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ARTICLES

COMMON LAW AND STATUTE LAW IN ADMINISTRATIVE LAW

JACK M. BEERMANN*

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INTRODUCTION

The largely statutory appearance of U.S. administrative law should not be surprising in light of the existence of the federal Administrative Procedure Act of 1946 (APA).[1] The APA, including its additions and amendments, is a relatively comprehensive guide to much of administrative law in the United States. It contains the procedures agencies are supposed to follow in both rulemaking and adjudication and provisions on the availability and scope of judicial review of agency action. As amended, it includes open meeting and open file requirements as well as procedures for negotiated rulemaking and legislative review of agency rules. Add in the generally held view that federal courts should not make common law but should act only when and how they are statutorily authorized to act, and it is understandable that administrative law takes on a strong statutory appearance.

Thus, although common law pops up explicitly on occasion in the odd quarter of administrative law, by and large the law of judicial review appears to be statutory and it is understood that way by most lawyers. Note the word "appears." Scratch below the surface, and the federal courts may not actually behave all that differently than court systems with an openly acknowledged common law tradition in administrative law. While the federal courts have always been statutorily authorized to employ the writs that English courts used in the common law of judicial review,[2] the courts have, since the enactment of the APA, been reluctant to be open about their use of common law in the administrative law arena, especially when a statute contains an answer or even the germ of an answer. Even when the federal courts rely on pre-APA case law or principles, courts usually filter this law through the lens of the APA.

The purpose of this Article is to uncover the statutory veneer of federal administrative law and reveal ways in which federal courts behave like common law courts, creating administrative law based on principles and policies that may or may not be consistent with the language, structure, and history of the APA and other relevant provisions. I will also highlight areas in which the Supreme Court has required a more statutory focus as a matter of contrast with the common law aspects of administrative law to illustrate that the Court has not provided, or even attempted to provide, a principled justification for its continued use of administrative common law. Last, this Article shows that the courts have not provided a method for

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1. Pub. L. No. 79-404, 60 Stat. 237 (codified as amended in scattered sections of 5 U.S.C. (2006)).

2. *See* Judiciary Act of 1789 § 14, 1 Stat. 73, 81–82 (current version at 28 U.S.C. § 1651 (2006)).

choosing between a statutory or common law focus in any particular doctrinal area.

A clarification of the term "common law" is in order at this point. While common law may have originally referred to a body of law thought to exist in common across jurisdictions under generally accepted standards of legal reasoning, I use the term here to distinguish statutory law made by legislators from case law made by courts. It is well understood that each state has its own common law, crafted by its courts under the supervision of the state supreme court, subject only to the supremacy of federal statutory and constitutional law.[3] In many contexts, including administrative law, courts use statutes and constitutional text as jumping-off points for a degree of creativity beyond that expected of a court engaged in the construction and application of an authoritative text. These courts apply a common law methodology in two separate but related senses. The first sense is that courts often make administrative law in areas ostensibly governed by the APA with little or no regard for the actual language or intent of the statute. Second, this law is then applied using the common law method of elaboration and development, so that doctrinal systems governing important areas of administrative law become so well-developed that it becomes virtually unnecessary to refer to the text of the APA when deciding cases concerning APA provisions.

This is not the first analysis of the relationship between the APA and the common law of judicial review in the United States. Kenneth Culp Davis examined the issue in 1980 and concluded that "most administrative law [in the United States] is judge-made law" and that the law in the long run will reject efforts to transform administrative law into a statutory discipline.[4] John Duffy concluded otherwise in 1998, arguing that administrative law was following a trend away from federal common law toward a more statutory basis.[5] With the benefit of another decade of developments, Davis appears to have the better of the arguments, although Duffy may actually have been expressing not a conclusion but a hope—based on a particular case in which the Supreme Court took a strongly statutory perspective—that the entire body of administrative law would move in the statutory direction. It is, however, more of a spectrum than a dichotomy with courts

3. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938). There are small pockets of federal common law, for example, the law governing federally issued negotiable instruments and the preclusive effects of federal court judgments, but this federal common law exists only in the tiniest fraction of subject areas.

4. Kenneth Culp Davis, *Administrative Common Law and the* Vermont Yankee *Opinion*, 1980 UTAH L. REV. 3, 3.

5. John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 115 (1998).

paying more or less attention to enacted law across the range of administrative law subjects. The most that one can confidently say today is that administrative law contains elements that appear to be highly statutorily focused alongside elements in which courts exercise the discretion of a common law court.[6]

In this Article, I analyze two of the many sets of administrative law issues that could be explored under this rubric: the law of administrative procedure and the availability and scope of judicial review of agency action. In the procedural area I look at rulemaking procedure, the timing and availability—including preclusion—of judicial review, and standing to seek judicial review. In the more substantive area of the scope of review, I look at two issues: judicial review of agency statutory interpretation and the general standard governing judicial review of agency policy decisions. In both areas, the operative question is whether courts reviewing agency action for procedural or substantive regularity are following governing statutes or applying judicially created norms.

Before turning to the analysis, it is necessary to confront a sensible challenge to this project. My thesis is that U.S. administrative law is fashioned from a combination of statutory law and common law doctrines without any strong indication of which, if either, is more appropriate than the other in any particular context. There is another view, however, that also ought to be considered. Perhaps the dichotomy identified in this Article is a false one, and even in those situations that I have placed furthest toward the common law end of the spectrum, the courts are merely engaged in traditional statutory construction and gap filling that is well within the historical practice of judges in common law countries. Most of the decisions examined construe language of governing statutes, most notably the APA. When courts have gone too far and abandoned statutory fidelity altogether, the Supreme Court has brought them back in line.

While I appreciate this view of judicial practice as applied to administrative law, in my view, for the reasons largely expressed in the body of this Article, it obscures more than it reveals. Rather, the dichotomy or spectrum concerning common law methodology and

6. The issue of common law versus statutory methodology is often relevant to administrative law analysis even if it has not often been the central focus. More recent publications have cast at least a glancing blow at the subject. *See* Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 508–10 (2010) (discussing how the nonstatutory nature of administrative law allows constitutional principles to become part of "ordinary administrative law"); Noga Morag-Levine, *Agency Statutory Interpretation and the Rule of Common Law*, 2009 MICH. ST. L. REV. 51, 52–60 (2009) (describing the evolution of common law principles in England that limited the lawmaking powers of agencies).

adherence to authoritative statutes reveals important features of administrative law. Not only does the dichotomy or spectrum exist, but the decisions also do not explain why in some contexts a statutory focus is appropriate while in other contexts it is not. With no indication of a trend in either direction, and no way to choose a methodology in advance in any particular context, it appears that administrative law does not satisfy basic rule of law requirements.

I. ADMINISTRATIVE PROCEDURE

The APA prescribes detailed procedures for formal[7] and informal rulemaking,[8] and for formal adjudication.[9] Unless a more specific statute provides otherwise, federal agencies are required to follow the procedures specified in the APA. Given the concentrated attention Congress paid to administrative procedure in the APA,[10] this area would seem to be a prime candidate for judicial modesty in the sense that a court reviewing administrative procedure would require agencies to follow the APA and other statutorily mandated procedures and nothing more. However, as we shall see, despite adherence by the Supreme Court to the principle that courts should not require agencies to employ procedures beyond those required by statute, this is not how the law regarding judicial review of administrative procedure has developed.

A. *Informal Rulemaking Procedure*

Let us use informal rulemaking as our main example. The APA establishes a bare bones rulemaking procedure that is used in the vast majority of agency rulemaking proceedings. This procedure, referred to as "informal" or "notice-and-comment rulemaking," requires notice of the proposed rulemaking, opportunity for interested persons to comment on the proposed rules, and a "concise general statement of their basis and purpose" of any rules actually adopted.[11] In the very earliest decisions construing the APA, the federal courts applied the requirements of the APA

7. 5 U.S.C. §§ 554, 556–557 (2006).

8. *Id.* § 553.

9. *Id.* §§ 554, 556–557.

10. *See* Fahey v. O'Melveny & Myers, 200 F.2d 420, 480 (9th Cir. 1952) ("We take judicial notice of the prolonged campaign to secure passage of the APA and the fact that few pieces of legislation passed in recent years received more attention at the hands of Congress. During its consideration the entire field of administration procedure and judicial review of administrative orders was subjected to searching scrutiny in order to develop a more orderly pattern in this area of law . . . .").

11. 5 U.S.C. § 553(c). There is also a provision for formal rulemaking in the Administrative Procedure Act (APA), but that procedure is rarely used. *See id.* §§ 556–557.

primarily with reference to the text, perhaps because of the recognition that Congress paid a great deal of attention to the finer points of administrative procedure when it drafted the APA.

As time went on, and perhaps the memory of the concentrated political attention to the details of administrative procedure faded, close adherence to the text of the APA broke down. By the late 1960s, federal courts entertaining challenges to the results of informal rulemakings adjusted procedural requirements based on their own sense of best practices in light of the importance and complexity of the particular rulemaking proceeding. The courts treated the APA as setting a floor, but employed a common law methodology to determine the appropriate level of procedure in each particular proceeding. In other words, courts would require agencies to provide procedures over and above those specific in the APA when they found that issues were too important or complex to be determined via such a sparse procedural framework.

In 1978, the Supreme Court in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*[12] firmly rejected this practice as inconsistent with the statutory scheme embodied in the APA. The Court held that courts may not require procedures other than those specified in the APA or another applicable statute, except in "extremely compelling circumstances" or when an agency makes "a totally unjustified departure from well-settled agency procedures of long standing."[13]

In the *Vermont Yankee* decision itself, the Court held that agencies could not be ordered to allow cross-examination or other trial-type procedures in proceedings governed by the APA's notice-and-comment rulemaking provisions.[14] The Court later extended the *Vermont Yankee* rule to less formal decisionmaking processes,[15] and the black letter rule in U.S. law is that courts generally may not require agencies to adopt procedures other than those required by statute, including the APA, unless such procedures are constitutionally deficient.[16] While the Court supported its decision with policy arguments concerning uniformity and predictability, it drew those arguments, and most of the support for its decision, from the statute and its legislative history. The Court viewed the role of courts engaged in judicial review of administrative procedure as enforcing the standards imposed by Congress rather than as creating a system of agency best procedural

12. 435 U.S. 519 (1978).

13. *Id.* at 542–43. For a more complete review of the *Vermont Yankee* decision and its current application—or nonapplication—see Jack M. Beermann & Gary Lawson, *Reprocessing* Vermont Yankee, 75 GEO. WASH. L. REV. 856 (2007).

14. *Vermont Yankee*, 435 U.S. at 543.

15. Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633 (1990).

16. *See* Beermann & Lawson, *supra* note 13, at 871–72.

practices.

Despite this apparently clear directive, lower federal courts have persisted in applying a common law method to procedural questions arising under the APA's rulemaking provisions. Perhaps this should not be surprising. Kenneth Culp Davis attacked *Vermont Yankee* as inconsistent with the traditional common law powers of U.S. courts and with the APA itself, which explicitly preserves "additional requirements imposed by statute or *otherwise recognized by law*."[17] Davis predicted that "[t]he law in the long run will reject the *Vermont Yankee* opinion and is tending to do so in the short run."[18] His prediction and characterization of the post-*Vermont Yankee* case law has proven half right. Although *Vermont Yankee* itself has not been repudiated, and in fact has been reaffirmed, the lower federal courts continue in many areas to shape administrative procedure in a common law process without much reference to the text and history of the APA.

B. Notice of Proposed Rulemaking

The best example of continued federal court creativity despite *Vermont Yankee* is the application of the § 553 requirement that agencies provide notice of the "terms or substance of . . . proposed rule[s] or a description of the subjects and issues involved."[19] In cases arising shortly after the APA was adopted, the federal courts stuck to the statutory language and rejected challenges to the adequacy of agency notices of proposed rulemaking whenever the notice met the statutory minima by specifying the subjects and issues involved in the rulemaking, as required by the APA.[20] More

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17. *See* Davis, *supra* note 4, at 10 (emphasis added) (quoting 5 U.S.C. § 559 (2006)). Davis concluded that "otherwise recognized by law" must refer to common law.

18. *Id.* at 13. John Duffy pointed out more recently that *Vermont Yankee* itself was a common law decision because it relied on pre-APA precedent for its central holding and because it allowed for exceptions to its rule—for extremely compelling circumstances and departures from long standing agency practices—that are not provided for in the APA or any other statute. *See* Duffy, *supra* note 5, at 182. Duffy finds a statutory basis for *Vermont Yankee* in APA § 706(2)(D)'s requirement that courts set aside "agency action reached 'without observance of procedure required by law.'" *Id.* at 186. He interprets "law" as limited to the APA and to other governing statutes. *Id.*

19. 5 U.S.C. § 553(b)(3).

20. *See* Colo. Interstate Gas Co. v. Fed. Power Comm'n, 209 F.2d 717, 723–24 (10th Cir. 1954), *rev'd on other grounds*, 348 U.S. 492 (1955); Owensboro on the Air, Inc. v. United States, 262 F.2d 702, 706 (D.C. Cir. 1958); Logansport Broad. Corp. v. United States, 210 F.2d 24, 28 (D.C. Cir. 1954). In *Logansport*, for example, the court rejected the argument that the notice was insufficient because the agency departed from the priorities announced in the notice and decided the matter based on a consideration not previously announced—a determination that very high frequency (VHF) television stations should be allocated to larger cities. It seems fairly clear that under current law in the federal courts of appeals, the

recently, however, even after *Vermont Yankee*, lower federal courts have imposed nonstatutory tests such as requirements that the final rule be a "logical outgrowth" of the notice or that the final rule not materially alter the proposal.[21] Courts have also required that agencies provide public notice of information or studies they considered when formulating the final rule.[22]

Courts support these decisions with arguments based on fairness to the parties interested in the rulemakings and on the quality of the rules likely to be produced with better notice. From one perspective, this is consistent with the traditional role of courts engaged in statutory construction, which is to apply the language and intent of the statute in a way that makes sense in light of the policies underlying the statutory scheme. However, the requirements entailed in these tests are elaborated and clarified in a case law process largely detached from the language and intent behind the APA's rulemaking provisions, rendering the entire enterprise inconsistent with the statutory method for applying the APA's procedural provisions apparently required by the Supreme Court in *Vermont Yankee*.

Although the notice decisions seem to be in tension with the *Vermont Yankee* rule, the Supreme Court appears to have embraced the lower courts' general approach to notice. In a recent decision rejecting a challenge to a rule based on inadequate notice, the Court framed the issue as follows:

> The Administrative Procedure Act requires an agency conducting notice-and-comment rulemaking to publish in its notice of proposed rulemaking "either the terms or substance of the proposed rule or a description of the subjects and issues involved." The Courts of Appeals have generally interpreted this to mean that the final rule the agency adopts must be "a 'logical outgrowth' of the rule proposed." . . . The object, in short, is one of fair notice.[23]

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agency would be required to disclose its new decision rule in a second notice so that interested parties could comment on the potential basis for the decision. *But see* Am. Med. Ass'n v. United States, 887 F.2d 760 (7th Cir. 1989) (rejecting a challenge to the notice based on significant change from proposal to final rule).

21. Chocolate Mfrs. Ass'n v. Block, 755 F.2d 1098, 1105 (4th Cir. 1985).

22. *See* United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 251 (2d Cir. 1977); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 392–93 (D.C. Cir. 1973). This requirement had been rejected in the earlier and more statutorily oriented decision in *Logansport*. 210 F.2d at 28. More recently, D.C. Circuit Judge Kavanaugh has questioned whether this requirement is consistent with *Vermont Yankee*. *See* Am. Radio Relay League, Inc. v. FCC, 524 F.3d 227, 246 (D.C. Cir. 2008) (Kavanaugh, J., concurring in part, concurring in the judgment in part, and dissenting in part).

23. Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 174 (2007) (quoting 5 U.S.C. § 553(b)(3); Nat'l Black Media Coal. v. FCC, 791 F.2d 1016, 1022 (2d Cir. 1986)); also citing United Steelworkers of Am. v. Marshall, 647 F.2d 1189, 1221 (D.C. Cir. 1980),

The Supreme Court did not firmly endorse the lower courts' understanding of the notice requirement, but there is no hint of discomfort with it. At least for the foreseeable future, the federal courts are likely to continue to apply the logical outgrowth test and related doctrines when evaluating the sufficiency of agency notice of proposed rules.

C. *Ex Parte Comments*

Another area in which federal courts continue to impose procedural requirements and restrictions on agencies that are not supported by any statute involves agency receipt of ex parte communications during informal rulemaking proceedings. The APA says nothing about these, and because the APA explicitly prohibits them in formal proceedings, the best statutory argument is that they are allowed in informal rulemaking.[24] Some lower courts, however, have banned them, perhaps for good reason—they facilitate favoritism and fuel suspicion.[25] However, a panel of the D.C. Circuit recently ruled against a ban on ex parte contacts outside the formal adjudication context based on the panel's reading of *Vermont Yankee*.[26] This is a small step in extending *Vermont Yankee* beyond what the Supreme Court has explicitly required.

D. *Availability and Timing of Judicial Review*

The APA regulates the availability and timing of judicial review. This includes a specification of what agency actions are reviewable and unreviewable, who may seek judicial review, and when review is available.[27] In this area, the federal courts at times follow the statutory language fairly closely and insist on a statutory method, while at other times they engage in a much freer, common-law-like methodology.

1. *Reviewable Agency Action*

As the APA specifies, "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."[28] The first half of this provision is

cert. denied sub nom. Lead Indus. Assn., Inc. v. Donovan, 453 U.S. 913 (1981); S. Terminal Corp. v. EPA, 504 F.2d 646, 659 (1st Cir. 1974).

24. 5 U.S.C. § 557(d).

25. *See, e.g.*, Home Box Office, Inc. v. FCC, 567 F.2d 9, 53–57 (D.C. Cir. 1977); Sangamon Valley Television Corp. v. United States, 269 F.2d 221, 224 (D.C. Cir. 1959).

26. Marine Eng'rs' Beneficial Ass'n v. Mar. Admin., 215 F.3d 37, 42–43 (D.C. Cir. 2000).

27. 5 U.S.C. §§ 701–704.

28. *Id.* § 704.

redundant; the second, according to the Supreme Court, creates a presumption that all final agency action is subject to judicial review of some sort.[29] The vague language of the second half of this provision—"final agency action for which there is no other adequate remedy in a court"[30]—is intended to clarify that when judicial review of a category of agency action is provided for in a statute other than the APA, that statute's judicial review provisions take precedence over the APA's and continue in force. This is sensible statutory reasoning: normally, a more specific statute takes precedence over a general statute. The APA basically admits that it is meant to provide review in those cases in which review is not otherwise available.

This picture of specific statutes providing review with an APA backstop for other situations is incomplete. There is another category of review, denominated "nonstatutory review," under which courts review agency action that is covered neither by a specific review provision nor by the APA.[31] These challenges to agency action include petitions for mandamus, general federal question equity actions, and actions for declaratory relief under the federal Declaratory Judgment Act. The term *nonstatutory review* is a misnomer, since these forms of nonstatutory review depend at least to some extent on various statutes including the APA itself, which provides that if judicial review under the APA is inadequate or unavailable, the challenger may employ "any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction."[32] This goes hand in hand with the APA provision relied upon by Davis for the proposition that Congress did not intend for the APA to displace the federal courts' traditional common law powers in administrative law.[33]

In the absence of these nonexclusivity provisions in the APA, given the complex nature of the APA and the concentrated attention that was

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29. *See* Lincoln v. Vigil, 508 U.S. 182, 190 (1993) ("[W]e have read the APA as embodying a 'basic presumption of judicial review.'") (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 140 (1967)).

30. 5 U.S.C. § 704.

31. Nonstatutory review has been asserted as a means of reviewing presidential actions that are not reviewable under the APA. *See generally* Kevin M. Stack, *The Reviewability of the President's Statutory Powers*, 62 VAND. L. REV. 1171 (2009); Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 COLUM. L. REV. 1612, 1613–14 (1997). For a more general look at nonstatutory review, see Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1115–17 (2009), and Clark Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensible Parties, Mandamus*, 75 HARV. L. REV. 1479, 1479–83 (1962).

32. 5 U.S.C. § 703.

33. *See supra* note 17 and accompanying text (discussing 5 U.S.C. § 559).

involved in its framing, there would have been strong arguments against preservation of review outside the APA. It might have been wise to presume that the APA constituted the exclusive means to challenge agency action, and if an action under the APA is not available, no review is available. As appealing as this reasoning might be in other contexts, it is inconsistent with the language and intent of the APA.

The question then becomes what law determines the availability of these nonstatutory remedies such as mandamus, certiorari, and injunctions. The answer turns out to be federal common law. (It may seem odd to use the term "common law" since these are technically considered equitable remedies. The term is used here to denote judicial action based on the traditional powers of courts in the absence of enacted substantive law.) There are some statutory aspects; from the very beginning, in the All Writs Act, Congress granted federal courts the power to employ the traditional writs known to courts at that time.[34] These remedies may also be entailed in the judicial power granted to the federal courts in Article III of the Constitution, which means that they would exist even without Congress's permission. Further, various statutes grant federal courts jurisdiction over actions for mandamus, habeas corpus, and suits in equity arising under federal law.

Even if congressional permission is necessary for federal courts to grant the traditional remedies of non-APA judicial review, no federal statute specifies the conditions under which each remedy should be granted. By specifying that writs must be "agreeable to the usages and principles of law,"[35] the All Writs Act in effect delegates this determination to the courts. In administrative law, federal courts fashion appropriate actions and remedies where the APA and other specific regulatory statutes do not fulfill the task, applying the same common law methodology they employed before passage of the APA.

Thus the entitlement to judicial review comprises both statutory and nonstatutory elements. Because most judicial review arises under the APA, little attention has been paid to the nonstatutory aspects of judicial review, but in light of the APA's explicit provision for nonstatutory methods of review, it remains an important aspect of U.S. administrative law.

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34. Judiciary Act of 1789 § 14, 1 Stat. 73, 81–82 (current version at 28 U.S.C. § 1651 (2006)).

35. 28 U.S.C. § 1651(a).

2. *Exceptions to the Availability of Judicial Review*

The APA creates two broad exceptions to the availability of judicial review. First, judicial review is not available when another statute precludes it. Second, judicial review is not available when "agency action is committed to agency discretion by law."[36] The former exception is highly statutory, and the federal courts look to the language and intent of statutes to determine whether review is precluded. Statutes precluding review are relatively rare and are somewhat disfavored, with the Supreme Court interpreting them relatively narrowly.

The exception to review for when agency action is committed to agency discretion has statutory and common law elements. The statutory phrase "committed to agency discretion by law" is ambiguous because it cannot mean that every discretionary action by an agency is unreviewable. That would undercut a central purpose of judicial review, ensuring that agencies do not abuse the discretion they are granted, and it would be inconsistent with the APA's specification that agency action is unlawful and should be set aside if it involves an abuse of discretion.[37] As the Supreme Court recognized, this exception was meant to incorporate pre-APA common law. However, in its first discussion of this provision, the Court ignored an important aspect of the pre-APA law of reviewability, stating that under this exception, agency action is unreviewable only if, in a particular matter, the standards governing agency action are so vague that there is, in effect, no law to apply.[38] This inquiry is highly discretionary, calling on federal courts to engage in a common-law-like analysis of whether a particular agency statute meets some standard of vagueness as understood in the case law.

More importantly, the Court completely ignored the pre-APA understanding that judicial review is not available when a statute grants discretion in terms of the personal judgment of an official, using phrases such as "in his judgment" to describe the conditions for executive action.[39] The APA's language was meant to incorporate this doctrine, and this oversight was remedied later when the Court found no review of actions under a statute granting the Director of the Central Intelligence Agency (CIA) the power to terminate the employment of any agency employee when he "'shall deem such termination necessary or advisable in the interests of the United States.'"[40] The Court noted that the inclusion of the

36. 5 U.S.C. § 701(a)(2).

37. *Id.* § 706(2)(A).

38. Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 410, 413–14 (1971).

39. *See, e.g.*, United States v. George S. Bush & Co., 310 U.S. 371, 376–77, 379–80 (1940).

40. Webster v. Doe, 486 U.S. 592, 599–601 (1988) (emphasis omitted) (holding that an

word "deem" indicated that Congress meant for this authority to be a personal decision of the agency director, not questionable in court or any other forum.[41] Although the Court formally stuck to the "no law to apply" interpretation of the provision, it strained to include "deeming clause" provision in its understanding of when there is no law to apply. This remedied the Court's earlier neglect of this important aspect of the pre-APA common law of reviewability, which Congress had intended to incorporate into the APA.

Later, Justice Scalia convinced the Court that the common law should have an even greater role in its reviewability jurisprudence than had existed before the passage of the APA. In his separate opinion in *Webster,* he argued that the phrase "by law" in the APA's judicial review exception refers generally to a common law of review under which certain categories of agency action were exempt from judicial review.[42] He also implied that personnel decisions by the CIA Director are one such category.[43] Justice Scalia's argument is interesting, and it may even be normatively persuasive, but it has absolutely no support in either the language or the history of the APA or in pre-APA common law. Even the Supreme Court decision that most strongly supports the argument that some categories are exempt from judicial review, involving agency prosecutorial discretion, carefully adhered to the "no law to apply" understanding of the statutory exemption. In line with that reasoning, the Court recognized that agency action within the category is subject to judicial review if clear statutory standards govern the exercise of the otherwise unreviewable discretion.[44]

Despite the doubtful pedigree of Justice Scalia's categorical approach to nonreviewability, in a decision just a few years following his separate opinion advocating the approach, a majority of the Court, in an opinion by Justice Souter, adopted this reasoning and announced that "[o]ver the years, we have read [APA] § 701(a)(2) to preclude judicial review of certain categories of administrative decisions that courts traditionally have regarded as 'committed to agency discretion.'"[45] For this assertion, Justice Souter's authority consisted of one concurring opinion and one dissenting opinion, raising the question of what he meant by "we" in the statement.

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executive officer's actions are not subject to review if the actions are necessary, appropriate, and in accordance with legislation) (quoting 50 U.S.C. § 403(c) (1988)).

41. *Id.* at 600.

42. *Id.* at 608–09 (Scalia, J., dissenting).

43. *Id.*

44. Heckler v. Chaney, 470 U.S. 821, 831–32 (1985); *see also* Dunlop v. Bachowski, 421 U.S. 560, 566–68 (1975) (holding that Congress did not intend to prohibit all judicial review of an agency's decision under the Labor-Management Reporting and Disclosure Act).

45. Lincoln v. Vigil, 508 U.S. 182, 191 (1993).

The next issue that arose under this development is what the Court would find sufficient to establish a tradition of nonreviewability of a category of administrative actions. The Court's first application of this doctrine allowed for such weak evidence of a tradition that it has opened up reviewability to the possibility of an unmoored common law process under which federal courts would be free to exclude categories of agency actions from judicial review based on their own view of good policy without any real precedent.[46] Our common law tradition assumes that judges act within a framework of accepted norms of judicial behavior, such as adherence to precedent and fidelity to tradition, while maintaining the appropriate deferential judicial attitude toward statutes. In this particular instance, we would expect the Court to rely on a well-established common law tradition of nonreviewability before it exercises its common law power to deny review in the face of a statute that grants an entitlement to judicial review of agency action. However, in the single case in which the Court found nonreviewability under the categorical approach, the best support it could muster for the tradition of nonreviewability (of agency allocations of funds from lump sum appropriations) was a citation to a 1975 opinion by the Comptroller General deciding a government contract protest.[47] No judicial opinion supported the Court's conclusion that the category of allocation of funds from lump sum appropriations had been traditionally unreviewable.[48]

There were two more straightforward paths to the decision, both with more statutory orientations. The Court might have said that the very nature of a lump sum appropriation is that there is no law to apply to the allocation of funds among permissible agency objectives. It might have also said that the nature of a lump sum appropriation is to assign final discretion over allocation to responsible agency officials. Rather than take either of these more constrained paths, the Court chose to adopt the reasoning that maximized its common law power to determine when judicial review is not available.[49] Perhaps the intent was to let Congress and the agencies know who's boss.

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46. *Id.* at 192–93.

47. *Id.* at 192 (citing LTV Aerospace Corp., 55 Comp. Gen. 307, 319 (1975)).

48. *Id.*

49. Justice Souter's opinion for the Court in *Lincoln* also left open the possibility that judicial review of the allocation of funds from lump sum appropriations might be available if an agency goes beyond statutory bounds. *See id.*, 508 U.S. at 193 ("[A]s long as the agency allocates funds from a lump-sum appropriation to meet permissible statutory objectives, § 701(a)(2) gives the courts no leave to intrude. '[T]o [that] extent,' the decision to allocate funds 'is committed to agency discretion by law.'") (quoting 5 U.S.C. § 701(a)(2) (2006)).

3. *Standing to Seek Judicial Review*

Both the APA and the U.S. Constitution play a role in determining whether a party has standing to seek judicial review of agency action in a federal court. Standing involves the requirement of a case or controversy for federal court jurisdiction under Article III of the Constitution.[50] Standing also involves a set of nonconstitutional requirements, some deriving from the APA[51] and some from general prudential concerns.[52] In both areas, the Supreme Court has adopted unclear and malleable common law standards, allowing courts great freedom in making standing determinations.[53] Contrary to the usual hope for increased clarity in common law reasoning over time, the criteria for standing have not been refined in a way that has led to clarity or predictability in the law of standing either under the APA or the Constitution.

The APA specifies that a "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."[54] Uncertainty exists over the meaning of "adversely affected or aggrieved . . . within the meaning of a relevant statute."[55] Does this language liberalize standing, allowing anyone injured by agency action to seek judicial review, or does it require that a person seeking judicial review identify a statutory source outside the APA for the right to review?

Pre-APA law was very restrictive, rarely granting standing to third parties such as competitors.[56] The Supreme Court has interpreted the APA to liberalize standing substantially, holding that by *within the meaning of a relevant statute*, § 702 requires that the adversely affected or aggrieved "complainant [be] arguably within the zone of interests to be protected or regulated by the statute."[57] While standing is generally not an impediment

50. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) ("[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III.").

51. *See* Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 394–96 (1987) (discussing APA standing rules).

52. *See* Warth v. Seldin, 422 U.S. 490, 499–500 (1975) (discussing prudential standing limitations).

53. *See infra* notes 62–63 and accompanying text.

54. 5 U.S.C. § 702.

55. *Id.*

56. *See, e.g.*, Alexander Sprunt & Son, Inc. v. United States, 281 U.S. 249, 254–55 (1930) (denying shippers standing to challenge an agency decision that set rates charges for other shippers).

57. Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1970). It is not completely clear that the APA is the source of the zone of interests test since more recently, the Court has characterized the test as a generally applicable prudential standing

to litigation by the direct subject of regulation seeking judicial review, this liberalization is important for third parties who are affected by the regulation of others. These parties include business interests complaining about lenient regulation of competitors and environmentalists complaining about lenient environmental regulation.

What does it mean for a third party to be "arguably within the zone of interests" of a statute? The Court looks at multiple factors including the language, purpose, and history of the statute to determine whether the plaintiff is within a category of those meeting the zone of interests test. The Court has not been clear about what it actually requires, sometimes looking for affirmative indications that Congress intended to include the party seeking review within the zone of interests and other times looking mainly for evidence of whether Congress meant to exclude an affected party from the class of parties eligible to seek judicial review. In the most recent application in a statutory context, the Court held that voters were within the zone of interests of a law requiring political action committees to disclose certain information, concluding, "We have found nothing in the Act that suggests Congress intended to exclude voters from the benefits of these provisions, or otherwise to restrict standing, say, to political parties, candidates, or their committees."[58] This holding implies that adversely affected parties are within the zone of interests unless there is affirmative evidence that Congress meant to exclude them from having standing. Although the Court did rely on the language of the statute and its purpose to conclude that Congress intended to include voters within the statute's purview, in earlier cases the Court stated that "there need be no indication of congressional purpose to benefit the would-be plaintiff" for the plaintiff to meet the zone of interests test.[59]

In another decision, however, excluding postal workers' unions from standing to challenge the U.S. Postal Service's decision to surrender part of its statutory monopoly to competitors, the Court denied standing because it could not find affirmative evidence in the relevant statute or legislative history that workers' interests were meant to be considered in the decision.[60] The Court is thus unclear on whether affirmative evidence of inclusion is required for standing, or whether it is sufficient that there is no evidence that Congress intended to exclude an adversely affected or

requirement, stating that it applies even in cases that do not arise under the APA. *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 12, 17 (2004).

58. FEC v. Akins, 524 U.S. 11, 20 (1998).

59. Clarke v. Sec. Indus. Ass'n., 479 U.S. 388, 399–400 (1987) (citing Inv. Co. Inst. v. Camp, 401 U.S. 617 (1971)).

60. Air Courier Conference of Am. v. Am. Postal Workers Union, 498 U.S. 517, 528–30 (1991).

aggrieved party. The Court could have made this a statutory inquiry, focused on whether there is evidence in a statute or legislative history that Congress intended to benefit, or at least was concerned about, the plaintiff's class. Instead, the Court constructed a common-law-like test with multiple and sometimes conflicting factors calling for the exercise of policy judgment for its application.

In constitutional standing, the Court has constructed a common-law-like jurisprudence that is even less clear in application than the statutory and prudential standing tests. There are three basic constitutional requirements for standing: the plaintiff must have suffered an injury, the injury must have been caused by the challenged conduct, and the injury must be redressable by a favorable judgment.[61] Although these criteria appear relatively clear, in practice they have been very pliable and have produced divided courts and wildly inconsistent results.

The classic examples of the pliability of the constitutional standing requirements are the roughly contemporaneous decisions in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*[62] and *Simon v. Eastern Kentucky Welfare Rights Organization (EKWRO)*.[63] In each case, an interest group challenged regulation of third parties that allegedly affected members of the group indirectly. In *SCRAP*, a group of law students concerned with the environment challenged the Interstate Commerce Commission's decision to increase freight shipping rates, alleging that the increase would impede recycling by making it more expensive, which in turn would lead to more garbage in parks they used and more pollution generally.[64] Remarkably, the Supreme Court held that this chain of argument was sufficient to establish standing.[65] In *EKWRO*, welfare advocates challenged the Internal Revenue Service's interpretation of the requirement that nonprofit hospitals provide free care to patients unable to pay, alleging that lax enforcement made it difficult for members to receive free care.[66] The Court held that this set of allegations was insufficient to establish standing, largely on the ground that there was no guarantee that even with stricter enforcement the patients would be able to obtain free care.[67] This may be so, but it is difficult to see how this is more speculative than the argument that lower freight rates would lead to more recycling, less litter and less pollution. Recently appointed Chief Justice Roberts complained that the

61. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).
62. 412 U.S. 669 (1973).
63. 426 U.S. 26 (1976).
64. *SCRAP*, 412 U.S. at 678–80.
65. *Id.* at 685–87.
66. *EKWRO*, 426 U.S. at 32–33.
67. *Id.* at 43–44.

Court had returned to the excesses of *SCRAP* by allowing the Commonwealth of Massachusetts standing to challenge the refusal of the Environmental Protection Agency (EPA) to regulate carbon dioxide emissions, based on the possibility that reducing carbon dioxide emissions from cars would reduce global warming and thus reduce erosion of the Massachusetts coastline.[68]

One aspect of *EKRWO* helps explain both the appearance of inconsistency, and the controversial nature of standing cases at the Court. Justice Stewart, concurring in the *EKRWO* decision, commented, "I cannot now imagine a case, at least outside the First Amendment area, where a person whose own tax liability was not affected ever could have standing to litigate the federal tax liability of someone else."[69] Why not, and why the exception for the First Amendment? Because the injury-causation-redressability requirements for standing are proxies for broader considerations concerning the proper role of the courts in deciding matters of government policy. While normally courts have no role to play when a third party complains about the tax treatment of someone else, the First Amendment's restrictions on the establishment of religion are important enough to justify an exception. Some decisions of the 1960s stressed that standing is concerned primarily with ensuring the adverseness necessary to make out a constitutional case or controversy.[70] However, when the Court began to pull back on the most liberal standing doctrines of that period, it explained that standing is also concerned with separation of powers, namely with keeping courts within their proper role in government.[71] It should, therefore, not be surprising that standing decisions can be divisive and inconsistent, given the diversity and strength of views on the basic issue of the proper judicial role. Any attempt to confine the doctrine in a rule-bound fashion will likely fail. What we have seen and are likely to continue to see in standing is a common-law-like elaboration of the standards for injury, causation, and redressability that appears to depend less on the content of the standards than the views of the Justices on the appropriateness of standing in a particular case.

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68. *See* Massachusetts v. EPA, 549 U.S. 497, 547–48 (2007) (Roberts, C.J., dissenting).

69. *EKWRO*, 426 U.S. at 46 (Stewart, J., concurring).

70. *See, e.g.*, Flast v. Cohen, 392 U.S. 83, 101 (1968) ("[I]n terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.")

71. *See, e.g.*, Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 473–74 (1982) (discussing the relationship between Article III standing and separation of powers).

4. Timing of Judicial Review

Case law on the timing of judicial review is a study in contrasts. On the one hand, the Court has created a ripeness doctrine of dubious pedigree and highly uncertain standards while, on the other hand, the Court has taken a statutory approach to the requirement that those seeking judicial review exhaust their administrative remedies before going to court. Let us look first at exhaustion and then at ripeness.

The requirement that parties seeking judicial review of agency action exhaust their administrative remedies before going to court is one of the pillars of the common law of judicial review. The leading case on exhaustion is the pre-APA decision in *Myers v. Bethlehem Shipbuilding Corp.*[72] In that case, the National Labor Relations Board charged Bethlehem with unfair labor practices. Rather than seek a hearing on the complaint before the Board, Bethlehem went straight to federal court to enjoin further administrative proceedings on the ground that it was not engaged in interstate commerce and thus not within the Board's jurisdiction. The Supreme Court held that Bethlehem should have sought relief first in the agency, based on a well-established common law requirement of exhaustion. In response to Bethlehem's arguments for immediate judicial intervention, the Court stated: "The contention is at war with the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."[73]

Courts continued to apply the common law requirement of exhaustion, with its exceptions, to a wide variety of challenges to administrative action.[74] In APA cases, however, there was a factor that was lacking in many other contexts: the APA contains a provision that governs the timing of judicial review, establishing that agency action is final when the petitioner has exhausted those administrative remedies expressly provided for by statute or agency rule.[75] Because the APA provides that aggrieved parties are entitled to review of final agency action, the Supreme Court held that in cases arising under the APA, courts are not free to impose common law exhaustion requirements, but rather must follow the APA when determining whether the time is right for judicial review.[76] In a sense,

72. 303 U.S. 41 (1938).

73. *Id.* at 50–51.

74. *See, e.g.*, McCarthy v. Madigan, 503 U.S. 140 (1992) (reviewing the option of administrative action through the Federal Bureau of Prisons for a case involving a federal prisoner and his right to initiate a suit).

75. 5 U.S.C. § 704 (2006).

76. Darby v. Cisneros, 509 U.S. 137, 146 (1993).

the APA's statutory finality provisions have displaced the common law requirement of exhaustion of administrative remedies.

The statutory turn in exhaustion is the jumping-off point for John Duffy's claim that administrative procedure generally is becoming more statutory in focus.[77] This statute-based exhaustion regime stands in marked contrast to the Court's ripeness jurisprudence. Early on in the life of the APA, the issue arose as to whether a regulated party may seek judicial review immediately upon the issuance of an unfavorable rule, or whether the party must await an enforcement action to challenge the rule. The APA's statutory provisions, in fact the same ones relevant to the exhaustion inquiry, support immediate review—the issuance of a rule is a final agency action, and normally once a rule is issued, no statute or rule requires appeal to a higher agency authority before judicial review may be sought. The issuance of a rule is the end of the administrative line.

Despite the strength of these statutory arguments, the Supreme Court has constructed a common law standard governing whether a regulated party may seek immediate review of a rule or must await enforcement before challenging it. Although the Court acknowledged that the issuance of a rule is final agency action within the meaning of the APA—and thus would be subject to immediate review under the Court's exhaustion case law[78]—the Court stated that a pre-enforcement challenge to a rule is not ripe unless the issues are fit for judicial review and the complainant would suffer serious hardship if review were delayed until after enforcement.[79] The Court characterized its ripeness doctrine as a matter of judicial discretion, and it has continued to apply the doctrine even after recognizing that exhaustion is governed by statute and rule rather than discretionary legal doctrines.[80] Thus, in the related areas of ripeness and exhaustion of administrative remedies, we find radically different methods, with one area governed by statute and the other governed by common law standards.

77. *See* Duffy, *supra* note 5, at 160. Davis cited the law of exhaustion of remedies as an example of administrative common law, but that was before *Darby v. Cisneros* rejected the common law doctrine of exhaustion in cases governed by the APA. *See* Davis, *supra* note 4, at 8.

78. *See* Abbott Labs. v. Gardner, 387 U.S. 136, 149 (1967) ("[T]he regulations in issue we find to be 'final agency action' within the meaning of § 10 of the Administrative Procedure Act, 5 U.S.C. § 704 . . . .").

79. *Id.* at 148–49.

80. *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 479 (2001) (concluding that a challenge to final rules was ripe because the relevant statute explicitly provided for pre-enforcement judicial review).

II. STANDARDS AND SCOPE OF JUDICIAL REVIEW

The APA contains an apparently comprehensive set of standards of judicial review that apply across the spectrum of administrative action,[81] unless they have been displaced by another statutorily applicable standard. Although these statutory provisions outline the standards that govern the scope of judicial review, the actual meaning of the standards has developed in a common law fashion, sometimes with little attention to the language of the governing statute. In the interest of space, the focus here is on three issues: the standard of review that is applied to agency decisions of statutory interpretation, the meaning of the "arbitrary and capricious" standard, and the circumstances under which de novo review is available.

A. *Review of Questions of Agency Statutory Interpretation*

Over the past twenty-five years, perhaps the greatest change in U.S. administrative law, at least as a formal matter, has been the creation and development of the "*Chevron* doctrine"[82] for judicial review of questions of agency statutory interpretation. This doctrine is the quintessential common law creation, created with only a passing nod to the statutory standard that governs the matter and then developed without further reference to the statute.[83] The reason for the qualifier, that the change may only be formal rather than substantive, is that it is not clear how much the change in the standard has affected judicial or agency behavior. There is no question that *Chevron* has drastically affected the way cases are argued to the courts, and how the issue is discussed within the scholarly commentary, but what is unclear is whether, especially at the Supreme Court, *Chevron* has actually had much impact on how cases are ultimately decided.[84]

Chevron itself involved the EPA's interpretation, in a rule issued after notice and comment, of the term "stationary source" in a provision of the Clean Air Act. After the D.C. Circuit rejected the EPA's interpretation, the Supreme Court heard the case and issued what appeared to be a revolutionary new standard for judicial review of agency statutory

81. 5 U.S.C. § 706.

82. Named for the Court's decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

83. Justice Scalia, whose behavior indicates that he is not very happy with judicial deference to agency statutory interpretations, has stated that *Chevron* was not "observant of the APA's text." *See* United States v. Mead Corp., 533 U.S. 218, 242 n.2 (2001) (Scalia, J., dissenting).

84. For a general look at *Chevron* and an argument that the doctrine is a failure and should be abandoned, see 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 (2010).

construction. The Court created a two-step standard. The first step is to determine "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter."[85] If, however, "Congress has not directly addressed the precise question at issue," the reviewing court enters the second step in which it must defer to an agency's "permissible construction" of a statute if the statute is either "silent or ambiguous" on the issue before the court.[86] So far, the statute that governs the scope of judicial review has not made an appearance.

The Court's opinion elaborates on the second step's deferential standard by separating congressional silence and ambiguity into two categories: one in which Congress has "explicitly left a gap for the agency to fill" and another in which the gap is implicit.[87] In the case of explicit gaps, the Court almost mentions the governing statute when it states that regulations filling an explicit gap "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."[88] This quoted language is a paraphrase of APA § 706(2)(A)'s "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" standard. Notice that "otherwise not in accordance with law" becomes, in the Court's words, the much more deferential sounding "manifestly contrary to the statute."[89] The Court did not elaborate on what it meant by "manifestly." Perhaps it meant "facially" or "obviously," as the term implies. In addition, the Court completely ignored the APA's admonition that "the reviewing court shall decide all relevant questions of law [and] interpret constitutional and statutory provisions."[90]

The development of the *Chevron* standard continues the pre-APA tradition at the Court of creating conflicting common law standards regarding review of agency decisions on questions of law. The Court has long oscillated between the view that statutory interpretation is a judicial function, and highly deferential standards of review like *Chevron,* sometimes stopping temporarily at points in between the two extremes.[91] This has continued even after *Chevron.* Soon after *Chevron* was decided, the Court

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

86. *Id.* at 843.

87. *Id.* at 843–44.

88. *Id.*

89. *Id.* at 844.

90. 5 U.S.C. § 706 (2006).

91. *Compare* United States v. Am. Trucking Ass'ns, 310 U.S. 534, 544 (1940) (stating that statutory interpretation is a judicial function), *with* NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 130–31 (1944) (noting that statutory interpretation is a judicial function, but that courts should give "appropriate weight" to agency decisions), *and* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (holding that while agency decisions are not binding on the courts, courts may rely on these decisions for guidance).

explained that in determining whether Congress has directly spoken to the precise question at issue, the Court should employ "traditional tools of statutory construction" such as the canons and other interpretive devices.[92] The Court no longer required that Congress actually mention the issue in question in the statute or its legislative history to find that Congress had directly spoken to that precise question at issue. This makes it much more likely that the Court will find clear congressional intent, which under *Chevron* "is the end of the matter,"[93] and will apply this intent regardless of the agency's views.[94]

The Court has also constructed an elaborate jurisprudence of when *Chevron* applies and when it does not.[95] While the Court's analysis purports to be based on Congress's intent, the level of deference is influenced by congressional intent much less today than it was in the pre-APA period when a clear convention that Congress could easily follow existed.[96] Under current law, the Court uses indirect evidence—mainly the level of procedure required by Congress—to determine whether Congress intended for courts to defer to agency statutory interpretations. This construction is based on the supposition that the more procedure Congress required, the more it intended that judicial review of statutory decisions be deferential. Even within this framework, the Court has maintained a great deal of discretion, refusing to set hard and fast standards for when *Chevron* applies and when it does not.[97]

Finally, when the Court decides that *Chevron* does not apply, its analysis reverts to the pre-APA *Skidmore* doctrine, under which the reviewing court decides whether to defer to the agency's interpretation based on all the factors that might be considered relevant to whether the court ought to defer to the agency's interpretation.[98] As Justice Scalia points out, this is no

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92. INS v. Cardoza-Fonseca, 480 U.S. 421, 446 (1987).

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

94. See United Food & Commercial Workers Union Local 751 v. Brown Group, Inc., 517 U.S. 544, 550 (1996) and MCI Telecommunications Corp. v. American Telephone & Telegraph Co., 512 U.S. 218, 233 (1994), for examples of cases in which the Court has found clear legislative intent despite the fact that Congress did not mention the precise issue in question.

95. *See* United States v. Mead Corp., 533 U.S. 218, 230 n.12 (2001) (enumerating rulemaking and adjudication cases where *Chevron* deference has been applied).

96. *See* Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 493, 545–46 (2002) (describing the past standard by which Congress would expressly signal when it was granting regulatory authority and how the courts now find regulatory authority in congressional ambiguity).

97. *See Mead*, 533 U.S. at 231 (holding that lack of a certain procedure alone does not determine *Chevron* applicability).

98. *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (holding that the level of a

legal test at all, but rather simply tells the courts to decide based on whatever they find relevant.[99] More to the point for present purposes, the standard has no connection to the APA or any other statute, and there is no reason to believe that a court applying the *Skidmore* standard is likely to defer when and only when Congress wants it to.

B. Review Under the Arbitrary and Capricious Test

The catchall standard that governs judicial review of agency action, which applies to most cases not involving formal agency adjudication, is the arbitrary and capricious test, spelled out in the APA as whether the agency action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[100] In the Court's most comprehensive pronouncement on the meaning of this standard, it stated that in addition to making sure that the agency has acted within the scope of its authority, the reviewing court

> must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.[101]

While this standard is based on the statute, the Court did not parse the APA's language and elaborate on the meaning of "arbitrary," "capricious," or "abuse of discretion." Rather, it used the statute as a jumping-off point for the creation of what appears to be a sensible standard for reviewing the substance of agency decisions.

In subsequent decisions, the Court has elaborated on this standard in a common law fashion, without any claim that the developments result from the language or intent of the APA. For example, in a decision invalidating the rescission of a rule requiring airbags in new automobiles, the Court stated that the arbitrary and capricious standard requires that the agency "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[102] The "rational connection" language is quoted from a

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court's deference to agencies is determined by a totality of the circumstances test).

99. *See Mead*, 533 U.S. at 241 (Scalia, J., dissenting) (arguing that the "*Mead* Court effectively replaced the *Chevron* doctrine with the *Skidmore* . . .").

100. 5 U.S.C. § 706(2)(A) (2006).

101. Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

102. Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)).

Supreme Court opinion applying the substantial evidence standard of review to a formal agency adjudication,[103] which is supposed to be a more stringent standard of review than the arbitrary and capricious test. In a more recent decision applying the standard, the Court reversed the EPA's decision not to take action against greenhouse gases on a similar basis—that the agency had not provided a "reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change."[104] The meaning of the arbitrary and capricious test is thus derived from decisions applying an altogether different standard of review which is supposed to be less deferential to agency decisions. This illustrates how little regard the Court has for the statutory standards it is applying as it develops its common law of judicial review.

C. *De Novo Review*

The APA provision on de novo review is an example of a situation in which the APA has been construed to create a wholly new doctrine, rejecting pre-APA common law standards. The APA states simply that agency action should be set aside when the agency decision is "unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court."[105] The APA says nothing about when this is true—that is, when facts are subject to trial de novo. The Supreme Court, relying on a legislative report from the House of Representatives that cites no case law, has stated that trial de novo is available in two circumstances: first when agency fact-finding procedures are inadequate in an adjudicatory matter, and second when new issues are raised in a proceeding to enforce an order issued as a result of a nonadjudicatory agency proceeding.[106] The Attorney General, in the well-known 1947 *Attorney General's Manual on the Administrative Procedure Act*, vehemently disagreed with the House Report's description of this provision, stating that "the language of [§ 706], 'to the extent that the facts are subject to trial de novo by the reviewing court,'

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103. *Burlington Truck Lines*, 371 U.S. at 168.

104. Massachusetts v. EPA, 549 U.S. 497, 534 (2007). This was under the Clean Air Act's own statutory standard of review which contains the exact same language as the APA's arbitrary and capricious standard. *See* 42 U.S.C. § 7607(d)(9)(A) (2006).

105. 5 U.S.C. § 706(2)(F).

106. Citizens to Pres. Overton Park, 401 U.S. at 415 (citing H. R. REP. NO. 79-1980, at 45 (1946)). Interestingly, while the House Report explains what the APA provision means, it cites no authority for its explanation. The *Attorney General's Manual on the Administrative Procedure Act*, however, supports its view with pre-APA case law and a careful reading of the statutory language. *See* U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 109–10 (1947) [hereinafter ATTORNEY GENERAL'S MANUAL] (citing 5 U.S.C. § 706 (2)(F)).

obviously refers only to those existing situations in which judicial review has consisted of a trial de novo."[107] According to the Manual, "existing situations" refers to "situations where other statutes or the courts have prescribed such review."[108] The reference to previous action by courts implicates pre-APA common law. The Manual posits that the House Report is based on an unenacted previous version of the de novo provision.[109]

This disagreement between the Executive Branch on one side and Congress and the Supreme Court on the other occurs along two axes. The first is an unsurprising disagreement over the scope of review, with the Executive Branch arguing for narrower review than contended for by Congress and the Court. The second is along a different axis of method. The House Report, as adopted by the Court, explains the language and intent of the APA without drawing any connection to the preexisting common law or any other precedent. The Manual, by contrast, urges a more common law focus, reading the de novo provision as incorporating the pre-APA understandings of when de novo review is available. In this case, the Manual is more faithful to the language of the provision, while the Court pays more attention to the House Report than to the statutory language.

D. *Dynamic Statutory Interpretation and the APA*

Given the concentrated attention in Congress and beyond that led to the enactment of the APA, this discussion should lead to the question of why the courts have strayed so far from the statutory language of the APA. As we have seen, in the early years, at least with regard to some provisions, courts were careful to stick pretty closely to the language of the statute. But as time went on, even with regard to those provisions, the courts applied more of a common law methodology with the statute providing at most a jumping-off point. The role of the statute is merely to authorize the court to rule on the issue under its own principles.

This movement away from strict application of the meaning and history of the APA should not be surprising for several related reasons. As William Eskridge explained in his landmark book *Dynamic Statutory Interpretation*, as statutes age and the political background changes, the meaning of a statute may evolve toward a more contemporary understanding of the language

107. ATTORNEY GENERAL'S MANUAL, *supra* note 106, at 109.

108. *Id.* at 110.

109. *See id.* at 109–10 (discussing how the legislative history repeatedly cites language that was omitted by the Senate Committee).

and values underlying the statute.[110] When the enacting coalition is still present, courts are more likely to stick closely to the plain meaning and intent underlying a statute. Reasons for this include the fact that the judges share the views of the political community that enacted the statute, judges may be concerned about criticism or even being overruled by statute if they do not apply a statute as the enactors anticipate, and the fact that when a statute is relatively new, judges may have an easier time discerning the meaning of the statute and how the legislature intended it to apply to the issues that led to the statute's enactment.

As a statute ages, as we have seen with the APA, courts may move away from strict application, again for several reasons. For one, with the passage of time, judges may be less able to discern the intent of the enacting legislature, especially if the language of the statute is not crystal clear. Further, new problems may arise, inviting application of the statute in unanticipated situations. Similarly, problems that were serious or seemed important to the enacting legislature may no longer be or seem important as social conditions and political views change over time. Political views may change so that the enacting legislature's solution to a problem may no longer seem sensible years later, and if the enacting coalition is no longer present, judges may feel free to be creative because they are less likely to be statutorily overruled, or even criticized, for not following the original legislative intent.

More specifically with regard to the APA, the fact that administrative procedure received such concentrated attention in Congress when it enacted the APA in 1946 may not seem so important to the courts more than fifty years later. Courts today may be more sensitive to procedural fairness considerations in administrative law, especially as the administrative state continues to grow and touch more and more aspects of society. Further, the increased complexity and importance of administrative action may convince some judges and observers that more attention to process, and more stringent judicial review, is necessary. While judicial activism in administrative law has been criticized on several fronts, most notably for contributing to the "ossification" of rulemaking,[111] there is not really a threat of a serious backlash due to the passage of time since the APA was enacted. In sum, the federal courts are relatively free to impose their own policy views in the area of administrative law and procedure.

110. *See generally* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 13-80 (1994) (discussing the movement away from originalism and toward a more fluid concept of statutory interpretation).

111. *See generally* Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385 (1992); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59 (1995).

Administrative law is unlikely to return to a strict statutory focus.

CONCLUSION

In 1980, Kenneth Culp Davis mustered eight separate reasons for his prediction that the *Vermont Yankee* decision requiring a statutory focus in judicial review of administrative procedure would ultimately be rejected in favor of a common law orientation. Two of them merit attention here. The first, his fifth, is that "[a]ny effort to stifle judicial creativity is profoundly incompatible with the nature of the judicial process."[112] The second, his last, is that ingrained pre-APA common law and the APA itself allow courts to set aside agency action that is either procedurally or substantively arbitrary and capricious, and *Vermont Yankee* goes against the grain by cutting off review of procedural decisions except when the allegation is that the agency did not follow applicable statutes and rules.[113]

Davis was both right and wrong at the same time. He was wrong in the sense that the law has not explicitly rejected *Vermont Yankee* and has in fact reaffirmed it every time the issue has arisen. He was correct, however, in his identification of the predominance of common law in administrative law despite the existence of the APA (and the occasional appearance that the federal courts were enforcing it) rather than applying a common law of judicial review. Davis's accurate characterization of the inherently creative nature of the judicial process probably explains why in the more than thirty years since the *Vermont Yankee* decision, the doctrine has been confined to a relatively narrow space within administrative procedure, with only the smallest of steps toward a more comprehensive statutory focus.

The more recent views of John Duffy on the role of common law in judicial review are similarly partially correct and partially incorrect. Duffy rightly points out that the turn toward a statutory focus concerning exhaustion of administrative remedies before judicial review throws the ripeness doctrine exemplified in *Abbott Laboratories v. Gardner* into question. If the APA's finality requirements displace the common law of exhaustion, they ought also to displace nonstatutory ripeness doctrines. However, Duffy is incorrect insofar as he predicts that statutory law—or as he phrases it, the "supremacy of legislation"—is ascendant in administrative law.[114] In particular, the nonstatutory fitness and hardship test from *Abbott Laboratories* continues to be applied to determine whether final agency action is ripe for review;[115] equally, the notice cases in the courts of appeals apply standards

112. Davis, *supra* note 4, at 14.

113. *Id.* at 15.

114. Duffy, *supra* note 5, at 161.

115. *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 479 (2001) (concluding

that are far removed from the statutory language. More generally, *Darby v. Cisneros* did not set off a movement toward statutory administrative law any more than *Vermont Yankee* did. Rather, as before, pockets of administrative law are statutory and other pockets are common law, and courts apparently do not feel the need to justify or even acknowledge the apparent methodological contradictions.

We are left with the question this Article started with: Is the methodological dichotomy upon which my analysis is built real, or simply a reflection of different, but acceptable, traditions in judicial method?

It is plausible to argue that there is no great dichotomy, but rather disparate approaches that occur frequently in our legal system, in which judicial opinions are often more important than the text of any particular statutory or constitutional provision. In the area of rulemaking procedure, for example, while the unmoored methodology employed by the pre-*Vermont Yankee* courts may have involved too much judicial creativity, the decisions regarding the adequacy of the notice of proposed rulemaking simply construe the language of the APA in light of the statute's purposes, hardly a radical move away from fidelity to the proper judicial role. One could see the rules regarding ex parte contacts in rulemaking not as judicial usurpation but rather as an attempt to ensure that rulemaking remains a fair and open procedure as intended by the authors of the APA. Without explicit statutory approval of ex parte contacts in rulemaking, the courts are on solid ground in regulating them in light of the policies and principles underlying the APA. Similarly, with regard to the ripeness and availability of judicial review, the statutes are arguably vague and incomplete, and thus it is well within the traditions of the Anglo-American legal system for courts to construe such statutes and fill gaps as they become apparent.[116] The same could be said for scope of review—the courts are merely construing statutes that do not have self-evident meanings, and doing so in the traditional way: with attention to the statutory language, the legislative intent, and the statute's underlying principles.

While these examples and arguments cannot be dismissed out of hand, they do not rebut the primary contentions here: that the common law versus statute law dichotomy is a useful lens for examining many areas of administrative law, that the courts in many areas apply a common law methodology while in others they apply a highly statutory focus, and that the courts have not provided guidance on when each methodology is more

that the challenge to the final rules was ripe).

116. On traditional views of statutory construction in the United States which allow for judicial creativity in filling gaps and construing vague terms, see BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 127–30 (1921).

appropriate.

In conclusion, if the past is prologue—which it usually is—administrative law scholars and practitioners are likely to need to continue to feel comfortable working from both a statutory and a common law orientation.