative analysis mean that the variation in judges' abilities is still likely to be significantly smaller than the 'tremendous variation' between and within executive agencies in respect of 'qualifications, motivations, professional norms, backgrounds, ambitions [and] institutional commitments'.[237] To use the almost ironic words of Vermeule himself, the 'practical impossibility of proof … does not in principle bar an informed prediction', and 'reasoned inferences' must ultimately be made by institutional designers.[238] In another work, Vermeule quotes Keynes, who acknowledges that 'the necessity for action and for decision compels us as practical men to do our best' – despite a lack of 'scientific basis'.[239]

A key feature in his scholarship, Vermeule's decision-theoretic 'principle of insufficient reason' holds that *if* there is no good reason to believe that any one choice will yield higher benefits, a decision-maker should assume the payoffs of each are equal (and ultimately decide based on costs).[240] Considering now an institutional designer deciding between a status quo interpretive regime and a Vermeulian regime: all it takes to avoid this crude principle of insufficient reason is to show *some* or *any* justification for believing that maintenance of independent judicial review will be more beneficial than harmful. Public choice theory principles and a comparison of the respective 'ecological' features of the judiciary and executive provide that justification in spades. For, as expressed by Komesar: '[Tasks] that

233 This is 'a contest of plausible but unconfirmable empirical assertions': see Vermeule, 'Closure Problem' (n 6) 699.

234 Sunstein, Jolls and Thaler (n 4) 1475 (emphasis added).

235 Kenneth J Arrow, 'Rationality of Self and Others in an Economic System' in Robin M Hogarth and Melvin W Reder (eds), *Rational Choice: The Contrast Between Economics and Psychology* (University of Chicago Press, 1987) 201, 202.

236 Sunstein, Jolls and Thaler (n 4) 1481.

237 Berger (n 66) 229.

238 Vermeule, 'Judicial Competence' (n 2) 1865.

239 Vermeule, 'Rationally Arbitrary Decisions' (n 78) 1, quoting JM Keynes, 'The General Theory of Employment' (1937) 51(2) *Quarterly Journal of Economics* 209, 214 <https://doi.org/10.2307/1882087>.

240 Hans-Werner Sinn, 'A Rehabilitation of the Principle of Insufficient Reason' (1980) 94(3) *Quarterly Journal of Economics* 493, 493–4 <https://doi.org/10.2307/1884581>. See, eg, Vermeule, *Judging under Uncertainty* (n 1) 173–5.

strain the abilities of an institution may wisely be assigned to it anyway if the alternatives are even worse'.[241]

IV PROPOSED 'LEAST-WORST' SOLUTION

This Part seeks to deploy Vermeulian-style logic and reasoning to propose an alternative, *anti-Vermeulian* solution to the problem of uncertainty in judicial statutory interpretation. Taking stock, this article has thus far sought to explicate the following three key points:

1. It is impossible for interpreters to be *certain* when selecting their interpretive tools, even where Parliament has prescribed an interpretive approach.[242] The questions relevant to the choice of interpretive method and source – for example, '*is a consultation of Parliamentary Committee reports likely to aid or hinder the discovery of legislative purpose?*' – are transcientific. Accordingly, uncertainty and the associated use of heuristics are unavoidable in statutory interpretation.
2. 'Institutional problems demand institutional solutions'.[243] When devising a theory of interpretation – a methodology for interpreters to deploy when discerning statutory meaning – it is better to take a parsimonious, anti-idealist view of interpreters' strengths and weaknesses than to fall into the common trap of 'institutional nirvana'.
3. Given administrators and legislators are systemically disincentivised from self-applying statutory limits to their own power, there is value in a theory of interpretation under which the judiciary maintains its primary interpretive function. This is so *even if* administrators possess incrementally greater technocratic abilities.

A A Quarantined, 'Tiered' Formalist Method

This article proposes the following interpretive method to ameliorate the problem of uncertainty – an alternative to the Vermeulian proposal outlined in Part II. This is a set of technical rules for the anti-idealist judicial reviewer to apply. The proposed 'tiered' interpretive regime is closely but not exactly identifiable with section 15AB of the *Acts Interpretation Act 1901* (Cth) ('*Acts Interpretation Act*'): it is an *improvement* to this codified approach which provides a 'gateway' to the use of extrinsic materials.[244] It is formalist in the sense that it prescribes rules to be applied in a consistent order[245] and textualist in that it gives primacy to the words

241 Komesar (n 4) 6.

242 For example, the *Acts Interpretation Act* (n 36) ss 15AA–AB. See the commentary on *R v A2* (n 77) in Basten and Gvozdenovic (n 29) 394.

243 William F Shughart II, 'George W Bush and the Return to Deficit Finance' (2004) 118(3–4) *Public Choice* 223, 232 <https://doi.org/10.1023/B:PUCH.0000020071.98193.09>.

244 *Acts Interpretation Act* (n 36) s 15AB.

245 See, eg, Sunstein, 'Defended Empirically' (n 2) 3–4: formalist strategies entail commitments to 'rule-bound law' and to 'constraining the discretion of judges' in individual cases.

of the provision in question. However, it is distinctly not textual in its inclusion of *non*-statutory extrinsic materials, in spite of these interpretive sources amplifying conditions of (unavoidable) uncertainty.

The *first tier* of the proposed method requires judicial interpreters to focus on the text of the legislative instrument, with primacy given to the specific provision in question – the strongest indicia of legislative purpose. Similar to the first rule of Vermeule's formalist method, judges should adhere to the surface meaning of the text where there is no ambiguity on its face and where (in the presiding judges' opinion) to do so would not give rise to any reasonable possibility of absurd results.

The *second tier* of the proposed regime allows judges, in cases where the provision at hand is reasonably ambiguous or where absurd results may accompany literal interpretation, to refer to the texts of related statutes. These include statutes that comprise the wider regulatory scheme related to the subject matter at hand. For instance, in *Talua's* case, this included the *Anti-Discrimination Act*.[246]

Under the *third tier* of the proposed method, where ambiguity or a reasonable possibility of absurdity persists, judges may consult non-statutory extrinsic materials to discover the legislative purpose behind the provision at hand. However, where judges have good reason to think they are likely to misunderstand different extrinsic sources (eg, transcripts of committee hearings in technical subject areas), they should tread tentatively when inferring purpose and may *take into account* other interpretive views (such as that of expert technocrats for highly-technical statutes) if *necessary*.

The proposed tiered system bears likeness to section 15AB(1) of the *Acts Interpretation Act*. Whilst section 15AB(1) was originally regarded as a 'big hurdle' or 'brake' on unfettered recourse to extrinsic materials (allowing 'archaeological' interpretive methodologies only where there is ambiguity[247] or the possibility of absurdity),[248] the common law has since developed to enable 'open and regular' recourse, diluting the hurdles in section 15AB(1) to a nullity.[249] Per the joint majority judgment of Brennan CJ, Dawson, Toohey and Gummow JJ in *CIC Insurance v Bankstown Football Club* ('*CIC Insurance*'),[250] the common law 'modern approach to statutory interpretation … insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise'.[251] Under this *CIC Insurance* principle (reaffirmed in *SZTAL v Minister for Immigration and Border Protection)*,[252] neither ambiguity of statutory text nor any other 'hurdle' is required before judges may open the legislative history can of 'contextual' worms. This article's proposed approach

246 *Anti-Discrimination Act* (n 26) s 7.
247 *Acts Interpretation Act* (n 36) s 15AB(1)(b)(i).
248 Ibid s 15AB(1)(b)(ii).
249 Jacinta Dharmananda, 'Outside the Text: Inside the Use of Extrinsic Materials in Statutory Interpretation' (2014) 42(2) *Federal Law Review* 333, 335 <https://doi.org/10.1177/0067205X1404200205>; Commonwealth, *Parliamentary Debates*, Senate, 30 March 1984, 963 (Senator Gareth Evans).
250 (1997) 187 CLR 384 ('*CIC Insurance*').
251 Ibid 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).
252 (2017) 262 CLR 362, 368 [14] (Kiefel CJ, Nettle and Gordon JJ), 374 [37] (Gageler J) (citations omitted) ('*SZTAL*').

reintroduces the need for section 15AB(1)-like hurdles, albeit in an even stricter form: reaching the threshold of ambiguity or possibility of unreasonableness at the first tier does not immediately allow recourse to extrinsic materials (third tier). The second tier provides an additional 'sieve'.

Further, the interpretive path followed by judges for any given statute should take precedential effect going forward. For instance, the judge in *Talua's case* would have likely reached (at most) the second tier of interpretation. Her Honour could likely have discovered the intended purpose behind section 34(5) of the *Education Act* by examining section 6 of the same Act (first tier), but in the case she believed reasonable ambiguity to persist, the purpose would have been inferred from the larger regulatory anti-discrimination scheme (second tier). This interpretive 'path' (ceasing with the deployment of second-tier interpretive methodologies) would take *methodological stare decisis* effect, whereby future courts interpreting section 34(5) would use those same methods and refer only to materials examined by the *Talua* Court.

B Benefits of a Tiered Approach

The proposed tiered method of statutory interpretation is born from an appreciation of both: (a) the immense value in maintaining judicial oversight (for anti-idealistic, institutional reasons); and (b) the need to curb the insidious problem of uncertainty identified by Vermeule.

1 'Vermeulian' Benefits of a Tiered Approach

At each tier of the proposed method, judges face an increasing degree of uncertainty. Judges face a greater number of more complex candidate interpretive 'options' at each tier, amplifying the effects of three of the four main vectors of uncertainty outlined in Part II: *option set uncertainty*, *payoff uncertainty* and *interaction uncertainty*.

Given its primary ambition of limiting uncertainty in the interpretive process, the strength of the proposed regime is its *quarantining* or filtering out of considerations that arise at 'more uncertain' tiers. For instance, given the NSW Supreme Court judge in *Talua's case* could have easily discovered the legislative intent behind section 34(5) at the second tier (by referring only to statutory indicia of purpose), it was unnecessary to open the costly can of worms of examining legislative history at the third tier. Doing so only increased the intensity of uncertainty faced, without adding additional benefit. Indeed, in *Talua's case*, the Second Reading Speech only confirmed what statutory sources indicated. This is another important difference between the proposed method and that prescribed by the *Acts Interpretation Act*, which at section 15AB(1)(a) permits the use of extrinsic materials to 'confirm' meaning that is clear on its face.[253]

The second, very Vermeulian ambition of the tiered method is the reduction of cost incurred in the interpretive process. At each tier, there are arguably more costs (in the form of time, money and effort) involved in formulating an interpretive

253 *Acts Interpretation Act* (n 36) s 15AB(1)(a).

decision. The proposed method seeks to eliminate the unnecessary costs associated with eclectic approaches to interpretation,[254] which often include lengthy 'archaeological' research expeditions into legislative history – as undertaken by the *Talua* Court.

Further, paying homage to Vermeulian analyses, the likely 'system effects' of this proposed method are significant increases in predictability and cost savings for other stakeholders in the interpretive process. Applying a consistent interpretive methodology and limiting the number of interpretive tools that may be used at any given tier would have practical benefits for legislators (who compose statutes), agencies (who execute statutes) and private individuals (who act and litigate under statutes). As such, attenuating the problem of uncertainty faced by interpreters can greatly assist parties interacting with the legal sphere – who themselves face a different kind of uncertainty on a day-to-day basis.

The proposed 'quarantining' approach represents a *pragmatic*, '*second best*' approach to interpretation distinguishable in its objectives from the *Project Blue Sky v Australian Broadcasting Authority* common law formulation of the interpretive task.[255] Indeed, while *Project Blue Sky* undoubtedly advocated for a first-best commitment to legislative supremacy and endorsed the use of eclectic, archaeological tools to achieve this, Blaker notes that statements of the High Court in *Zheng v Cai*[256] and *Lacey v Attorney-General (Qld)*[257] flirt with the idea that considerations of pragmatism and 'preferred *results*' are also of importance.[258]

2 Anti-Vermeulian Benefits of a Tiered Approach

It may be argued that, given many existing statutes have been drafted in a way that necessitates recourse to extrinsic materials (such as explanatory memoranda), a judge applying the proposed tiered method will reach the 'third-tier' in many, if not most, cases anyway. In doing so, it could be argued, expensive archaeological searches of legislative history will persist and uncertainty will continue to plague interpretive tasks.

However, *even if* the proposed tiered method was largely unsuccessful in ameliorating uncertainty in judging, there is value in the promise that this uncertainty will be navigated by judges rather than politically-accountable administrators. This article asserts that judges, largely unaffected by perverse motivational pulls, are more worthy soldiers in the face of severe decision-making uncertainty than administrators. For as Vermeule himself acknowledges, public choice concerns provide reason to believe that 'agencies will invoke "uncertainty" pretextually or inconsistently', effectively weaponising it to 'justify choices made covertly on

254 See, eg, Basten and Gvozdenovic (n 29) 394.

255 (1998) 194 CLR 355, 381 [69], 384 [78] (McHugh, Gummow, Kirby and Hayne JJ) ('*Project Blue Sky*'). See also *CIC Insurance* (n 250) 408 (Brennan CJ, Dawson, Toohey and Gummow JJ); *SZTAL* (n 252) 374 (Gageler J).

256 (2009) 239 CLR 446 ('*Zheng*').

257 *Lacey* (n 90).

258 Ibid 591–2 [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) (emphasis added); *Zheng* (n 256) 455–6 [28] (French CJ, Gummow, Crennan, Kiefel and Bell JJ). See also Blaker (n 7) 550.

illegitimate grounds'.[259] That is, whilst the interpretation of a judge using heuristics under conditions of uncertainty may be at worst 'boundedly' rational (as in *Talua's case*), interpretations reached by an *administrator* acting under conditions of uncertainty have the potential to be far less legitimate.

C Benefits of Methodological Stare Decisis

The principle of methodological *stare decisis* that accompanies the proposed tiered approach means that future judges must adhere to the interpretive methodologies undertaken by their predecessors and refer only to the interpretive sources they consulted. Judicial methodology has been granted precedential status in many other areas of law – such as in the interpretation of contracts – and even in the statutory interpretation context in the US in respect of *Chevron* deference.[260] Gluck notes that methodological *stare decisis* is even a *common* feature of statutory interpretation in at least four states in the US.[261]

Methodological *stare decisis* represents the elimination of the fourth vector of uncertainty outlined in Part II – the *decision uncertainty* faced by interpreters when contemplating whether or not it is beneficial to make a new interpretive decision. Granting precedential status to previously employed interpretive methods and sources removes this part of judges' calculus altogether. Unless the interpretation of a previous court is 'plainly wrong' in the *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* sense,[262] judges need not re-tread ground each time by revisiting the prickly question of interpretive choice. This undoubtedly also brings associated predictability benefits for non-interpreting parties like litigants. Further, given the status quo approach involves the 'interminable repetition of what are essentially the same methodological debates', methodological *stare decisis* would bring decreased costs for interpreters, drafters and litigants alike.[263]

A final important corollary benefit of *stare decisis* is that consistent interpretive methodologies likely mean consistent statutory interpretations, which in turn mean consistent boundaries set on the powers of administrative agencies. Judges' strict reinforcement of their predecessors' interpretive methods ultimately serves to counteract the natural tendencies of administrators to attempt to aggrandise their own power over time within identical statutory confines.[264]

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259 Vermeule, 'Rationally Arbitrary Decisions' (n 78) 19.

260 *Chevron* (n 19).

261 See Abbe R Gluck, 'The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism' (2010) 119(8) *Yale Law Journal* 1750, 1750–7, 1766, 1817–23 ('Laboratories').

262 (2007) 230 CLR 89, 151–2 [135] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

263 Gluck, 'Laboratories' (n 261) 1766.

264 Niskanen (n 174) 618.

V CONCLUSION

Vermeule describes his proposed 'operating-level formalism' as an 'interim' theory of interpretation – necessary only until a time when the 'dispositive' questions about interpretive methods can be answered with empirical data.[265] Unfortunately, the nature of the questions at hand – for instance, whether consultation of one interpretive source *assists* or *hinders* the discovery of legislative intent – means they will likely never be amenable to scientific answers. Judging under uncertainty will therefore remain the 'only type of judging on offer'.[266]

That being said, Vermeule's identification and diagnosis of this uncertainty that inheres in judging is deeply enriching to the broader school of anti-idealist theory and serves as a 'useful challenge to conventional thinking about the judicial role' that will have no doubt tempered the ambitions of 'first-best' interpretive methods.[267] However, whilst Vermeule and other anti-ideal scholars chastise traditional interpretation scholars for adopting lazily 'asymmetric' conceptions about institutions, their theorising only goes part-way down the anti-idealist path they recommend. Indeed, a more balanced and comprehensive institutional analysis – one this article has sought to contribute – eschews 'nirvana fallacies' in respect of *all* branches of government. Given the need to 'entrench precautions against the risks that official action will result in dictatorship or tyranny, corruption and official self-dealing' (to use Vermeule's own words),[268] this article rejects the core anti-idealist argument that the expected net benefit of judge-led statutory interpretation is zero.

Vermeule postulates that the 'greatest masters' of the game of chess select their move after they 'calculate all relevant costs and benefits of all possible courses of action'.[269] Institutional designers, *pace* Vermeule, are not playing chess. Though, like in chess, it is important to understand the capacities and limitations of institutions, it is also critical to understand that very *human* institutions, unlike wooden pieces on a chess board, behave in ways that do not always maximise theoretical limits. Engaging the synergies that exist within public choice theory scholarship and behavioural economics, this article has sought to equip institutional designers with an austere perspective on the cognitive forces that pull upon institutional actors – ultimately espousing a very-*Vermeulian* anti-idealism that serves as a defence of independent, strong-form judicial review. The theory of interpretation proffered by this article attempts to mitigate the problem of uncertainty in a nuanced way, marrying the anti-idealist penchant for least-worst decision-theoretic analysis with even deeper insights about institutions and the human interpreters that comprise them.

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265 Vermeule, *Judging under Uncertainty* (n 1) 289. See Schauer (n 185) 634.
266 Vermeule, *Judging under Uncertainty* (n 1) 289.
267 Siegel (n 16) 433.
268 Vermeule, *Constitution of Risk* (n 13) 11.
269 Ibid 190.