

THE DEATH OF ADMINISTRATIVE COMMON LAW OR THE RISE OF THE ADMINISTRATIVE PROCEDURE ACT

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“[C]ourts must hold the administrative agencies within the confines of their Congressional authority. But in doing so they should not even unwittingly assume that the familiar is the necessary and demand of the administrative process observance of conventional judicial procedures when Congress has made no such exaction. Since these agencies deal largely with the vindication of public interest and not the enforcement of private rights, this Court ought not to imply hampering restrictions, not imposed by Congress, upon the effectiveness of the administrative process.”¹

Abstract

The academy is engaged in a robust dialogue about discrete aspects of changes and challenges confronting our modern administrative state. This Article suggests the current dialogue is too myopic: the existing conversation, while critical, fails to appreciate how the array of disparate administrative law issues unfolded as a consequence of the evolution of administrative common law. Administrative common law, or judge-made law untethered to particular statutory language, captured the judiciary’s attention during the evolution of our administrative state. Today, that is changing. Administrative law has become exceedingly dynamic during the Roberts Court. The past few terms, the Court has focused more acutely

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1. *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 335 (1945) (Frankfurter, J., dissenting).

than before on the problems precipitated by administrative common law precedent in a post-Administrative Procedure Act era. This Article suggests how the administrative state is confronting its fifth phase of development. The first four phases exhibited judicial ripostes to pressing temporal concerns and a corresponding development of administrative common law. The consequence is that much of administrative common law is anachronistic, unnecessary, and, consequently, on the verge of being cast aside—leading us into a fifth phase—and exploring fundamental assumptions about modern administrative law.

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INTRODUCTION

Administrative common law is dying—indeed, swiftly during Chief Justice Roberts’s tenure. Aspects of modern administrative law remain untethered to the Administrative Procedure Act (“APA”);² administrative law, after all, remains handicapped by judicially-crafted common law principles whose continued resonance seems problematic. Dan Farber and Anne O’Connell aptly capture the problem when observing how “the actual workings of the administrative state have increasingly diverged from the assumptions animating the” development of foundational principles of modern administrative law.³ The Roberts Court, almost at every occasion of late, seems insistent on linking the judicial role to the APA: it invoked the APA when proclaiming how “prudential standing’ [was] a misnomer”;⁴ it relied on the APA this past term when deciding that interpretative rules under the APA do not require affording an opportunity for notice and comment;⁵ and it also recently suggested how the “ripeness” doctrine may not fit comfortably within the confines of the APA.⁶ Other principles seem at risk, as well. Succinctly, administrative law is rapidly changing or abandoning some of its historical shackles. It is confronting a paradigmatic shift, entering its next phase, and addressing the practical realities surrounding a bureaucratically-infused, word-processed, internet-based era. This is both good and bad.

The developments arguably precipitating this change are varied. Some observers, for instance, worry that the administrative state is not functioning well, with agencies seemingly captured by the community they regulate.⁷ This was the refrain surrounding the Minerals Management Service (“MMS”) lax oversight that allegedly allowed the

2. 5 U.S.C. §§ 500–504, 551–559, 701–706 (2012).

3. Daniel A. Farber & Anne Joseph O’Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1140 (2014).

4. *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 (2014) (quoting *Ass’n of Battery Recyclers v. EPA*, 716 F.3d 667, 675 (2013) (Silberman, J., concurring)); see *infra* notes 274–84 and accompanying text.

5. *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1206 (2015) (stating that section 4 “specifically exempts interpretive rules from the notice-and-comment requirements that apply to legislative rules”); see *infra* note 464 and accompanying text.

6. See *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2347 (2014); see *infra* text accompanying notes 333–37.

7. See Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 37–41 (2010) (evaluating overlooked institutional design characteristics that prevent agency capture by interest groups); Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1342–61 (2013) (proposing mechanisms to strengthen the effectiveness of Office of Information Regulatory Affairs (“OIRA”) review in preventing agency capture).

BP disaster in the Gulf of Mexico.⁸ It echoes the concerns of those who attribute the collapse of Wall Street to poor regulatory policies.⁹ It is the message imbued in the apparent exposé of the Environmental Protection Agency's ("EPA") regulation of pesticides.¹⁰ While the idea that agencies often reflect the biases and prejudices of the industries they regulate is not new and possibly suspect,¹¹ the concept of agency capture nevertheless creates an impression that something is amiss. This impression, in turn, erodes public confidence and perpetuates a belief "that the U.S. regulatory system needs a major overhaul."¹² Thomas McGarity worries that "[t]he situation will . . . deteriorate" until we strike a "new bargain" that ensures that "the business community's economic freedoms are once again constrained by a government that is willing to impose greater responsibilities on powerful economic actors."¹³

This is occurring while the country engages in a dialogue about the proper response to congressional gridlock. The political polarization within Congress has retarded our nation's capacity to ensure that our legal institutions can respond effectively to economic, social, global, and environmental challenges. Some political scientists suggest this gridlock is consistent with democratic principles, albeit recognizing the power of a conservative block in Congress to achieve a conservative agenda.¹⁴ Regardless, this gridlock becomes acutely problematic when agencies confront modern issues and threats under statutes ill-designed for contemporary problems. The archetypal example is the urgency of responding to climate change and the immediate threat of rising

8. See Barkow, *supra* note 7, at 17–18; Livermore & Revesz, *supra* note 7, at 1377–78.

9. See Christopher Carrigan & Cary Coglianese, *Oversight in Hindsight: Assessing the U.S. Regulatory System in the Wake of Calamity*, in REGULATORY BREAKDOWN: THE CRISIS OF CONFIDENCE IN U.S. REGULATION 1, 1 (Cary Coglianese ed., 2012).

10. See E. G. VALLIANATOS & MCKAY JENKINS, POISON SPRING: THE SECRET HISTORY OF POLLUTION AND THE EPA vii–ix (2014) (exposing regulatory capture of the EPA by polluters, as told by a former civil servant).

11. See Carrigan & Coglianese, *supra* note 9, at 11 (noting how, empirically, regulatory breakdown may not explain public incidents such as the BP spill); *id.* at 13 ("[F]ixating on a disaster or even a series of disasters as measures of regulatory performance can make it very difficult to consider the possibility that the system is, in fact, not fundamentally broken."); *id.* at 15 (urging caution about uncritical acceptance of regulatory capture).

12. *Id.* at 3. Agency capture undermines the notion that agencies apply their expertise based on the evidence before them and then offer a potentially unbiased and reasoned decision for developing or applying a particular norm. See Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387, 394–95 (1987).

13. THOMAS O. MCGARITY, FREEDOM TO HARM: THE LASTING LEGACY OF THE LAISSEZ FAIRE REVIVAL 292 (2013).

14. *E.g.*, Amitai Etzioni, *Gridlock?*, 10 FORUM, no. 3, 2012, at 1–2.

greenhouse gas emissions.¹⁵ Another is the cry for executive action to address our immigration challenges as a lackluster Congress fails to pass immigration reform.¹⁶ And yet, when the executive branch addresses contemporary problems, the opposing political party accuses it of abusing executive power. Indeed, the extreme right has been vitriolic in protesting that the executive has acted lawlessly and threatens to undermine “constitutional equilibrium.”¹⁷ The U.S. House of Representatives even wasted time and daresay taxpayer dollars in authorizing Speaker John Boehner to file suit against the President.¹⁸ Yet, it matters little whether such views are politically motivated or specious,¹⁹ they contribute to a growing *geist* surrounding the administrative state.

Shadowing this administrative *geist* are the more meaningful conversations about agency administration and influence. Since Professor, now Justice, Elena Kagan wrote a pioneering article on presidential administration,²⁰ many scholars urge the necessity of executive flexibility in an age otherwise characterized by congressional abdication. Elena Kagan argued persuasively that presidential oversight and control of administrations reflects a legitimate aspect of the modern administrative state: it affords accountability and, therefore, promotes democracy.²¹ Jodi Short adds that presidential control masks the

15. See Jad Mouawad & Coral Davenport, *E.P.A. Takes Step to Cut Emissions from Planes*, N.Y. TIMES, Jun. 10, 2015, at B1.

16. See Jerry Markon, *Napolitano: Obama May Have to “Step In” on Immigration*, WASH. POST, Oct. 27, 2014, at A03.

17. George F. Will, Opinion, *Repulsing a Lawless Obama*, WASH. POST, June 22, 2014, at A21; accord Peter Ferrara, *The Lawless President*, AM. SPECTATOR (July 10, 2013), <http://spectator.org/articles/55255/lawless-president>.

18. Michael R. Crittenden & Colleen McCain Nelson, *House Authorizes Boehner to Sue President*, WALL ST. J., July 31, 2014, at A4.

19. See Danny Vinik, *Republicans’ New Midterm Strategy: Obama Is a Lawless President*, NEW REPUBLIC (May 12, 2014), <http://www.newrepublic.com/article/117727/republicans-new-midterm-strategy-obama-lawless-president> (suggesting that the “lawless” argument serves as a political strategy).

20. See generally Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001) (discussing presidential control over administrative agencies to achieve political agendas).

21. *Id.* at 2331–39. Others suggest that political considerations either ought to be accepted or at least disclosed. See, e.g., Nina A. Mendelson, *Disclosing “Political” Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1130 (2010); Mark Seidenfeld, *The Irrelevance of Politics for Arbitrary and Capricious Review*, 90 WASH. U. L. REV. 141, 144–45 (2012); Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 8–9 (2009); see also Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 507–13 (1985) (supporting increased presidential control); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 452–63 (1987) (favoring increased presidential

underlying assumption of the modern state, one premised on agency expertise and rational decision making rather than on the legitimacy of political decision making.²² Lisa Bressman describes how administrative law has “vacillat[ed] between procedures . . . and politics, . . . produc[ing] rules that reflect contradictory procedural and political impulses.”²³ Kirti Datla and Richard Revesz argue that we should abandon the illusion that “independent” federal agencies are different from other executive agencies, recognizing that all agencies act within the confines of executive control to the degree permitted under Article II of the Constitution.²⁴ And in a seminal article, Professors Jim Rossi and Jody Freeman explore the importance of presidential oversight as a consequence of the myriad areas of shared regulatory space among various agencies.²⁵ I, along with many others, explore how administrative law principles threaten to cabin change as new administrations enter Washington, D.C.²⁶ This same focus on executive flexibility, however, has morphed into a wide-ranging dialogue about executive oversight and, in particular, the function of the Office of Management and Budget

control with sufficient checks and balances). Considerable literature cloaks the discussion under separation-of-powers theory and the unitary executive. See Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 641 (2000); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1156–59 (1992); Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 917–18 (1988); Cynthia R. Farina, *Undoing the New Deal Through the New Presidentialism*, 22 HARV. J.L. & PUB. POL’Y 227, 227 (1998); Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 6 (1983).

22. Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 DUKE L.J. 1811, 1814 (2012). Short explores the potential for arbitrary and capricious review to be expanded to include following presidential directives as legitimate decision-making. *Id.* at 1815.

23. Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1766 (2007) (examining how judicially developed procedural doctrines coincide with political process theorists who explore the dynamic of the principal-agent theory for the interplay between Congress and agencies).

24. Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 772 (2013) (“Agencies cannot be neatly divided into two categories.”). In *FCC v. Fox Television Stations, Inc.*, Justice Scalia observed that such “agencies are sheltered not from politics but from the President, and it has often been observed that their freedom from presidential oversight (and protection) has simply been replaced by increased subservience to congressional direction.” 556 U.S. 502, 523 (2009). Of course, these are purportedly empirical statements without empirical support, although Scalia cites several prominent law review articles. *See id.*

25. Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1135–37 (2012).

26. See, e.g., Sam Kalen, *The Transformation of Modern Administrative Law: Changing Administrations and Environmental Guidance Documents*, 35 ECOLOGY L.Q. 657, 658–59 (2008).

(“OMB”).²⁷ Thomas McGarity even suggests how the rulemaking process in Washington, D.C., with White House review, resembles a “blood sport” when the stakes appear high.²⁸

Moreover, many discussions about the rulemaking process seemingly devolve into a dialogue about whether the process has become ossified, along with the merits of cost-benefit analysis²⁹ or developing simpler rules.³⁰ The purported ossification of the rulemaking process garners sufficient currency to warrant a critical review of the fundamental precept of informal notice and comment under the APA. Courts and commentators alike uniformly suggest how the predominant paradigm for establishing policy—the rulemaking process—has become encumbered by a host of hurdles.³¹ Those hurdles then “ossify” the rulemaking process by chilling an agency’s willingness to navigate

27. See Farber & O’Connell, *supra* note 3, at 1138–41; Lisa Heinzerling, Response, *Classical Administrative Law in the Era of Presidential Administration*, 92 TEX. L. REV. 171, 172–73 (2014); see also Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1261–62 (2006); Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533, 533 (1989); Alan B. Morrison, Commentary, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059, 1059–60 (1986); Sidney A. Shapiro, *OMB and the Politicization of Risk Assessment*, 37 ENVTL. L. 1083, 1085 (2007). Lisa Heinzerling provides quite possibly the best window into the operations of OIRA, where she describes both the “actual practice” and its problems. Lisa Heinzerling, *Inside EPA: A Former Insider’s Reflections on the Relationship Between the Obama EPA and the Obama White House*, 31 PACE ENVTL. L. REV. 325, 325–26 (2014). OMB or the White House also might play a role when reviewing agencies’ agendas, through screening congressional materials such as budgets, priorities, proposals, or testimony. See Datla & Revesz, *supra* note 24, at 806–08. Of course, those who have worked in an administration are aware that not all “informal” communications between agency personnel and congressional staff are screened.

28. Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L.J. 1671, 1681 (2012) (parroting refrain from an SEC official). McGarity is concerned with ex parte contacts (lobbying) both at agencies and with OIRA. *Id.* at 1732–34; see also ESA L. SFERRA-BONISTALLI, *EX PARTE COMMUNICATIONS IN INFORMAL RULEMAKING* 5 (2014). Bressman too suggests that restrictions on ex parte contacts would further the political process theory of administrative law. Bressman, *supra* note 23, at 1787–88.

29. See, e.g., David M. Driesen, *Is Cost-Benefit Analysis Neutral?*, 77 U. COLO. L. REV. 335, 336–38 (2006); Richard L. Revesz, *Quantifying Regulatory Benefits*, 102 CALIF. L. REV. 1423, 1424–25 (2014); Cass R. Sunstein, *The Limits of Quantification*, 102 CALIF. L. REV. 1369, 1372 (2014); see also FRANK ACKERMAN & LISA HEINZERLING, *PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING* 195–98 (2004).

30. See, e.g., CASS R. SUNSTEIN, *SIMPLER: THE FUTURE OF GOVERNMENT* 215–18 (2013).

31. See, e.g., Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1400–07 (1992) (discussing burdens imposed by analytical requirements).

through those barriers unless absolutely necessary.³² As many who have worked in the federal government at some point since the 1980s likely appreciate,³³ quantifying or empirically testing the ossification thesis seems illusive. It is not a deviation from some mean of how many regulations an agency issues on an annual basis that provides any meaningful data.³⁴ Rather, the thesis requires examining how many times an agency *purposefully* avoided rulemaking when resolving an issue or establishing policy.³⁵ The duty to maintain confidences, the fear of disclosure in any future litigation, and agency loyalty all inhibit reliable collection of that information. And so, for now, we are confronted with a lingering debate over ossification that bleeds into a wider conversation about the administrative state's capacity to handle the modern world.

Our modern world, after all, is rapidly changing, while the APA assumes a more stable, deliberate, and quite possibly overly staid system. The information age has radically transformed the availability, speed, and flow of information—to such a degree that agencies struggle to stay on the information treadmill. The APA's proponents could not have conceived of an era when the science of today would change with new developments in only a year or two, or that we could gather and assess information with such alacrity that our assumptions about markets or the economy could be proven wrong quickly. The environmental field, in particular, reflects how swiftly we can learn and change our assumptions and, consequently, J.B. Ruhl and Robin Craig persuasively argue how the APA needs to tolerate a greater degree of flexibility to ensure that our decisions about the environment can be adaptive, responding to information through monitoring and readjusting our assumptions.³⁶

These diverse issues collectively have engendered considerable scholarly commentary, typically focusing on a singular aspect of the problem with modern administrative law. Some scholars simply

32. *Id.* at 1386 (“[A]gencies are beginning to seek out alternative, less participatory regulatory vehicles to circumvent the increasingly stiff and formalized structures of the informal rulemaking process.”).

33. The author worked in the Department of the Interior from 1994 to 1996.

34. Efforts to quantify ossification appear to focus too narrowly on such things as the number of rulemakings, the speed of rulemaking, or agency response to congressional directives. *See, e.g.*, Jason Webb Yackee & Susan Webb Yackee, *Administrative Procedures and Bureaucratic Performance: Is Federal Rule-making “Ossified”?*, 20 J. PUB. ADMIN. RES. & THEORY 261, 267–73 (2009); *see also* Bressman, *supra* note 23, at 1819–20.

35. Agencies act through collective decisions of individual people, and those individuals can overtly recognize that they are choosing to avoid rulemaking because of the inherent hurdles or they may subconsciously proceed along a non-rulemaking path because of implicit biases, fears, or concerns associated with rulemaking.

36. Robin Kundis Craig & J.B. Ruhl, *Designing Administrative Law for Adaptive Management*, 67 VAND. L. REV. 1, 6–16 (2014).

champion the need for alternative solutions to legislative gridlock.³⁷ Others suggest that perhaps we should begin exploring agency-specific precedents rather than assuming crosscutting administrative law principles.³⁸ Or quite possibly we could focus more critically on the nature of arbitrary and capricious review under the APA.³⁹

But in the words of Cass Sunstein, I hope to “nudge”⁴⁰ such conversations about administrative law toward a wider inquiry into the myths and assumptions populating the field. Modern administrative law is simultaneously resilient and debilitating, in large measure because we struggle to overcome constructs developed too long ago. Passed in 1946,⁴¹ the APA codified nascent concepts during the first part of that century. Yet, Professor Davis informed law students in 1965 that the “bulk” of administrative law “is judge-made law,” with “some of it . . . common law in the sense that it is produced by courts without reliance on either constitutional or statutory provisions.”⁴² We should abandon the pretense that judicially crafted principles in opinions such as *SEC v. Chenery Corp. (Chenery II)*,⁴³ *NLRB v. Hearst Publications, Inc.*,⁴⁴ or *Skidmore v. Swift & Co.*,⁴⁵ carry sufficient resonance in today’s paradigm. We should appreciate how administrative common law doctrines such as prudential standing, ripeness, and even deference, all surfaced in response to temporally relevant issues, and that perhaps parroting language from opinions from an eroded paradigm should be done cautiously, not thoughtlessly.

This Article, therefore, submits that the administrative state is on the cusp of a precipice, confronting a new, fifth phase in its development. The Court must decide how to merge modern agency practice, the APA,

37. See, e.g., Todd S. Aagaard, *Using Non-Environmental Law to Accomplish Environmental Objectives*, 30 J. LAND USE & ENVTL. L. 35, 35–36 (2014); E. Donald Elliott, *Portage Strategies for Adapting Environmental Law and Policy During a Logjam Era*, 17 N.Y.U. ENVTL. L.J. 24, 26–27 (2008); Richard J. Lazarus, *Congressional Descent: The Demise of Deliberative Democracy in Environmental Law*, 94 GEO. L.J. 619, 622 (2006); Sandra Zellmer, *Treading Water While Congress Ignores the Nation’s Environment*, 88 NOTRE DAME L. REV. 2323, 2327 (2013).

38. See, e.g., Richard E. Levy & Robert L. Glicksman, *Agency-Specific Precedents*, 89 TEX. L. REV. 499, 500–01 (2011).

39. See Louis J. Virelli III, *Deconstructing Arbitrary and Capricious Review*, 92 N.C. L. REV. 721, 724 (2014).

40. SUNSTEIN, *supra* note 30, at 13–15.

41. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946).

42. KENNETH CULP DAVIS, ADMINISTRATIVE LAW: CASES – TEXT – PROBLEMS 1 (1965).

43. *SEC v. Chenery Corp. (Chenery II)*, 318 U.S. 80 (1943); see *infra* text accompanying notes 232, 365–68.

44. 322 U.S. 111 (1944), *overruled in part by* *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992); see *infra* text accompanying notes 143, 152, 426.

45. 323 U.S. 134 (1944); see *infra* text accompanying notes 170–71, 440–41.

and relics of administrative common law. What ultimately is at stake is whether the APA will be treated as administrative law's "living" constitution or merely as a written, rigid instrument. Classically, in *Vermont Yankee*, the Court held that the judiciary could not impose additional, non-APA (common law) prescribed procedural requirements on agencies,⁴⁶ and since then limited the exhaustion doctrine⁴⁷ and suggested that it would look to the APA as any other statute for discerning the Court's role.⁴⁸ But until recently it has been reluctant to examine how that approach corresponds with a host of administrative common law principles.⁴⁹ As of late, though, the Roberts Court has escalated its understanding of how the APA itself furnishes the full breadth of authority for procedural correctness.⁵⁰

Part I of this Article, consequently, walks through the first four phases in administrative law's development, illustrating how and why certain doctrines have surfaced. With administrative law now in its fifth phase, the Court is confronting the challenges posed by the assumptions and principles from these prior periods. Parts II, III, and IV then explore some of those assumptions and principles, reviewing why they emerged and illustrating why they ought to be abandoned. Specifically, Part II chronicles how the Roberts Court asserts the APA's importance and is whittling away at common law concepts affecting parties' access to judicial consideration, such as prudential standing, and is poised to (and ought to) abandon the prudential, common law notion of ripeness. Next, Part III examines the seemingly accepted myth that agencies enjoy sufficient flexibility when choosing how best to establish policy. Finally, Part IV demonstrates the challenges posed by continued adherence to principles regarding the scope of review and deference, which seem unnecessary under the APA and because of our modern approach toward statutory construction.

I. PARADIGM SHIFTS

Oddly enough, "administrative law" seems trapped in an adolescent stage. We can discuss administrative law as having experienced four

46. *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 545–48 (1978).

47. *Darby v. Cisneros*, 509 U.S. 137, 146–47 (1993).

48. *See, e.g., Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267, 272–76 (1994) (examining "burden of proof" under the APA).

49. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009).

50. *Id.* (stating that the APA "sets forth the full extent of judicial authority to review executive agency action for procedural correctness" (citing *Vt. Yankee*, 435 U.S. at 545–49)).

growth spurts, and now struggling with the contours of a fifth phase.⁵¹ It is important that one appreciate how the law has developed, because, as Jerry Mashaw opines, “recognizing the shape of nineteenth-century American administrative law can help us both to better understand the system or model of administrative law that we currently observe and to motivate inquiry into parts of that system that are currently neglected.”⁵² The architects of the APA naturally looked backwards when selecting which aspects of the law they chose to embolden,⁵³ as did the judiciary.⁵⁴ Yet all too often that backwards inquiry overlooked the law in motion and the context in which justices crafted their judicial opinions. The following Sections, therefore, examine the various periods with sufficient particularity to appreciate how, and perhaps why, the law developed the way it did and, correspondingly, in succeeding Sections, why courts should sever unnecessary ties to historical anomalies.

A. Phase I: De Facto Administrative Agencies

Administrative law’s nascent period emerged prior to the pre-Civil War era, when either non-judicial bodies adjudicated facts, or behavior was regulated other than by state or federal statutory prescriptions. This period is perhaps best described as a period of de facto administrative practice. After all, the administration of laws by executive branch employees dates back to our founding.⁵⁵ And that we have had a “regulatory state” since well before the twentieth century is

51. Scholars occasionally simplify the history. *E.g.*, Bressman, *supra* note 23, at 1758–67 (describing early, middle, and current administrative law periods). Bressman’s acute analysis demonstrates the importance of political accountability and procedural formality, although she could have wrapped procedure’s pedestal around the dominance and influence of the legal process school.

52. Jerry L. Mashaw, *The American Model of Federal Administrative Law: Remembering the First One Hundred Years*, 78 GEO. WASH. L. REV. 975, 976 (2010).

53. See ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, S. DOC. NO. 79-248, at 11 (2d Sess. 1946) (detailing the legislative history behind the APA).

54. *Id.* at 36.

55. See JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 4 (2012) (detailing origins of the federal administrative law structure); Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256, 1258–59 (2006); Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1195 (1986). A Senate committee report pre-dating the APA chronicles the early history of agencies, with at least eleven agencies or subdivisions of agencies “trac[ing] their beginnings” to pre-Civil War statutes. COMM. ON ADMIN. PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. NO. 77-8, at 8 (1st Sess. 1941).

uncontestable.⁵⁶ Agency officials, for instance, adjudicated rights to land patents;⁵⁷ they reviewed and awarded claims;⁵⁸ they contracted for services;⁵⁹ and they determined who received patents for their inventions.⁶⁰ But the role of the judiciary was limited, with little need for “administrative law.”

1. Avoiding Scope of Review.

Early nineteenth century cases avoided such thorny issues as scope of review and deference because the judiciary interceded in executive actions only in rare instances when the official acted in a ministerial fashion.⁶¹ In *Gaines v. Thompson*, for instance, the Court reviewed the judiciary’s role in reviewing executive official actions.⁶² Canvassing several cases since *Marbury v. Madison*,⁶³ the *Gaines* Court concluded that courts could interfere only when an official performs a ministerial act affecting the private rights of individuals.⁶⁴ Courts could not,

56. See WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE: LAW & REGULATION IN NINETEENTH-CENTURY AMERICA* 19 (1996); Mashaw, *supra* note 55, at 1258–60. The classic 1927 treatise by John Dickinson recognized that “administrative” functions were carried out early in our history. JOHN DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES* 4–6 (1927). In *Williams v. United States*, for example, the Court reviewed the necessity of having officials below the President perform executive tasks and allowed an affidavit by the Clerk of the Treasury Department to recount the agency’s practice. 42 U.S. (1 How.) 290, 295–97 (1843); see also *McElrath v. United States*, 102 U.S. 426, 436–37 (1880) (discussing, but not resolving, the fiction that the President impliedly authorizes certain actions by underlings).

57. *E.g.*, *M’Cluney v. Silliman*, 15 U.S. (2 Wheat.) 369, 369 (1817); *Wilcox v. Jackson ex dem. M’Connel*, 38 U.S. (13 Pet.) 498, 502–03 (1839).

58. *E.g.*, *United States v. Ferreira*, 54 U.S. (13 How.) 40, 47 (1851) (describing the limits of allowing the judiciary to act on behalf of administrative officers, while the judge was acting as claims adjudicator, referred to as a commissioner for Secretary of Treasury). Of course, attached to the *Ferreira* opinion is the unpublished opinion in *United States v. Todd*, where the Court held unconstitutional a congressional act of 1792 purporting to confer adjudicatory power on judges to resolve pension claims outside of the judicial process. *Id.* at 52. This issue first surfaced in *Hayburn’s Case*, 2 U.S. (2 Dall.) 409, 409 (1792).

59. *E.g.*, *Kendall v. U.S. ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 527 (1838).

60. *E.g.*, *Comm’r of Patents v. Whiteley*, 71 U.S. (4 Wall.) 522, 522–23 (1866).

61. See *infra* note 64 and accompanying text.

62. 74 U.S. (7 Wall.) 347, 348–49 (1868); see also *Litchfield v. The Register & Receiver*, 76 U.S. (9 Wall.) 575, 577 (1869) (following *Gaines*).

63. 5 U.S. (1 Cranch) 137 (1803).

64. *Gaines*, 74 U.S. (7 Wall.) at 352–53 (quoting *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 498 (1866)). In *Johnson*, Mississippi sought to restrain President Johnson from enforcing the Reconstruction Act. 71 U.S. (4 Wall.) at 475. The *Gaines* Court, quoting *Johnson*, defined a ministerial duty as “the performance of which may in proper cases be required of the head of a department by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under circumstances admitted or

however, interfere when an official exercised discretion.⁶⁵ When those officials exercised discretion, the doctrine of sovereign immunity constrained judicial review as well.⁶⁶

2. Discretionary Space.

The Court's primary function, therefore, was examining whether the statutory language delegated discretion to the executive department. In *Decatur v. Paulding*, for instance, the Court observed how an agency in doubt about a law could request advice from the Attorney General about the construction of that law, but that "the Court certainly would not be bound to adopt the construction given by the head of a department. And if they supposed his decision to be wrong, they would, of course, so pronounce their judgment."⁶⁷ The Court then, and much later in the century, married this approach with its attitude toward judicial interference with executive actions. "[C]lear and precise" language suggested that Congress had assigned the executive with performing ministerial acts and "there was no room for construction"—that is, the exercise of discretion.⁶⁸ Absent discretionary space, the judiciary lacked

proved to exist and imposed by law." *Gaines*, 74 U.S. (7 Wall.) at 353 (quoting *Johnson*, 71 U.S. (4 Wall.) at 498). The Court presumed easily identifiable, almost inviolate, spheres of responsibility. *See Johnson*, 71 U.S. (4 Wall.) at 549. Indeed, counsel for the United States argued three decades earlier "that occasional conflicts and encroachments upon each other's sphere of powers by the different departments of the government, were expected to arise; and that it was thought a matter of security, that each was left to the independent maintenance of its own rights, and bound by duty to resist the invasions of the others." *Kendall*, 37 U.S. (12 Pet.) at 536. In 1845, Justice Story feared that allowing executive officials to interpret the law without sufficient judicial oversight threatened the tenet of our tripartite governmental structure and impermissibly permitted executive authority to intrude into the judicial realm. *Cary v. Curtis*, 44 U.S. (3 How.) 236, 253, 256 (1845) (Story, J., dissenting). Justice McLean, meanwhile, warned how allowing the executive and judicial function to be exercised together constituted "an engine of oppression." *Id.* at 266 (McLean, J., dissenting).

65. Bruce Wyman explains the doctrines' relationship:

An act is within [a governmental actor's] authority if it is within his discretion. Therefore, if any officer act within the discretion, discretion which has been vested in him, he is irresponsible. Only if the duty of the officer left no discretion to him in the premises, can it be said with truth that what he does contrary to that duty is his personal act, for which he should be held liable as a private person.

BRUCE WYMAN, *THE PRINCIPLES OF THE ADMINISTRATIVE LAW GOVERNING THE RELATIONS OF PUBLIC OFFICERS* 57 (1903).

66. *See, e.g., Pennoyer v. McConnaughy*, 140 U.S. 1, 8–10 (1891) (explaining how plaintiff's suit to enjoin land conveyance could proceed); *see also WYMAN, supra* note 65, at 56–57 (explaining that, absent discretion, an agency official effectively acts personally a private individual capable of being sued).

67. 39 U.S. (14 Pet.) 497, 515 (1840); *see also Kendall*, 37 U.S. (12 Pet.) at 540–41.

68. *United States ex rel. Lisle v. Lynch*, 137 U.S. 280, 285 (1890).

jurisdiction.⁶⁹ Wyman's administrative law treatise echoed this sentiment when he wrote how the executive department should be afforded the benefit of the doubt when implementing federal statutes unless its action is "squarely in conflict with [the] law."⁷⁰ Ernst Freund posited that discretionary space would be cabined by "the exercise of judgment on the basis of greater experience and at some distance from local interests" through the hierarchical structure of agencies, and ultimately by the chief executive.⁷¹

Executive discretion justified avoiding difficult issues of statutory construction. Ambiguous language conferred discretion, which in turn left the courts with little to do.⁷² In *United States ex rel. Ness v. Fisher*, for instance, a party challenged a General Land Office decision involving falsely acquired public property.⁷³ The Court observed how the Secretary of the Interior's construction of the law was neither arbitrary nor

69. A court could issue a writ of mandamus if "the duty . . . is plainly ministerial . . . and it cannot issue in a case where its effect is to direct or control the head of an executive department in the discharge of an executive duty involving the exercise of judgment or discretion." *United States ex rel. Redfield v. Windom*, 137 U.S. 636, 644 (1891).

70. WYMAN, *supra* note 65, at 68. "[T]he distinction between discretionary powers and ministerial duties is in [the] last analysis," Wyman observed, "the question what the law is in any particular case." *Id.* at 150; *see also id.* at 11 (stating that the foundational principle that discretionary action is necessarily consistent with the law); *id.* at 135 ("[J]udicial courts would not interfere . . . in any matter where that officer had discretion."); *see also* *Keim v. United States*, 177 U.S. 290, 292 (1900) ("It has been repeatedly adjudged that the courts have no general supervising power over the proceedings and action of the various administrative departments of government."); *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 31–32 (1827) ("Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts."). In some early cases, the Court simply noted that its construction followed the executive department's, without any hint of deference. *E.g.*, *Tex. & Pac. Ry. Co. v. ICC*, 162 U.S. 197, 210, 217–19 (1896); *Stairs v. Peaslee*, 59 U.S. (18 How.) 521, 529 (1855); *Stuart v. Maxwell*, 57 U.S. (16 How.) 150, 152 (1853). If a statute was ambiguous, the Court afforded a contemporaneous construction "great respect." *Edwards' Lessee v. Darby*, 25 U.S. (12 Wheat.) 206, 210 (1827) (land case).

71. Ernst Freund, *The Law of the Administration in America*, 9 POL. SCI. Q. 403, 414 (1894).

72. In *Merritt v. Welsh*, the Court rejected allowing an agency to fix unambiguous statutory language, even if Congress had been mistaken (duties on sugar and color versus chemical composition). 104 U.S. 694, 704 (1881). Customs valuations, for instance, could not be easily assailed, because Congress directed that they would be final and, absent fraud or action beyond statutory authority, courts could examine as a matter of law only the appropriateness of the classification. *See Oelbermann v. Merritt*, 123 U.S. 356, 361–62 (1887); *Hilton v. Merritt*, 110 U.S. 97, 106 (1884). If, however, the valuation was conducted by one who did not satisfy the statutory standard, the Court considered the action as illegal—or beyond statutory authority. *See, e.g., Converse v. Burgess*, 59 U.S. (18 How.) 413, 416 (1855); *Greely v. Thompson*, 51 U.S. (10 How.) 225, 234 (1850).

73. 223 U.S. 683, 689 (1912).

capricious, and if “room for difference of opinion as to the true construction” existed, then the issue “necessarily involved the exercise of judgment and discretion.”⁷⁴ In some instances, the Court seemed willing to treat an agency’s contemporaneous practice or construction of a statute with “great respect.”⁷⁵ And when the Court considered an agency’s interpretation beyond Congress’ charter, it did say so.⁷⁶ Decades later,

74. *Id.* at 691. The Court added:

So, at the outset we are confronted with the question, . . . whether a decision of that officer, made in the discharge of a duty imposed by law, and involving the[]exercise of judgment and discretion, may be reviewed by mandamus and he be compelled to retract it, and to give effect to another not his own, and not having his approval. The question is not new, but has been often considered by this court and uniformly answered in the negative.

Id. at 691–92; *see also* United States *ex rel.* Hall v. Payne, 254 U.S. 343, 347–48 (1920) (holding, in a land office case, that the Secretary’s construction was neither arbitrary nor capricious and “involved the exercise of judgment and discretion”); United States v. Hammers, 221 U.S. 220, 225–29 (1911) (finding a public land law ambiguous, and affording persuasive weight to the land office’s practice and interpretation). Justice Holmes arguably departed from this approach in a characteristically cryptic opinion rejecting the Secretary’s construction. Santa Fé Pac. R.R. Co. v. Payne, 259 U.S. 197, 199–200 (1922).

75. United States v. Pugh, 99 U.S. 265, 269 (1878); *accord* United States v. Ala. Great S. R.R. Co., 142 U.S. 615, 621 (1892) (“It is a settled doctrine of this court that in case of ambiguity the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced.”); United States v. Philbrick, 120 U.S. 52, 59 (1887); Brown v. United States, 113 U.S. 568, 571 (1884); Hahn v. United States, 107 U.S. 402, 406 (1883). The issue occasionally involved a practice or interpretation sandwiched between two statutes, with the Court examining the effect of an interpretation of the earlier act on the latter one. *E.g.*, United States v. Healey, 160 U.S. 136, 145–46, 148–49 (1895) (stating that the lack of uniform interpretation precluded affording construction respect, and rejecting agency interpretation of latter act); *cf.* Humbird v. Avery, 195 U.S. 480, 499 (1904) (directing the Department to resolve factual questions before judicial intervention, after Congress resolved conflicting Land Department rulings). In *Bates & Guild Co. v. Payne*, 194 U.S. 106, 109 (1904), Justice Brown recognized that factual judgments in land cases generally are conclusive, contrasting the principle of *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497 (1840), for other agencies. Justice Brown, accepting as conclusive a postmaster general classification, observed:

That where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive; and that even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it, although they may have the power, and will occasionally exercise the right of so doing.

Payne, 194 U.S. at 109–10. Justice Harlan complained that the *Bates & Guild* Court abandoned roughly seventy-five years of precedent affording an agency’s construction deference. *Id.* at 111–12 (Harlan, J., dissenting).

76. When the Treasury Department confined Congress’ decision regarding the importation of all live animals for breeding to only those of superior stock, the Court held

the Court continued to avoid reviewing some agency statutory constructions when the Court determined that the program had little impact on the regulated community.⁷⁷ But the infusion of arbitrary and capricious review, at least in the land office cases, presaged, according to Jerry Mashaw, “a more modern form” of judicial review.⁷⁸

B. Phase II: Incremental Changes to the Scope of Review

1. Administrative Law Emerges.

Later in the century, converging developments precipitated exploring the role, function, contours, and constitutional dimensions of administrative bodies and, correspondingly, the judiciary. While particular forms of agency practice existed earlier, Louis Jaffe wrote how “[i]t is customary and appropriate to date the present federal era from the creation of the Interstate Commerce Commission in 1887.”⁷⁹ Shortly thereafter, in 1900, Bruce Wyman taught the nascent course in administrative law at Harvard Law School.⁸⁰ In his treatise, published a few years later, he lamented how “administrative law has not been

that it could do so only through an amendment to the law, not through a regulation. *Morrill v. Jones*, 106 U.S. 466, 466 (1883).

77. In *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 125 (1940), *overruled by* 66 Stat. 308 (1952), the Court avoided reviewing an agency interpretation of the Walsh-Healey Act because no legal rights of the plaintiff had been threatened (today, the issue would trigger standing).

78. MASHAW, *supra* note 55, at 246. Mashaw highlights two early cases, *Lindsey v. Hawes*, 67 U.S. (2 Black) 554, 554 (1862), and *Johnson v. Towsley*, 80 U.S. (13 Wall.) 72, 83-84 (1871). *Id.* at 246-48. The General Land Office cases involve unique issues beyond the scope of this Article, including vested rights in land patents, mistake, fraud, subversion of the public land laws, and equity jurisprudence. In *Johnson*, for example, the Court observed that “there has always existed in the courts of equity the power in certain classes of cases to inquire into and correct mistakes, injustice, and wrong in both judicial and executive action.” 80 U.S. (13 Wall.) at 84; *see also* *Downs v. Hubbard*, 123 U.S. 189, 211-12 (1887); *Moore v. Robbins*, 96 U.S. 530, 535-36 (1877); *Shepley v. Cowan*, 91 U.S. 330, 340 (1875); *Stark v. Starrs*, 73 U.S. (6 Wall.) 402, 409-10 (1867); *Garland v. Wynn*, 61 U.S. (20 How.) 6, 8 (1857); *Barnard v. Ashley*, 59 U.S. (18 How.) 43, 44 (1855). But over matters such as land surveys, the Court noted clearly “that it [was] not the province of this court to” review those decisions. *United States v. Maxwell Land-Grant Co.*, 121 U.S. 325, 377 (1887). In *Hewitt v. Schultz*, the Court warned how ignoring the Department’s long-standing construction of public land laws might produce “endless confusion” and upset an array of expectations. 180 U.S. 139, 156-57 (1901). The Court would do so, however, if the language of the statute expressly excluded the construction or if the construction was not uniform. *Id.*

79. LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 9 (1965). According to Jaffe, “[t]he Interstate Commerce Commission broke new ground,” although it had been “preceded” by similar efforts in the states as part of the Granger Movement. *Id.*

80. WILLIAM C. CHASE, *THE AMERICAN LAW SCHOOL AND THE RISE OF ADMINISTRATIVE GOVERNMENT* 60-65 (1982) (describing Wyman’s course and methodology).

conceived of as a department of our public law when it is part of the legal system of every country of continental Europe.”⁸¹ The maligned Ernst Freund at Chicago’s law school simultaneously promoted (albeit unsuccessfully) scientific inquiry into the administrative state.⁸² Justice Frankfurter would later pen how administrative law developed during this period, with the help of opinions by Chief Justice White and the enlargement of the Interstate Commerce Commission’s authority under the Hepburn Act⁸³ and the Mann-Elkins Act.⁸⁴ Other contributing factors were the creation of similar agencies in many states and a “widespread recognition that these specific instances marked a general movement . . . [which] made increasingly manifest the place of administrative agencies in enforcing legislative policies.”⁸⁵

81. WYMAN, *supra* note 65, at 2. Jerry Mashaw describes Wyman’s book as “the first attempt to systematize American administrative law at the national level.” MASHAW, *supra* note 55, at 252. Frank Goodnow also published two influential books on the subject. *See generally* FRANK J. GOODNOW, PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES (1905) (representing Goodnow’s attempt at a more comprehensive study of American administrative conditions as compared to his earlier work devoted to a comparison of different systems); FRANK J. GOODNOW, COMPARATIVE ADMINISTRATIVE LAW (1893) (comparing the administrative structures of the United States, England, France, and Germany). Nathan Grundstein offered a concise description of both Wyman’s and Goodnow’s approach. Nathan D. Grundstein, *Presidential Power, Administration and Administrative Law*, 18 GEO. WASH. L. REV. 285, 287–92 (1950).

82. Ernst Freund became “the first American master of” administrative law. Louis L. Jaffe, *An Essay on Delegation of Legislative Power: I*, 47 COLUM. L. REV. 359, 360 (1947). Freund expanded upon Wyman as well as foreign scholars (Goodnow was his teacher, and Freund studied in Germany) and published the first administrative law casebook in 1911, with a second in 1928. *See* ERNST FREUND, ADMINISTRATIVE POWER OVER PERSONS AND PROPERTY (William S. Hein & Co., Inc. 1996) (1928); ERNST FREUND, CASES ON ADMINISTRATIVE LAW (1911). In 1894, Freund wrote: “[I]t must appear as remarkable that that branch of the public law which deals with the organization and action of the government in its administrative department has, until a very recent time, received so little attention from English and American jurists.” Freund, *supra* note 71, at 403. Freund hoped administrative law would “become more familiar to the public . . . [and] legal profession . . . [and] become one of the recognized branches of public law.” *Id.* at 404. While Freund anticipated many issues that would surface in administrative law, his approach toward the administrative state clashed with the dominant philosophy and arguably relegated him to a level of obscurity. CHASE, *supra* note 80, at 47–59, 94–98, 136–37; *see also* Grundstein, *supra* note 81, at 325 (explaining how Freund sought to constrain discretionary administrative behavior by tying agencies more toward the legislative branch).

83. Pub. L. No. 59-337, 34 Stat. 584 (1906).

84. Pub. L. No. 61-218, 36 Stat. 539 (1910).

85. *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 138 (1939). Justice Holmes equally credits Chief Justice White’s promotion of administrative agencies. *See* WALTER F. PRATT, JR., THE SUPREME COURT UNDER EDWARD DOUGLASS WHITE, 1910–1921, at 45 (1999). The notion of entrusting authority to expert “administrators” departed from the story of majoritarian rule dominant during the nineteenth century. *See* WILLIAM E. NELSON, THE ROOTS OF AMERICAN BUREAUCRACY, 1830–1900, at 113–14 (1982). In

A modern form of judicial review then surfaced, with the Court seemingly more tolerant of reviewing factual judgments when it considered the facts intertwined with jurisdiction. Professor Wyman, for instance, taught students that courts could review when and where agencies could act, just not how.⁸⁶ In the land office cases, for instance, the Court viewed its role as exploring *jurisdictional facts* to determine whether, in fact, the agency was operating legitimately inside discretionary space.⁸⁷ If a statute gave the Secretary the authority to do X upon a finding of Y, then the Court reasoned that it is only natural to explore whether Y exists even if X embraces expansive discretionary authority.⁸⁸ This principle became accepted lore by the turn of the century⁸⁹ and, not surprisingly, produced difficult precedent as the administrative state progressed.⁹⁰

England, Albert Dicey explored how administrative agencies became part of political institutions in the unwritten constitutional state. A. V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 475–546 (1885) (portraying administrative law as an aspect of fulfilling democracy). *But cf.* WILLIAM A. ROBSON, JUSTICE AND ADMINISTRATIVE LAW: A STUDY OF THE BRITISH CONSTITUTION 26–33 (1928) (questioning Dicey’s analysis). Scholars, after all, still thought it necessary to explain why administrative “rules” constituted a source of “law.” JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 111–12 (Columbia Univ. Press 2d ed. 1938) (1921).

86. See CHASE, *supra* note 80, at 81. Wyman later softened his position, troubled by agency adjudications arguably stretching perceived bounds of justice. *Id.* at 91–92.

87. See, e.g., *Noble v. Union River Logging R.R. Co.*, 147 U.S. 165, 173–75 (1893).

88. *Id.* at 171–72. “It is true that, in every proceeding of a judicial nature, there are one or more facts which are strictly jurisdictional, the existence of which is necessary to the validity of the proceedings, and without which the act of the court is a mere nullity . . .” *Id.* at 173. Justice Brown’s citations in *Noble* seem inapt. For instance, he conflates personal jurisdiction questions with agency construction and implementation of statutes. *E.g.*, *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877) (personal jurisdiction), *overruled in part by Shaffer v. Heitner*, 433 U.S. 186 (1977); *D’Arcy v. Ketchum*, 52 U.S. (11 How.) 165, 175 (1850) (comity and justice for jurisdiction). Justice Brown also opined that other cases established what are called “quasi jurisdiction” facts that once “established to the satisfaction of the court, cannot be attacked collaterally.” *Noble*, 147 U.S. at 173.

89. See, e.g., WYMAN, *supra* note 65, at 365.

90. Professor Davis explains how *Crowell v. Benson*, 285 U.S. 22 (1932), “brought the concept of jurisdictional facts into such prominence.” KENNETH C. DAVIS, HANDBOOK ON ADMINISTRATIVE LAW 537 (1951); see also *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 51–54 (1936); *Ho v. White*, 259 U.S. 276, 283–84 (1922). In *United States v. Baltimore & Ohio Railroad Co.*, Justice Brandeis required the Interstate Commerce Commission to render necessary “quasi jurisdictional findings” to ensure that the agency had the authority to act. 293 U.S. 454, 464–65 (1935). Professor Davis further noted that, in *Estep v. United States*, 327 U.S. 114, 142 (1946), Justice Frankfurter “condemned” the concept. DAVIS, *supra*, at 539 n.92; see also Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 411–12 (2007) (describing Frankfurter’s negative reaction). Landis similarly warned that the concept of de novo judicial review of “jurisdictional facts” threatened the administrative state. JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 133, 140–41 (7th ed. 19660).

The “law-fact distinction,” according to Jerry Mashaw when summarizing the legendary account by Louis Jaffe, “morphed into something like a general presumption of the reviewability of administrative action for legal error in the 1902 case *American School of Magnetic Healing v. McAnnulty*.”⁹¹ Mashaw further adds that following *McAnnulty*⁹² the scope of judicial review expanded through “selective myopia.”⁹³ It seems troubling, however, that *McAnnulty* could justify an expanded judicial review. In *McAnnulty*, the Postmaster General interceded in a purported mail fraud scheme involving an institution claiming to heal all human ills through magnetic healing.⁹⁴ The Court, in an opinion by Justice Peckham, plucked out of context aspects from the public lands cases⁹⁵ and avoided “some grave questions of constitutional law.”⁹⁶ Without referring to any evidence, Justice Peckham assessed whether he believed the business was engaging in mail fraud, as well as explored the scientific difficulty of proving whether magnetic healing actually works.⁹⁷ Justice Peckham authored *Lochner v. New York*,⁹⁸ and his opinion in *McAnnulty* is quite similar; he treated the business as engaging in some constitutionally protected activity and employed a style of reasoning that has since been discredited—the Court subjectively determining for itself whether it believed the facts warranted social or economic legislation.⁹⁹

91. MASHAW, *supra* note 55, at 248.

92. 187 U.S. 94.

93. MASHAW, *supra* note 55, at 249. Jaffe included *McAnnulty* as the first case in his casebook section on “Whether Action Is Reviewable.” LOUIS L. JAFFE & NATHANIEL L. NATHANSON, ADMINISTRATIVE LAW: CASES AND MATERIALS 801 (2d ed. 1961).

94. 187 U.S. at 95–98.

95. See cases cited *supra* note 78.

96. *McAnnulty*, 187 U.S. at 103.

97. *Id.* at 104–06. Justice Peckham concluded: “Unless the question may be reduced to one of fact, as distinguished from mere opinion, we think these statutes cannot be invoked for the purpose of stopping the delivery of mail matter.” *Id.* at 106.

98. 198 U.S. 45 (1905).

99. Only two years later, the Court confronted a constitutional challenge to Congress’ ability to allow the Postmaster to intercept fraudulent mail (the business engaged in a ponzi scheme, described then as a lottery), a challenge that included the claim that the Postmaster General was rendering decisions indiscriminately and without affording a hearing. *Pub. Clearing House v. Coyne*, 194 U.S. 497, 508 (1904). The *Coyne* Court recalled how even in *McAnnulty* the Court assumed the law’s constitutionality—of course overlooking that Justice Peckham averted what he termed grave constitutional concerns. *Id.* at 509; see also text accompanying notes 91, 96. Notably, Peckham dissented without opinion in *Coyne*. 194 U.S. at 516.

2. Progressivism's Influence.

The progressive movement helped solidify “administrative law” as a discipline, purportedly offering general principles for delimiting the parameters of federal agency authority and discretion. After all, the field helped facilitate economic and social reforms.¹⁰⁰ It meant, for many such as Justice Felix Frankfurter, a muted role for the Court when reviewing social and economic legislation.¹⁰¹ Progressives benefited from the late nineteenth century rhetoric against bureaucrats and Teddy Roosevelt-style service reform.¹⁰² They benefited from increasing executive power and the role of the executive branch as a forum for effecting policy change.¹⁰³ And many embraced, quite possibly too enthusiastically, “the scientific ideal of reformers, as one that required trained experts who made decisions and otherwise performed their tasks in accordance with autonomous, abstract standards.”¹⁰⁴ This incentivized them to focus principally on infusing administrative law into our constitutional structure rather than on what ought to be the principles of administrative law.¹⁰⁵ New agencies, therefore, began sprouting, with perhaps the greatest succession beginning in 1920.¹⁰⁶ The judiciary acquiesced by tolerating the constitutional ability of administrative bodies to impose costs on regulated groups without the need for individualized—and therefore debilitating—determinations.¹⁰⁷

100. “The administrative process has, during the last seventy-five years, been the characteristic instrument of political and economic reform.” JAFFE & NATHANSON, *supra* note 93, at 6.

101. See 9 ALEXANDER M. BICKEL & BENNO C. SCHMIDT, JR., *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE JUDICIARY AND RESPONSIBLE GOVERNMENT 1910–1921*, at 15–16 (Cambridge Univ. Press 2007) (1984).

102. See PERI E. ARNOLD, *REMAKING THE PRESIDENCY: ROOSEVELT, TAFT, AND WILSON, 1901–1916*, at 41 (2009); NELSON, *supra* note 85, at 120–21.

103. ARNOLD, *supra* note 102, at 41.

104. NELSON, *supra* note 85, at 125; see also SAMUEL HABER, *EFFICIENCY AND UPLIFT: SCIENTIFIC MANAGEMENT IN THE PROGRESSIVE ERA, 1890–1920*, at 75–98 (1964); Schiller, *supra* note 90, at 413 (progressives preferring expertise).

105. The American Bar Association created a Special Committee on Administrative Law, apparently to offset what James Landis lamented was a weak “bar.” James M. Landis, *Crucial Issues in Administrative Law: The Walter-Logan Bill*, 53 HARV. L. REV. 1077, 1078–82 (1940).

106. JAFFE, *supra* note 79, at 9.

107. In what is now a fundamental principle of administrative law, the Court held that widely shared economic costs need not be preceded by individualized adjudications. Compare *Londoner v. City & Cty. of Denver*, 210 U.S. 373, 386 (1908) (holding that a small number of persons, affected on individual grounds, had a right to a hearing regarding the decision to levy a tax for paving a street for special benefits), with *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915) (holding that real estate owners, as members of the general population, did not have a right to a hearing regarding a tax

Of course, not all ostensible progressives accepted uncritically the expanding administrative state. Freund and his followers feared that overly broad delegations to administrative agencies, particularly absent effective judicial oversight, threatened individual liberty and our constitutional structure.¹⁰⁸ Roscoe Pound too expressed considerable reservations, particularly questioning the model of expert judgment by administrators disconnected from political pressures.¹⁰⁹ Speaking to the American Bar Association (“ABA”) in 1917, the president of the ABA and future Supreme Court Justice, George Sutherland, assailed administrative agencies as an affront to liberty.¹¹⁰ He objected to having a singular body engage in legislating, administering the law, and adjudicating.¹¹¹ He lamented the increasing number of agencies, the

increase as it was “impracticable” for every person to have a “direct voice” in the tax’s adoption). Admittedly some disagreement surrounds the basis for distinguishing these two cases. *See, e.g.*, RICHARD J. PIERCE, JR. ET AL., ADMINISTRATIVE LAW AND PROCESS § 6.3.2 (5th ed. 2008). And neither case warrants much modern respect. *See* Henry J. Friendly, Book Review, 8 HOFSTRA L. REV. 471, 476–77 (1980) (describing Professor Davis’ attitude toward cases); Nathaniel L. Nathanson, *Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review Under the Administrative Procedure Act and Other Federal Statutes*, 75 COLUM. L. REV. 721, 724–25 (1975) (noting factual errors in *Bi-Metallic*).

108. “[T]he most important point in the development of administrative law is the reduction of discretion. . . .” Ernst Freund, *Historical Survey*, in ERNST FREUND ET AL., THE GROWTH OF AMERICAN ADMINISTRATIVE LAW 9, 24 (1923); *see also* Grundstein, *supra* note 81, at 324–25. In 1918, Freund joined the newly created Commonwealth Fund, whose members included Benjamin Cardozo, Roscoe Pound, Felix Frankfurter, Harlan Fiske Stone, and later even Charles Evan Hughes, with the objective of exploring the administrative state. *See* CHASE, *supra* note 80, at 103–05. Frankfurter became the force among this coterie, and Freund an outcast. *See id.* at 106–16, 123.

109. *See* Schiller, *supra* note 90, at 423.

110. George Sutherland, *Private Rights and Government Control*, in REPORT OF THE FORTIETH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 197, 204 (1917), *reprinted in* S. DOC. NO. 119 (1917). As a Justice, Sutherland subsequently warned that, while administrative agencies may be necessary, absent sufficient judicial oversight against arbitrary behavior they might threaten “fundamental rights, privileges, and immunities of the people.” *Jones v. SEC*, 298 U.S. 1, 23–25 (1936); *see also* Mark Tushnet, Lecture, *Administrative Law in the 1930s: The Supreme Court’s Accommodation of Progressive Legal Theory*, 60 DUKE L.J. 1565, 1610–12 (2011) (describing reaction to *Jones v. SEC*).

111. *See* Sutherland, *supra* note 110, at 204. The previous year, ABA President Elihu Root similarly suggested the need for policing agencies. Elihu Root, *Public Service by the Bar*, in REPORT OF THE THIRTY-NINTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 355, 368–69 (1916); *see also* CHARLES E. HUGHES, SOME ASPECTS OF THE DEVELOPMENT OF AMERICAN LAW 22 (1916). Justice Sutherland characteristically wrote the opinion in *Humphrey’s Executor v. United States*, employing a capacious approach toward statutory construction to restrict the President’s removal power and uphold Congress’ purported limitation by explaining the differences between the legislative, judicial, and executive powers. 295 U.S. 602, 627 (1935). He warned of “[t]he fundamental necessity of maintaining each of the three general departments of government entirely free from the

failure by Congress to define adequately the scope and authority of those agencies, as well as the failure to staff the agencies with trained employees.¹¹² This all became more troubling, he suggested, because administrative law principles effectively insulated many decisions from scrutiny,¹¹³ portending the development of “a system of administrative government which may easily become autocratic and oppressive.”¹¹⁴

C. Phase III: New Dealers Push Progressivism Toward the APA

1. Solidifying the Administrative State.

Such concerns faded a few decades later. Reuel Schiller’s history of this period chronicles how “Roosevelt’s landslide in 1932 brought with it a commitment to administrative government on an unprecedented scale.”¹¹⁵ Schiller explains how progressives-turned-New-Dealers firmly believed in expert technocrats capable of making informed choices to address societal issues.¹¹⁶ This coincided with a changing judicial attitude

control or coercive influence, direct or indirect, of either of the others.” *Id.* at 629. This illustrates the judiciary’s struggle with placing administrative agencies within the confines of our tripartite system. One court acutely observed how

[t]he question of delegation of power by the Legislature, and especially legislative power to other branches of the government, to administrative boards or to individuals, has been a question that has caused a great deal of controversy in the courts, not only in the state courts, but also in the federal courts. It has been said that the Legislature makes the law, that the executive executes the law, and that the judiciary expounds or determines what the law is.

Cook v. Burnquist, 242 F. 321, 324 (D. Minn. 1917). The post-Civil War era marked a weak executive power period, and the Tenure of Office Act, ch. 154, 14 Stat. 430 (1867), reflected Congress’ dominance. It “cut down the power of the President to remove civil officers.” *Wallace v. United States*, 257 U.S. 541, 545 (1922). Notably, Congress passed the Act purposely to limit President Johnson’s power. ROBERT V. REMINI, *THE HOUSE: THE HISTORY OF THE HOUSE OF REPRESENTATIVES* 199 (2006). The Act resulted in a variety of cases, including *Embry v. United States*, 100 U.S. 680 (1879), and eventually the principal case of *Myers v. United States*, 272 U.S. 52 (1926), distinguished by Justice Sutherland in *Humphrey’s*, 295 U.S. at 626.

112. See Sutherland, *supra* note 110, at 204, 206.

113. Between 1910 and 1913, Congress experimented with a separate Commerce Court designed to diminish some of these concerns. See MORTON KELLER, *REGULATING A NEW ECONOMY: PUBLIC POLICY AND ECONOMIC CHANGE IN AMERICA, 1900–1933*, at 49 (1990).

114. Sutherland, *supra* note 110, at 206. Paul Verkuil credits the reticence toward allocating more authority to administrative agencies to classical liberalism’s focus on the adversary system and procedural correctness. Paul R. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 265 (1978).

115. Schiller, *supra* note 90, at 404.

116. *Id.* at 406.

toward the administrative state.¹¹⁷ Writing in 1930, Justice Frankfurter observed how courts began accepting that the Constitution did not “forbid the creation of administrative devices merely because these exercised functions which, as a matter of logical analysis, partook of all three forms of governmental power—legislative, executive, and judicial.”¹¹⁸ Earlier he explained how statutory law was becoming pervasive, with Congress often leaving the details of implementation “lodged in a vast congeries of agencies.”¹¹⁹ And yet he lamented how up until recently scholars had conceived of administrative law as “exotic.”¹²⁰ But he warned against any precipitous response to perceived ills of the administrative state and limits on judicial review, recognizing the dynamic nature of the field and the doctrinal need for supporting empirical information.¹²¹ Such views became instilled in his Harvard seminar students—students who would soon become governmental lawyers.¹²²

Administrative law thereafter became less exotic as doctrines began crystalizing. In what Louis Jaffe describes as “farm[ing] where no plow had gone before,” the New Deal prompted an intense discussion of the role and function of administrative agencies under the Constitution and in a democratic society.¹²³ If, for instance, Congress delegated broad authority to an agency to regulate against “unreasonable” forms of behavior, a fear over delegation was justifiable. Absent modern day principles of judicial review, what other legal doctrines would have justified restraining unpalatable agency behavior under a broadly worded “unreasonable” standard? Quite possibly too few.¹²⁴ But with organized

117. Of course, not all contemporaries welcomed agencies. *See generally*, JAMES M. BECK, OUR WONDERLAND OF BUREAUCRACY: A STUDY OF BUREAUCRACY IN THE FEDERAL GOVERNMENT AND ITS DESTRUCTIVE EFFECT ON THE CONSTITUTION (1932) (an anti-bureaucracy polemic).

118. FELIX FRANKFURTER, THE PUBLIC AND ITS GOVERNMENT 87–88 (1930). Frankfurter joined with J. Forrester Davison to publish a casebook in 1932. *See generally* FELIX FRANKFURTER & J. FORRESTER DAVISON, CASES AND OTHER MATERIALS ON ADMINISTRATIVE LAW (1932). Schiller suggests that this sentiment coincided with an “extreme judicial deference” to agency actions during the late 1930s and early 1940s. Schiller, *supra* note 90, at 406. William Chase posits that this occurred slightly earlier. CHASE, *supra* note 80, at 134.

119. Felix Frankfurter, *The Task of Administrative Law*, 75 U. PA. L. REV. 614, 614 (1927).

120. *Id.* at 615.

121. *Id.* at 620. He observed how “[i]ntensive studies of the administrative law . . . will furnish the necessary prerequisite to an understanding of what administrative law is really doing, so that we may have an adequate guide for what ought to be done.” *Id.*

122. *See* CHASE, *supra* note 80, at 138–39.

123. Jaffe, *supra* note 82, at 363.

124. The judiciary recognized how controlling appointments and removal served as a legislative check. Freund, *supra* note 71, at 408–09. Also, early administrative cases

principles of judicial review crystalizing, concerns about delegation of power and democratic theory dissipated somewhat over the next decade.¹²⁵ The Court instead began transplanting constitutional language from its earlier cases into the new administrative law realm. Police power cases offered ample rhetoric for the Court to review decisions for arbitrary, capricious, or unreasonable behavior.¹²⁶ Yet a more robust appreciation for appropriate while circumscribed judicial review became necessary.

2. Fits & Starts of Judicial Review Model.

But administrative law was trapped between a common law heritage and legislation, animated by a utilitarian need for reform. Progressives undoubtedly touted the need for expert administrators, while some studies questioned the assumption of unbiased experts in a pluralistic society dominated by political factions.¹²⁷ The Constitution, though, served as a backstop to protect against overly aggressive abuses—often under the guise of due process.¹²⁸ This left several open questions, however, including (a) whether courts could separate legal

triggered constitutional inquiries, such as whether an agency's establishment of a reasonable rate was confiscatory or simply "unreasonable" under the Due Process Clause. *See, e.g., Smyth v. Ames*, 171 U.S. 361, 365 (1898).

125. Today, we generally consider *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), and *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) as aberrations, but they reflected a serious story emerging about how to place administrative agencies within a legal system previously marked by easily identifiable spheres—the legislative, executive, and judiciary. Louis Jaffe characterized "[d]elegation as the handmaiden of regulation," one that "is distasteful to holders of economic power" and yet animated by "the general concern that large decisions of policy should be grounded in consent" arrived at through the politically accountable process of the legislature. Jaffe, *supra* note 82, at 359. Professor Davis argued that forcing agencies to use rulemaking to develop criteria or standards would avert a concern over otherwise broad delegations. KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 44–51, 221 (1969). Judge Friendly expressed even greater concern with broad delegations. *See* Henry J. Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 HARV. L. REV. 863, 874 (1962). For only a handful of the contemporary articles on delegation, see Sidney B. Jacoby, *Delegation of Powers and Judicial Review: A Study in Comparative Law*, 36 COLUM. L. REV. 871 (1936) and O. Douglas Weeks, *Legislative Power Versus Delegated Legislative Power*, 25 GEO. L.J. 314 (1937). In the Godkin Lectures at Harvard, even Justice Jackson warned how Congress "launch[ed]" agencies quite possibly without sufficient consideration. ROBERT H. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 46 (1955).

126. "The established doctrine is that . . . liberty may not be interfered with . . . by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect." *Myer v. Nebraska*, 262 U.S. 390, 399–400 (1923).

127. CHASE, *supra* note 80, at 131–33.

128. *Id.*

interpretations from factual questions and, if so, (b) the appropriate approach toward review of each. On the one hand, considerable precedent cabined the ability of the judiciary to review factual judgments.¹²⁹ Absent a structured approach toward statutory construction, which had not yet crystallized, distinguishing between legal and factual judgments became highly subjective and possibly influenced by the Court's attitude toward a particular agency.¹³⁰ Professor Davis posited how the Court appeared inclined to describe an issue as one involving statutory construction when disagreeing with the agency, while suggesting the matter involved evidentiary facts and judgment when agreeing with the agency.¹³¹ It was all the more problematic because many New Deal programs contained broad delegations, with little guidance other than available sources for discerning the mischief Congress sought to rectify.¹³² This meant that undefined and vague terms like "unfair competition," "producer," or "employee" offered few clues: they required either statutory construction and, by default, a resort to exploring the mischief, purpose, and legislative history surrounding a statute, or constructing a judicial review paradigm that could justify deferring—in some, but not all, instances—to expert agencies. To the extent the Court could do the latter, it avoided the refrain that the Court was engaging in "legislating."¹³³ Justice Stone observed how our complex society demanded such broad statutory policy goals with operative facts left to the ascertainment and implementation by the agency.¹³⁴ Professor Jaffe later accepted the concept of a "mixed"

129. Avoiding questioning factual findings echoed the sentiment that courts should avoid crossing "into the jurisdiction of another department." WYMAN, *supra* note 65, at 142. This would change once the Court required sufficient relevant findings. *See, e.g.*, *Eastern-Central Motor Carriers Ass'n v. United States*, 321 U.S. 194, 210 (1944).

130. Robert L. Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70, 70 (1944) (noting differential treatment of FTC and Interstate Commerce Commission cases); DAVIS, *supra* note 90, at 906 (noting the same).

131. DAVIS, *supra* note 90, at 907–09.

132. *See* Louis L. Jaffe, *The Illusion of the Ideal Administration*, 86 HARV. L. REV. 1183, 1186, 1189 (1973) (questioning broad delegation model).

133. *See* ROSCOE POUND, *ADMINISTRATIVE LAW: ITS GROWTH, PROCEDURE AND SIGNIFICANCE* 18 (1942) ("At the beginning of the present century it was not uncommon to hear complaints of judicial usurpation of lawmaking power when courts applied the received canons of genuine interpretation . . .").

134. *See* *Opp Cotton Mills, Inc. v. Adm'r of Wage & Hour Div. of Dep't of Labor*, 312 U.S. 126, 145, 155–56 (1941). In *Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co.*, the Court held that, for FCC decisions, Congress expressly limited judicial review to questions of law, as well as for substantial evidence, but the latter only ensures against arbitrary or capricious decisions which "do[] violence to the law. It is without the sanction of the authority conferred" and therefore the limited factual inquiry "is not concerned with the weight of evidence or with the wisdom or expediency of the administrative action." 289 U.S. 266, 277 (1933). This had been established in earlier *Interstate Commerce Commission*

question of law and fact to resolve this dilemma,¹³⁵ a phrase coined earlier.¹³⁶ This fiction of a mixed question of law and fact offered a mask that would permit judicial review somewhat consistent with precedent.

In *Gray v. Powell*, for instance, the Court considered whether the Director of the Bituminous Coal Division correctly decided that Seaboard Air Line Railway Company was not a “producer” of coal entitled to an exemption under the Bituminous Coal Code.¹³⁷ Seaboard had engaged in a series of interrelated transactions, including leasing coal lands, to ensure a reliable supply of coal for its railroads.¹³⁸ The Director concluded that, because Seaboard was neither directly involved in the mining of coal nor operating the mine itself, but rather contracted with others, it was not a “producer.”¹³⁹ In delivering the majority opinion, Justice Reed (a New Dealer) observed how Congress, in “familiar practice,” delegated the judgment to an administrative agency, and even though no dispute over evidentiary facts was present, the Court nevertheless could not “substitute its judgment for that of the Director.”¹⁴⁰ A year earlier,

cases, where the Court held that a finding without substantial evidence is “arbitrary and baseless.” *E.g.*, *Interstate Commerce Comm’n v. Louisville & Nashville R.R. Co.*, 227 U.S. 88, 91 (1913). But the justification was premised upon a vague constitutional guarantee against “all arbitrary exercise of power.” *Id.* And findings without evidence exceeded the Commission’s power. *Id.* at 92. Opinions authored by Justice Brandeis seemed willing to give administrative agencies greater deference. *See* *Virginian Ry. Co. v. United States*, 272 U.S. 658, 663–66 (1926) (applying a more deferential approach toward reviewing for substantial evidence); *W. Paper Makers’ Chem. Co. v. United States*, 271 U.S. 268, 271 (1926) (same); *see also* *Assigned Car Cases*, 274 U.S. 564, 580–84 (1927) (deferring to learned experience of agency particularly when exercising legislative function).

135. Louis L. Jaffe, *Judicial Review: Question of Law*, 69 HARV. L. REV. 239, 241 (1955) (objecting to the notion that courts must decide de novo all legal questions).

136. *E.g.*, Francis H. Bohlen, *Mixed Questions of Law and Fact*, 72 U. PA. L. REV. 111, 112 (1924); Stern, *supra* note 130, at 93.

137. 314 U.S. 402, 403–06 (1941).

138. *Id.* at 407–09.

139. *Id.* at 406–08.

140. *Id.* at 412. Justice Reed added that the Court would not “absorb the administrative functions to such an extent that the executive or legislative agencies [would] become mere fact finding bodies deprived of the advantages of prompt and definite action.” *Id.* Today, a court might examine the agency’s construction of “producer” under standard deference analysis, yet Justice Reed indicated that unless the Court concludes the “circumstances deemed by the Commission to bring them within the concept ‘producer’ is so unrelated to the tasks entrusted by Congress to the Commission as in effect to deny a sensible exercise of judgment, it is the Court’s duty to leave the Commission’s judgment undisturbed.” *Id.* at 413. The dissenters examined the meaning of “producer” as a judicially reviewable legal issue. *Id.* at 420–21 (Roberts, J., dissenting); *see also* *Swift & Co. v. United States*, 316 U.S. 216, 233 (1942) (holding that the Court would not upset the conclusive judgment of the Commission in the “forum” in which such “practices may be questioned and may be weighed”).

Justice Reed gave “great weight” to an agency’s view of a broadly worded statute that the agency itself had been instrumental in securing.¹⁴¹

Three subsequent cases, *Dobson v. Commissioner of Internal Revenue*,¹⁴² *NLRB v. Hearst Publications, Inc.*,¹⁴³ and *Skidmore v. Swift & Co.*,¹⁴⁴ carried *Gray v. Powell* forward. Each case presented the difficulty of distinguishing when and how to review facts and law.¹⁴⁵ Justice Frankfurter earlier had regaled his colleagues with his mastery of the importance of agencies and appreciating their expertise.¹⁴⁶ Justice Jackson’s *Dobson* opinion is perhaps one of the most lucid illustrations of how the Court grappled with changing norms and past precedent.¹⁴⁷ At one point, Justice Jackson candidly admitted that, even though Congress changed the tax law to limit judicial review, past habits of broader review remained.¹⁴⁸ He found this particularly unfortunate in the tax arena, because, “[t]ested by every theoretical and practical reason for administrative finality” due to the agency’s fair process and expertise, “no administrative decisions are entitled to higher credit in the courts.”¹⁴⁹ And he posited how the problem arguably surfaced because of the difficulty of distinguishing review of facts from law, and in the further suggestion of mixed questions of law and fact.¹⁵⁰ Employing Justice Frankfurter’s approach, Justice Jackson then suggested that an agency ought to separately identify, if possible, conclusions of fact and those of law, and even when the latter a court might give “weight” (although not binding) due to an agency’s expertise.¹⁵¹

Next, when confronting a similar construction question, this time for the term “employee,” the Court issued its now legendary and

141. *United States v. Am. Trucking Ass’ns*, 310 U.S. 534, 549 (1940).

142. 320 U.S. 489, 501 (1944).

143. 322 U.S. 111, 130 (1944) *overruled in part by* *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992).

144. 323 U.S. 134, 140 (1944).

145. *See Dobson*, 320 U.S. at 506–07; *Hearst*, 322 U.S. at 130; *Skidmore*, 323 U.S. at 139.

146. *Rochester Tel. Co. v. United States*, 307 U.S. 125, 145–46 (1939). And only four years earlier, Justice Frankfurter described how reviewing courts could, not through an exercise of judicial review and the issuing of a remedy, usurp congressionally assigned tasks. *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 144–45 (1940). He added how laws governing agencies ensure “fundamentals of fair play,” with “interested parties . . . afforded an opportunity for hearing” and entitled to a decision “express[ing] a reasoned conclusion.” *Id.* at 143–44. Earlier cases had expressed the need for a reasoned judgment (i.e., avoiding arbitrary or capriciousness). *E.g.*, *Fed. Radio Comm’n v. Nelson Bros. Bond & Mortg. Co.*, 289 U.S. 266, 284 (1933).

147. *Dobson*, 320 U.S. at 497–98; *see also Rochester Tel. Co.*, 307 U.S. at 138–42.

148. *Dobson*, 320 U.S. at 497–98.

149. *Id.* at 499.

150. *Id.* at 500–01.

151. *Id.* at 501–02.

misunderstood *Hearst Publications* opinion. The dynamic was familiar: the New Deal paradigm of a broadly worded delegation, coupled with the Court's interest in accepting, to the extent capable, the mischief, spirit, or purpose of the legislation. The Court famously reviewed whether newsboys were employees under the National Labor Relations Act ("NLRA").¹⁵² The case engaged what Justice Jackson described as "the greatest source of litigation" during the period: the finality courts afford agency decisions.¹⁵³ The NLRB, and in particular its alleged biases and combining of functions, had been the subject of considerable media and congressional scrutiny.¹⁵⁴ For certain decisions, such as Board-initiated proceedings against unfair labor practices, "[t]he findings of the Board as to the facts, if supported by evidence, shall be conclusive."¹⁵⁵ And earlier

152. *NLRB v. Hearst Publ'ns, Inc.*, 322 U.S. 111, 113 (1944), *overruled in part by* *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992).

153. JACKSON, *supra* note 125, at 47. Jackson illustrated his point with *Interstate Commerce Commission v. Louisville & Nashville Railroad Co.*, 227 U.S. 88, 91 (1913). *Id.* at 48. There, the Interstate Commerce Commission allegedly explored whether a rate was "unreasonable," ostensibly without any evidence. *Louisville & Nashville R.R.*, 227 U.S. at 89–90. The question was whether that conclusion could be reviewed:

Under the statute the carrier retains the primary right to make rates, but if, after hearing, they are shown to be unreasonable, the Commission may set them aside and require the substitution of just for unjust charges. The Commission's right to act depends upon the existence of this fact, and if there was no evidence to show that the rates were unreasonable there was no jurisdiction to make the order. In a case like the present the courts will not review the Commission's conclusions of fact by passing upon the credibility of witnesses or conflicts in the testimony. But the legal effect of evidence is a question of law. A finding without evidence is beyond the power of the Commission.

Id. at 92 (citations omitted). The Court noted "[a] finding without evidence [would be] arbitrary and baseless" and reviewed the record to assess whether the Commission had substantial evidence. *Id.* at 91, 94–98. The Court in *ICC v. Del., Lackawanna & W. R.R. Co.*, 220 U.S. 235, 251–52 (1911) held that the Hepburn Act, ch. 3591, 34 Stat. 584 (1909), made unreviewable factual judgments on criteria for charges by carriers. The Court also declined to review discretionary judgments on matters involving foreign affairs, under the principle that such judgments were conclusive and review would interfere with a political question. See WYMAN, *supra* note 65, at 103, 105–07, 113.

154. See JAMES A. GROSS, *THE RESHAPING OF THE NATIONAL LABOR RELATIONS BOARD: NATIONAL LABOR POLICY IN TRANSITION, 1937–1947*, at 151–71 (1981); see also *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 224–25 (1938) (addressing procedural issues). In 1944, Justice Jackson (with Justices Stone and Frankfurter joining) challenged Justice Black's highly deferential approach toward the Board's tilting too heavily toward a dubious policy involving closed shop agreements. *Wallace Corp. v. NLRB*, 323 U.S. 248, 267, 269 (1944).

155. National Labor Relations (Wagner) Act, Pub. L. No. 74-198, 49 Stat. 449, 454 (1935); see also *NLRB v. Nev. Consol. Copper Corp.*, 316 U.S. 105, 106–07 (1942); *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 299 (1939); *Consol. Edison Co.*, 305 U.S. at 229. In 1947, Congress made the Board's factual findings conclusive "if supported by substantial evidence on the record considered as a whole." Labor Management Relations

the Court had announced that it would “refuse[] to review the evidence or weigh the testimony” and declared that it would “reverse or modify the findings only if clearly improper or not supported by substantial evidence.”¹⁵⁶ The question was whether Congress intended the term “employee” to have its common law or some other meaning.¹⁵⁷ The Board argued that the spirit, as well as the purpose, of the Act belied “exclusive resort to the common law for a determination of coverage.”¹⁵⁸ It further claimed that a reasonable exercise of its expert judgment, on a case-by-case basis, should be considered conclusive if supported by substantial evidence.¹⁵⁹ The lower court disregarded the Board’s views, treating the question as a legal issue capable of de novo review.¹⁶⁰ The Board countered that its determination either should be considered conclusive unless arbitrary or without substantial evidence, or at the very least “entitled to weight.”¹⁶¹ And then it added that “the case does not present an unmixed question of law any more than did *Gray v. Powell*” and other cases.¹⁶² The issue involved “judgment,” it reasoned, and as such the agency’s decision could not be circumvented by calling it a “pure matter[] of law.”¹⁶³

Hearst Publications, therefore, required examining broad statutory concepts, whose import required expertise beyond the ken of judges. The Court’s analysis did not begin, as we would expect today, with a formula for statutory construction but rather with an explanation for why the term “employee” lacked sufficient clarity of application in the common law realm.¹⁶⁴ This led the Court to conclude that a uniform, national approach toward the treatment of “employee” was necessary, and that the history, terms, and purposes of the Wagner Act would inform who would be treated as an employee.¹⁶⁵ The inquiry necessarily encompassed

Act of 1947, Pub. L. No. 80-101, § 10, 61 Stat. 136, 148 (1947). Statutes generally varied on whether Congress used “substantial evidence,” “evidence,” or “testimony.” See Stern, *supra* note 130, at 76.

156. Wash., Va. & Md. Coach Co. v. NLRB, 301 U.S. 142, 147 (1937); see also *Opp Cotton Mills v. Adm’r of Wage & Hour Div. of Dep’t of Labor*, 312 U.S. 126, 154–56 (1941) (holding that if there is substantial evidence, then the facts are conclusive).

157. *Hearst Publ’ns*, 322 U.S. at 120.

158. Brief for the National Labor Relations Board at 28, *Hearst Publ’ns*, 322 U.S. 111 (Nos. 336-339), 1944 WL 66445.

159. *Id.* at 28–29.

160. *Id.* at 46.

161. *Id.* at 47.

162. *Id.* at 48.

163. *Id.* at 48–49. It admitted how “it would be arbitrary for an administrative body to give the statute a different meaning” if Congress’ intent was clear, but if room for discretion exists “the specialized skill of the Board” must be respected. *Id.* at 50 n.43, 55.

164. *Hearst Publ’ns*, 322 U.S. at 120–23.

165. *Id.* at 121–26.

an iterative process between the economic marketplace and the decision-maker, rather than a continual “technical legal refinement” practiced by the judiciary.¹⁶⁶ Economic facts, in short, would control.¹⁶⁷ And the Court explained how Congress delegated that inquiry to the agency assigned the task of administering the Act.¹⁶⁸ The Court appreciated how the judiciary must address questions of statutory interpretation, “giving appropriate weight” to those with special expertise, but then caveated that statement by noting that the judiciary’s role is limited when broad statutory terms are first addressed by the agency: the agency’s judgment is accepted if the record supports the factual conclusions and there is “a reasonable basis in law.”¹⁶⁹

The Court in *Skidmore v. Swift & Co.* then ostensibly fashioned a deference doctrine premised upon a congressional delegation theory.¹⁷⁰ In another example of broadly worded congressional language, this time involving the phrase “working time,” the Court addressed the weight it would afford the agency’s view contained in an amicus brief.¹⁷¹ The Fair Labor Standards Act (“FLSA”) required paying overtime to workers for being employed in excess of specified hours.¹⁷² Then a Senator, Justice

166. *Id.* at 125.

167. “[T]he broad language of the Act’s definitions . . . leaves no doubt that its applicability is to be determined broadly, in doubtful situations, by underlying economic facts rather than technically and exclusively by previously established legal classifications.” *Id.* at 129.

168. *Id.* at 130.

169. *Id.* at 131. Professor Jaffe justified *Hearst* by urging the examination of statutory purpose. Jaffe, *supra* note 135, at 263. Archibald Cox too discussed navigating between statutory purpose and statutory language, quoting Judge Learned Hand’s opinion in *Guisseppi v. Walling*, 144 F.2d 608, 623–24 (2d Cir. 1944) (Hand, J., concurring). Archibald Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 HARV. L. REV. 370, 376 (1947); see also Archibald Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 1, 42–43 (1947) (discussing *Hearst Publications*) [hereinafter Cox, *Aspects*]. In *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491 (1947), Justice Jackson sounded a slightly different tone, albeit noting that factual judgments would be upheld if supported by substantial evidence (statutorily mandated) and if the agency acted in accordance with the law. But in rebuffing a challenge to the Board’s authority, he then upheld the Board’s approach when suggesting that the issue involved purely a legal question. *Id.* at 492–93. The dissenters, including Chief Justice Vinson and Justices Douglas and Frankfurter, rejected the economic judgment and believed it thwarted the purposes of the Act. *Id.* at 497–98 (Douglas, J., dissenting). In *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), the Court reaffirmed how the labor law’s language effectively mirrored the common law substantial evidence standard, incorporated into the APA.

170. 323 U.S. 134, 137 (1944).

171. Brief on Behalf of the Administrator of the Wage and Hour Division, United States Department of Labor, as Amicus Curiae at 11, *Skidmore*, 323 U.S. 134 (Nos. 12, 73), 1944 WL 42828.

172. Fair Labor Standards Act of 1938, Pub. L. No. 75-718, § 7(a), 52 Stat. 1060, 1063 (1938); see also *United States v. Rosenwasser*, 323 U.S. 360, 361–63 (1945). The

Black sponsored the original proposal for regulating wages and hours,¹⁷³ and the Court in 1941 upheld its constitutionality.¹⁷⁴ Some companies refused to credit time employees had to spend on company premises while not performing actual work (waiting time), a norm apparently for on-site firefighters.¹⁷⁵ The FLSA permitted employees to sue for overtime compensation, or it allowed an enforcement suit against the alleged infractor by the Administrator of the Wage and Hour Division of the Department of Labor.¹⁷⁶ Other than through litigation, Interpretative Bulletins served as the principal mechanism for alerting how the Administrator would enforce the Act.¹⁷⁷ Two years prior to *Swift*, the Court rejected an interpretative bulletin judgment, reasoning that, if Congress left the term undefined, it expected a broad construction to achieve the congressional purpose, and the Court could not legislate what Congress avoided—presumably by blessing how the Administrator had so interpreted it.¹⁷⁸ That same year Justice Frankfurter observed, in connection with what employees the Act covered, how the FLSA “puts upon the courts the independent responsibility of applying ad hoc the general terms of the statute to an infinite variety of complicated industrial situations.”¹⁷⁹ And in *Swift’s* companion case, the Court avoided discussing the agency’s position.¹⁸⁰

Rosenwasser Court discussed how Congress legislated with sufficiently broad strokes to address the mischief being remedied, and the Court so interpreted the Act’s language. 323 U.S. at 361–63.

173. Steve Suits, *Hugo L. Black*, ENCYCLOPEDIA ALA. (Nov. 16, 2008), <http://www.encyclopediainalabama.org/article/h-1848>.

174. *United States v. Darby*, 312 U.S. 100, 175 (1941).

175. *See Skidmore*, 323 U.S. at 135–36.

176. The Court in *Walling v. A. H. Belo Corp.*, addressed defining “regular rate” as a matter of statutory construction and, therefore, of law. 316 U.S. 624, 630–31 (1942). The Court observed that its task was to define a phrase Congress left undefined, presumably “because the employment relationships to which the Act would apply were so various and unpredictable.” *Id.* at 634. And the Court rejected the construction of the agency (as a litigating position) as too artificial. *Id.* at 633.

177. *E.g., id.* (describing Interpretative Bulletin No. 4). The agency lacked the authority to issue legally enforceable rules. MICHAEL ASIMOW ET AL., STATE AND FEDERAL ADMINISTRATIVE LAW 111 (2d ed. 1998). Tax cases already established a “settled rule that the practical interpretation of an ambiguous or doubtful statute that has been acted upon by officials charged with its administration will not be disturbed except for weighty reasons.” *Brewster v. Gage*, 280 U.S. 327, 336 (1930); *see also Fawcus Mach. Co. v. United States*, 282 U.S. 375, 378 (1931); *McCaughn v. Hershey Chocolate Co.*, 283 U.S. 488, 492 (1931); *Universal Battery Co. v. United States*, 281 U.S. 580, 583–84 (1930). The principle was not limited to taxation, however. *See United States v. Moore*, 95 U.S. 760, 763 (1877) (Navy appointment).

178. *A. H. Belo*, 316 U.S. at 634–35.

179. *Kirschbaum v. Walling*, 316 U.S. 517, 523 (1942). Six years later, even though the agency had furnished interpretations indirectly through the Solicitor General and in

That the *Swift* Court would address the agency's view is unsurprising. The lower court invoked the agency's interpretative bulletin that night waiting time for switchboard operators could be segregated from normal hours and applied that principle to the plaintiffs in *Swift*.¹⁸¹ The Wage and Hour Division filed an amicus brief with the Court, claiming the lower court misunderstood the agency's position.¹⁸² The Division explained how it developed bulletins in response to company inquiries and through the bulletins sought to demonstrate that, while the ordinary language of the Act might warrant "*excluding . . . uninterrupted eating and sleeping periods, neither the statutory language nor the need for a common sense application of the Act warrants*" the lower court's conclusion adopting a rigid "either-or-rule."¹⁸³ The bulletins, therefore, offered a practical guide for how companies might approach questions—in this case, waiting periods.¹⁸⁴ The particular bulletin for waiting periods, however, did not specifically address auxiliary firemen's duty but instead offered a broad opinion for how the question might be approached on a case-by-case basis.¹⁸⁵ The Division then noted its practice of responding to requests to address auxiliary firemen, informing companies that "usually" the company might exclude "uninterrupted eating and sleeping periods . . . but that the remainder of the time on duty including, of course, all time actually spent in answering alarms should be treated as part of the hours of work or employment for purposes of the Act."¹⁸⁶ This led the Division to argue for a more flexible rule for when compensation might be due and why the language and spirit of the Act, as well as precedent, supported such a construction.¹⁸⁷ Indeed, the

testimony, Justice Reed commented that since "no authority was given any agency to establish regulations, courts must apply the statute to this situation without the benefit of binding interpretations within the scope of the Act by an administrative agency." *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 461 (1948). Justice Frankfurter dissented, accusing the Court of engaging in a theoretical "cross-word puzzle" devoid of concerns from actual "industrial life." *Id.* at 478 (Frankfurter, J., dissenting).

180. See *Armour & Co. v. Wantock*, 323 U.S. 126 (1944); see also *Walton v. S. Package Corp.*, 320 U.S. 540 (1944) (examining a similar issue as federal statutory construction, without any discussion of agency interpretation).

181. *Skidmore v. Swift & Co.*, 136 F.2d 112, 113 (5th Cir. 1943), *rev'd* 323 U.S. 134 (1944).

182. Brief on Behalf of the Administrator of the Wage and Hour Division, *supra* note 171, at 8.

183. *Id.* at 9 (emphasis added).

184. *Id.* at 9–12.

185. *Id.* at 10–12.

186. *Id.* at 13.

187. *Id.* at 13–14. The company responded to the Administrator by questioning which aspect of the bulletin, if any, applied. Respondent's Brief at 41–42, *Skidmore*, 323 U.S. 134 (No. 12), 1944 WL 42827. The Petitioner argued that the facts in the instant case differed

Division explained how the Court that year, in *Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123*,¹⁸⁸ held that the statutory language lacked precision and must be implemented in light of the Act's remedial purpose.¹⁸⁹ *Muscoda* involved travel to and from underground mines, and the Court, reviewing its precedent and the lower court factual findings, concluded that travel time was compensable, noting that its conclusion comported with an investigatory report by the Division.¹⁹⁰ And concurring, Justice Frankfurter observed how Congress intentionally left the term vague, allowing the judiciary sufficient flexibility for examining, on a case-by-case basis, its policy ramifications and application.¹⁹¹

Justice Jackson's opinion in *Swift*, therefore, necessarily confronted both the Division's interpretative bulletin as well as its amicus brief, and in doing so explained why the Division's policy, not its interpretation of the statute, warranted consideration.¹⁹² Jackson, after all, believed that the issues were more factual than statutory, and policy naturally informed how courts could assess and respond to factual findings.¹⁹³ This led Jackson to afford respect to the Division's policies, which were "based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case" (and which would be used in Division enforcement proceedings).¹⁹⁴ And then he added, as if to help future courts from the perils of such FLSA cases, the now classic (bereft of citations and arguably unintentionally broad) language about deference.¹⁹⁵

from what the bulletin discussed. Brief for Petitioners at 18, *Skidmore v. Swift & Co.*, 323 U.S. 134 (No. 18), 1944 WL 42827.

188. 321 U.S. 590, 597–98 (1944).

189. Brief on Behalf of the Administrator of the Wage and Hour Division, *supra* note 171, at 15.

190. 321 U.S. at 600.

191. *Id.* at 604 (Frankfurter, J., concurring). Justice Jackson thought the case lacked any question of law. *Id.* (Jackson, J., concurring). Justice Roberts believed otherwise, necessitating judicial construction of the term "workweek." *Id.* at 606 (Roberts, J., dissenting).

192. *Skidmore*, 323 U.S. at 138–40.

193. *Id.* at 139.

194. *Id.*

195. In full, Jackson observed:

We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Id. at 140. The following year the Court quite perfunctorily added how an agency's construction of its own regulation would be controlling unless "plainly erroneous or

Yet, the panoply of possible constitutional claims afforded ample opportunity for parties to urge a robust review, producing what some describe as a “doctrinal synergy” that replaced the decline of substantive due process with the emergence of deferential review.¹⁹⁶ During the late eighteenth to early nineteenth centuries, parties ostensibly lacked clear guidance on how to frame challenges to administrative action. This naturally produced opinions with varying degrees of discussion and mixed concepts. After all, the Court’s progressives promoted reviewing legislative activity under a deferential standard of rationality,¹⁹⁷ and given that administrative agency judgments often were treated as the equivalent of legislation, it was only natural to employ that same form of analysis to agency “legislation.”¹⁹⁸ That translated into reviewing agency decisions for arbitrariness, which the Court treated as a constitutional due process issue.¹⁹⁹ Many of the early challenges to agency rates, for instance, were cloaked as constitutional claims.²⁰⁰ The Court needed to

inconsistent with the regulation.” *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

196. Schiller, *supra* note 90, at 432 (embracing Barry Cushman, *Doctrinal Synergies and Liberal Dilemmas: The Case of the Yellow Dog Contract*, 1992 SUP. CT. REV. 235, 236).

197. See BICKEL & SCHMIDT, *supra* note 101, at 603.

198. See, e.g., *Prentis v. Atl. Coast Line Co.*, 211 U.S. 210, 226 (1908); see also *Keller v. Potomac Elec. Power Co.*, 261 U.S. 428, 447–48 (1923) (asking whether action favored legislative or judicial character). It is not surprising, therefore, that the judiciary struggled to decide when due process and the right to a hearing apply to particular circumstances. Compare *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 446 (1915), with *Londoner v. City & Cty. of Denver*, 210 U.S. 373, 375 (1908). See *supra* note 108 and accompanying text. What is surprising, however, is that the debate continues to this day. See PETER L. STRAUSS ET AL., *GELLHORN AND BYSE’S ADMINISTRATIVE LAW: CASES AND COMMENTS* 35–50 (11th ed. 2011).

199. See, e.g., *Norfolk & W. Ry. Co. v. United States*, 287 U.S. 134, 142–43 (1932).

200. For instance, the Court’s review of state ratemaking would be reviewed through a due process lens. E.g., *N.Y. ex rel. N.Y. & Queens Gas Co. v. McCall*, 245 U.S. 345, 348–49 (1917) (“[W]hether there was such a want of hearing or such arbitrary or capricious action . . . as to violate the due process clause.”); see also BICKEL & SCHMIDT, *supra* note 101, at 611 (“[T]he Court would examine the record only so far as necessary to determine whether there had been ‘a want of hearing or such arbitrary or capricious action’ . . . [so] as to violate the due process clause.”). Professors Bickel and Schmidt chronicle how the necessity of affording some mechanism for reviewing allegedly unconstitutional actions (particularly allegedly confiscatory rates) produced the troublesome opinion in *Ohio Valley Water Co. v. Borough of Ben Avon*, 253 U.S. 287, 293 (1920), where, according to Justice Brandeis, the Court without sufficient appreciation concluded that due process necessitated sufficient review because of the legislative character of the ratemaking process. BICKEL & SCHMIDT, *supra* note 101, at 609–30. Justice Frankfurter and others treated the case as reflective of a judicial distrust of legislative judgments. *Id.* at 628; see also *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 50 (1936); *Crowell v. Benson*, 285 U.S. 22, 45–46 (1932); *Ng Fung Ho v. White*, 259 U.S. 276, 283–84 (1922). James Landis treated these cases as a product of a syllogism created as a consequence of treating ratemaking as legislative activity that might be confiscatory. LANDIS, *supra* note 90, at 127. Mark Tushnet explores how these cases

ensure that the Interstate Commerce Commission acted within its constitutional authority by regulating intrastate rates that arguably affected interstate commerce.²⁰¹ Rate cases, such as *Acker v. United States*,²⁰² therefore, reviewed an agency's judgment for "arbitrary or unreasonable" behavior or lacking in "substantial" record support, all as a surrogate for assessing whether the rate was confiscatory and violated the Constitution.²⁰³ Both the Natural Gas Act and the Federal Power Act require that rates be "just and reasonable," and the findings of the Federal Power Commission (now the Federal Energy Regulatory Commission) are to be upheld if supported by substantial evidence.²⁰⁴ In 1942, Chief Justice Stone concluded that the scope of review would be narrow, ensuring that the required procedures had been followed, a "fair hearing" afforded, and absent overstepping the limits of due process a court would only intercede if the result was arbitrary when considering the facts before the agency.²⁰⁵

Only two years later, the Court announced a slightly different approach. In *Federal Power Commission v. Hope Natural Gas Co.*, Justice Douglas's majority opinion examined whether the effect or result of the Commission's order violated the Constitution or departed from the statutory standard of just and reasonable rates.²⁰⁶ Notably, Douglas acknowledged that, if the result did not offend the Constitution or the just and reasonable standard, "judicial inquiry under the Act is at an end."²⁰⁷ But his opinion suggested little room for judicial intervention, prompting Justice Frankfurter to lecture his colleagues about the need to ensure that an agency has considered the relevant criteria and explained

reflected a bias toward the judiciary, protecting constitutional rights by ensuring some review to avoid unsubstantiated decisions. Tushnet, *supra* note 110, at 1594–602.

201. See, e.g., *Florida v. United States*, 282 U.S. 194, 208–10, 215 (1931) (requiring the Commission to identify facts supporting regulating intrastate rates to avert undue interstate discrimination).

202. 298 U.S. 426, 430–31, 433 (1936).

203. Brief for Appellants at 3, *Acker*, 298 U.S. 426 (No. 655), 1936 WL 64923. Appellants predicated jurisdiction upon an alleged confiscation, Statement as to Jurisdiction at 4, *Acker*, 298 U.S. 426 (No. 655), and the analysis proceeded as such, until the last part of the opinion when the Court rejected the suggestion that confiscation was the issue. *Acker*, 298 U.S. at 434. Yet Appellants invoked *West Ohio Gas Co. v. Public Utilities Commission of Ohio*, 294 U.S. 79, 81 (1935), where Justice Cardozo rejected a rate as arbitrary and contrary to the Fourteenth Amendment's requirement for "fair play." Brief for Appellants, *supra*, at 111.

204. *Fed. Power Comm'n v. Nat. Gas Pipeline Co. of Am.*, 315 U.S. 575, 581–83, 586 (1942).

205. *Id.* at 586.

206. 320 U.S. 591, 600–02 (1944).

207. *Id.* at 602.

its decision.²⁰⁸ Yet Frankfurter too favored a circumscribed role for the Court, observing in *Board of Trade of Kansas City v. United States* how expert bodies are better suited to the “empiric” judgment of ratemaking.²⁰⁹ Of course, a year later, Justice Frankfurter responded to a claim that certain FCC regulations were arbitrary and capricious by suggesting that if that means attacking regulations as “unwise,” that would not be an inquiry for the Court.²¹⁰ And in *United States v. Morgan*, he concluded that an attack on an agency’s factual findings (contained in a report of over 1340 printed pages) supporting a maximum rate for the Kansas City Stockyards “would in itself go a long way to convert a contest before the Secretary into one before the courts.”²¹¹ And Frankfurter refused to travel that path.²¹²

208. *Id.* at 626. (Frankfurter, J., dissenting). Frankfurter rejected blindly accepting the judgment of experts, extolling the need to explore whether the agency adequately considered the relevant criteria. *Id.* at 627.

209. 314 U.S. 534, 546 (1942). Frankfurter concluded that a “judgment in a situation like this implies, ultimately, prophecy based on the facts in the record as illumined by the seasoned wisdom of the expert body,” and the Court has “neither technical competence nor legal authority to pronounce upon the wisdom of the course taken by the Commission.” *Id.* at 547–48. In *Railroad Commission v. Rowan & Nichols Oil Co.*, he examined whether the Railroad Commission of Texas’ oil proration order violated the Fourteenth Amendment, concluding that in a realm where “knowledge [is] still shifting and growing, and in a field where judgment is therefore necessarily beset by the necessity of inferences bordering on conjecture . . . it would be presumptuous for courts . . . to deem the view of the administrative tribunal . . . offensive to the Fourteenth Amendment.” 310 U.S. 573, 581–82 (1940); see also *R.R. Comm’n v. Rowan & Nichols Oil Co.*, 311 U.S. 570, 573–75 (1941) (urging deference to judgments of expert administrators).

210. *NBC v. United States*, 319 U.S. 190, 224 (1943). Frankfurter’s analysis focused principally on examining whether the Commission “made out” a sufficient “case for its allowable discretion,” and he effectively skirted any such inquiry by suggesting that it was obvious and that the Commission had not tied its hands for future licensing decisions. *Id.* at 225. In an earlier FCC case, Justice Cardozo similarly observed that a court could not substitute its judgment for that of “administrative officers who have kept within the bounds of their administrative powers,” and a court should only examine whether the decision was an expression of a “whim” rather than judgment. *Am. Tel. & Tel. Co. v. United States*, 299 U.S. 232, 236–37 (1936). Later Cardozo refused to question the agency’s approach absent “arbitrary and outrageous” behavior, *id.* at 243, but his lone citation to due process language from *Norfolk & W. Railway Co. v. United States*, 287 U.S. 134, 143 (1932), suggests this was to avoid a due process problem.

211. 313 U.S. 409, 417 (1941).

212. “On ultimate analysis the real question is whether the Secretary or a court should make an appraisal of elements having delusive certainty. Congress has put the responsibility on the Secretary and the Constitution does not deny the assignment.” *Id.* Earlier, Justice Brandeis held that cases under the same Act would be reviewed only to assess whether the “order rests upon an erroneous rule of law, . . . is based upon a finding made without evidence, . . . or upon evidence which clearly does not support it.” *Tagg Bros. & Moorhead v. United States*, 280 U.S. 420, 442 (1930).

3. The APA.

The APA then surfaced for controlling what became perceived by the late 1930's as excessive agency discretion.²¹³ In 1939, President Roosevelt tasked the Attorney General with preparing a report on procedural reform of administrative law.²¹⁴ This effort offset the more critical special committee within the ABA and proposals to reform the administrative process.²¹⁵ The ABA's solution was the 1939 Walter-Logan bill, which would have retarded the growth of administrative flexibility.²¹⁶ The Attorney General's Committee on Administrative Procedure released its report in 1941, becoming "the best study of federal administrative procedure ever prepared," according to Paul Verkuil.²¹⁷ The report mirrored the emphasis of those in the legal process school who focused on procedures rather than curing "overzealous administrators."²¹⁸ Not surprisingly, legal process scholar Henry M. Hart, Jr. served on the committee.²¹⁹ Notably, however, the majority suggested a narrow approach toward judicial review, while the minority urged a slightly more robust review of the evidentiary record.²²⁰ With this study, the next generation of administrative law scholars, such as Kenneth C. Davis, Walter Gellhorn, and Louis Jaffe, began grappling with the design of the next phase of administrative law.²²¹

After the war, the APA as adopted departed from the Walter-Logan bill.²²² The APA afforded sufficient flexibility; it adopted common law

213. See Joanna Grisinger, *Law in Action: The Attorney General's Committee on Administrative Procedure*, 20 J. POL'Y HIST. 379, 380 (2008).

214. Verkuil, *supra* note 114, at 274 n.80. A 1936 study explored "administrative management," but "its conclusions . . . were controversial and unconvincing." *Id.* at 274 n.82.

215. See Grisinger, *supra* note 213, at 388–89.

216. See *id.* at 385–87. The Walter-Logan bill passed Congress in 1940, but succumbed to a vitriolic veto by President Roosevelt. *Id.* at 391.

217. Verkuil, *supra* note 114, at 275; see also DAVIS, *supra* note 90, at 8 (reporting on the "primary source of information about the federal administrative process").

218. Grisinger, *supra* note 213, at 380.

219. *Id.* at 389.

220. See Cox, *Aspects*, *supra* note 169, at 39; see also Grisinger, *supra* note 213, at 400.

221. See Friendly, *supra* note 107, at 471.

222. Verkuil, *supra* note 114, at 277. The Walter-Logan Bill, for instance, favored the ABA's concern over greater judicial scrutiny of factual as well as legal judgments, and rejected the expertise theory. See Schiller, *supra* note 90, at 424–25. Our appreciation of the forces animating the passage of the APA is significantly influenced by rhetoric and might benefit from a thorough analysis of legislative voting behavior. See, e.g., Anthony Michael Bertelli, *Congressional Ideology and Administrative Oversight in the New Deal Era*, 43 HIST. METHODS 125, 135 (2010); see also Daniel R. Ernst, *The Politics of Administrative Law: New York's Anti-Bureaucracy Clause and the O'Brian-Wagner Campaign of 1938*, 27 LAW & HIST. REV. 331, 333–34 (2009) (noting that ideas and interests alone do not explain

principles from the 1941 report and incorporated the New Dealers' concept of expert agencies.²²³ According to Joanna Grisinger,

[l]ike the Attorney General's Committee—and unlike the Walter-Logan bill—the APA did not significantly expand judicial review to previously exempt administrative functions. Nor did the statute make significant changes to the existing standards of judicial review prescribed in cases and statutes. The APA adopted the standard for judicial review of administrative fact-finding found in the code of administrative procedure proposed by Messrs. McFarland, Stason, and Vanderbilt.²²⁴

D. Phase IV: The Rise of Rulemaking

Over the next decades, several issues dominated the conversation. The legal process school that crystalized after the war, after all, sought “further ‘judicialization’ of the administrative process.”²²⁵ Building off Wyman's earlier emphasis on judicial scrutiny of process rather than the substance of agency decisions, proponents of legal process elevated the importance of relying upon process as a surrogate for fairness.²²⁶ A critical review of administrative agencies ensued.²²⁷

the politics of administrative law); George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1560 (1996) (describing history as a political battle over the New Deal).

223. See Schiller, *supra* note 90, at 428–29; see also Grisinger, *supra* note 213, at 405.

224. Grisinger, *supra* note 213, at 406.

225. Ruth Smalley, *Report of the Committee on Agency Rule Making*, 12 ADMIN. L. BULL. 180, 180 (1960). “Procedures were seen as a means to the end of fair implementation of government programs and their efficacy was to be measured by their contribution to that end.” Verkuil, *supra* note 114, at 275.

226. See CHASE, *supra* note 80, at 63–64, 70–71.

227. Presidential commissions focused principally on the procedures of ad hoc adjudications. See FIRST REPORT OF THE CONFERENCE ON ADMINISTRATIVE PROCEDURE 9–14 (1953). A Hoover Commission task force recommended, unsuccessfully, changes in the administrative process, including establishing an Administrative Court. COMMISSION ON ORG. EXECUTIVE BRANCH GOV'T, LEGAL SERVICES AND PROCEDURE 31–93 (1955); see also Act of May 23, 1955, Pub. L. No. 84-41, 69 Stat. 64 (1955); Act of July 10, 1953, Pub. L. No. 83-108, 67 Stat. 142 (1953). Congress too became interested, although it failed to act. See Charlotte P. Murphy, *Legislative Interest in Administrative Procedure During the 86th Congress: Some Notes, Quotes and Comments*, 12 ADMIN. L. BULL. 128, 128–43 (1960) (focusing considerably on fairness, transparency, and ethical behavior). And the judiciary during this period addressed fundamental issues such as fairness and influence from superiors. *E.g.*, *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266–67 (1954) (“[I]f the word ‘discretion’ means anything in a statutory or administrative grant of power, it means that the recipient must exercise his authority according to his own understanding and conscience.”).

But the dialogue animating judges and scholars alike focused considerably on how to control an abuse of agency discretion within the adjudicatory paradigm.²²⁸ Reuel Schiller chronicles how, during the 1960s and 1970s, the rulemaking period emerged from the discontent of the previous decades and along with it surfaced a more active judiciary willing to entertain greater oversight of the process.²²⁹ In late 1960, James Landis prepared a report (*Report on Regulatory Agencies to the President-Elect*) for President Kennedy on reforming what many believed was a broken regulatory process.²³⁰ Judge Friendly lamented how federal agencies pronounced new policy directions or interpretations often through particular agency adjudications and that the administrative state needed enhanced predictability and stable standards.²³¹ The Supreme Court, however, had endorsed ad hoc (or possibly unpredictable) policymaking, although cautioning that “[t]he function of filling in the interstices of the Act should be performed, as much as possible, through

The role and function of independent regulatory agencies also garnered considerable attention. See WILLIAM L. CARY, *POLITICS AND THE REGULATORY AGENCIES* 60–89 (1967) (Chairman of the SEC during the early 1960s, discussing role of such agencies); R. W. Lishman, “*Independence*” in the *Independent Regulatory Agencies*, 13 ADMIN. L. REV. 133, 135 (1961) (former Chief Counsel, House Special Subcommittee on Legislative Oversight); see also ROBERT E. CUSHMAN, *THE INDEPENDENT REGULATORY COMMISSIONS* 146–491 (1941); Datla & Revesz, *supra* note 24, at 771–72.

228. E.g., J. Skelly Wright, Book Review, *Beyond Discretionary Justice*, 81 YALE L.J. 575, 581 (1972) (“But while all branches of government must join in the fight to limit discretion, I believe it is the courts which will have to bear the primary burden.”).

229. Reuel E. Schiller, *Rulemaking’s Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 ADMIN. L. REV. 1139, 1143–55 (2001).

230. Carl McFarland, *Landis’ Report: The Voice of One Crying in the Wilderness*, 47 VA. L. REV. 373, 421–38 (1961). Landis, however, accepted that courts had overcome any hostility to the administrative state. James M. Landis, *The Administrative Process—The Third Decade*, 13 ADMIN. L. REV. 17, 19 (1960) (noting that no cases have imposed “crippling blows to the administrative process”). Landis’s 1960 eighty-seven-page report emphasized several things, including coordination of government policy. *Id.* at 19–20. An earlier recommendation for the creation of an office of administrative procedure had not materialized, although the Attorney General had established an office within the Department of Justice. McFarland, *supra*, at 389 n.29, 399. Landis proposed establishing a procedural office (an Administrative Conference) “as a permanent base for making studies of procedural methods and proposing improvements.” *Id.* at 407. In 1961, President Kennedy issued Executive Order 10,934, establishing the Administrative Conference of the United States (“ACUS”). 26 Fed. Reg. 3233, 3233 (Apr. 13, 1961). Congress responded in 1964 by passing legislation authorizing the ACUS. Administrative Conference Act, Pub. L. No. 88-499, 78 Stat. 615 (1964); see Paul R. Verkuil, *What the Return of the Administrative Conference of the United States Means for Administrative Law*, 1 MICH. J. ENVTL. & ADMIN. L. 17, 18–22, 19 n.10 (2012).

231. See Henry J. Friendly, *The Federalist Administrative Agencies: The Need for Better Definition of Standards*, 75 HARV. L. REV. 863, 867 (1962).

this quasi-legislative promulgation of rules to be applied in the future.”²³² But as the largeness of the federal regulatory state grew, scholars began encouraging agencies to employ the APA’s informal rulemaking process in lieu of the more traditional use of agency adjudication—or ad hoc policymaking.²³³ Professor Davis, in particular, assiduously promoted widespread rulemaking.²³⁴ Informal rulemaking captured near unanimity.²³⁵ And its use correspondingly blossomed during the decade. William Pedersen aptly observed how “[t]he increased use of rulemaking has changed the whole structure of administrative law.”²³⁶ Judge Skelly Wright similarly proclaimed that “[a]dministrative law has entered an age of rulemaking.”²³⁷ And this age of rulemaking ushered in the modern era of judicial review.²³⁸

Since then, however, modern administrative law has vacillated between cabining and unleashing the regulatory state. The past several decades illustrate the difficulty courts and agencies encounter when the 1970s administrative law paradigm, a paradigm still infused with judicially constructed doctrines, confronts our post-modern world.²³⁹ The 1970s paradigm initially began by constricting the judicial role and unleashing the administrative state,²⁴⁰ while simultaneously

232. *Chenery II*, 332 U.S. 194, 202 (1947).

233. See, e.g., Ben C. Fisher, *Rule Making Activities in Federal Administrative Agencies*, 17 ADMIN. L. REV. 252, 252–53 (1965); Ralph F. Fuchs, *Agency Development of Policy Through Rule-Making*, 59 NW. U. L. REV. 781, 781–82 (1965); Smalley, *supra* note 225, at 181; see also Louis J. Hector, *The New Critique of the Regulatory Agency*, 12 ADMIN. L. BULL. 12, 16 (1959); McFarland, *supra* note 230, at 433–36; Cornelius J. Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board*, 70 YALE L.J. 729, 730–31 (1961); cf. *Views of the Administrative Conference of the United States on the “Report on Selected Independent Regulatory Agencies” of the President’s Advisory Council on Executive Organization*, 57 VA. L. REV. 927, 928, 930 (1971) (promoting rulemaking).

234. DAVIS, *supra* note 125, at 56–59.

235. See, e.g., Warren E. Baker, *Policy by Rule or Ad Hoc Approach—Which Should it Be?*, 22 LAW & CONTEMP. PROBS. 658, 671 (1957); see also David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 921 (1965); Peter L. Strauss, *Rules, Adjudications, and Other Sources of Law in an Executive Department: Reflections on the Interior Department’s Administration of the Mining Law*, 74 COLUM. L. REV. 1231, 1236–44 (1974).

236. William F. Pedersen, Jr., *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 38–39 (1975).

237. J. Skelly Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375, 375 (1974).

238. See James V. DeLong, *Informal Rulemaking and the Integration of Law and Policy*, 65 VA. L. REV. 257, 284–89 (1979); Schiller, *supra* note 229, at 1141.

239. Schiller, *supra* note 229, at 1152–55.

240. Sidney Shapiro and Robert Glicksman explore how Congress began micro-managing agency action, while the Court by the 1980s conversely “adopted a more restrained approach to the review of administrative decisions.” Sidney A. Shapiro & Robert L.

perpetuating old and developing new administrative common law principles confounding that state. The APA may have constructed judicial guideposts, but the Court exhibited trepidation toward abandoning language that surfaced along the path of administrative law's rise.²⁴¹ In short, it seemingly avoided acknowledging the necessity of a paradigmatic shift.

That shift, though, is upon us. The administrative state has changed considerably since 1946, and yet administrative law remains plagued by persistent administrative common law doctrines seemingly ill-suited for our present phase of administrative law. To begin with, many doctrines were intertwined with analytical tools the Court invoked when addressing statutory construction—a fundamental issue embedded in our pre-APA world. Nicholas Parrillo insightfully explores how the period surrounding the APA exhibited a judicial appetite for engaging in a searching approach toward statutory construction, an approach that has since changed with the rise of textualism.²⁴² Also, subdued and yet pervasive constitutional issues influencing the Court then lack credence today. Constitutional due process constraints have shrunk, and the burgeoning informal rulemaking paradigm provides limited opportunities for individualized determinations under the older due process model. Article III standing has crystalized, affecting administrative law doctrines such as ripeness, exhaustion, and possibly finality. The “hard look” doctrine urged by some members of the D.C. Circuit in the 1970s became softened by the slightly more subdued 1980s arbitrary and capricious review of *Motor Vehicle Manufacturers Ass'n of the United States v. State Farm Mutual Automobile Insurance Co.*²⁴³ And giving a keynote address on the fiftieth anniversary of the APA, Philip Howard poignantly observed how “[t]he notice and comment procedures and the wide band of discretion that Congress provided in 1946 bear little relationship with the procedures that have been in effect in Washington for several decades.”²⁴⁴

Glicksman, *Congress, the Supreme Court, and the Quiet Revolution in Administrative Law*, 5 DUKE L.J. 819, 819 (1988).

241. See Schiller, *supra* note 229, at 1154–55.

242. See Nicholas R. Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890–1950*, 123 YALE L.J. 266, 280–82 (2013).

243. 463 U.S. 29 (1983). Justice Rehnquist treated the majority opinion as effectively engaging in hard look review. *Id.* at 58–59 (Rehnquist, J., concurring in part and dissenting in part).

244. Philip K. Howard, *Keynote Address: Administrative Procedure and the Decline of Responsibility*, 48 ADMIN. L. REV. 312, 312 (1996).

While we are now witnessing wide-ranging conversations about the administrative state, the dialogue could be better informed by an appreciation of why many administrative common law doctrines developed during the first four phases and canvassed above are anachronistic. The remaining Parts of this Article, therefore, explore a few of those doctrines or assumptions, such as the myth that agencies enjoy flexibility when deciding how best to establish policy, the incessant question of the judiciary's role in reviewing administrative judgments, as well as the waning doctrines of prudential standing and ripeness.

II. CURBING ADMINISTRATIVE COMMON LAW CONSTRAINTS

The Court has been quite receptive to revisiting administrative common law principles limiting judicial review. Congress designed the APA to facilitate access to the courts, and yet many common law principles, such as exhaustion, ripeness, and prudential standing, often erected barriers to that access. This Part reviews how the Court has whittled away at those barriers, with increasing frequency during the past few years. The first Section explores access to the courts and whether or how the APA limits the types of plaintiffs who may seek review. In particular, it examines the rise and fall of prudential standing and the dilemma posed by the Court's recent decision in *Lexmark International Inc. v. Static Control Components, Inc.*²⁴⁵ From there, this Part explores whether the common law doctrine of "ripeness" will similarly succumb to the pressure of applying the APA, and only the APA.

A. *Opening the Courthouse Doors*

As administrative law unfolded and courts became more willing to supervise agency action, the judiciary became perceived of as a forum for curbing agency behavior.²⁴⁶ Many viewed this as a welcome development that cast aside the private or common law model that had been so dominant.²⁴⁷ Older cases suggested that a party could challenge a governmental decision only if the decision imposed a direct obligation on

245. 134 S. Ct. 1377 (2014).

246. See Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 183–85 (1992); see generally Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975).

247. See, e.g., Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1434–40 (1988).

the party or otherwise breached a duty owed to party.²⁴⁸ *The Chicago Junction Case* illustrates the disagreement between progressives and the old guard.²⁴⁹ Writing for the majority, Justice Brandeis considered whether plaintiffs claiming competitive harm from an Interstate Commerce Commission order could sue under the Interstate Commerce Act.²⁵⁰ Brandeis allowed a railway company that had intervened before the Interstate Commerce Commission to challenge the Commission's decision approving an acquisition that would affect the plaintiff's market share.²⁵¹ Justice Sutherland responded that "[t]he complainants have no standing to vindicate the rights of the public, but only to protect and enforce their own rights," and that they lacked either a legal or equitable right.²⁵² By the early 1940s, however, the judiciary began construing language allowing "aggrieved" parties whose interests were "adversely affected" to challenge decisions that worked a competitive harm even if competitive harm was not an appropriate consideration for the agency decision.²⁵³ As early as 1943, for instance, Judge Jerome Frank interpreted language allowing "aggrieved" persons to seek judicial review as embracing a private attorney general theory.²⁵⁴

Once courts allowed beneficiaries of regulatory programs (and not those who were objects of the regulation) the right to challenge agency decisions, the private law model of a "legal interest" appeared problematic. A robust debate ensued in the academy and among judges about when and how parties ought to be able to challenge agency decisions.²⁵⁵ In 1961, Louis Jaffe suggested that section 10(a) of the APA

248. "It is a maxim of the law . . . that every duty laid upon a public officer, for the benefit of a private person, is enforceable by judicial process." *Butterworth v. United States*, 112 U.S. 50, 57 (1884).

249. 264 U.S. 258, 267–69 (1924).

250. *Compare id.* at 267–70 (finding that a governmental decision was not precluded from judicial review), *with id.* 271–73 (Sutherland, J., dissenting) (asserting that injuries resulting from a governmental decision did not have a basis for legal remedy and that standing was not based on advocating for public interest, but based on the private grievances).

251. *Id.* at 270 (majority opinion).

252. *Id.* at 271–72 (Sutherland, J., dissenting). Sutherland was joined by two other conservatives, Justices McReynolds and Sanford. *Id.* at 274; *cf.* *Alexander Sprunt & Son, Inc. v. United States*, 281 U.S. 249, 257 (1930) (Brandeis, J.) (holding that *The Chicago Junction Case* involved an independent legal right of the plaintiff not present here).

253. *E.g.*, *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 476–77 (1940).

254. *Associated Indus. of N.Y. State, Inc. v. Iekes*, 134 F.2d 694, 708–10 (2d Cir. 1943), *vacated as moot*, 320 U.S. 707 (1943).

255. *See* Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1033 (1968); Louis L. Jaffe, *Standing Again*, 84 HARV. L. REV. 633, 633 (1971); *see also* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 228 (1988).

established “a general presumption in favor of judicial review regardless of whether the statutes so provide explicitly,” with the caveat about certain actions being precluded.²⁵⁶ His classic 1965 treatise challenged Justice Frankfurter’s claim that standing was devoid of common law principles.²⁵⁷ He reviewed how the law evolved and expanded at the federal and state levels for mandamus actions to review public decisions.²⁵⁸ But with analysis imbued with the philosophy of the legal process school, Jaffe cautioned against aggressive judicial intrusion where political constraints in public administration might serve as a better check.²⁵⁹ He suggested that a plaintiff bringing a “public action” would need to “convince the court that the dereliction of law has real public significance, involves a ‘public right,’ and that if he cannot, he must show a sufficient interest of his own.”²⁶⁰ Professor Kenneth C. Davis conversely argued for a more liberal approach.²⁶¹ And in the environmental area, “Professor Sax provided the most coherent justification for creative lawyers,” reconciling “environmental law precepts with New Deal administrative law and separation of powers principles.”²⁶² Following Sax’s model, Congress even included in the 1970

256. JAFFE & NATHANSON, *supra* note 93, at 831.

257. JAFFE, *supra* note 79, at 461.

258. *Id.* at 461–75. According to Jaffe, “[j]udicial control of official action, through citizen or taxpayer suits, has flourished when the seemingly more desirable system of administrative control has been lacking.” *Id.* at 474.

259. *Id.* at 480–82, 487. Jaffe concluded “that the most cogent arguments against public actions are that they strain the judicial function and distort the political process,” and yet they also “provide a modest measure of control of official action” and seem to provide the one valuable system of control. *Id.* at 483. He added, moreover, that they are “not inconsistent with our democratic premises, and arguably they reinforce them.” *Id.* Because of this approach, Jaffe viewed the citizen as the “prime political unit of the democracy” and as such ought to be able to sue (not as a taxpayer but as a citizen) provided sufficient checks exist on the “nature of the issue to be decided and the possibility of effective judicial action.” *Id.* at 486.

260. *Id.* at 490. Jaffe’s early casebook made this point clear, when he informed law students that courts would review agency behavior for “procedural regularity,” not the substance of the “determination.” JAFFE & NATHANSON, *supra* note 93, at 779.

261. Kenneth Culp Davis, *Standing to Challenge Governmental Action*, 39 MINN. L. REV. 353, 392–96 (1955).

262. A. Dan Tarlock, *Environmental Law, but Not Environmental Protection*, in NATURAL RESOURCES POLICY AND LAW: TRENDS AND DIRECTIONS 162, 170–71 (Lawrence J. MacDonnell & Sarah F. Bates eds., 1993). Emerging precedent supported standing for parties interested in protecting the environment. See *Scenic Hudson Pres. Conference v. Fed. Power Comm’n*, 354 F.2d 608, 615–17 (2d Cir. 1965) (allowing parties to challenge Federal Power Commission decision to allow pumped storage project on the top of Storm King Mountain); see also *Namekagon Hydro Co. v. Fed. Power Comm’n*, 216 F.2d 509, 510–11 (7th Cir. 1954); *Wash. Dep’t of Game v. Fed. Power Comm’n*, 207 F.2d 391, 395 n.11 (9th Cir. 1953); *Road River League v. Boyd*, 270 F. Supp. 650, 660–61 (S.D.N.Y. 1967) (discussing and adopting the reasoning in *Scenic Hudson*).

Clean Air Act a citizen suit provision allowing citizens to, in effect, serve as private attorney generals.²⁶³ Judge Bazelon of the D.C. Circuit followed suit when he similarly allowed an environmental organization to challenge a federal agency's failure to regulate the use of DDT.²⁶⁴

The same year that Judge Bazelon allowed the DDT lawsuit to proceed, Kenneth C. Davis observed that the Supreme Court had just liberalized the law of standing.²⁶⁵ The Court, in *Data Processing* and *Barlow*, enlarged the class of parties capable of seeking judicial review under the APA to include those with an injury in fact that are "arguably within the zone of interests protected" by the relevant statutory or constitutional provision.²⁶⁶

Of course, Justice Douglas's opinion in *Data Processing* reflects the Justice's penchant for pragmatic decisions. He began by observing how "[g]eneralizations about standing to sue are largely worthless as such," and after briefly addressing taxpayer standing, switched to concluding, without citation, that "[t]he first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise."²⁶⁷ From there, rejecting the lower court's reliance on *Tennessee Electric Power Co. v. Tennessee Valley Authority*,²⁶⁸ he concluded that the prior "legal interest" test related to the merits of the case, not the ability to bring the case, and then offered that "the question whether the interest sought to be protected by the complainant is arguably within the *zone of interests* to be protected or regulated by the

263. Clean Air Amendments of 1970, Pub. L. No. 91-604, § 12(a), 84 Stat. 1676, 1706-07 (1970) (codified as amended at 42 U.S.C. § 7604) (2012)). "The statutory scheme may be traced to an idea originally proposed by Professor Sax and first embodied in the Michigan Environmental Protection Act of 1970." Grant P. Thompson, *The Role of the Courts, in FEDERAL ENVIRONMENTAL LAW* 192, 230 (Erica L. Dolgin & Thomas G. P. Guilbert eds., 1974). For a discussion of early experience under the Michigan statute, see generally Joseph L. Sax & Roger L. Conner, *Michigan's Environmental Protection Act of 1970: A Progress Report*, 70 MICH. L. REV. 1003 (1972).

264. *Env'tl. Def. Fund, Inc. v. Hardin*, 428 F.2d 1093, 1096-97 (D.C. Cir. 1970).

265. Kenneth Culp Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970). Davis posited that *Ass'n of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970), and *Barlow v. Collins*, 397 U.S. 159 (1970), superseded the older "legal right" regime underpinning prior standing cases, and left the law of standing in some "turmoil." Davis, *supra*, at 450, 457; cf. *Kan. City Power & Light Co. v. McKay*, 225 F.2d 924, 926, 934 (D.C. Cir. 1955) (reversing district court opinion that gave private electric company standing to sue to enjoin federally supported power program).

266. JOSEPH VINING, *LEGAL IDENTITY: THE COMING AGE OF PUBLIC LAW* 39 (1978).

267. *Data Processing*, 397 U.S. at 151-52.

268. 306 U.S. 118 (1939). In *Tennessee Electric*, the Court held that plaintiffs lacked standing to challenge the Tennessee Valley Authority's constitutional power to generate and sell electricity—they lacked any protected interest to be free from competition. *Id.* at 146-47.

statute or constitutional guarantee in question.”²⁶⁹ Although seemingly waffling between whether this is an aspect of standing or something else,²⁷⁰ he explained how “the trend is toward enlargement of the class of people who may protest administrative action,” and he concluded that competitive harm in a similar case was sufficient to confer standing “since the private utility bringing suit was within the class of persons that the statutory provision was designed to protect.”²⁷¹

Yet what emerged from Justice Douglas’s cryptic analysis was an ill-defined zone of interest doctrine distinct from Article III standing—but marginally tethered to the APA’s language affording parties adversely affected or aggrieved within the meaning of the relevant statute with the ability to sue. This morphed into what became characteristically referred to as prudential standing, a doctrine that counseled courts to examine whether a complaint enjoyed standing because “Congress ‘intended for [a particular] class [of plaintiffs] to be relied upon to challenge agency disregard of the law.’”²⁷² But the doctrine recently became troublesome

269. *Data Processing*, 397 U.S. at 153–54 (emphasis added). Richard Stewart noted how Douglas “simply announced the . . . test without any effort to justify the test by reference to past decisions or policy considerations. Stewart, *supra* note 246, at 1731 n.304.

270. Justice Douglas referenced the APA’s language of “aggrieved by agency action within the meaning of a relevant statute” as affording “standing” to such parties. *Data Processing*, 397 U.S. at 153–54 (quoting 5 U.S.C. § 702 (1964)). Decades earlier, Justice Douglas wrote:

Generalizations as to when judicial review of administrative action may or may not be obtained are of course hazardous. Where Congress has not expressly authorized judicial review, the type of problem involved and the history of the statute in question become highly relevant in determining whether judicial review may be nonetheless supplied.

Switchmen’s Union of N. Am. v. Nat’l Mediation Bd., 320 U.S. 297, 301 (1943). *Switchmen’s Union*, however, involved a certification for purposes of collective bargaining under the Railway Labor Act (“RLA”), Pub. L. No. 69-257, 44 Stat. 577 (1926), and the RLA has since been construed as affording the narrowest scope of judicial review possible. *E.g.*, *Ballew v. Cont’l Airlines, Inc.*, 668 F.3d 777, 786–87 (5th Cir. 2012) (utilizing an exceptionally narrow scope of review). In authoring *Switchmen’s Union*, Justice Douglas held that Congress provided a limited avenue to protect asserted rights. 320 U.S. at 301. Later, the Court distinguished *Switchmen’s Union* where Congress had created a “right” for employees and inferentially an intent to allow those employees to ensure agency compliance with congressionally delegated authority, citing in part *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902). *Leedom v. Kyne*, 358 U.S. 184, 190 (1958).

271. *Data Processing*, 397 U.S. at 154–55. In *Barlow v. Collins*, Justice Douglas treated the parties as within a zone of interest because their interests were “implicit” in the statutory scheme and the “congressional intent” reflected an intent that the parties’ interest be protected. 397 U.S. 159, 164 (1970).

272. *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 399 (1987) (alterations in original) (quoting *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 347 (1984)).

once the D.C. Circuit considered it jurisdictional even though distinct from Article III.²⁷³

B. End of Prudential Standing, What About Zone of Interest?

The Court finally responded by abandoning prudential standing as an awkward administrative common law concept, focusing instead on the APA's language.²⁷⁴ In *Lexmark*, the Court reviewed whether a party could prosecute a case under the Lanham Act.²⁷⁵ Writing for the majority, Justice Scalia began by observing that the concept of prudential standing is "misleading."²⁷⁶ It is not, he suggested, constitutionally based, but rather involves exploring whether a particular plaintiff falls within the zone of interest of the relevant statute.²⁷⁷ While he favored the concept of "statutory standing" as more accurate, that too he believed is imprecise because the zone of interest test does not affect a court's subject matter jurisdiction.²⁷⁸ The issue required examining, "using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim."²⁷⁹ The Court further noted how the zone of interest test is not particularly demanding.²⁸⁰

Deciphering whether a party is aggrieved within the meaning of the relevant statute under the lingering zone of interest test remains problematic. To begin with, *Lexmark* suggests that courts should employ

273. *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 179 (D.C. Cir. 2012). Judge Kavanaugh argued that the doctrine was not jurisdictional. *Id.* at 181, 183 (Kavanaugh, J., dissenting); see also *Ass'n of Battery Recyclers v. EPA*, 716 F.3d 667, 674 (D.C. Cir. 2013) (treating prudential standing as a jurisdictional issue).

274. Justice Scalia earlier observed how the APA's language is a "term of art," with lineage pre-dating the APA. *Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 126–27 (1995). While prudential standing connotes a statutory cause of action and standing resides within Article III, the Court acknowledged that the concepts are difficult to "keep separate." *Bond v. United States*, 131 S. Ct. 2355, 2362 (2011). Justice Scalia suggested that the zone of interest test flows from common law limitation. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1389 n.5 (2014).

275. 134 S. Ct. at 1388. In *Monsanto Co. v. Geerston Seed Farms*, the Court effectively avoided addressing the breadth of the zone of interest. 561 U.S. 139, 155 (2010). See generally Bradford Mank, *Standing in Monsanto Co. v. Geerston Seed Farms: Using Economic Injury as a Basis for Standing when Environmental Harm Is Difficult to Prove*, 115 PENN ST. L. REV. 308, 336 (2010).

276. *Lexmark*, 134 S. Ct. at 1387–88, 1387 n.4.

277. *Id.* at 1388.

278. *Id.* at 1387–88, 1387 n.4.

279. *Id.* at 1387.

280. *Id.* at 1389. *But cf.* *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222, 1256 (D.C. Cir. 2014) (holding that while the zone of interest test is not demanding, it is not satisfied in this instance), *rev'd sub nom.* *Michigan v. EPA*, 135 S. Ct. 2699 (2015).

traditional tools of statutory construction.²⁸¹ And yet under the zone of interest test, those traditional tools have included considerations encompassed by the overall statutory scheme and not necessarily any particular provision.²⁸² Indeed, Justice Scalia previously quoted approvingly from the Attorney General's manual that the test includes "the courts' judgment as to the probable legislative intent derived from the spirit of the statutory scheme."²⁸³ This is far from a principled inquiry.²⁸⁴ It is neither the type of statutory construction inquiry Justice Scalia would condone in a typical case, nor does it seem particularly useful as anything but a justification for a court to reject unique party claims.

C. Ripeness, What Is It?

Next, the administrative common law ripeness doctrine is hopelessly unmoored and a likely candidate for abandoning. The doctrine counsels courts to "evaluate (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration."²⁸⁵ At its most fundamental level, the Court has yet to articulate whether the doctrine emanates from the Constitution, the APA, or some administrative common law constraint that the Court believes ought to be infused into the APA.²⁸⁶ To begin with, the APA itself omits any overt

281. 134 S. Ct. at 1387.

282. See *Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 127 (1995).

283. *Id.* Earlier, Justice Scalia rejected limiting an APA cause of action to only those statutes that include the APA language, observing how that "would have made the judicial review provision of the APA no more than a restatement of pre-existing law." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990).

284. Some courts since *Lexmark* continue to apply the zone of interest broadly, even ignoring Justice Scalia's suggestion to employ traditional tools of statutory construction, and doing so in a relaxed fashion. *E.g.*, *White Oak Realty, LLC v. U.S. Army Corps of Eng'rs*, No. 13-4761, 2014 WL 4387317, at *8 (E.D. La. Sept. 4, 2014).

285. *Nat'l Parks Hosp. Ass'n v. Dep't of the Interior*, 538 U.S. 803, 808 (2003).

286. In *Blanchette v. Connecticut General Insurance Corp.*, for instance, the Court sua sponte examined ripeness to ensure an Article III case or controversy, as well as to avoid deciding constitutional issues unnecessarily. 419 U.S. 102, 139-47 (1974). Some courts, therefore, treat ripeness like standing as part of subject matter jurisdiction. *E.g.*, *Dig. Props., Inc. v. City of Plantation*, 121 F.3d 586, 591 (11th Cir. 1997) ("The determination of ripeness 'goes to whether the district court had subject matter jurisdiction to hear the case.'" (quoting *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1573 n.7 (11th Cir. 1989))); *Missouri v. Harris*, 58 F. Supp. 3d 1059, 1068 (E.D. Cal. 2014) ("[S]tanding and ripeness . . . may support a challenge to subject matter jurisdiction raised by either party or sua sponte by the court."); *Montanans for Cmty. Dev. v. Motl*, 54 F. Supp. 3d 1153, 1157 (D. Mont. 2014) ("The ripeness inquiry regarding whether a case or controversy exists requires the same analysis as the injury-in-fact prong of the standing analysis."). Others fudge the

suggestion of a ripeness doctrine, and in the context of the ancillary doctrine of exhaustion, the Court in *Darby v. Cisneros* held that courts could not impose additional procedural hurdles to judicial review unless those hurdles have been imposed by Congress or the agency's own regulations.²⁸⁷ As such, there are those who believe ripeness should be abandoned as a part of any APA review.²⁸⁸

As administrative law unfolded during the New Deal era, the Court expressed reluctance to intrude into the administrative process when further steps in the process were likely to occur and inform how a particular agency decision might affect a party.²⁸⁹ The Court grounded this concern "partly" in the notion that Article III demands "Cases" or "Controversies" and "partly" as "an aspect of the procedural philosophy pertaining to the federal courts whereby, ever since the first Judiciary Act, Congress has been loathe to authorize review of interim steps in a proceeding."²⁹⁰ This often surfaced when parties pressed the Court to assess a statute's constitutionality, and the Court "improved upon the common law tradition and evolved rules of judicial administration especially designed to postpone constitutional adjudications and therefore constitutional conflicts until they are judicially unavoidable."²⁹¹ Justice Frankfurter, for instance, commented on the importance of a case being "ripe" for adjudication, ostensibly placing the concept inside the case or controversy constitutional cloak.²⁹² But he did so as an effort to underscore being cautious to avoid unnecessary constitutional rulings.²⁹³

issue by claiming that the doctrine embraces overlapping considerations, one constitutional and the other prudential. *E.g.*, *Simmonds v. INS*, 326 F.3d 351, 356–57 (2d Cir. 2003) ("Ripeness" is a term that has been used to describe two overlapping threshold criteria The first of these ripeness requirements has as its source the Case or Controversy Clause of Article III of the Constitution, [and is jurisdictional, while t]he second is a more flexible doctrine of judicial prudence"); *see also* Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153, 155–56 (1987).

287. 509 U.S. 137, 146–47 (1993); *see also* John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 162–75, 179 (1998) (suggesting that APA review does not include ripeness); G. Joseph Vining, *Direct Judicial Review and the Doctrine of Ripeness in Administrative Law*, 69 MICH. L. REV. 1443, 1498–99 (1971).

288. Vining, *supra* note 287, at 1546 ("It is preferable that the doctrine be abandoned . . .").

289. *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 131 (1939) (explaining that courts reflect the will of Congress, which is "loathe to authorize review of interim steps in a proceeding").

290. *Id.* The Court noted how Congress generally only permitted review of final judgments. *Id.* at 131 n.10.

291. Felix Frankfurter, *The Supreme Court of the United States, reprinted in LAW AND POLITICS: OCCASIONAL PAPERS OF FELIX FRANKFURTER 1913–1938*, at 21, 25 (Archibald MacLeish & E.F. Prichard, Jr. eds., 1939).

292. *United States v. CIO*, 335 U.S. 106, 125–26 (1948) (Frankfurter, J., concurring).

293. *E.g., id.*

After all, *Ashwander v. Tennessee Valley Authority*²⁹⁴ counseled that a matter would be ripe for constitutional adjudication if it involves “a real contest—an active clash of views, based upon an adequate formulation of issues, so as to bring a challenge to that which Congress has enacted inescapably before the Court.”²⁹⁵ Yet by the 1960s, before our modern Article III standing jurisprudence emerged to address the concerns of Justice Frankfurter and others, the academy already had begun promoting ripeness as a warranted protection against unnecessary judicial intervention: Professor Davis, for instance, explained how ripeness was only partly grounded in Article III, additionally justified as judge-made law to ensure that cases “are real and present or imminent, not squandered on problems which are abstract or hypothetical or remote.”²⁹⁶

When the fragmented mosaic of judicial limitations on judicial review became entangled with the 1960s and 1970s administrative state, the Court awkwardly groped for discernable rules rather than focusing on what Congress intended in the APA. In 1967, the Court decided *Abbott Laboratories v. Gardner*²⁹⁷ and *Toilet Goods Ass’n v. Gardner*,²⁹⁸ and addressed when the judiciary should engage in judicial review of agency judgments. When detailing the history surrounding these cases, Ronald Levin notes how they emerged during a period when the Food and Drug Administration believed it necessary to secure sufficient authority to promulgate legislative rules without unnecessarily elaborate procedures.²⁹⁹ The court of appeals in *Abbott* had held that challenging an FDA regulation amounted to pre-enforcement review not permissible under section 701(a) of the Food Drug & Cosmetic Act of 1938 (“FD&C”) (possibly allowed under section 701(e) of the Act).³⁰⁰

294. 297 U.S. 288 (1936).

295. *CIO*, 335 U.S. at 125 (Frankfurter, J., concurring). Justice Frankfurter also invoked *Ashwander* in *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 71 (1948) (“The policy against premature constitutional adjudications demands that any doubts . . . be resolved against jurisdiction.”).

296. DAVIS, *supra* note 42, at 397; *see also* KENNETH CULP DAVIS, ADMINISTRATIVE LAW TEXT 372–77 (1959). In the 1950s, Davis advocated for a “comprehensive reexamination” of ripeness. Kenneth Culp Davis, *Ripeness of Governmental Action for Judicial Review*, 68 HARV. L. REV. 1122, 1123 (1955); *see also* *Poe v. Ullman*, 367 U.S. 497, 508 (1961) (avoiding constitutional issue when not clear that enforcement of challenged statutes would occur). Professor Jaffe similarly discussed the doctrine. *See* JAFFE, *supra* note 79, at 395; Louis L. Jaffe, *Ripeness and Reviewable Orders in Administrative Law*, 61 MICH. L. REV. 1273, 1275–76 (1963).

297. 387 U.S. 136, 139–41 (1967), *abrogated by* *Califano v. Sanders*, 430 U.S. 99 (1977).

298. 387 U.S. 158, 162–65 (1967).

299. Ronald M. Levin, *The Story of the Abbott Labs Trilogy: The Seeds of the Ripeness Doctrine*, in ADMINISTRATIVE LAW STORIES 430, 443 (Peter L. Strauss ed., 2006).

300. *Id.* at 446–47.

By contrast, Judge Friendly wrote the appellate opinion in *Toilet Goods*, and in allowing review, arguably established the subsequent framework for the ripeness doctrine, according to Levin.³⁰¹ To begin with, Judge Friendly scolded the government's counsel for suggesting that suits based on a principle of ultra vires were barred by sovereign immunity.³⁰² Next, he addressed whether Congress' failure to afford judicial review under the FD&C sections 701(d) and (e) foreclosed review in advance of judicial review permitted once the rule was applied.³⁰³ He invoked the APA and the Declaratory Judgment Act (in a pre-*Califano v. Sanders*³⁰⁴ era) to conclude that the court could hear some cases unless Congress in the FD&C Act had intended to limit review to the actions in that Act.³⁰⁵ Judge Friendly explained how the issue floated around a penumbra of principles, ranging from standing, the APA requirement for "aggrieved" parties, the "actual controversy" requirement of the Declaratory Judgment Act (here, Judge Friendly referred only to the Act, not Article III), as well as the ripeness concept framed by Justice Frankfurter's earlier analysis and echoed by Professor Louis Jaffe.³⁰⁶ He acknowledged, moreover, how the "healthy trend" of rulemaking posed the unique problem of not imposing barriers to that trend but simultaneously ensuring an appropriate role for the judiciary.³⁰⁷ In particular, he endorsed Justice Frankfurter's concurring opinion in *Joint Anti-Fascist Refugee Committee v. McGrath*,³⁰⁸ where the Justice suggested a pragmatic approach toward judicial review: examining whether the issues are sufficiently crystalized for judicial review and the hardship of denying such review.³⁰⁹ He found further support in a variety of Supreme Court decisions, including *CBS, Inc. v. United States*,³¹⁰ which permitted judicial review of agency decisions. But he plucked these cases from their contextual moorings, arguably to expand, not contract, judicial review, but in doing so inadvertently established a new common law doctrine.³¹¹ That doctrine has since become modern ripeness, requiring that a court "evaluate (1) the fitness of the issues for judicial

301. *Id.* at 456–58.

302. *Toilet Goods Ass'n v. Gardner*, 360 F.2d 677, 683 n.6 (2d Cir. 1966).

303. *Id.* at 683.

304. 430 U.S. 99, 105 (1977).

305. *Toilet Goods Ass'n*, 360 F.2d at 683.

306. *Id.* at 684.

307. *Id.*

308. 341 U.S. 123, 156 (1951) (Frankfurter, J., concurring).

309. *Toilet Goods Ass'n*, 360 F.2d at 684. Judge Friendly also referenced JAFFE, *supra* note 79, at 396; *see also* Brian C. Murchison, *On Ripeness and "Pragmatism" in Administrative Law*, 41 ADMIN. L. REV. 159, 168–71 (1989).

310. 316 U.S. 407, 423–24 (1942).

311. *See Toilet Goods Ass'n*, 360 F.2d at 685–86.

decision and (2) the hardship to the parties of withholding court consideration.”³¹² The doctrine counsels that some final agency decisions ought to be deferred until certain factual issues become further crystalized.

Of course, Judge Friendly’s initial reasoning behind imbuing administrative law—and derivatively the APA—with a ripeness component makes little sense in the post-rulemaking era. As Levin observes, “pre-enforcement review of rules is a pervasive feature of administrative law practice,” and “in many regulatory programs, Congress has ordained that judicial review of a newly promulgated regulation must be sought immediately after its issuance or not at all.”³¹³

While perhaps ripeness concerns in pre-enforcement review of regulations have diminished somewhat, the doctrine carries resonance—albeit limited—for other types of agency actions. In *Ohio Forestry Ass’n, Inc. v. Sierra Club*, for instance, the Court held that a judicial review of a national forest plan was not ripe for review, although subsequent cases have allowed such review.³¹⁴ Next, in *National Parks Hospitality Ass’n v. Department of the Interior*, the Court held unripe a trade association challenge to a National Park Service rule because the rulemaking merely reflected the agency’s interpretation of a statute that it did not administer, and as such did not create “adverse effects of a strictly legal kind.”³¹⁵ The Court emphasized that the regulation did not affect the conduct of the regulated community.³¹⁶ And when addressing the fitness for review, the Court merely added a paragraph at the end of its opinion that the issue “should await a concrete dispute” and, as such, was not fit for review.³¹⁷

But the doctrine makes little sense in the modern administrative realm, as the Court now articulates the concepts of “agency action” and “finality,”³¹⁸ as well as how the law of “standing” has unfolded. When

312. *Nat’l Park Hosp. Ass’n v. Dep’t of Interior*, 538 U.S. 803, 808 (2003).

313. Levin, *supra* note 299, at 474.

314. 523 U.S. 726, 739 (1998). For an excellent summary of the case and the issue, see Professor Amada Leiter’s (then Cohen’s) law school case note. Amanda C. Cohen, Note, *Ripeness Revisited: The Implications of Ohio Forestry Association, Inc. v. Sierra Club for Environmental Litigation*, 23 HARV. ENVTL. L. REV. 547 (1999).

315. 538 U.S. at 809 (quoting *Ohio Forestry Ass’n*, 523 U.S. at 733).

316. *See id.* at 809–10.

317. *Id.* at 812.

318. The analysis generally mirrors a “finality” analysis. *See, e.g.*, *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 670 n.2 (2010) (demonstrating disagreement between the majority and dissent on whether a case involving an arbitration award was fit for review). And “finality’s” contours are evolving as the Court wrestles with agency “decisions” under the Clean Water Act. *See Hawkes Co. v. U.S. Army Corps of Eng’rs*, 782

reviewing constitutional challenges, pre-enforcement review of some actions may be problematic—but that is the difference between a facial and an as-applied challenge.³¹⁹ Even Justice Scalia’s opinion in *Lujan v. National Wildlife Federation* conflates the ripeness doctrine with “finality” and “agency action” principles.³²⁰

More importantly, today’s standing cases implicitly address the concerns animating the judiciary’s prudential concerns over ripeness. The Court’s decision in *Summers v. Earth Island Institute* is illustrative.³²¹ The case began as a facial challenge to Forest Service 2003 regulations allowing certain salvage timber sales to occur without affording the public any opportunity for notice and comment.³²² Several non-governmental organizations sought an injunction against a salvage timber sale in the Sequoia National Forest, which had been damaged by fire.³²³ The plaintiffs claimed the regulations and particular sale violated³²⁴ the 1992 Forest Service Decision Making and Appeals Reform Act.³²⁵ The plaintiffs secured a preliminary injunction and subsequently settled their dispute over the sale in the Sequoia National Forest but continued to press the facial challenge to the regulations.³²⁶ Without any particular sale in dispute, the district court addressed whether as a matter of standing or ripeness plaintiffs could continue their facial

F.3d 994 (8th Cir.), *cert. granted*, 2015 WL 8486656 (U.S. Dec. 11, 2015); *Sackett v. EPA*, 132 S. Ct. 1367 (2012).

319. See *Am. Trucking Ass’ns v. City of L.A.*, 133 S. Ct. 2096, 2105 (2013) (avoiding pre-enforcement review of state safety measures against federally licensed trucks). The issue is particularly acute in cases involving alleged “takings” in the land use context. See, e.g., *Horne v. Dep’t of Agric.*, 133 S. Ct. 2053, 2062 (2013) (noting that the concept in this context has been referred to as prudential ripeness, and not jurisdictional).

320. 497 U.S. 871, 890–91 (1990).

321. 555 U.S. 488, 499–500 (2009). *Summers* generated criticism, presumably by limiting a plaintiff’s ability to define their injury in fact as a probabilistic risk of harm. Bradford C. Mank, *Summers v. Earth Island Institute: Its Implications for Future Standing Decisions*, 40 ENVTL. L. REP. 10,958, 10,959 (2010); Bradford Mank, *Summers v. Earth Island Institute Rejects Probabilistic Standing, But a “Realistic Threat” of Harm Is a Better Standing Test*, 40 ENVTL. L. 89, 134–37 (2010); Jonathan Remy Nash, *Standing’s Expected Value*, 111 MICH. L. REV. 1283 (2013); See Michelle Fon Anne Lee, Note, *Surviving Summers*, 37 ECOLOGY L.Q. 381, 400–09 (2010); compare *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2346 (2014) (for chilling political speech probability of similar speech and affect in future justified standing), with *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1143 (2013) (for surveillance program challenge required certainly impending harm than speculative likelihood that activity will be targeted).

322. See *Earth Island Inst. v. Pengilly*, 376 F. Supp. 2d 994, 1004 (E.D. Cal. 2005).

323. See *id.* at 998–99.

324. *Id.*

325. Pub. L. No. 102-381, 106 Stat. 1419 (1992) (codified at 16 U.S.C. § 1612 (2012)).

326. *Earth Island Inst.*, 376 F. Supp. 2d at 999.

challenge.³²⁷ The court considered both issues and allowed the case to proceed, invalidating the regulations.³²⁸ The Ninth Circuit first agreed the plaintiffs had standing and then addressed “prudential” ripeness—a doctrine it described as ensuring that the judiciary does not review “legal issues outside the limits of Article III cases and controversies.”³²⁹ Here, the court naturally reviewed the *Abbott* trilogy, as well as the standing decision in *Lujan v. National Wildlife Federation*,³³⁰ and concluded the challenge was ripe only for the two particular regulations involved in the Sequoia sale and that the facial challenge to the remaining regulations would have to wait.³³¹ The Supreme Court deftly avoided the ripeness issue entirely, holding that the plaintiffs lacked Article III standing—not surprisingly mirroring aspects of the Ninth Circuit’s ripeness analysis.³³²

More recently, in *Susan B. Anthony List v. Driehas*, the Court decided a pre-enforcement review challenge to an Ohio statute, arguably chilling free speech during a political campaign.³³³ There, the Court held the plaintiff enjoyed Article III standing.³³⁴ But notably when the Court next addressed whether a separate argument based on ripeness might counsel against pre-enforcement review, the Court indicated that it already agreed how plaintiffs had constitutional standing and any prudential concerns might impermissibly intrude into the Court’s function of deciding cases within its jurisdiction.³³⁵ In a footnote, the Court added how the two doctrines, at least in this case, presented the same question and emanated from the same Article III concern³³⁶ and hinted that the issue remains outstanding about the “continuing vitality of the prudential ripeness doctrine.”³³⁷

Indeed, the Ninth Circuit’s approach toward ripeness illustrates how the doctrine is both insufficiently well-grounded and subsumed by modern standing analysis. That court curtly observed how ripeness

327. *See id.*

328. *Id.* at 1011.

329. *Earth Island Inst. v. Ruthenbeck*, 490 F.3d 687, 694 (9th Cir. 2006).

330. *Id.* at 694–95. Along with circuit opinions, the court cited *National Park Hospitality Ass’n v. Department of Interior*, 538 U.S. 803, 812 (2003) and *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 57–58 (1993).

331. *Earth Island Inst.*, 490 F.3d at 696.

332. *Summers v. Earth Island Inst.*, 555 U.S. 488, 500 (2009).

333. 134 S. Ct. 2334, 2340 (2014).

334. *Id.* at 2347.

335. *Id.* (quoting *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014)).

336. *Id.* at 2341 n.5.

337. *Id.* at 2347.

embraces constitutional and prudential considerations.³³⁸ Yet the analysis, it observed, “overlaps with the ‘injury in fact’ analysis for Article III standing. Whether framed as an issue of standing or ripeness, the inquiry is largely the same: whether the issues presented are ‘definite and concrete, not hypothetical or abstract.’”³³⁹ The Supreme Court dodged the issue in *Lexmark*,³⁴⁰ and almost tackled it in *U.S. Forest Service v. Pacific Rivers Council*,³⁴¹ where the Court avoided the merits of a ripeness defense to a challenge to a federal land use plan by dismissing the case after initially granting certiorari.³⁴²

Courts engage in a similar standing analysis when analyzing ripeness. In *Reno v. Catholic Social Services, Inc.*,³⁴³ the Court employed a ripeness framework, focusing principally on whether the harm to the plaintiff was imminent.³⁴⁴ But it then overlooked the presumption favoring review and invoked Justice Scalia’s opinion in *Lujan* for the proposition that “a controversy concerning a regulation is not ordinarily ripe for review under the Administrative Procedure Act until the regulation has been applied to the claimant’s situation by some concrete action.”³⁴⁵ The Eighth Circuit, for instance, considers the “touchstone of a ripeness inquiry” the likelihood and imminence of the harm.³⁴⁶

The Court undoubtedly will confront the vitality of prudential ripeness soon, hopefully acknowledging that ripeness in federal administrative cases is no longer an independent barrier to judicial review if the plaintiff satisfies Article III standing and the issues are

338. See *Wolfson v. Brammer*, 616 F.3d 1045, 1057–58 (9th Cir. 2010) (treating this as a principle flowing from *Nat’l Park Hosp. Ass’n v. Dep’t of Interior*, 538 U.S. 803, 808 (2003)).

339. *Id.* at 1058 (citations omitted) (quoting *Thomas v. Anchorage Equal Rights Comm’n*, 220 F.3d 1134, 1138 (9th Cir. 1999)).

340. See 134 S. Ct. at 1386–88.

341. 689 F.3d 1012, 1041–42 (9th Cir. 2012), *vacated and remanded*, 133 S. Ct. 2843, 2843 (2013); see also Hope M. Babcock, *Dismissal of the Certiorari Petition in Pacific Rivers Council: A Bullet Dodged in the Supreme Court’s War Against Public Challenges to Flawed Federal Land Use Planning*, 32 VA. ENVTL. L.J. 226, 245–46 (2014).

342. See Babcock, *supra* note 341, at 245–49 (discussing ripeness challenge).

343. 509 U.S. 43, 57–58 (1993).

344. *Id.*

345. *Id.* at 58 (citing *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 891 (1990)). Justice O’Connor’s concurring opinion reviews anticipatory challenges to agency rules, particularly agency-benefiting regulations and how the majority applied an incorrect categorical approach. *Id.* at 67–77 (O’Connor, J., concurring). She, however, “would not go so far as to state that a suit challenging a benefit-conferring rule is necessarily unripe simply because the plaintiff has not yet applied for the benefit.” *Id.* at 69.

346. *Parrish v. Dayton*, 761 F.3d 873, 875–76 (8th Cir. 2014).

otherwise final.³⁴⁷ Although the Court has vacillated on whether ripeness is constitutional or prudential,³⁴⁸ if ripeness is constitutional then the concerns prompting its development are now subsumed with modern standing doctrine and ought to be abandoned. To the extent ripeness is prudential and necessary to avoid unnecessarily intruding into agency decision-making prematurely, then the law surrounding finality ought to be capacious enough to protect against such premature judicial intrusion.

III. DISCRETIONARY SPACE FOR POLICY-MAKING

Next, administrative common law perpetuates a myth that agencies enjoy sufficient flexibility to choose how best to establish policy, whether through rulemaking, adjudication, or some form of guidance document.³⁴⁹ The myth today serves almost as a “story” for administrative law, and is quite simple: “The short of it is that legally effective agency declarations of policy may take almost any form.”³⁵⁰ Agencies may change a statutory interpretation if the language is ambiguous.³⁵¹ After all, agencies generally gravitate toward exhibiting a philosophy mirroring the incumbent administration.³⁵² And the judiciary appears reluctant to

347. The doctrine may carry continued resonance in other areas. *E.g.*, *Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 88–89 (2d Cir. 2002) (noting expansion of doctrine in land use context).

348. Chief Justice Roberts included the doctrine as flowing from Article III. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). Justice Souter suggested that ripeness considerations surface when parties request discretionary remedies by invoking the Court’s equitable power for declaratory or injunctive relief. *Catholic Soc. Servs.*, 509 U.S. at 57–58.

349. *See, e.g.*, JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 127 (4th ed. 2006) (“It is accepted that agencies are generally free to decide whether to formulate policy through rulemaking or adjudication.”); *see also* M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1384 (2004). Agencies also might effectively establish new standards (i.e., regulations) through enforcement proceedings (litigation) or by negotiation. *See* Andrew P. Morriss et al., *Choosing How to Regulate*, 29 HARV. ENVTL. L. REV. 179, 210–14 (2005) (employing public choice theory to explore regulation by litigation and by negotiation).

350. McFarland, *supra* note 230, at 435.

351. *See* Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005).

352. Professors Hammond and Markell explore “inside-out legitimacy” of agency behavior in response to “increasing recognition that the vast world of governance that agencies inhabit with relative policymaking freedom deserves close attention, accompanied by the recognition that combinations of internal and external controls may best optimize administrative legitimacy.” Emily Hammond & David L. Markell, *Administrative Proxies for Judicial Review: Building Legitimacy from the Inside-Out*, 37 HARV. ENVTL. L. REV. 313, 316 (2013) (providing an empirical analysis of “outside” petitions to withdraw state implementation of federal environmental programs and a surrounding theoretical analysis to test legitimacy).

impose a heightened standard of review when they do so.³⁵³ These precepts, however, not only mask that reality but also perpetuate embedded and yet erroneous assumptions.

A. *The Myth*

To begin with, the mythical story ignores too many factors to continue to pretend that agencies may elect to engage in either adjudication or rulemaking when establishing policy. Elizabeth Magill aptly explores how courts can control agency choice through “roundabout way[s],” such as through doctrines like reasonable interpretation of the law, arbitrary and capricious review, or the need for substantial evidence.³⁵⁴ Congress too may provide specific direction on how agencies must act.³⁵⁵ Agencies may not proceed through the rulemaking process and retroactively affect rights or obligations absent a clear congressional authorization to do so.³⁵⁶ Nor would it seem that agencies might do so when acting outside the rulemaking process if during that process the agency adopts a policy that monetarily penalizes previously legitimate conduct.

The APA seemingly accepted the extant paradigm that agencies could establish policy either through rulemaking or adjudication without appreciating how that could occur in practice or how the APA, as it would unfold, might diminish that presumption.³⁵⁷ The Supreme Court may have observed how the Constitution did not demand one approach over another.³⁵⁸ But that did not answer whether the APA favored one approach over another. Some scholars folded the choice of rulemaking or adjudication into a wider conversation about agency discretion. Professor Davis, for instance, championed rulemaking as a constraint against too much discretion, yet appreciated how the adjudicatory process might be necessary to afford agencies sufficient latitude to decide how factual controversies might apply to particular parties or to respond to new,

353. See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009).

354. Magill, *supra* note 349, at 1385. Magill observes how institutional constraints may cabin agency choices, such as the Department of Justice’s willingness to advance or defend a particular position or the Office of Management and Budget’s review of an agency’s proposed regulation. *Id.* at 1391–93; see also ROBERT A. KATZMANN, *JUDGING STATUTES* 24–27 (2014) (discussing congressional influence on agency interpretative process).

355. LUBBERS, *supra* note 349, at 129 (“Some agencies have their discretion limited by a statutory mandate requiring them to issue rules on a particular issue.”).

356. See *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208–09 (1988).

357. See JAFFE & NATHANSON, *supra* note 93, at 526–62 (outlining the various ways agencies could establish policy: through “avowed dicta” in adjudication, rulemaking, declaratory orders (advisory opinions), or press releases and the like).

358. See *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 106 (1946).

unforeseen circumstances.³⁵⁹ And Davis raised but avoided answering how to address the situation where agency adjudications depart from prior established policy.³⁶⁰

The Court too avoided critically analyzing such troublesome matters. In 1942, before the passage of the APA, the Court in *CBS, Inc. v. United States* observed how agencies could act either through rulemaking or adjudication.³⁶¹ The Court explained why regulations determining rights, even if not directed at a specific party, are generally reviewable.³⁶² The Court rebuffed the suggestion that judicial review would be unavailable unless the agency decision targeted a particular party, noting why it would be illogical to allow judicial review if the same decision had been accomplished during an adjudication rather than a rulemaking.³⁶³ Otherwise, of course, agencies would have a perverse incentive to engage in rulemaking to avoid judicial review.³⁶⁴ But the decision averted agency choice and scope of review.

While the following year the Court took the incremental step of holding that judicial review must be based on an agency's articulated reasons for its decision,³⁶⁵ not until 1947 and *Chenery II* did the Court

359. DAVIS, *supra* note 125, at 64–65 n.12, 67. According to Davis, the NLRB avoided the trappings of the rulemaking process by effectively adopting “rules” during adjudications. *Id.* at 68 n.17; *see also* Peck, *supra* note 233, at 730 (discussing the controversy surrounding the Board's use of adjudication rather than rulemaking).

360. DAVIS, *supra* note 90, at 188–90 (describing the amorphous concept of “rules” and the interplay with adjudication). Davis further suggested that the APA's approach toward rules as focusing on future effect would be too encompassing and instead focused on legislative history and distinguishing between particular versus general applicability. *Id.* at 190–92. Agencies, however, could change their policies during an adjudication, e.g., *FCC v. WOKO, Inc.*, 329 U.S. 223, 227–28 (1946), and Davis apparently accepted this. DAVIS, *supra* note 90, at 146, 550–61.

361. 316 U.S. 407, 420 (1942).

362. *Id.* at 416–20.

363. *Id.* at 421–22.

364. *See id.* The Court observed that “the Commission cannot insist that the appellant be relegated to that judicial review which would be exclusive if the rule-making power had never been exercised and consequently had never subjected appellant to the threatened irreparable injury.” *Id.* at 421. The Court further rejected the Commission's argument that its “rule” was an unreviewable policy, observing that it commanded conduct—unlike, as the Commission suggested, a press release. *Id.* at 422. In *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 200 (1956), the Court again reviewed why an adversely affected party could review an FCC regulation. Justices Harlan and Frankfurter, however, thought otherwise. *Id.* at 206–14 (Harlan, J., dissenting).

365. *SEC v. Chenery Corp. (Chenery I)*, 318 U.S. 80, 94–95 (1943). Professor Davis suggested that the requirement was constitutionally based, DAVIS, *supra* note 90, at 525, a perspective shared by Kevin Stack. Kevin M. Stack, *The Constitutional Foundations of Chenery*, 116 *YALE L.J.* 952, 956–57 (2007).

overtly announce the myth of agency choice.³⁶⁶ The facts of *Chenery II* are fascinating, although the issue ultimately became the ability of the agency to establish new rules of conduct through rulemaking or adjudication.³⁶⁷ The Court encouraged rulemaking but employed language noting the benefits of adjudication and agency choice.³⁶⁸ The *Chenery II* principle then became established precedent, later uncritically accepted in *NLRB v. Wyman-Gordon Co.*³⁶⁹ and *NLRB v. Bell Aerospace Co.*³⁷⁰ While *Chenery II* may have “nudge[d]” agencies toward rulemaking when exercising delegated authority,³⁷¹ the Court in *Wyman-Gordon*, according to Professor Jaffe, “quite needlessly rejected a splendid opportunity to insist on formal rule-making.”³⁷²

Yet *Chenery II*'s myth should have been interred following the third phase of administrative law. To begin, modern constitutional dogma rarely requires an individualized (adjudicatory) determination of the type envisioned during the *Londoner v. City and County of Denver*³⁷³ era. Recognizing that “*Chenery*'s statement remains definitive today,” William Araiza, for instance, explores how *Chenery*, along with *Wyman-Gordon* and *Bell Aerospace*, reflect an underlying current of hesitation to afford unvarnished discretion to choose between adjudication and rulemaking “when functionally the matter seems better suited for treatment by rulemaking,” such as when notions of fairness against retroactively penalizing parties or avoiding inconsistency all counsel against adjudication.³⁷⁴ Of course, he later describes how the dusty constitutional doctrine from *Bi-Metallic Investment Co. v. State Board of Equalization*³⁷⁵ and *Londoner* provide—an albeit limited—gloss over the choice of proceeding by rulemaking, positing that due process might require the

366. 332 U.S. 194, 203–04 (1947); see generally Roy A. Schotland, *A Sporting Proposition*, SEC v. *Chenery*, in ADMINISTRATIVE LAW STORIES 169 (Peter L. Strauss ed., 2006); Russell L. Weaver, *Chenery II: A Forty-Year Retrospective*, 40 ADMIN. L. REV. 161 (1988); Russell L. Weaver & Linda D. Jellum, *Chenery II and the Development of Federal Administrative Law*, 58 ADMIN. L. REV. 815 (2006).

367. 332 U.S. at 207.

368. See *id.*

369. 394 U.S. 759, 772 (1969).

370. 416 U.S. 267, 294 (1974) (“[T]he choice between rulemaking and adjudication lies in the first instance within the Board’s discretion.”).

371. Smalley, *supra* note 225, at 190.

372. Louis L. Jaffe, Book Review, 14 VILL. L. REV. 773, 774 (1969).

373. 210 U.S. 373 (1908).

374. William D. Araiza, *Agency Adjudication, the Importance of Facts, and the Limitations of Labels*, 57 WASH. & LEE L. REV. 351, 354–56 (2000).

375. 239 U.S. 441 (1915).

procedural attributes accompanying an adjudication.³⁷⁶ But little justification exists for *Chenery II*'s continued vitality.³⁷⁷

B. Conflating Policy Choices with Program Implementation

Today, an agency's ability to engage in "policy choice" during adjudication effectively is cabined by modern doctrines. Post-APA courts occasionally acknowledge how the ad hoc adjudicatory approach seems ill-suited for establishing "policy-type rules or standards."³⁷⁸ Indeed, some agencies began employing rulemaking precisely to avoid more troublesome adjudications.³⁷⁹ But the regulatory landscape of today effectively pushes agencies away from adjudication when establishing "policy." Early on, the Ninth Circuit cautioned that agencies should not circumvent the rulemaking process by overtly amending their rules during an adjudication.³⁸⁰ And the Supreme Court recently warned that agencies may not adopt a new policy by "simply disregard[ing] rules that are still on the books."³⁸¹ Notably, now that agencies generally have established policies articulated either in existing rules or guidance documents, the circumstances when agencies can avoid the claim that they are circumventing the rulemaking process are more limited.

The judiciary, moreover, appears reluctant to tolerate too much agency policymaking outside the rulemaking arena. After all, reliance on past policy (absent a regulatory change) implicates fundamental concerns over fairness.³⁸² In *NLRB v. Bell Aerospace Co.*, the Court asked whether "the adverse consequences ensuing from . . . reliance [were] so substantial" to warrant precluding the agency from proceeding through an adjudication.³⁸³ In *Fox Television Stations*, the Court noted how the

376. Araiza, *supra* note 374, at 382.

377. See Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 535–36 (2003); Magill, *supra* note 349, at 1417–25.

378. *E.g.*, *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 245–46 (1973). In *Florida East Coast Railway*, the Court interpreted "hearing" in the Interstate Commerce Act as not requiring a formal adjudicatory process (evidentiary hearing), and the Justices struggled with the constitutional undertones of due process and cases such as *Londoner* and *Bi-Metallic*. See *id.*

379. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.* involved an agency's use of rulemaking to avoid some of the trappings associated with an adjudication. 435 U.S. 519, 519 (1978).

380. See *Ford Motor Co. v. FTC*, 673 F.2d 1008, 1012 n.2 (9th Cir. 1981); *Patel v. INS*, 638 F.2d 1199, 1203 (9th Cir. 1980); *Ruangswang v. INS*, 591 F.2d 39, 44 (9th Cir. 1978).

381. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

382. See Albert C. Lin, *Refining Fair Notice Doctrine: What Notice Is Required of Civil Regulations?*, 55 BAYLOR L. REV. 991, 996 (2003).

383. 416 U.S. 267, 295 (1974).

presence of “serious reliance interests” might justify requiring a more robust than usual agency explanation for a change.³⁸⁴ And in *Christopher v. SmithKline Beecham Corp.*, reliance interests prevented an agency change in policy (announced in a brief as a new interpretation of the agency’s regulation) from being applied retroactively.³⁸⁵

This bleak picture of constrained agency choice does not necessarily unduly hinder an agency’s ability to address new situations through the adjudicatory process. Invariably, agencies must interpret their authorizing statutes as well as their regulations when new circumstances present themselves. And when doing so, it is likely that those who are similarly situated will be equally or roughly equally affected.

The rulemaking process is neither subverted nor violated simply because an agency adjudicatory order might have precedential effect and impact others in the regulated community. When, for instance, the Federal Communications Commission upheld a determination that a particular company’s audio bridging services constituted “toll teleconferencing” services under the Telecommunications Act, another group could not challenge that decision as impermissibly avoiding a rulemaking process.³⁸⁶ The court suggested that the FCC “has . . . broad discretion to . . . proceed by adjudication or rulemaking,” when engaging in statutory interpretation.³⁸⁷ The principal limitations are when the agency invokes its generic legislative authority or amends a prior legislative rule.³⁸⁸ This seems straightforward enough; otherwise, agencies would be forced through the rulemaking process each time a new circumstance presents itself and the agency would have to decide whether the statutory scheme applies. What is remarkable, however, is that courts seem compelled to discuss this as agency choice rather than implementation.³⁸⁹ Agency choice connotes a new, prospective policy, while implementation reflects the necessary application of existing, possibly vague, regulatory norms to new circumstances.³⁹⁰

This became problematic in another FCC case. In *Time Warner Cable Inc. v. FCC*, the Second Circuit held that an order of the FCC requiring a multichannel video programing distributor to continue to carry an unaffiliated network’s program under preexisting contractual terms

384. 556 U.S. at 515.

385. 132 S. Ct. 2156, 2167–68 (2012).

386. *Conference Grp., LLC v. FCC*, 720 F.3d 957, 958 (D.C. Cir. 2013).

387. *Id.* at 965.

388. *Id.*

389. *See, e.g., id.* at 965–66 (noting that the FCC’s statutory interpretation was given in the course of informal adjudication).

390. *See* Mark H. Grunewald, *The NLRB’s First Rulemaking: An Exercise in Pragmatism*, 41 DUKE L.J. 274, 277–82 (1991); Magill, *supra* note 349, at 1383.

(“2011 FCC Order”) constituted an impermissible legislative rule.³⁹¹ The case involved the Cable Act, designed to address the ability of cable operators to assert control over programming in particular geographic areas as a consequence of an anticompetitive market.³⁹² The Act directed that the FCC police discrimination against unaffiliated programmers, and the FCC responded by establishing a program for addressing discrimination complaints.³⁹³ In 1993, it adopted a regulation providing that complaints would be addressed case-by-case, including what would be necessary to establish a prima facie case warranting further inquiry.³⁹⁴ This, so far, would have been a classic situation for agency adjudication—with federal statutes dating back over one hundred years charging agencies with arresting discriminatory behavior on a “case-by-case basis.”³⁹⁵ But by the time of the 2011 FCC Order against the cable companies, too few complaint proceedings had occurred; the FCC believed it needed to alter the information necessary to establish a prima facie case, and it needed to afford complainants with the protection of a “standstill rule” that would preserve the existing contractual arrangements (absent such an approach vendors would be compelled to enter into new arrangements or fear retaliation).³⁹⁶ And in a 2007 notice of proposed rulemaking, the FCC asked for comments on possibly changing its 1993 regulations to address both concerns.³⁹⁷ When the FCC issued its 2011 order and addressed both those issues in the order rather than completing its 2007 notice of proposed rulemaking, it optically and correspondingly troublingly seemed to circumvent the rulemaking process.³⁹⁸

After responding to a First Amendment challenge,³⁹⁹ the Second Circuit addressed the administrative question.⁴⁰⁰ It rejected the agency’s attempt to defend the “standstill rule” as a procedural regulation exempt from notice and comment.⁴⁰¹ A substantive rule, the court observed, “create[s] new law, rights, or duties, in what amounts to a legislative act.”⁴⁰² While acknowledging that all procedural rules affect parties’

391. 729 F.3d 137, 171 (2d Cir. 2013).

392. *Id.* at 143.

393. *Id.* at 147–48.

394. *Id.*

395. *Id.* (citing Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, 9 F.C.C. Rcd. 2642, 2644 (1993)).

396. *Id.* at 149.

397. *Id.*

398. *See id.* at 143, 147–48.

399. *Id.* at 154–67.

400. *Id.* at 167–71.

401. *Id.* at 168–69.

402. *Id.* at 168 (quoting *Sweet v. Sheahan*, 235 F.3d 80, 91 (2d Cir. 2000)).

rights or obligations to some degree, the court suggested the line would be crossed when the consequences are so grave or when the policies furthering public participation might be thwarted.⁴⁰³ Because the standstill rule here “significantly” affected the parties’ rights, and because neither the FCC’s past practice nor its regulations or statutory regime provided for a standstill during the pendency of a complaint, the court held that the rule, in fact, was a new obligation that required notice-and-comment rulemaking.⁴⁰⁴ Indeed, in a similar circumstance, the D.C. Circuit rejected the FCC’s effort to avoid notice and comment by arguing for a broad application of the good cause exemption.⁴⁰⁵

C. *Predominance of Informal Mechanisms*

The judiciary also exhibits skepticism when agencies effectively impose new requirements through guidance or interpretative rules without first affording the public an opportunity for notice and comment.⁴⁰⁶ The APA expressly contemplates that guidance documents serve useful function and exempts from notice-and-comment rulemaking “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.”⁴⁰⁷ The literature is rife with

403. *Id.*

404. *Id.* at 168–69. The agency justified its rule as a logical outgrowth of a 2007 notice. *Id.* The logical outgrowth concept, however, assumes the agency has finalized a rule somewhat different than the proposed rule. *See Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1107 (D.C. Cir. 2014); *Ass’n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 442 (D.C. Cir. 2012) (“[R]egulated parties have an opportunity to comment on new regulations.”). In *Time Warner Cable*, the agency never finalized its rule, and invoking the logical outgrowth concept was quite novel. 729 F.3d at 170–71. Rather than rejecting the claim outright, the court held that the standstill rule was not a logical outgrowth. *Id.* But by considering the claim, the court implicitly suggested that simply affording notice in a proposed rule is sufficient when an agency later implements its proposal even if not finalized. In the past, the FCC has prevailed in challenges to a change in policy through adjudication. *E.g.*, *W. Union Int’l, Inc. v. FCC*, 804 F.2d 1280, 1291 (D.C. Cir. 1986) (change in policy not arbitrary or capricious). But when a change amends a preexisting regulation, the agency may do so during another rulemaking proceeding provided it offers a reasoned explanation. *E.g.*, *Ass’n of Pub.-Safety Commc’ns Officials-Int’l v. FCC*, 76 F.3d 395, 396–400 (1996); *see also FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (no heightened standard of review for FCC change in policy).

405. *Sorenson Commc’ns Inc. v. FCC*, 755 F.3d 702, 706–07 (D.C. Cir. 2014); *see also* GOV’T ACCOUNTABILITY OFF., FEDERAL RULEMAKING: AGENCIES COULD TAKE ADDITIONAL STEPS TO RESPOND TO PUBLIC COMMENTS (2012) (noting use of good cause exception).

406. Courts occasionally can avoid the issue on procedural grounds. *E.g.*, *Sierra Club v. EPA*, 754 F.3d 995, 996 (D.C. Cir. 2014) (holding that petitioners lacked standing to challenge an agency memorandum responding to a decision vacating a Clean Air Act rulemaking).

407. 5 U.S.C. § 553(b)(3)(A) (2012).

explanations about the importance of these informal mechanisms for implementing policy.⁴⁰⁸ And the Supreme Court in *Perez v. Mortgage Bankers Ass'n* illustrated once again how the Roberts Court intends on enforcing the language of the APA when it held that notice and comment was unnecessary when agencies issue interpretative rules (assuming that they are interpretative rules and not legislative rules).⁴⁰⁹ But two problems persist. First, the Court did not eviscerate judge-made rules for distinguishing when a guidance document or interpretative rule is a legitimate guidance document or interpretative rule rather than a legislative rule in disguise. In its perennial effort to arrest the effects of mountaintop mining, for instance, the EPA issued a series of memoranda and guidance, only to spend years in court addressing whether its documents required informal notice and comment.⁴¹⁰ The D.C. Circuit ultimately upheld the EPA's issuance of the guidance, but in doing so reflected the inherent difficulty with developed doctrines.⁴¹¹ The argument obscured how courts, in other instances, invalidated agency documents as violating the APA's informal notice-and-comment requirement.⁴¹² When, for example, the EPA responded to a particular ruling under the Clean Air Act, the D.C. Circuit held that the EPA violated the APA by signaling how it would respond to a Sixth Circuit ruling limiting the agency's air permitting program for certain oil and gas operations.⁴¹³ The EPA similarly was told that it impermissibly

408. *E.g.*, MICHAEL ASIMOW, *ADVICE TO THE PUBLIC FROM FEDERAL ADMINISTRATIVE AGENCIES* (1973); Michael Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 MICH. L. REV. 520, 529 (1977). "The original justification for such documents was to "advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power." U.S. DEPT OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (1947).

409. 135 S. Ct. 1199, 1201 (2015).

410. *See Nat'l Mining Ass'n v. Jackson*, 880 F. Supp. 2d 119, 129 (D.D.C. 2012); *Nat'l Mining Ass'n v. Jackson*, 816 F. Supp. 2d 37, 45 (D.D.C. 2011); *Nat'l Mining Ass'n v. Jackson*, 768 F. Supp. 2d 34, 46 (D.D.C. 2011).

411. *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 246–47 (D.C. Cir. 2014).

412. *E.g.*, *Sierra Club v. EPA*, 699 F.3d 530 (D.C. Cir. 2012) (determination of hazardous air pollutants); *Minard Run Oil Co. v. U.S. Forest Serv.*, 670 F.3d 236 (3d Cir. 2011) (settlement agreement and statement constituted regulations); *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1 (D.C. Cir. 2011) (instituting new technology constituted legislative rule); *Nat. Res. Def. Council v. EPA*, 643 F.3d 311 (D.C. Cir. 2011) (ozone standards guidance document); *Ensco Offshore Co. v. Salazar*, No. 10-1941, 2010 WL 4116892 (E.D. La. Oct. 19, 2010) (following its practice of issuing what it calls "Notice to Lessees" ("NTL"), the Department of the Interior issued an NTL after the BP oil spill, and the court held that the NTL was a substantive rule requiring informal notice-and-comment procedures).

413. *Nat'l Env'tl. Dev. Ass'n's Clean Air Project v. EPA*, 752 F.3d 999, 1009–11 (D.C. Cir. 2014). In response to *Summit Petroleum Corp. v. EPA*, 690 F.3d 733, 746–47 (6th Cir. 2012), invalidating the EPA's treatment of a natural gas plant and associated wells as one "source"

circumvented the APA when responding to a Senate inquiry on how the agency was administering a particular Clean Water Act program.⁴¹⁴

Second, perhaps more significantly, the trouble seems to be that simplistic early twentieth century classifications such as “guidance” and “interpretation” have become cumbersome in our Internet-based era dominated by detailed regulatory regimes and a robust appreciation for statutory/regulatory construction. For agency efforts to be meaningful, they must have some effect: whether in prescribing or proscribing conduct, or by influencing a court’s assessment of an agency’s approach. The dialogue over guidance documents generally recognizes this.⁴¹⁵ But historically, while the contours of deference were being crystalized, courts allowed agencies to announce their interpretation of statutory language, without much fanfare.⁴¹⁶ After all, courts generally considered those interpretations as having marginal force and effect, and they had little reason to afford any significant degree of deference to such pronouncements of the “law.”⁴¹⁷ And legal interpretations were

under Title V of the Clean Air permitting program, the EPA issued a *Summit* directive indicating that outside of the Sixth Circuit it would follow its past practice on interrelatedness in making new source determinations under Title V or New Source Review. *Nat’l Envtl. Dev. Ass’ns Clean Air Project*, 752 F.3d at 1003. When trade organizations challenged the *Summit* directive, the court found “no merit” to EPA’s defense. *Id.*

414. *Iowa League of Cities v. EPA*, 711 F.3d 844, 859 (8th Cir. 2013).

415. See generally Stephen M. Johnson, *Good Guidance, Good Brief!*, 72 MO. L. REV. 695 (2007) (discussing problems created by White House and congressional reforms and reasons for the trend away from legislative roles); John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893 (2004) (examining non-legislative rule issues resulting from judicial manageability concerns); Mark Seidenfeld, *Substituting Substantive for Procedural Review of Guidance Documents*, 90 TEX. L. REV. 331 (2011) (proposing courts should institute procedural review of agency guidance documents).

416. U.S. DEPT OF JUSTICE, *supra* note 408, at 26.

417. The Attorney General’s manual explains that such interpretations are advisory, often issued in response to a request for a ruling, possibly accepted by the public, but when challenged courts might only be influenced by the interpretation. *Id.* Rulings could be “binding” only if issued pursuant to statutory authority. *Id.* at 31, 100. A principal reason for the Committee’s focus on interpretative rulings was to ensure the public’s access to such rulings, including press releases and the like. *Id.* at 26–29. If the statutory language seemed somewhat ambiguous—particularly in the area of taxation, the Court occasionally noted with little analysis how agencies could issue interpretative regulations defining the statutory terms. *E.g.*, *Textile Mills Sec. Corp. v. Comm’r*, 314 U.S. 326, 338 (1941); see also *Helvering v. Credit All. Corp.*, 316 U.S. 107, 114 (1942) (“[I]t is a valid interpretative regulation and a proper exercise of the rule-making authority.”) (Black, J., dissenting). Writing in 1938, James Landis observed how the use of rulemaking to clarify statutory language had not received much attention. LANDIS, *supra* note 90, at 80.

distinguishable from agency implementation of the law.⁴¹⁸ Indeed, the APA's legislative history suggests that interpretative rules are "merely interpretations of statutory provisions—are subject to plenary judicial review, whereas 'substantive' rules involve a maximum of administrative discretion."⁴¹⁹ This was an era when scholars and courts still debated distinguishing between "legislation" and merely interpreting legislation, and it pre-dated modern deference principles, which acknowledge that interpreting often ambiguous or silent statutory language effectively implemented congressionally delegated power. If, therefore, one accepted those two premises, it made sense to carve interpretative rules out from the APA informal notice-and-comment requirements.

Neither premise, however, garners sufficient currency today; and both become problematic under our myth of agency choice that includes guidance documents. A good example is the challenged rule interpreting the geographic scope of the Clean Water Act.⁴²⁰ In the pre-APA era, this would have simply been treated as an interpretative rule, announcing the agency's understanding of what Congress meant when it used the phrase "waters of the United States." Few today would argue against affording an opportunity for notice and comment for this proposed "interpretive" rule (in its form as a proposed rule). Consequently, what has emerged since is the problematic endeavor of purportedly distinguishing between legislative and non-legislative rules. The difficulty, though, is that neither "guidance" nor "interpretation" are overly meaningful categories: An interpretation can accomplish the same result as a legislative rule, witness our example earlier under the Clean Water Act. Or, an interpretation of an ambiguous regulation might carry a heightened degree of deference, underscoring the importance of deciding whether opportunity for notice and comment is necessary. Some courts, therefore, expectedly appear inclined to demand that certain actions proceed through informal rulemaking—undermining our myth.

Consequently, lines marking boundaries among rulemakings, adjudication, and guidance/interpretation are too blurred. One option,

418. See U.S. DEP'T OF JUSTICE, *supra* note 408, at 26. Even the adoption of standards, such as for the quality of grain for sale, was not necessarily considered of a regulatory character. *Id.* at 45.

419. ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, S. DOC. NO. 79-248, at 18 (1946). Professor Davis moved slightly from this when writing: "[C]ourts do not necessarily inquire into the validity of interpretative regulations, but they may simply make their own interpretations, giving such weight to interpretative regulations as they seem to deserve." DAVIS, *supra* note 90, at 194–95, 647.

420. Definition of "Waters of the United States" Under the Clean Water Act, 80 Fed. Reg. 37,054 (June 29, 2015); Definition of "Waters of the United States" Under the Clean Water Act; 79 Fed. Reg. 22,188, 22,188–89 (Apr. 21, 2014); *In re EPA*, 803 F.3d 804 (6th Cir. 2015).

Paul Verkuil suggests, is to construct a unitary theory for administrative procedure that avoids the adjudication/rulemaking classification.⁴²¹ If a unitary theory seems too dramatic, we could consider whether the legal process school's Kantian faith in process should succumb a bit more to goals: we could focus less on procedural correctness and more on the objectives being sought, such as advance notice or public input. Regardless, we must acknowledge how our common law myth has been busted.

IV. SCOPE OF REVIEW

Heretical as it seems, “deference” promotes yet another unnecessary common law concept following the advent of the APA and modern principles of statutory construction. The Court molded modern “deference” from a mélange of historical artifacts designed to address the vagaries of pre-APA scope of review.⁴²²

Classically, for instance, although authors acknowledge the uneasiness of purportedly distinguishing between a review of legal issues and a review of mixed questions of law and fact,⁴²³ we nevertheless seem compelled to continue to confuse the next generation of law students with what is now a somewhat irrelevant distinction.⁴²⁴ Several books explore

421. Verkuil, *supra* note 114, at 291. *But cf.* Robert L. Rabin, *Administrative Law in Transition: A Discipline in Search of an Organizing Principle*, 72 NW. U. L. REV. 120, 139–42 (1977); Ernest Gellhorn & Glen O. Robinson, *Perspectives on Administrative Law*, 75 COLUM. L. REV. 771, 783–86 (1975).

422. Today's principal cases surfaced between 1970 and 1984. *See* *Chevron, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844–45 (1984); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 46 (1983); *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983); *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 546 (1978); *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976) (announcing test for assessing due process violation); *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.* 419 U.S. 281, 286 (1974) (holding that an agency's decision may be upheld if agency's justification can be reasonably discerned); *Camp v. Pitts*, 411 U.S. 138, 140–43 (1973); *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410–11 (1971), *abrogated by Califano v. Sanders*, 430 U.S. 99 (1977).

423. *See, e.g.*, JOHN F. MANNING & MATTHEW C. STEPHENSON, *LEGISLATION AND REGULATION: CASES AND MATERIALS* 744–48 (2d ed. 2013). The concept, of course, emerged well before modern deference principles, *see* Bohlen, *supra* note 136, at 113–15, and, as such, even Judge J. Skelly Wright of the D.C. Circuit gave the doctrine a nod when suggesting that the application of the National Environmental Policy Act posed a mixed question. *Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1095 & n.68, 1096 (D.C. Cir. 1973).

424. Courts continue to parrot the concept, uncritically. *See, e.g.*, *Plunk v. Hobbs*, 719 F.3d 977, 981 (8th Cir. 2013); *Hussain v. Obama*, 718 F.3d 964, 967 (D.C. Cir. 2013); *New Orleans Depot Servs., Inc. v. Dir., Office of Workers' Comp. Programs*, 718 F.3d 384, 387 (5th Cir. 2013) (en banc); *Local Union 36, Int'l Bhd. of Elec. Workers v. NLRB*, 706 F.3d 73,

the scope of review separately as review of agency regulations, review of adjudications, and, in particular, review of facts and mixed questions of fact and law, and review of interpretative rules and guidance documents. Some authors separate scope of review into review of facts, review of law, and then review of discretion.⁴²⁵ *NLRB v. Hearst Publications, Inc.*'s⁴²⁶ approach toward law and facts may well have served a purpose in the 1940s, but its relevance today seems dubious.⁴²⁷ It reflects little more than the unresolved tension among the Justices over statutory construction and exploring statutory purpose when deciding whether to trust expert administrators. The legal process school helped resolve that by urging a flexible approach toward statutory construction and allowing agencies to adopt any permissible construction of a statute.⁴²⁸ Yet, since *Hearst*, administrative law remains hampered by a residual notion that something might be a mixed question of law and fact distinct from routine cases involving judicial review.

But other more insidious relics from the *Hearst* era are even more troubling. Quite possibly no administrative law doctrine has elicited more interest and yet elided consistency than the concept of agency deference and the scope of review. In many administrative law conflicts, courts confront whether to afford deference to an agency's interpretation of a statute or its own regulation.⁴²⁹ This issue is foundational. While today the APA itself provides a governing framework, that framework is either implicitly perceived as being inadequate or its framework has not been sufficiently tested. The judiciary continues to grapple with reconciling how to push the law forward under the APA's framework without overtly abandoning precedent whose roots extend back to a pre-APA era. This next Section reviews some of those historical relics with the goal of illustrating why this administrative common law concept developed and suggesting why it may be unnecessary today.

84 (2d Cir. 2013); *Zhou Hua Zhu v. U.S. Attorney Gen.*, 703 F.3d 1303, 1309, 1311–12 (11th Cir. 2013); *In re IDC Clambakes, Inc.*, 727 F.3d 58, 64, 71 (1st Cir. 2013); *Ashland Facility Operations, LLC v. NLRB*, 701 F.3d 983, 989 (4th Cir. 2012).

425. *E.g.*, JOHN M. ROGERS ET AL., ADMINISTRATIVE LAW 477–569 (3d ed. 2012).

426. 322 U.S. 111 (1944), *overruled in part by* *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992).

427. John Manning and Mathew Stephenson question *Hearst's* modern relevance, and they further note how Professors Jaffe and Davis disagreed over the import of the law/fact distinction. MANNING & STEPHENSON, *supra* note 423, at 744–46. “[O]ne line of objection to *Hearst*,” they posit, “insists that courts cannot maintain a principled and consistent distinction between pure questions of law and mixed questions of law and fact.” *Id.* at 746.

428. See William N. Eskridge, Jr. & Philip P. Frickey, *The Making of the Legal Process*, 107 HARV. L. REV. 2031, 2038 (1994).

429. See *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868–71 (2013).

The Court's effort to mold modern deference principles to fit non-traditional agency policymaking decisions reflects the systemic difficulty of applying possibly "aged" doctrines to new circumstances. Many lawyers are all too familiar with how the Court established a purportedly new framework for agency deference in *Chevron, Inc. v. Natural Resources Defense Council, Inc.*⁴³⁰ Reviewing the EPA's informal rule promulgated under the Clean Air Act, the Court instructed district courts to determine "whether Congress has directly spoken to the precise question at issue."⁴³¹ If so, then agencies must obey that command—albeit as articulated by the court; if, however, the statutory language is ambiguous, then the court will defer to an agency's reasonable interpretation.⁴³² This language arguably cobbled together seemingly venerable principles that pre-dated the APA.⁴³³ Borrowing from nineteenth century concepts, the Court considered deference as a product of the exercise of *legitimate authority* by those with expertise to *exercise* that authority.⁴³⁴ And the Court accepted that agencies would enjoy

430. 467 U.S. 837, 842, 844, 865–66 (1984); *see also* *Barnhart v. Walton*, 535 U.S. 212, 217–18 (2002) (restating *Chevron* test).

431. *Chevron*, 467 U.S. at 842.

432. *Id.* at 842–43. The D.C. Circuit recently characterized the methodology slightly differently, stating that "[i]n general, if a statute 'is silent or ambiguous with respect to the specific issue at hand' then 'the [agency] may exercise its reasonable discretion in construing the statute,'" including possibly regulating circumstances or parties not specifically identified. *Nat'l Ass'n of Mfrs. v. SEC*, 748 F.3d 359, 366 (D.C. Cir. 2014) (quoting *Bldg. Owners & Managers Ass'n Int'l v. FCC*, 254 F.3d 89, 93–94 (D.C. Cir. 2001), *overruled by* *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18 (D.C. Cir. 2014)).

433. In Brief for the Administrator of the Environmental Protection Agency, *Chevron*, 467 U.S. 837 (No. 82-1005), the EPA presented a weak array of cases. *E.g.*, *INS v. Wang*, 450 U.S. 139, 144 (1981); *Beal v. Doe*, 432 U.S. 438, 447 (1977) (noting in passing to be mindful of agency construction); *Union Elec. Co. v. EPA*, 427 U.S. 246, 256 (1976) (affording "great deference to the Administrator's construction of the Clean Air Act"); *Train v. Nat. Res. Def. Council, Inc.*, 421 U.S. 60, 75 (1975) (accepting a "sufficiently reasonable" construction); *Morton v. Ruiz*, 415 U.S. 199, 231–32 (1974) (noting necessity for agency policy formulation and rulemaking when Congress leaves a gap); *Inv. Co. Inst. v. Camp*, 401 U.S. 617, 626 (1971) (invoking older cases that afford "great weight to any reasonable construction"). Cass Sunstein, for instance, cogently traces how *Chevron* harkens back to "the New Deal enthusiasm for agency autonomy." Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2074 (1990). John H. Reese, too, reviews the historical antecedents relied upon by the Court. John H. Reese, *Bursting the Chevron Bubble: Clarifying the Scope of Judicial Review in Troubled Times*, 73 FORDHAM L. REV. 1103, 1108–10 (2004).

434. *See supra* notes 70–78, 196–200 and accompanying text; *see also* William D. Araiza, *Deference to Congressional Fact-Finding in Rights-Enforcing and Rights-Limiting Legislation*, 88 N.Y.U. L. REV. 878, 887 (2013) ("The academic discussion of the deference question has largely focused on issues of comparative expertise and authority.").

legitimacy when Congress either expressly or impliedly delegated the *authority* to engage in the type of decision-making process at issue.⁴³⁵

But *Chevron's* relatively simplistic formula for allocating responsibility between the judiciary and agencies is perhaps too simplistic and fraught with difficulty.⁴³⁶ To begin, not until almost twenty years later did the Court address whether *Chevron* would apply to the bevy of new mechanisms that agencies employ when providing guidance on how they interpret congressional commands. With the advent of the computer and word processing, coupled with the emergence of the Internet and the capability to access agency information, agencies could more easily develop and disseminate documents informing the public and agency personnel about how to interpret and implement those commands. Yet, whether such documents would be afforded *Chevron* deference remained shrouded until the Court attempted to offer some clarification in 2000 and then again in 2001.

In *Christensen v. Harris County*⁴³⁷ and *United States v. Mead Corp.*,⁴³⁸ the Court considered the degree of deference agencies would enjoy when announcing an understanding of a congressional command other than through an APA or equivalent informal rulemaking process. In *Christensen*, the Court held that “interpretations contained in policy

435. For a thorough treatment of the delegation issue, see Lisa Schultz Bressman, *Chevron's Mistake*, 58 DUKE L.J. 549, 575–80 (2009).

436. Some of the all-too numerous articles on *Chevron* include: David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 206; Elizabeth Garrett, *Legislating Chevron*, 101 MICH. L. REV. 2637, 2645–46 (2003); Ernest Gellhorn & Paul Verkuil, *Controlling Chevron-Based Delegations*, 20 CARDOZO L. REV. 989, 993 (1999); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 614 (1996); Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 835 (2001); Mark Seidenfeld, *Chevron's Foundation*, 86 NOTRE DAME L. REV. 273, 278 (2011); Peter L. Strauss, “Deference” Is Too Confusing—Let's Call Them “Chevron Space” and “Skidmore Weight,” 112 COLUM. L. REV. 1143, 1151–52 (2012); and Peter L. Strauss, *Overseers or “The Deciders”—The Courts in Administrative Law*, 75 U. CHI. L. REV. 815, 816–17 (2008). Professor Beermann, for instance, identifies ten persuasive reasons why *Chevron* might be ill-advised. Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 782–84 (2010). Various empirical studies further question whether *Chevron* affords the judiciary cover for tilting toward a judge's inherent biases. See, e.g., Jason J. Czarnecki, *An Empirical Investigation of Judicial Decisionmaking, Statutory Interpretation, and the Chevron Doctrine in Environmental Law*, 79 U. COLO. L. REV. 767, 810 (2008); William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1122 (2008); Connor N. Raso & William N. Eskridge, Jr., *Chevron as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1744 (2010).

437. 529 U.S. 576, 587 (2000).

438. 533 U.S. 218, 221 (2001).

statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.”⁴³⁹ The Court signaled that such “informal” documents could be “entitled to respect” under the Court’s 1944 opinion in *Skidmore v. Swift & Co.*,⁴⁴⁰ “to the extent that those interpretations have the ‘power to persuade.’”⁴⁴¹ The Court’s subsequent decision in *Mead*, however, shuttered any meaningful opportunity for clarity, when the Court suggested that informal notice-and-comment rulemaking is not necessarily a prerequisite for *Chevron* deference.⁴⁴² *Mead* requires that (1) “Congress clearly delegated authority to the agency to make rules carrying the force of law and (2) that the agency interpretation was promulgated in the exercise of that authority.”⁴⁴³ But *Mead* arguably lacks any theoretical foundation. Adrian Vermeule, for instance, posits it “is close to disastrous on institutional grounds.”⁴⁴⁴ Lisa Bressman argues that its procedural lens, while important, disconnected *Chevron*’s delegation rationale from the delegation inquiry.⁴⁴⁵ The suggestion that the inquiry includes

439. 529 U.S. at 587.

440. 323 U.S. 134, 140 (1944).

441. *Christensen*, 529 U.S. at 587 (quoting *Skidmore*, 323 U.S. at 140). *Chevron*’s rationale, however, offers little theoretical support for *Skidmore*. See Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1237 (2007).

442. *Mead*, 533 U.S. at 233–35; see also *Vill. of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 658 (D.C. Cir. 2011) (*Chevron* deference applied in absence of notice-and-comment rulemaking); *Resisting Env’tl. Destruction on Indigenous Lands v. EPA*, 716 F.3d 1155, 1161 (9th Cir. 2013) (*Chevron* applies to Environmental Appeals Board decisions).

443. *N. Cal. River Watch v. Wilcox*, 633 F.3d 766, 773 (9th Cir. 2010) (citing *Mead*, 533 U.S. 236–37).

444. ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 215 (2006); see also Adrian Vermeule, *Introduction: Mead in the Trenches*, 71 GEO. WASH. L. REV. 347, 347 (2003). Robin Craig observes that “*Mead* thus complicated *Christensen*’s relatively simple focus.” Robin Kundis Craig, *Agencies Interpreting Courts Interpreting Statutes: The Deference Conundrum of a Divided Supreme Court*, 61 EMORY L.J. 1, 15 (2011); see also Michael P. Healy, *Reconciling Chevron, Mead, and the Review of Agency Discretion: Source of Law and the Standards of Judicial Review*, 19 GEO. MASON L. REV. 1, 2 (2011); Ronald M. Levin, *Mead and the Prospective Exercise of Discretion*, 54 ADMIN. L. REV. 771, 773 (2002); Thomas W. Merrill, *The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 808 (2002).

445. Bressman, *supra* note 435, at 554. Bressman, of course, along with others, initially assumed that *Chevron*’s delegation rationale was a fiction and that “Congress probably does not draft statutes with *Chevron* in mind.” *Id.* at 562; see also Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1474, 1477 (2005). The recent searching empirical analysis undermines that assumption. See Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside: An Empirical Study of Congressional Drafting, Delegation and the Canons: Part I*, 65 STAN. L. REV. 901, 995 (2013); Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the*

examining whether the agency statement carries the force of law is circular and since diminished.⁴⁴⁶ And also the Court took roughly thirty years to decide whether *Chevron's* simplistic two-step analysis should be infused with a preliminary inquiry for threshold questions.⁴⁴⁷

Finally, embedded within the *Chevron* and *Mead* framework remains two sublime problems the Court has assiduously avoided. In its famous footnote, the *Chevron* Court announced that step one would require exploring all traditional tools of statutory construction to determine if Congress has directly spoken to the precise issue.⁴⁴⁸ As a practical matter, and as any litigant knows, it is because Congress generally has not *directly* or *precisely* addressed an issue that explains why parties are in court. This, then, is where the traditional tools of statutory construction emerge to assist, not whether the issue has been *directly* or *precisely* addressed, but rather whether a court can be convinced that a reasonably objective person could conclude that Congress intended to include the precise factual circumstance.⁴⁴⁹ James Willard Hurst wrote how

Inside: An Empirical Study of Congressional Drafting, Delegation and the Canons: Part II, 66 STAN. L. REV. 725, 771 (2014).

446. When reviewing the Court's formulation that *Chevron* deference would apply only when Congress delegates to the agency the authority to act with the force of law, Thomas Merrill and Kathryn Watts review why this issue will be systemic and effectively illusive because of the statutory language Congress often chooses. Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 482–83 (2002); see also Russell L. Weaver, *The Emperor Has No Clothes: Christensen, Mead and Dual Deference Standards*, 54 ADMIN. L. REV. 173, 177–78 (2002). In *Barnhart v. Walton*, the Court diminished the force of law factor. 535 U.S. 212, 224–25 (2002). Yet, courts still examine whether a particular interpretative mechanism carries the force of law. See, e.g., *Ketchikan Drywall Servs., Inc. v. INS*, 725 F.3d 1103, 1112 (9th Cir. 2013) (interim guidelines). And in *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1204 (2015), the Court's analysis of interpretative rules underscored the fact that the interpretive rules do not carry the force and effect of law.

447. Should, for instance, an agency enjoy deference for interpretative questions relating to the agency's jurisdiction, allowing the agency to expand its regulatory reach? Professor Sunstein referred to such questions as a step zero inquiry. Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 228 (2006); see also Merrill & Hickman, *supra* note 436, at 848, 873; Nathan Alexander Sales & Jonathan H. Adler, *The Rest Is Silence: Chevron Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. ILL. L. REV. 1497, 1508 (examining jurisdictional issues independently from an agency's judgment). In *City of Arlington v. FCC*, 133 S. Ct. 1863, 1874 (2013), the Court rejected limiting *Chevron*. In *King v. Burwell*, 135 S. Ct. 2480, 2488–89, 2496 (2015), however, *Chevron* step zero received a slight nod when Chief Justice Roberts, writing for the majority, held that the Internal Revenue Service was not entitled to *Chevron* deference because Congress neither charged nor anticipated that the Service would affect policy for the health insurance industry.

448. *Chevron, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

449. Judge Brett Kavanaugh reportedly suggested that lawyers often assiduously look for ambiguity—implicitly through the use of traditional tools of statutory construction—to

[o]f course due to variety and change in human affairs it will often be true that the legislators did not forecast the particular condition or set of facts to which someone now suggests applying the statute. But they may well supply sufficient specifications to provide a discernible frame of reference within which the situation now presented quite clearly fits, even though it represents in some degree a new condition of affairs unknown to the lawmakers.⁴⁵⁰

Those “sufficient specifications” are the traditional tools. And the vast array of traditional tools of statutory construction effectively forces parties to marshal those tools to argue somehow that the “context” supports their particular construction. But this seems to reflect a search for objective congressional intent, with the court serving as a faithful agent attempting to use its authority to enforce that intent. And yet long ago Thomas Merrill explained how modern textualism eschews these premises underlying *Chevron*.⁴⁵¹

Next, *Chevron* is more of an illusion than a separate deference framework. After all, *Chevron*’s step one is nothing more than the post-New Deal approach toward statutory construction, and how much *Chevron* applies or does not is dependent upon how broad of an inquiry a court engages in when employing “traditional” tools of statutory construction. And *Chevron*’s step two overlaps so much with traditional APA review that *Chevron*’s departure would likely go quietly. Jason Czarnezki, for example, observes how “[j]udges and students commonly conflate *Chevron* step two and arbitrariness/hard look review.”⁴⁵² And the D.C. Circuit suggests that canons of construction serve a limited role once the issue moves to *Chevron* step two.⁴⁵³ In a recent case, the Supreme

find ambiguity even when language seems clear. Susannah Landes Foster, Note, *When Clarity Means Ambiguity: An Examination of Statutory Interpretation at the Environmental Protection Agency*, 96 GEO. L.J. 1347, 1348 (2008).

450. JAMES WILLARD HURST, DEALING WITH STATUTES 35 (1982).

451. Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 352–54 (1994).

452. Czarnezki, *supra* note 436, at 810; see also Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT. L. REV. 1253, 1263–64 (1997). Others describe the overlap or confusion, as well. *E.g.*, M. Elizabeth Magill, *Step Two of Chevron v. Natural Resources Defense Council*, in A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 85, 96–102 (John F. Duffy & Michael Herz eds., 2005); Bressman, *supra* note 377, at 585; Stack, *supra* note 365, at 1005–07.

453. See *Nat’l Ass’n of Mfrs. v. SEC*, 748 F.3d 359, 367 (D.C. Cir. 2014), *overruled by Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18 (D.C. Cir. 2014). Judge Silberman found step two indistinguishable from APA review. See Laurence H. Silberman, *Chevron—The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 827–28 (1990).

Court invoked *Chevron* as the operating framework, and yet while concluding the statutory provision was ambiguous—and as such, warranting agency deference under *Chevron* step two—nonetheless determined that the agency had not acted within reasonable bounds when interpreting a provision.⁴⁵⁴ This is perhaps one of the closest and most recent examples of how the APA's requirement for reasonable decision-making, including even when interpreting statutory provisions, can effectively supplant and potentially render obsolete the need for *Chevron*.

Chevron nevertheless remains ensconced as a pillar of administrative law, joined by the Court's generous deference doctrine involving an agency's interpretation of its regulations—another relic, albeit seemingly more likely to succumb to the weight of the APA. Regulations necessarily carry the force and effect of law,⁴⁵⁵ and yet how much leeway an agency ought to enjoy when interpreting its own words, particularly when written sufficiently vaguely, has become problematic. When a party challenges an agency's interpretation of its own regulations, a matter seemingly quite simple under *Auer v. Robbins*,⁴⁵⁶ courts occasionally appear reticent to accept a capacious deference doctrine. In the *Auer* line of cases, the Court articulates how an agency's interpretation of its regulations should be upheld unless it is clearly erroneous or contrary to the regulation's plain language,⁴⁵⁷ “does not reflect the agency's fair and

454. *Michigan v. EPA*, 135 S. Ct. 2699, 2707, 2712 (2015). The EPA interpreted language in the Clean Air Act authorizing the regulation of hazardous air pollutants from stationary sources as not requiring consideration of costs (when considering whether regulation is “appropriate and necessary”), a judgment the Court found unreasonable. *Id.*; see also *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 8 F. Supp. 3d 500 (S.D.N.Y. 2014) (contesting whether Clean Water Act water transfer rule is arbitrary and capricious).

455. See *Boske v. Comingore*, 177 U.S. 459, 470 (1900) (holding that authority to promulgate regulations not inconsistent with statutory authority have the force of law); *United States v. Eliason*, 41 U.S. (16 Pet.) 291, 301–02 (1842) (requiring compliance with army regulations); cf. *Morrill v. Jones*, 106 U.S. 466, 466 (1883) (invalidating regulation as impermissibly limiting a congressional decision). In *United States v. Eaton*, 144 U.S. 677, 687–88 (1892), however, the Court held that the failure of regulated parties to follow a regulation could not in itself support criminal liability. For more recent cases, see *Vitarelli v. Seaton*, 359 U.S. 535, 545–46 (1959); *Service v. Dulles*, 354 U.S. 363, 372 (1957); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1954).

456. 519 U.S. 452, 461 (1997).

457. *Auer* is not without critics, including those who claim it ignores the APA. E.g., J. Lyn Entrikin Goering, *Tailoring Deference to Variety with a Wink and a Nod to Chevron: The Roberts Court and the Amorphous Doctrine of Judicial Review of Agency Interpretations of Law*, 36 J. LEGIS. 18, 50 (2010) (“*Auer* deference abdicates judicial responsibility for resolving ambiguities, if that can be done. Nor can *Auer* be reconciled with APA section 10(2)(A) . . .”).

considered judgment on the matter,”⁴⁵⁸ departs from a prior practice, or reflects a post hoc litigation position.⁴⁵⁹ *Auer* was premised on *Bowles v. Seminole Rock & Sand Co.*, where the Court without any citation or analysis simply announced that “the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.”⁴⁶⁰ In *Chase Bank USA, N.A. v. McCoy*, the Court affirmed that *Auer* would apply to an agency’s interpretation of an ambiguous regulation contained in an amicus brief.⁴⁶¹

But *Auer*’s simplistic formula, a judicially crafted construct from a different era, is becoming increasingly problematic. Today, agencies generally have regulations for most of their programs, and the scope of discretionary space exists either in the ability of agencies to develop new regulations or to interpret (and possibly reinterpret) existing regulations. Quite naturally, the convergence of congressional political gridlock and federal executive agency interest in responding to modern threats under statutes ill-equipped to address those threats leaves federal agencies with few options. When circumstances demand that agencies act through informal rulemaking, they do so and occasionally explore how far they can push a statute’s apparent plain language.⁴⁶² When instead agencies conclude that informal devices—whether in the form of an interpretative policy or guidance document—can accomplish significant enough reform in otherwise stagnant programs, they similarly test how far they can deploy an informal device to secure their objective. *Auer* then becomes relevant.

Not surprisingly, therefore, opportunities abound for testing *Auer*’s legitimacy. The vitality of *Auer* triggered a dialogue between Chief

458. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2159 (2012) (quoting *Auer*, 519 U.S. at 462).

459. *Decker v. Nw. Env’tl. Def. Ctr.*, 133 S. Ct. 1326, 1337 (2013).

460. 325 U.S. 410, 414 (1945). To illustrate the difficulty with the Court’s analysis, the immediately preceding sentence mentioned the possible need to look at “[t]he intention of Congress or the principles of the Constitution” for interpretative clues, without any overt hint of their relevance. *Id.* The Court initially accepted the plain language of the rule and then added how any doubts were removed by the administrative construction contained in a bulletin and “countless explanations and interpretations.” *Id.* at 416–18. *See generally* Matthew C. Stephenson & Miri Pogoriler, *Seminole Rock’s Domain*, 79 GEO. WASH. L. REV. 1449 (2011); Sanne H. Knudsen & Amy J. Wildermuth, *Unearthing the Lost History of Seminole Rock*, 65 EMORY L.J. 47 (2015).

461. 562 U.S. 195, 208–10 (2011).

462. *See, e.g., Am. Petroleum Inst. v. EPA*, 706 F.3d 474, 477–80 (D.C. Cir. 2013) (determining cellulosic biofuel production projection beyond authority); *see also* Jon Wellinghoff et al., *Facilitating Hydrokinetic Energy Development Through Regulatory Innovation*, 29 ENERGY L.J. 397, 415–16 (2008).

Justice Roberts and Scalia in *Decker*.⁴⁶³ It became pronounced this past term in *Perez v. Mortgage Bankers Ass'n*, with Justices Scalia, Thomas, and Alito all explicitly questioning its efficacy.⁴⁶⁴ Instead of addressing the penumbra of deference-associated issues directly, the Court is engaging in a doomed incremental common law tradition.⁴⁶⁵ *Auer* seems fated, whether sometime soon or not too far off, to be abandoned; the principal question will be whether it will be replaced by *Chevron* or simply the APA. Some courts already effectively employ a *Chevron*-type analysis.⁴⁶⁶ But folding *Auer* into *Chevron* seems unnecessary and perpetuates a failure to rely simply on the APA and modern principles of statutory construction, which if they fail to yield a sufficiently clear outcome would permit an agency to interpret its rule(s) in any manner that is neither arbitrary, capricious, an abuse of discretion, nor otherwise contrary to law.

CONCLUSION

Professor Verkuil cogently observed in 1978 that the APA “reflects much of the progressive thinking about administrative law that emerged from the 1940’s [sic],” but perhaps too optimistically added it “does little to hamper or rigidify the administrative process.”⁴⁶⁷ Yet he then added “it is now doubtful that the APA is a document of persuasive influence.”⁴⁶⁸ This is a different message than Justice Frankfurter’s suggestion that there is no such thing as common law judicial review in the

463. 133 S. Ct. at 1338–39 (Roberts, C.J., concurring); *id.* at 1339 (Scalia, J., concurring in part and dissenting in part). A similar concern animated the Court’s incremental adoption of an anti-parroting canon to avoid allowing an agency to bootstrap a higher degree of deference by merely adopting statutory language as regulatory language. See *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006).

464. 135 S. Ct. 1199, 1210 (2015) (Alito, J., concurring); *id.* at 1211 (Scalia, J., concurring); *id.* at 1213 (Thomas, J., concurring). Sanne Knudsen and Amy Wildermuth chronicle the “roots and evolution” of the *Seminole Rock* doctrine and, consistent with the general thesis of this Article, explain how the doctrine has become “untethered” from the reasons animating its creation. Knudsen & Wildermuth, *supra* note 460, at 52.

465. See Michael P. Healy, *The Past, Present, and Future of Auer Deference: Mead, Form and Function in Judicial Review of Agency Interpretations of Regulations*, 62 U. KAN. L. REV. 633 (2014).

466. *E.g.*, *Northshore Mining Co. v. Sec’y of Labor*, 709 F.3d 706, 709 (8th Cir. 2013) (accepting *Auer* “test,” but suggesting *Auer* changed the analysis “only slightly”); *Zhou Hua Zhu v. U.S. Attorney Gen.*, 703 F.3d 1303, 1307–08 (11th Cir. 2013) (addressing whether language is ambiguous and using traditional tools of construction). Other courts generously accept agency interpretations when they occur through a structured process. *E.g.*, *D.L. ex rel. K.L. v. Balt. Bd. of Sch. Comm’rs*, 706 F.3d 256, 259 (4th Cir. 2013).

467. Verkuil, *supra* note 114, at 278.

468. *Id.* at 321.

administrative state.⁴⁶⁹ But it is precisely the common law interstices of the APA that have made the Act both resilient and debilitating: resilient because the judiciary is not cabined by anachronistic doctrines; debilitating because the judiciary is struggling to weave the various threads of judicial review into a principled pattern that folds easily into the APA's structure.

Some common law interstices, therefore, seem unnecessary. The Court already acknowledges how exhaustion and prudential standing cannot fold into the APA structure,⁴⁷⁰ and it appears poised to add ripeness to the list. But then arguably neither can other principles carried forward from older stages of administrative law, such as the myth of agency choice of process, the notion of a mixed question of law and fact, or the various deference doctrines from *Skidmore*, *Chevron*, and *Auer*. If, as in *Perez*, the Roberts Court remains intent on emphasizing how the APA provides the “full extent of judicial authority” and “courts lack authority ‘to impose upon [an] agency’” additional obligations,⁴⁷¹ administrative common law is on a precipice.

And it is being nudged further toward the edge by the host of issues swirling around the larger conversation about the modern administrative state. This fifth phase of administrative law must confront these issues. It may require a more searching examination of the APA, or quite possibly engaging in a comprehensive review of the APA. It also may require critically examining whether the legal process school's assumptions carry continued resonance today, or perhaps whether process should yield equally to principles of participatory democracy and transparency, or accountability. Either way, the current phase of administrative law cries for reflective assessment. It must resolve just how much the APA is a “living” document for the administrative realm—similar to a “living” constitution, or merely a temporally embedded written instrument to be assiduously followed by the judiciary.

469. *Stark v. Wickard*, 321 U.S. 288, 312 (1944) (Frankfurter, J., dissenting).

470. *Darby v. Cisneros*, 509 U.S. 137, 146–47 (1993).

471. 135 S. Ct. 1199, 1207 (2015) (alteration in original) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009); *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 549 (1978)).