BEYOND "NO LAW TO APPLY": UNITING THE CURRENT COURT IN THE CONTEXT OF APA REVIEWABILITY

In back-to-back Supreme Court Terms, § 701(a)(2) of the Administrative Procedure Act[1] (APA) has returned to the forefront. While the APA generally allows anyone "adversely affected or aggrieved by agency action" to seek judicial review,[2] the APA makes agency action unreviewable under § 701(a)(1) if the organic statute "preclude[s] judicial review,"[3] or under § 701(a)(2) if the "agency action is committed to agency discretion by law."[4] Two recent cases, *Department of Commerce v. New York*[5] and *Department of Homeland Security v. Regents of the University of California*,[6] featured a divide between Chief Justice Roberts, who held that the relevant agency actions were unlawful because they were "arbitrary and capricious" under § 706 of the APA, and Justice Alito, who contended that the agency actions were not reviewable at all because of § 701(a)(2).[7]

The now-recurring dispute between Chief Justice Roberts and Justice Alito on the scope of § 701(a)(2) exemplifies broader divisions on the Court. While some scholars have claimed that the "conservative" Justices share a unified approach that achieves conservative political victories,[8] such analysis ignores meaningful differences among the Justices in their understandings of the proper role of the judiciary. Specifically, Professor Adrian Vermeule has helpfully distinguished "Article II conservatives" from "Article III conservatives."[9] On Vermeule's view, Article II conservatives are generally "deferential to presidential

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[1] 5 U.S.C. §§ 551, 553–559, 701–706.

[2] *Id.* § 702.

[3] *Id.* § 701(a)(1).

[4] *Id.* § 701(a)(2).

[5] 139 S. Ct. 2551 (2019).

[6] 140 S. Ct. 1891 (2020).

[7] In both cases, Justice Thomas wrote partial dissents in which he argued why, even if reviewed, the Administration's actions were not "arbitrary and capricious." *See Commerce*, 139 S. Ct. at 2578 (Thomas, J., concurring in part and dissenting in part); *Regents*, 140 S. Ct. at 1919 (Thomas, J., concurring in the judgment in part and dissenting in part). In *Commerce*, Justice Thomas acknowledged that Justice Alito "made a strong argument" that census questions were unreviewable. 139 S. Ct. at 2577 n.2 (Thomas, J., concurring in part and dissenting in part).

[8] *See, e.g.*, Leah Litman, Joshua Matz & Steve Vladeck, *We Ought to Be Concerned About Preserving the Political Order of the Supreme Court*, WASH. POST (June 18, 2019, 3:49 PM), https://www.washingtonpost.com/opinions/yes-the-publics-perception-of-the-supreme-court-matters/2019/06/18/5b25128c-91e6-11e9-b58a-a6a9afaa0e3e_story.html [https://perma.cc/K2GJ-4ZFG] (accusing the "conservative justices" of "jettison[ing] their principles," such as skepticism of administrative agencies, to help the Trump Administration in *Commerce*).

[9] Adrian Vermeule, *Article II Conservatism Is Alive and Well*, LAWFARE (June 26, 2017, 4:58 PM), https://www.lawfareblog.com/article-ii-conservatism-alive-and-well [https://perma.cc/7ZHH-URYK].

and executive power in constitutional law; deferential to agencies in administrative law; and take a narrow reading of civil liberties in criminal law, terrorism, and related contexts."[10] By contrast, Article III conservatives are "suspicious of executive power, suspicious of deference in administrative law, and hospitable to civil liberties [and] to libertarian property rights."[11] Chief Justice Roberts and Justice Alito exemplified this debate in their recent clashes over § 701(a)(2), as Justice Alito argued the judiciary should not "stick its nose" into questions reserved for the executive[12] and challenged the expansive "role that the Federal Judiciary now plays."[13]

Despite their differences, both sides share a commitment to "original, positive law over judge-made doctrines"[14] and to the distinction between legal judgments (where courts belong) and policy decisions (where they do not).[15] This Note seeks to use these shared commitments to identify mistaken elements of § 701(a)(2) doctrine and find common ground between the Article II and Article III camps. By approaching § 701(a)(2) through these lenses — "APA originalism"[16] and the view that "the law itself includes restraints on the authority of courts" to keep them removed from policy judgment[17] — this Note argues that current doctrine inappropriately extends a presumption of reviewability, relies on an illegitimate "no law to apply" test, and ignores the distinction between public and private rights. In moving beyond current doctrine, Justice Scalia, who sought to limit courts' authority to make policy judgments,[18] centered his preferred test on the specific action challenged and its tradi-

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[10] *Id.*

[11] *Id.*

[12] *Commerce*, 139 S. Ct. at 2597 (Alito, J., concurring in part and dissenting in part).

[13] Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1932 (2020) (Alito, J., concurring in part and dissenting in part).

[14] Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852, 898 (2019).

[15] *Id.* at 898–99. These values are the "center of gravity" for the current Court. *Id.* at 895.

[16] The term refers to the increasing "extent of scholars' [and judges'] attention to the relevant historical context — including the linguistic, epistemological, institutional, and legal premises from which those who enacted the APA proceeded." Evan D. Bernick, *Envisioning Administrative Procedure Act Originalism*, 70 ADMIN. L. REV. 807, 830 (2018). Although "originalism is most familiar as a means of interpreting *constitutional* text," for interpreters of *either* the APA or the Constitution, "(1) the meaning of a legal text consists in its communicative content; [and] (2) the communicative content conveyed through particular words, phrases, and sentences . . . is fixed at the time that that text is ratified or enacted." *Id.* at 834 (citation omitted). While "textualism" may also be an appropriate term for this methodology, this Note uses "originalism" in order to respond in the same vernacular as those who argue that the APA can be "rework[ed]" by "each generation of judges" because the "experience with the APA parallels that with the Constitution." Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039, 1039 (1997).

[17] Adrian Vermeule, *Reviewability and the "Law of Rules": An Essay in Honor of Justice Scalia*, 92 NOTRE DAME L. REV. 2163, 2173 (2017) (emphasis omitted) (describing Justice Scalia's view).

[18] *See, e.g.*, Massachusetts v. EPA, 549 U.S. 497, 560 (2007) (Scalia, J., dissenting) ("No matter how important the underlying policy issues at stake, this Court has no business substituting its own desired outcome for the reasoned judgment of the responsible agency.").

tions of review, defined at a low level of generality. These lessons suggest Justice Alito had the better of the argument in *Commerce* and the majority's analysis in *Regents* was incomplete.

At first glance, this more expansive view of § 701(a)(2) may seem counter to the anti-agency posture that some see as the unified position of "conservatives." Yet this Note suggests it can achieve consensus because it most faithfully applies the original meaning of the APA. Further, a modified version of Justice Alito's *Commerce* dissent can unify the Article II and Article III camps because it would help reverse the mid-twentieth-century "transformation" of administrative law from serving "the protection of private autonomy" from government intrusion to the "provision of a surrogate political process" in the courts.[19]

This Note proceeds as follows: Part I applies APA originalism to inform the proper scope of § 701(a)(2). Part II discusses how a commitment to limiting courts from wading into policy judgment, most clearly articulated by Justice Scalia, would alter § 701(a)(2) jurisprudence. Part III presents a modified version of Justice Alito's *Commerce* dissent as a model that ought to unite the Article II and Article III factions.

I. AN APA ORIGINALIST ANALYSIS OF § 701(A)(2)

"With the enactment of the APA in 1946, the judicial method . . . should have shifted to the task of interpreting the new statute, rather than continuing to formulate and apply judicially-created doctrines."[20] This normative prescription, like any formalist approach, is justified as serving the values of legislative supremacy and the rule of law.

In interpreting this important statute, "originalism" offers the appropriate methodology. First, interpreting the APA as positive law requires uncovering the statute's meaning, which was necessarily "fixed" at ratification or enactment.[21] That inquiry requires "interpret[ing] statutory terms to 'mean what they conveyed to reasonable people *at the time they were written*,'" and the tools of originalism identify that meaning as it was fixed seventy-five years ago.[22] Second, to quote Professor Will Baude in the constitutional context, APA originalism is increasingly "our law."[23] Both *Vermont Yankee Nuclear Power Corp. v. Natural Resource*

[19] Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1670 (1975); *see also* Merrill, *supra* note 16, at 1039–40.

[20] John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 121 (1998).

[21] Bernick, *supra* note 16, at 834.

[22] Bostock v. Clayton County, 140 S. Ct. 1731, 1755 (2020) (Alito, J., dissenting) (alteration in original) (quoting ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 16 (2012)).

[23] *Cf.* William Baude, Essay, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015). *But see* Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 57 (hypothesizing that the APA originalist tendency applies more to the APA's provisions for procedure than to those for judicial review).

Defense Council, Inc.[24] and *Perez v. Mortgage Bankers Ass'n*[25] swept away administrative common law in favor of original meaning of the APA's text, and in *Kisor v. Wilkie*,[26] both sides focused on the text of § 706.[27] The Court has also endorsed a specifically *originalist* interpretive method of the APA in defining its "task" as "constru[ing the APA] in accord with its ordinary or natural meaning" as it would have been understood "in 1946, the year the APA was enacted."[28]

Despite this basis for APA originalism, APA reviewability has in many ways retained a common law flavor,[29] including in *Abbott Laboratories v. Gardner*,[30] a case decided at the "zenith of the New Federal Common Law era."[31] By contrast, APA originalism "proceed[s] by seeking to ascertain the original public meaning of the APA's text,"[32] relying on a familiar hierarchy of evidentiary sources — text and structure, evidence of public meaning, history, and postenactment practice.[33] The APA, pursuant to the original methods originalist methodology of Professors John McGinnis and Michael Rappaport, is then read against "the background of a complex and reticulated legal tradition,"[34] with attention to terms of art and the original methods of interpretation.[35] After all, the APA is "not remotely a self-contained statute, but assumes an entire underlying jurisprudence and practice."[36]

This Part will proceed by reviewing major modern § 701(a)(2) cases, laying out the historical evidence, and then applying an originalist methodology to show where modern doctrine has strayed.

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[24] 435 U.S. 519 (1978).

[25] 575 U.S. 92 (2015).

[26] 139 S. Ct. 2400 (2019).

[27] *Compare id.* at 2419 (plurality opinion) ("Section 706 and *Auer* thus go hand in hand."), *with id.* at 2432–34 (Gorsuch, J., concurring in the judgment) (describing *Auer* as inconsistent with the APA).

[28] Dir., Off. of Workers' Comp. Programs, Dep't of Lab. v. Greenwich Collieries, 512 U.S. 267, 272 (1994). In conducting this originalist inquiry, the Court interpreted "the phrase to have the meaning generally accepted in the legal community at the time of enactment." *Id.* at 275.

[29] *See* Jack M. Beermann, *Common Law and Statute Law in Administrative Law*, 63 ADMIN. L. REV. 1, 9 (2011).

[30] 387 U.S. 136 (1967).

[31] Duffy, *supra* note 20, at 163.

[32] Bernick, *supra* note 16, at 843.

[33] *Id.* at 844–45.

[34] JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 153 (2013).

[35] *Id.* at 130–32; *cf.* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 985–95 (2017) (challenging *Chevron* deference by reading the APA "[a]gainst the backdrop of the historical development of the law," *id.* at 987).

[36] Antonin Scalia, Vermont Yankee*: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 375.

A. Modern Supreme Court Case Law

In *Citizens to Preserve Overton Park v. Volpe*,[37] the Court found the reviewability question "easily answered" because the Senate Report of the APA expressed that § 701(a)(2) should be a "very narrow exception"[38] that applied when "statutes are drawn in such broad terms that in a given case there is no law to apply."[39] Since the Court found the statute's delegation for determining what is "feasible and prudent" actually prevented destruction of land if there was no problem with an alternative route, there was law to apply and the action was reviewable.[40] In *Dunlop v. Bachowski*,[41] the Court held that an agency's decision to accept a union election was reviewable.[42] The Court cited the "strong presumption" of judicial review from *Abbott Labs* and held that nothing in the "statutory scheme, its objectives, its legislative history, [or] the nature of the administrative action involved" prohibited review.[43]

In *Heckler v. Chaney*,[44] the Court held that the FDA's decision not to enforce its drug labeling laws against lethal injection drugs was an unreviewable exercise of prosecutorial discretion.[45] *Chaney* established a presumption of unreviewability for singular nonenforcement decisions, because there is no law for a court to apply in assessing whether the agency correctly balanced the many factors that go into an enforcement decision.[46] Then, in *Webster v. Doe*,[47] the Court determined that the CIA's firing of a gay employee was unreviewable under the APA because statutory language allowing the Director to "deem" a firing to be in the "interests of the United States" provided no law to apply.[48] In dissent, Justice Scalia rejected the "no law to apply" test as the only standard for

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[37] 401 U.S. 402 (1971).

[38] *Id.* at 410.

[39] *Id.* (quoting S. REP. NO. 79-752, at 26 (1945)).

[40] *Id.* at 411–13.

[41] 421 U.S. 560 (1975).

[42] *Id.* at 566.

[43] *Id.* at 567. Justice Rehnquist disagreed, pointing to traditions at a low level of generality, such as the Court "repeatedly recogniz[ing] the exclusive role in post-election challenges played by the Secretary." *Id.* at 595 (Rehnquist, J., concurring in the result in part and dissenting in part).

[44] 470 U.S. 821 (1985).

[45] *Id.* at 837–38.

[46] *Id.* at 831; *see* Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 718 (1990) (noting that the "law to apply" test "served a function that was entirely different from its role in *Overton Park*," since this test "was largely rooted in practical considerations"). The Court also gestured at an APA originalist argument. *See Chaney*, 470 U.S. at 832–33.

[47] 486 U.S. 592 (1988).

[48] *Id.* at 600. However, the employee's constitutional challenge was not precluded by § 701(a)(2) or the organic statute. *Id.* at 603–04.

§ 701(a)(2) reviewability, instead emphasizing "tradition, case law, and sound reasoning" as sources of unreviewability.[49]

B. Originalist Evidence

While the text of § 701(a)(2) established a threshold inquiry for APA review, determining exactly which actions are committed to agency discretion is "so difficult and complex that," when Professor Kenneth Culp Davis wrote in the 1970s, "it remain[ed] largely unsolved."[50] It was also "confusing . . . whether Congress intended to change the law of reviewability" from the pre-APA common law.[51] Beginning with the text, one 1940s commentator noted, in a preview of Justice Scalia's argument in *Webster*, that "by law" is "clearly more broad in . . . scope than if the phrase 'by statute' had been used, indicating a congressional purpose to exempt agency discretion previously precluded by judicial decision."[52]

The additional originalist evidence beyond the text is mixed but points to the view that the APA was focused on the specific types of actions challenged, including attention to the distinction between public and private rights. First, "the congressional committees had before them the interpretation of the Attorney General,"[53] which interpreted the draft text as "in general, declar[ing] the existing law concerning judicial review."[54] Relatedly, the 1941 report from the Attorney General's Committee had clarified for Congress that the status quo involved "specific determinations as to whether the particular administrative activity" is reviewable[55] and that unreviewability was more likely in cases that "do not involve private right."[56]

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[49] *Id.* at 607 (Scalia, J., dissenting) (quoting *Chaney*, 470 U.S. at 831). Justice Scalia further argued that even constitutional claims can be left as unreviewable. *Id.* at 612.

[50] KENNETH CULP DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 28.16, at 638 (1976).

[51] 4 KENNETH CULP DAVIS, ADMINISTRATIVE LAW § 28.08, at 38 (1st ed. 1958). Indeed, while the Walter-Logan bill that was vetoed by President Roosevelt in 1941 centered its approach to reform on providing "broad judicial review," the "APA's provisions for judicial review were little more than an afterthought" because "courts would no longer so surely strike down the agency action" and might even "impede agency action that favored conservatives or business interests." George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1644–45 (1996).

[52] Alfred L. Scanlan, *Judicial Review Under the Administrative Procedure Act — In Which Judicial Offspring Receive a Congressional Confirmation*, 23 NOTRE DAME L. REV. 501, 508 (1948); *cf. Webster*, 486 U.S. at 608 (Scalia, J., dissenting) ("Why 'statutes' for preclusion, but the much more general term 'law' for commission to agency discretion? The answer is . . . that the latter was intended to refer to 'the common law of judicial review of agency action' . . . ." (quoting *Chaney*, 470 U.S. at 832)).

[53] Scanlan, *supra* note 52, at 508.

[54] S. COMM. ON THE JUDICIARY, ADMINISTRATIVE PROCEDURE ACT, S. DOC. NO. 79-752, note (1946) (Appendix to Attorney General's Statement Regarding Revised Committee Print of October 5, 1945).

[55] DEP'T OF JUST., FINAL REPORT OF ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 84 (1941) [hereinafter FINAL REPORT].

[56] *Id.* at 86.

Indeed, as the *Johnson v. Towsley*[57] Court explained in 1871, the granting of a land patent was generally "conclusive" and mandamus would not be granted unless there was a "misconstruction of the law."[58] Yet courts *could* review agency action "when it invades private rights," and, once the patent had vested as a property right, judicial review resolved disputes between two private individuals.[59] Professor Louis Jaffe argued that this regime was transformed into a "presumption of reviewability"[60] by *American School of Magnetic Healing v. McAnnulty*,[61] which held that "courts generally have jurisdiction to grant relief" when an agency violates the law.[62] However, the case was a typical application of nonstatutory review, in which "courts of equity . . . reflect[ing] a long history of judicial review of illegal executive action" utilize a judge-made remedy of injunctive relief.[63] This tradition has "survived" to the present, though limited to constitutional claims or to claims that the agency has acted ultra vires.[64] Since "the entitlement to judicial review comprises both statutory and nonstatutory elements,"[65] reviewability itself is likely not a binary question but instead turns on the standard of review or type of claim being brought. For instance, the Supreme Court has held agency action unreviewable under § 706's arbitrary and capricious standard, while acknowledging that review would be available if an agency clearly exceeds its statutory authority.[66]

Regardless, even after *McAnnulty*, as the Attorney General's Committee noted, there was "the category of cases in which judicial review is denied because . . . the cases deal with matters which are more fittingly lodged in the exclusive discretion of the administrative branch,"

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[57] 80 U.S. 72 (1871).

[58] *Id.* at 81, 86.

[59] *Id.* at 84. While administrative law of this era was "compartmentaliz[ed]," the relevance of the public/private rights distinction was "apparent," sometimes in a "conscious but unrecorded" manner, but other times explicit. Gordon G. Young, *Public Rights and the Federal Judicial Power: From* Murray's Lessee *Through* Crowell *to* Schor, 35 BUFF. L. REV. 765, 799–800 (1986).

[60] *See* Louis L. Jaffe, *The Right to Judicial Review I*, 71 HARV. L. REV. 401, 424 (1958).

[61] 187 U.S. 94 (1902).

[62] *Id.* at 108. Interestingly, Davis hypothesized that the outcome came in part because the case concerned a fraud prosecution rather than traditional public benefits. *See* Kenneth Culp Davis, *Unreviewable Administrative Action*, 15 F.R.D. 411, 416–17 (1954).

[63] Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 327 (2015) (Scalia, J.). Relatedly, Professor John Duffy has argued *McAnnulty* reflected equity jurisdiction as statutorily authorized by the 1875 grant of general federal question jurisdiction in equity. Duffy, *supra* note 20, at 125–26.

[64] Kathryn E. Kovacs, *Revealing Redundancy: The Tension Between Federal Sovereign Immunity and Nonstatutory Review*, 54 DRAKE L. REV. 77, 92–93, 107 (2005); *see also* Mittleman v. Postal Regul. Comm'n, 757 F.3d 300, 307 (D.C. Cir. 2014) (describing nonstatutory review as "quite narrow" and "available only to determine whether the agency has acted 'ultra vires' — that is, whether it has 'exceeded its statutory authority'" (citation omitted)).

[65] Beermann, *supra* note 29, at 11.

[66] *See* Lincoln v. Vigil, 508 U.S. 182, 193 (1993) ("Of course, an agency is not free simply to disregard statutory responsibilities . . . . But as long as the agency . . . meet[s] permissible statutory objectives[, in this context], § 701(a)(2) gives the courts no leave to intrude.").

which must be cases that "do not involve private right."[67] For example, in *Perkins v. Lukens Steel Co.*,[68] the Court declined to review the setting of wages that producers must pay to receive government contracts, as the policy neither "invade[d] private rights in a manner amounting to a tortious violation" nor involved "regulation of . . . private business."[69]

Second, the floor debates, which included "create[d]" statements designed to influence future courts,[70] were contradictory. On the one hand, Senator McCarran declared "that where an agency without authority or by caprice makes a decision, then it is subject to review,"[71] but on the other, he reconfirmed that the review provision set out in the APA "does not apply in any situation" where the action had been committed to agency discretion.[72] However, "[h]ad a general, undiscriminating grant [of judicial review] been intended, one would expect to find it articulated and debated; [yet] those debates are not to be found."[73]

Third, the Committee Reports and Attorney General Manual also express contradictory views. The Senate Report introduced, seemingly from nowhere, the pro-review formulation that § 701(a)(2) controls only when statutes "are drawn in such broad terms that in a given case there is no law to apply,"[74] while the Attorney General Manual countered that "many statutory provisions" provide unreviewable discretion and that the APA was a "general restatement of the principles of judicial review."[75] Indeed, the Attorney General's Manual, which the Supreme Court has found "merits interpretive weight,"[76] described *specific types of actions* that would be unreviewable, such as the granting of loans and nonenforcement decisions.[77]

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[67] FINAL REPORT, *supra* note 55, at 86.

[68] 310 U.S. 113 (1940).

[69] *Id.* at 129; *cf.* Stark v. Wickard, 321 U.S. 288, 310 (1944) (explaining that actions "entrusted to administrative bodies" were reviewable "only to the extent necessary to protect justiciable individual rights against administrative action fairly beyond the granted powers").

[70] Shepherd, *supra* note 51, at 1666.

[71] PROCEEDINGS FROM CONGRESSIONAL RECORD OF MARCH 12, MAY 24, 25, AND 27, 1946, at 311.

[72] *Id.* at 323.

[73] Peter L. Strauss, *On Resegregating the Worlds of Statute and Common Law*, 1994 SUP. CT. REV. 429, 492 ("[I]t took a quarter century . . . for that interpretation to emerge.").

[74] S. REP. NO. 79-752-79, at 212 (1945).

[75] DEP'T OF JUST., ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 93, 95–96 (1947) [hereinafter ATTORNEY GENERAL'S MANUAL].

[76] John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 918 n.129 (2004).

[77] ATTORNEY GENERAL'S MANUAL, *supra* note 75, at 94–95. In this way, the Attorney General's Manual echoed *Switchmen's Union v. National Mediation Board*, 320 U.S. 297 (1943), which held an agency's certification of union election results unreviewable, *id.* at 301. The Court explained that, without a provision settling the question, "*the type of problem involved* and the history of the statute in question become highly relevant." *Id.* (emphasis added). Given the "different tradition" for railway labor disputes as opposed to other "transportation problems" — a low level of generality — the Board's certification was unreviewable. *Id.* at 307.

Of course, constitutional originalism uses "widely read explanatory statements,"[78] such as the ratification debates or the *Federalist Papers* and *Anti-Federalist Papers*.[79] But, for the same reasons that legislative history is often unreliable, *APA originalism* must be "particularly wary of drawing upon the APA's pre- and post-enactment history" due to a "concerted . . . effort to . . . create a record" that would obscure the compromise struck in the APA.[80] Indeed, the Senate Report relied on by *Overton Park* was drafted to advance the Senate Committee's desire to have a "stronger bill" than actually survived the legislative process.[81] And the Attorney General's Manual may be "unreliable when it advances a pro-executive point of view"[82] because it too was a "highly political document."[83] For similar reasons,[84] constitutional originalists have been hesitant to rely on the *Federalist Papers* or *Anti-Federalist Papers*, and when they do so, it is "only to the extent they reflect original public meaning."[85] Only when those sources explain a term of art,[86] agree with each other,[87] or "offer[] a persuasive account of likely" meaning,[88] are they useful. Here, just as the *Federalist Papers* are most persuasive when they provide their "own basis for verification," such as historical analysis,[89] the Attorney General's Manual is slightly more persuasive because it connects vague § 701(a)(2) text to a thorough legal analysis of the preexisting scope of reviewability. By contrast, the Senate Report's "no law to apply" language comes with no independent basis to support that test.

Originalists also consider "postenactment history or practice," including early precedents, even though such evidence is "the least reliable

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[78] Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 553 (1994).

[79] *See* Amul R. Thapar & Joe Masterman, *Fidelity and Construction*, 129 YALE L.J. 774, 796 (2020).

[80] Bernick, *supra* note 16, at 845.

[81] Shepherd, *supra* note 51, at 1662–63.

[82] 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, 790 (2010).

[83] Duffy, *supra* note 20, at 119. Indeed, the use of the Manual itself as an interpretive tool may reflect its own Article II/Article III divide: Justice Scalia cited the Manual somewhat frequently, but usually in ways "that advance[d], rather than stymie[d], executive interests." K.M. Lewis, Note, *Text(Plus-Other-Stuff)ualism: Textualists' Perplexing Use of the Attorney General's Manual on the Administrative Procedure Act*, 1 MICH. J. ENV'T & ADMIN. L. 287, 306 (2012). Conversely, Justice Gorsuch's dissent in *Kisor v. Wilkie* downplayed the Manual in favor of floor statements and postenactment judicial precedents. *See* 139 S. Ct. 2400, 2436–37 (2019).

[84] Thapar & Masterman, *supra* note 79, at 796 ("Were the Federalist Papers not tendentious partisan documents?").

[85] *Id.*

[86] *See* Lewis, *supra* note 83, at 310 (noting the use of the Attorney General's Manual to elucidate a term of art as a principled textualist use).

[87] *Cf.* United States v. Lopez, 514 U.S. 549, 586 (1995) (Thomas, J., concurring) (showing that both the *Federalist Papers* and *Anti-Federalist Papers* agreed on the meaning of "commerce").

[88] John F. Manning, *Textualism and the Role of* The Federalist *in Constitutional Adjudication*, 66 GEO. WASH. L. REV. 1337, 1339 (1998) (emphasis omitted).

[89] *Id.* at 1362.

source."[90] In an early case, the Fifth Circuit held that the choice of companies from whom insurance for federal housing was bought — a quintessential "privilege"[91] — was unreviewable in the absence of fraud.[92] Similarly, the Ninth Circuit held that governmental interference with a mining claim was reviewable because there was a tradition of reviewing these claims and the claim was to "property in the fullest sense."[93] Meanwhile, the D.C. Circuit held that § 701 used "terms of art" from pre-APA statutes to indicate that its reviewability provisions were "a restatement of existing law," and then cited *Perkins* as a case articulating that law.[94] The Supreme Court in *Panama Canal Co. v. Grace Line, Inc.*[95] determined that the § 701(a)(2) inquiry was "no different than if mandamus were sought,"[96] referring to review "restrict[ing] judicial intervention to executive action lacking any legal authority."[97] In 1970, the Court in *Barlow v. Collins*[98] "abandoned 1946 meaning" in applying a presumption of judicial review[99] — but even then, regarding only "judicial review of administrative action adjudicating private rights."[100] Perhaps this makes sense since arbitrariness review was "drawn from Supreme Court decisions involving the Due Process of Law Clauses," which required a rational basis for "depriv[ing] people of 'life, liberty, or property.'"[101]

C. Applying an Originalist Methodology

With this evidence, the original methods originalist methodology, which rejects the use of a "construction zone" to resolve ambiguity[102]

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[90] Calabresi & Prakash, *supra* note 78, at 553.

[91] *See* Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 568 (2007) ("[U]nlike the core private rights . . . , [privileges] were but means to carry out public ends . . . . As such, they were not understood to vest in private individuals in the same way as core private rights.").

[92] Fed. Pub. Hous. Auth. v. Mobile Hous. Bd., 164 F.2d 146, 149 (5th Cir. 1947).

[93] Adams v. Witmer, 271 F.2d 29, 34 (9th Cir. 1958) (noting such claims had been reviewed "for many years and long before the [APA]").

[94] Kan. City Power & Light Co. v. McKay, 225 F.2d 924, 932 (D.C. Cir. 1955).

[95] 356 U.S. 309 (1958).

[96] *Id.* at 318.

[97] Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 944 (2011).

[98] 397 U.S. 159 (1970).

[99] Strauss, *supra* note 73, at 492 n.187.

[100] 397 U.S. at 166; *cf.* Schilling v. Rogers, 363 U.S. 666, 677 (1960) (Brennan, J., dissenting) ("This Court has gone far towards establishing the proposition that preclusion of judicial review of administrative action adjudicating private rights is not lightly to be inferred." (citations omitted)).

[101] Bernick, *supra* note 16, at 848 (quoting U.S. CONST. amend. V).

[102] For some originalists, interpreters may enter the "construction zone" and create gap-filling doctrines when the "communicative content" of the text fails "to yield determinate answers." *Id.* at 836. However, the concepts used in the construction zone — moral judgment, Thayerian deference, or a presumption of liberty — are inapposite in this context, where the debate centers on whether one politically accountable branch gave unreviewable discretion to another politically accountable branch. *See* Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 471 (2013).

and instead relies on terms of art and original methods originalism, provides some answers.[103] First, the combination of the contemporaneous and postenactment evidence suggests terms of art were utilized to restate pre-APA reviewability law. Indeed, the lack of "clarity" in the legislative history "brings us back, full circle, to the APA's text and . . . historical background,"[104] which, as Professor Alfred Scanlan argued contemporaneously and Justice Scalia argued years later, seemed to incorporate pre-APA reviewability doctrine.[105] Second, just as "the people decided whether to ratify the Constitution based on an explanation of its meaning by those with legal knowledge,"[106] Congress ratified the APA based on preenactment legal advice from the Attorney General, making this advice especially probative. Here, that guidance informed Congress that the status quo made specific reviewability determinations based on traditions of review while considering public/private rights. Third, since originalists "consult[] background principles to understand the text," such as "common law concept[s],"[107] the preexisting legal concept of public/private rights helps resolve ambiguity, especially given its contemporaneous prominence.[108]

These findings hold several implications. First, despite regular recitation of the *Abbott Labs* presumption of reviewability in § 701(a)(2) cases since *Overton Park*, the APA originalist pedigree for such an application is questionable.[109] While some scholars argued that *McAnnulty* inaugurated such a regime in 1902, for the remainder of the early twentieth century, the Court "went both ways on reviewability,"[110] and after the APA, the *Panama Canal* Court applied no presumption, and *Barlow* applied one only when private rights were implicated. After all, the text of § 701(a) makes reviewability a "threshold inquiry: only where" the action is not covered by § 701(a)(2) do the review provisions

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[103] MCGINNIS & RAPPAPORT, *supra* note 34, at 150–53.

[104] Bamzai, *supra* note 35, at 990 (conducting a similar analysis of APA § 706).

[105] *See supra* note 52 and accompanying text.

[106] John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction,* 103 NW. U. L. REV. 751, 771 (2009); *see also* Manning, *supra* note 88, at 1339 ("Textualists subscribe to an objective theory of interpretation, pursuant to which interpreters ask what a reasonable lawmaker, familiar with the relevant context, would have believed that he or she was voting for."); *cf. id.* at 1354 ("Blackstone's *Commentaries* are helpful precisely because they comprise a potential source of 'the popular understanding' of legal concepts current at the time of ratification.").

[107] McGinnis & Rappaport, *supra* note 106, at 795 n.159, 799.

[108] *Cf.* Caleb Nelson, *Vested Rights, "Franchises," and the Separation of Powers*, 169 U. PA. L. REV. (forthcoming 2021) (manuscript at 1), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3540318 [https://perma.cc/NU3E-VKTG] (arguing that the concepts, as an original matter, were "more embedded in separation-of-powers doctrines than people realized").

[109] *See* Sam Kalen, *The Death of Administrative Common Law or the Rise of the Administrative Procedure Act*, 68 RUTGERS U. L. REV. 605, 654 (2016) (describing *Abbott Labs* as "awkwardly grop[ing] for discernable rules rather than focusing on what Congress intended in the APA").

[110] Davis, *supra* note 62, at 417–21.

apply.[111] Second, reviewability is likely mediated by the concept of a public/private rights distinction — the pre-APA *Johnson* and *Perkins* suggested this, as did DOJ's technical assistance and the post-APA *Barlow* — with actions disturbing private rights more likely reviewable.[112]

Third, the "drawn so broadly such that there is no law to apply" formulation from *Overton Park* emerged for the first time twenty-five years after the passage of the APA from the Senate Report, even though the Senate Report is especially unreliable originalist evidence. Specifically, that formulation, for which the Report provided no external basis, transforms reviewability solely into an investigation of the breadth of the organic statute's delegation,[113] whereas in the AG Manual and the pre-APA jurisprudence it cited, reviewability turned on whether the kind of action being challenged was susceptible to judicial review.[114]

II. RESPECTING THE LAW/POLICY DIVIDE IN § 701(A)(2)

Article II and Article III conservatives are united in their respect for the distinction between law and policy.[115] As Justice Scalia argued in a related context, doctrine ought to keep the judiciary "out of affairs better left to the other branches" and reject the "emergence of the courts as an equal partner with the [political] branches in the formulation of public policy."[116] APA reviewability bears directly on the law/policy distinction because "hard look" review thrusts the courts into policy questions.[117] Correspondingly, in the § 701(a)(2) context, Justice Scalia consistently

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[111] Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285, 1304 (2014).

[112] While the Court in *Shaughnessy v. Pedreiro*, 349 U.S. 48 (1955), spoke broadly of the APA's purpose of removing "obstacles to judicial review of agency action under subsequently enacted statutes" in a § 701(a)(1)/statutory preclusion context, it provided further basis for recognizing the public/private rights distinction for APA reviewability writ large. *See id.* at 51. At stake was not pre-enforcement review of changes to public rights such as welfare benefits, but instead "rights to full judicial review of [a] deportation order," clearly implicating a life/liberty interest. *Id.* at 51–52.

[113] *See* 401 U.S. 402, 410 (1971) (quoting S. REP. NO. 79-752, at 26 (1945)).

[114] Although the Senate Report provides no external validation for the formulation, one potential source for a narrow focus on the delegation that could have been raised was *Butterworth v. United States*, 112 U.S. 50 (1884). *See also* Young, *supra* note 59, at 805–06 ("The language of . . . *Butterworth* . . . is somewhat distinct from the earlier cases. . . . [It seems to be a] precursor[] of the modern view that whether one has acquired a personal interest turns upon a reasonable construction of the statute. Put another way, a presumption of reviewability should exist in favor of narrowly defined classes of intended beneficiaries."). However, the lack of such analysis makes it unlikely that the Senate Report's view can be treated as persuasive evidence of original meaning.

[115] *See, e.g.*, Metzger, *supra* note 23, at 37–38 (discussing the conservative Justices' rejection of deference of legal questions in *Kisor* and acceptance of a policy rationale in *Commerce*).

[116] Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK L. REV. 881, 891, 893 (1983) (discussing standing). Other commentators have noticed that "both inquiries [namely, standing and reviewability] lead to the same conclusion for Scalia and the Court: In the end, such a general problem with policy should be addressed by the other branches of the government." Noah Perch-Ahern, *Broad Programmatic Attacks:* SUWA*, the Lower Courts' Responses, and the Law of Agency Inaction*, 18 TUL. ENV'T L.J. 411, 431–32 (2005).

[117] *See, e.g.*, Aaron L. Nielson, *Sticky Regulations*, 85 U. CHI. L. REV. 85, 98 (2018).

rejected a dice-loading presumption of reviewability and the "no law to apply test," which "renders the concept of unreviewability superfluous."[118] In this way, Justice Scalia's approach incorporates the lessons of APA originalist analysis and shows the complementarities between APA originalism and the focus of the law/policy distinction.

A. Presumption of Reviewability

Despite debatable origins as an APA originalist matter, the Court "has consistently applied the presumption of reviewability"[119] since *Abbott Labs* found that the APA "embodies the basic presumption" in sections 702 and 704 and in the House Committee Report.[120] That presumption "must be overcome: to reject it, an interpreter must point to affirmative evidence . . . that Congress meant something other than what it is presumed to have meant."[121] The canon has "increase[d] significantly the likelihood that a court will find an administrative action reviewable."[122] Although the *Abbott Labs* presumption is usually invoked in determining whether an organic statute precludes review under § 701(a)(1),[123] courts often treat the § 701(a)(1) and § 701(a)(2) analyses as "indistinguishable."[124] Recently, the *Commerce* and *Regents* majorities both applied the *Abbott Labs* presumption.[125]

However, for then-Judge Scalia on the D.C. Circuit, the *Abbott Labs* presumption of reviewability was a doctrine that applied *only* to questions of statutory preclusion under § 701(a)(1) and *not* to the agency discretion exception of § 701(a)(2). In his dissent in *Chaney v. Heckler*,[126] he relied on the fact that *Dunlop* separated its statutory preclusion analysis, which applied the *Abbott Labs* presumption, from its discussion of § 701(a)(2), which separately determined that the action did not fit into the exception.[127] Then-Judge Scalia was wary of "narrowing the 'agency discretion' exception by an across-the-board application of a 'presumption of reviewability.'"[128]

This skepticism of applying a presumption of reviewability in § 701(a)(2) cases flowed from more fundamental parts of his philosophy.

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[118] Levin, *supra* note 46, at 734.

[119] RICHARD J. PIERCE, JR., & KRISTIN E. HICKMAN, ADMINISTRATIVE LAW TREATISE § 19.6 (6th ed. 2020).

[120] 387 U.S. 136, 140 & n.2 (1967) (citing H.R. REP. NO. 79–1980, at 41 (1946)).

[121] Bagley, *supra* note 111, at 1305.

[122] Daniel B. Rodriguez, *The Presumption of Reviewability: A Study in Canonical Construction and Its Consequences*, 45 VAND. L. REV. 743, 746 (1992).

[123] *See* Bagley, *supra* note 111, at 1290 n.21.

[124] PIERCE & HICKMAN, *supra* note 119, § 19.8.

[125] Dep't of Com. v. New York, 139 S. Ct. 2551, 2567 (2019); Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1905 (2020).

[126] 718 F.2d 1174 (D.C. Cir. 1983).

[127] *Id.* at 1193–96 (Scalia, J., dissenting).

[128] *Id.* at 1194.

First, as a committed textualist, Justice Scalia worried that substantive canons in statutory interpretation could "increase the unpredictability, if not the arbitrariness, of judicial opinions."[129] Second, despite the modern tendency to blur §§ 701(a)(1)–(2) as one inquiry, Justice Scalia would have used the canon against superfluity in reading the provisions to remain distinct,[130] without bringing an often-determinative presumption to both provisions.

Third, Justice Scalia rejected, in analogous contexts, blurring the line between private and public rights and making it easier for private rights to be adjudicated in Article I courts.[131] Although the public rights framing does not appear in his § 701(a)(2) opinions, it may help explain his intuitions,[132] especially given the originalist basis for providing a stronger presumption of review when the challenged agency action has interfered with a liberty or private property interest.

This instinct can be seen clearly by comparing *Chaney* and *Weyerhaeuser Co. v. U.S. Fish & Wildlife Service*.[133] In *Chaney*, the Court found nonenforcement of consumer safety provisions unreviewable, but noted that if the agency had used "coercive power over an individual's liberty or property rights," it would have "infringe[d] upon areas that courts often are called upon to protect."[134] Meanwhile, in *Weyerhaeuser*, where the agency had designated private land as a "critical habitat," it was not lost on the Court that the agency's action affected "the rights of a private party" to use that property.[135] Although the public right/private right distinction did not explicitly factor into the analysis, it may have deterred the Court from finding a tradition of unreviewability. Indeed, the D.C. Circuit in *Natural Resource Defense Council, Inc. v. Hodel*[136] recognized that the need for review is much stronger in cases where the agency action affects "the lives and liberties

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[129] Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION 3, 28 (Amy Gutmann ed., 1997). Relatedly, one argument for the presumption is based on the doctrine of constitutional avoidance. Bagley, *supra* note 111, at 1313. However, Justice Scalia seemed to limit the use of the canon to situations "when competing interpretations were in some degree of equipoise." Brian Taylor Goldman, *The Classical Avoidance Canon as a Principle of Good-Faith Construction*, 43 J. LEGIS. 170, 191 (2017).

[130] *See* Cal. Hum. Dev. Corp. v. Brock, 762 F.2d 1044, 1052 (D.C. Cir. 1985) (Scalia, J., concurring) (finding review *not* precluded under § 701(a)(1), but committed to discretion under § 701(a)(2)).

[131] *See* Granifinanciera, S.A. v. Nordberg, 492 U.S. 33, 51 (1989) (Scalia. J., concurring).

[132] *See* Bret C. Birdsong, *Justice Scalia's Footprints on the Public Lands*, 83 DENV. U. L. REV. 259, 262 (2005) (describing his approach as "one which favors judicial review of the administration of public laws impacting traditional private rights . . . [but] disfavors (or at least seeks to limit) judicial review of the administration of public laws that benefit individuals or groups representing some broader aspect of the public interest").

[133] 139 S. Ct. 361 (2018).

[134] Heckler v. Chaney, 470 U.S. 821, 832 (1985).

[135] *Weyerhaeuser*, 139 S. Ct. at 370.

[136] 865 F.2d 288 (D.C. Cir. 1988).

of the American people," leaving compliance with reporting requirements outside the scope of judicial review.[137]

While the public rights concept may seem out of place — are not all agency actions related to a public regulatory scheme?[138] — this confusion is a result of "modern" definitions that have "made [the concept] seem less coherent than it actually was."[139] When public and private rights are understood *not* as "a way of classifying . . . entire cases," but instead as discrete "legal interests," their usefulness here is clear.[140] Prosecutions are classic "private rights cases," but they involve, like many cases current doctrine considers public rights cases, "public rights (represented by the prosecutor) . . . pitted against the defendant's rights to life, liberty, or property."[141] An action where "privileges" are denied implicates only public rights, but once "monetary penalties . . . [are] operated against [a] property right[]," a private right interest, as originally defined, is implicated.[142] Indeed, the *Abbott Labs* dissenters made this point: "Where personal status or liberties are involved, the courts may well insist upon" review,[143] while in "a regulatory scheme designed to protect the public," unreviewability can be justifiable.[144]

Considering *Commerce* and *Regents* in light of the embedded public/private rights distinction suggests that Chief Justice Roberts was too quick to find reviewability.[145] First, in *Commerce*, likely in part because

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[137] *Id.* at 318; *see also* Levin, *supra* note 46, at 746 ("[C]ourts likely will hold unreviewability appropriate when the petitioner challenges a phase of administrative activity that does not directly affect private interests.").

[138] *See* Stern v. Marshall, 564 U.S. 462, 490 (2011) (noting that modern jurisprudence has defined public rights cases as those "in which the claim at issue derives from a federal regulatory scheme, or in which resolution of the claim by an expert Government agency is deemed essential to a limited regulatory objective").

[139] Nelson, *supra* note 108 (manuscript at 4).

[140] *Id.* (manuscript at 5).

[141] *Id.*

[142] *Id.* As Professor Caleb Nelson has noted elsewhere, this original understanding of public rights is not current doctrine. *See* Nelson, *supra* note 91, at 604–05.

[143] Toilet Goods Ass'n v. Gardner, 387 U.S. 167, 187 (1967) (Fortas, J., concurring in part and dissenting in part).

[144] *Id.* at 188.

[145] Notably, in neither case did the Court consider the agency to have acted ultra vires or in violation of a constitutional right — the kind of review in question was solely whether the agencies had acted arbitrarily and capriciously in violation of § 706. *See* Dep't of Com. v. New York, 139 S. Ct. 2551, 2569 (2019); Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1915 (2020). Indeed, this distinguished *Commerce* and *Regents* from the Deferred Action for Parents of Americans (DAPA) litigation of 2015, where Texas alleged procedural invalidity and inconsistency with the underlying immigration statute. *Compare* Texas v. United States, 809 F.3d 134, 170 (5th Cir. 2015) (noting that Texas claimed that DAPA "must go through notice and comment" and is "substantively contrary to law" as an unreasonable interpretation of the Immigration and Nationality Act), *with* Casa De Md. v. U.S. Dep't of Homeland Sec., 924 F.3d 684, 712 (4th Cir. 2019) (Richardson, J., concurring in part and dissenting in part) ("Our nation's immigration laws do not limit the Secretary's authority to enforce those laws by removing illegal aliens.").

no private right would be invaded by an additional question about citizenship status, Justice Alito was content that the Secretary is "accountable to Congress with respect to the administration of the census" and "is always answerable to the President, who is, in turn, accountable to the people."[146] Indeed, Justice Alito cited *Hodel* for the idea that reporting requirements in the Census Act "cut[] against judicial review" because it shows that "Congress, not the Judiciary, . . . is best situated" to review the action.[147] By contrast, Congress cannot — as an original matter — "authorize . . . agencies to make binding determinations that . . . forfeit vested private rights" without judicial review.[148]

Second, the majority opinion in *Regents* relies on the *Chaney* language about allowing review when the issue is one "courts are called upon to protect," and identifies defending government-provided benefits such as Social Security and job authorization as appropriate subjects for judicial review.[149] That the APA retained the public/private right distinction, though, casts the *Chaney* language in a different light. Specifically, "claims of entitlement to welfare benefits, government jobs, and other forms of so-called 'new property'. . . clearly fall within the category" of public rights.[150] If the right way to understand the "coercion" language of *Chaney* is the public/private rights distinction, the benefits immediately at risk in *Regents* are *not* the kinds of interests courts must step in to protect, at least not in pre-enforcement arbitrariness review.[151]

B. The "No Law to Apply" Test

Since *Overton Park* seized on a phrase in the Senate Report to define the § 701(a)(2) inquiry as whether a statute had been "drawn in such broad terms that in a given case there is no law to apply,"[152] this formulation has served as the predominant test. In recent Supreme Court cases, the Court parsed statutory language to determine if the delegation to the agency was so broad that there was "no law to apply."[153]

However, Justice Scalia, for reasons consistent with his broader commitment to respecting the law/policy distinction, was skeptical of the

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[146] *Commerce*, 139 S. Ct. at 2606 (Alito, J., concurring in part and dissenting in part).

[147] *Id.* at 2602–03 (citing Nat. Res. Def. Council, Inc. v. Hodel, 865 F.2d 288, 319 (D.C. Cir. 1988)).

[148] Nelson, *supra* note 108 (manuscript at 3).

[149] *Regents*, 140 S. Ct. at 1906 (quoting Heckler v. Chaney, 470 U.S. 821, 832 (1985)).

[150] Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 330 n.121 (1993).

[151] *See* Vermeule, *supra* note 17, at 2166 ("Justice Scalia, by contrast, was reluctant to countenance pre-enforcement review, which threatens to undo his distinction between general programs or policies and specific applications.").

[152] Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971) (quoting S. REP. NO. 79-752, at 26 (1945)).

[153] *See, e.g.*, Dep't of Com. v. New York, 139 S. Ct. 2551, 2569 (2019) ("Because this is not a case in which there is 'no law to apply,' the Secretary's decision is subject to judicial review." (citation omitted)).

test: In *ICC v. Brotherhood of Locomotive Engineers*[154] (*BLE*), his majority opinion found agency action unreviewable without once invoking the phrase "no law to apply"; in *California Human Development Corp. v. Brock*,[155] then-Judge Scalia focused on the type of action being challenged, finding that discretionary grant allocations had a "general unsuitability for judicial review" and for that reason are "traditionally" unreviewable;[156] and in his *Webster* dissent, Justice Scalia explicitly argued that the "no law to apply" test "falls far short of explaining the full scope of the areas from which the courts are excluded,"[157] instead emphasizing "tradition, case law, and sound reasoning" as part of the inquiry.[158] As examples, he cited longstanding doctrines that "operate[] to keep certain categories of agency action out of the courts," such as the "political question" doctrine, sovereign immunity, and "prudential limitations upon the courts' equitable powers."[159] The Supreme Court in *Lincoln v. Vigil*[160] unanimously adopted Justice Scalia's reasoning regarding lump-sum appropriations because those allocation decisions are "administrative decision[s] traditionally regarded" as unreviewable.[161]

Despite the fact that the "no law to apply" test sounds like it respects the law/policy distinction, skepticism of the "no law to apply" test squares with commitments to APA originalism and the law/policy distinction for three reasons. First, courts traditionally have identified precedents "permitting judicial challenges to certain types of executive action,"[162] while the alternative *Overton Park* test has little originalist basis, beyond especially unhelpful legislative history. Second, if one's goal is "filter[ing] out judicial scrutiny of general policies . . . until they are applied,"[163] the "no law to apply" test will not serve that purpose. As Professor Ronald Levin has explained, the test makes § 701(a)(2) "meaningless" "because the APA would generate exactly the same results without the clause as with it."[164] If § 701(a)(2) kicks in only when § 706(2)(A) review would be "futile" anyways, the doctrine does little work in shielding policymaking from judicial meddling.[165] In trying to

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[154] 482 U.S. 270 (1987).
[155] 762 F.2d 1044 (D.C. Cir. 1985).
[156] *Id.* at 1052 (Scalia, J., concurring) (quoting Heckler v. Chaney, 470 U.S. 821, 831 (1985)).
[157] 486 U.S. 592, 608 (1988) (Scalia, J., dissenting).
[158] *Id.* at 607 (quoting *Chaney*, 470 U.S. at 831).
[159] *Id.* at 609–10.
[160] 508 U.S. 182 (1993).
[161] *Id.* at 192 (citing UAW v. Donovan, 746 F.2d 855, 861 (D.C. Cir. 1984) (Scalia, J.)). The divergence between Justice Scalia's approach to § 701(a)(2) and the black-letter "no law to apply" test is sharp enough that the D.C. Circuit recently described the *Lincoln* approach as a "distinct" test. Physicians for Soc. Resp. v. Wheeler, 956 F.3d 634, 642 (D.C. Cir. 2020).
[162] Merrill, *supra* note 97, at 946.
[163] Vermeule, *supra* note 17, at 2177 (describing Justice Scalia's view).
[164] Levin, *supra* note 46, at 706.
[165] *See id.* at 707.

keep the judiciary within its proper role, Justice Scalia would need other sources of "law" and other tests that remove actions from review.

Third, for Justice Scalia, judges must announce general rules of decision, develop doctrines that provide "precise, principled content" to implement the statutory text, and then apply those same rules to different facts regardless of their policy preferences.[166] However, the "no law to apply" test, like the intelligible principle test that Justice Scalia found unadministrable in the nondelegation context,[167] is "not over a point of principle but over a question of degree."[168] Parsing a statute to determine whether it was "drawn" too broadly leads to judicial analysis centering on whether the text "meanders."[169] As many have feared with the intelligible principle test, such analysis becomes difficult to separate from policy preferences.[170] The "no law to apply" test blurs law and policy, as courts ask not what a legal text means, but whether enough content exists to perform the "hard look" review of § 706(2)(A).[171]

Despite the coherence of these criticisms of the *Overton Park* test, the tradition-based alternatives seem at first glance unhelpful. It is not clear that "tradition, case law, or sound reasoning" will generate anything like a predictable, easily applied rule of decision, as *Commerce* demonstrated: Chief Justice Roberts determined there was no relevant tradition committing the action to agency discretion because "courts have entertained both constitutional and statutory challenges to census-related decisionmaking."[172] However, at a lower level, Justice Alito argued there was no tradition of review because none of those prior challenges focused on the "content of census questions."[173] This familiar "levels of generality" problem threatens to blow up the law/policy distinction, as selecting the level of generality involves policy judgment.[174]

However, Justice Scalia had a consistent view for approaching this problem.[175] In *BLE*, Justice Stevens saw no tradition of unreviewability

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[166] *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1183 (1989).

[167] *See* Viktoria Lovei, Comment, *Revealing the True Definition of APA § 701(a)(2) by Reconciling "No Law to Apply" with the Nondelegation Doctrine*, 73 U. CHI. L. REV. 1047, 1048 (2006) (noting that they are "the same test" but "lead to opposite results").

[168] Mistretta v. United States, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting).

[169] Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv., 139 S. Ct. 361, 371 (2018).

[170] *See* J. HARVIE WILKINSON III, COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE 72 (2012).

[171] Given the importance of the law/policy distinction, many of the Justices may be skeptical of aggressive forms of this review in the first place. *See, e.g.*, Pojanowski, *supra* note 14, at 893–94.

[172] 139 S. Ct. 2551, 2568 (2019).

[173] *Id.* at 2604 (Alito, J., concurring in part and dissenting in part).

[174] *Cf.* Ronald Dworkin, *Bork's Jurisprudence*, 57 U. CHI. L. REV. 657, 665–66 (1990) (describing the different levels of generality at which originalists could approach the Fourteenth Amendment and the policy choices implicated).

[175] Before taking the bench, Justice Scalia was attuned to the levels of generality problem for assessing reviewability — in the related context of sovereign immunity. In a 1970 article, he argued that analysis of the case law "tended to proceed at a broad level of generality," risking "distortion[s]"

because of cases in which the Court reviewed an agency's denial of a petition for reconsideration.[176] However, Justice Scalia, focusing at a lower level (like Justice Alito in *Commerce*), held that these precedents were limited to denials of petitions for reconsideration due to changed facts or new evidence — but that there was no tradition of reviewability for denials *based on claims of material error*.[177] In a similar disagreement in *California Human Development Corp.*, Judge Bazelon saw a tradition of reviewing grant allocation formulae,[178] but then-Judge Scalia argued that there was no tradition of reviewing grant allocation formulae *with no statutory entitlement*, which left the action presumptively unreviewable.[179] For Justice Scalia, this approach was central to his goal of reducing judicial policymaking and unguided discretion.[180]

III. JUSTICE ALITO'S *COMMERCE* DISSENT AS A MODEL

In many ways, Justice Alito's opinion in *Commerce* offers a model for how to handle reviewability issues. Its rejection of a universal presumption of reviewability, implicit attention to the public/private rights distinction, and downplaying of the "no law to apply" test in favor of assessing specific traditions of review track both the original meaning of § 701(a)(2) and the law/policy distinction. Yet by including "practical consequences" as a "factor," the test invites unnecessary policy judgment.

With this caveat, Justice Alito's *Commerce* opinion represents a compelling approach that could attract consensus on this Court due to its links to the original positive law of the APA and the law/policy distinction. However, rather than embrace Justice Alito's approach to reviewability, some conservatives adopted the opposite extreme, celebrating the majority for providing new weapons for a judiciary-led attack on the administrative state.[181] This Part explains why Justice Alito's *Commerce* dissent was mistaken to incorporate "practical consequences" into its § 701(a)(2) analysis and argues that, with this modification, it ought to be the unifying framework for the Article II and Article III camps.

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as courts apply previous precedents in other contexts where they do not belong. Antonin Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public-Lands Cases*, 68 MICH. L. REV. 867, 919 (1970).

[176] 482 U.S. 270, 291–92 (1987) (Stevens, J., concurring in the judgment).

[177] *Id.* at 282–84 (majority opinion).

[178] *See* 762 F.2d 1044, 1048 n.48 (1985).

[179] *See id.* at 1052 (Scalia, J., concurring).

[180] *See* John F. Manning, *Justice Scalia and the Idea of Judicial Restraint*, 115 MICH. L. REV. 747, 769–70 (2017).

[181] *See, e.g.*, John Yoo & James Phillips, *Roberts Thwarted Trump, but the Census Ruling Has a Second Purpose*, THE ATLANTIC (July 11, 2019), https://www.theatlantic.com/ideas/archive/2019/07/liberals-helped-roberts-undercut-bureaucratic-state/593737/ [https://perma.cc/GS8B-CPJU].

A. The Consideration of Practical Consequences

Although Justice Alito's *Commerce* dissent tracks the lessons of APA originalism and the law/policy divide generally, it also adds an additional "factor": whether review will "produce 'disruptive practical consequences.'"[182] While the phrase is drawn from *Southern Railway Co. v. Seaboard Allied Milling Corp.*[183] and its statutory preclusion analysis, the context reveals why it's an inapt consideration in § 701(a)(2) analysis.

The *Southern Railway* Court was not conducting a functionalist determination of whether review was desirable. Instead, the Court was engaged in statutory interpretation pursuant to the § 701(a)(1) inquiry. Specifically, the Court was assessing an organic statute to determine whether review had been statutorily precluded and considered that review would "render obsolete the carefully designed and detailed procedures" elsewhere in the act for shippers to bring certain complaints.[184] The consideration of "disruptive practical consequences" refers to how the Interstate Commerce Act's scheme would work (or fail to work) if much of the *post*-effective analysis currently done under § 13(1) would be required to be done *pre*-effective under § 15(8)(1).[185] This consideration is not discussed as a separate factor to be analyzed, but is cited as "confirm[ation]" that its statutory construction for purposes of the § 701(a)(1) analysis is correct — "Congress intended" preclusion of § 15(8)(1) investigations.[186]

If the "disruptive practical consequences" language had been part of § 701(a)(2) analysis, it would have focused on the practical consequences of unpredictability and judicial activism inherent in judges deciding cases with no law to apply.[187] Instead, the discussion illustrates why this factor must be limited to the § 701(a)(1) context — it's an interpretive tool for determining whether the statute precluded review. Although the practical consequences "factor" appears to be little more than a makeweight in Justice Alito's analysis — the breadth of the delegation and the tradition of unreviewability seem to do the work — courts should nonetheless discard it. Not only is it a category error between statutory preclusion and committed-to-agency-discretion doctrine, but it also invites the judiciary to make policy judgments.

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[182] Dep't of Com. v. New York, 139 S. Ct. 2551, 2598 (2019) (Alito, J., concurring in part and dissenting in part) (quoting S. Ry. Co. v. Seaboard Allied Milling Corp., 442 U.S. 444, 457 (1979)). Although Justice Scalia also cited this phrase in his *Webster* dissent, it was not used as a "factor" but only as a part of a lengthy string-cite to show that the "no law to apply" test is "much less than the full answer to whether § 701(a)(2) applies." Webster v. Doe, 486 U.S. 592, 608–09 (1988) (Scalia, J., dissenting).

[183] 442 U.S. 444 (1979).

[184] *Id.* at 456.

[185] *Id.* at 456–57.

[186] *Id.* at 457.

[187] *See, e.g.*, Harvey Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion*," 82 HARV. L. REV. 367, 380–95 (1968) (proposing a multifactor standard).

B. Unifying the Article II and Article III Camps

At first glance, Justice Alito's approach seems inconsistent with the anti-administrativist posture that has dominated conservative legal thinking recently. However, due to its consistency with APA originalism, attention to the public/private rights distinction, and commitment to the law/policy divide, it can bridge intra-conservative disagreements.

First, removing some actions from APA review is crucial for respecting the law/policy distinction. As Justice Scalia encouraged in a related context, doctrine ought to allow "once-heralded programs . . . to get lost or misdirected" in implementation without judges "enforcing the political prejudices of their own class."[188] While administrative law has "embraced the procedural-judicial model with a vengeance, [and] expanded the interests to be protected" in courts[189] to "fight regulatory capture and timidity,"[190] an originalist § 701(a)(2) could reverse this shift.

Second, any tension between Justice Alito's *Commerce* dissent and skepticism of *Chevron* deference is resolved through emphasis on "a sharper line between legal judgment and lawmaking will."[191] For textualists, interpretation of ambiguous statutory text does not, as *Chevron* suggested, amount to a policy choice.[192] But in the context of § 701(a)(2), the judicial role often centers on policy judgments reviewed for arbitrariness, not legal interpretation.[193] Justice Alito's *Commerce* dissent tracks the intuition that "deference on policy questions is the corollary of non-deference on legal questions."[194] Further, this dichotomy again shows synergies between APA originalism and the law/policy distinction: as Professor Aditya Bamzai has shown, the same pre-APA precedents discussed above "distinguished between the jurisdictional standard of mandamus and the proper method for interpreting statutes,"[195] and review "turned on whether a particular issue was characterized as one of 'law' or one of 'fact.'"[196] As one example, *Johnson* noted that the Court "fre-

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[188] Scalia, *supra* note 116, at 896–97.

[189] William Funk, *Public Participation and Transparency in Administrative Law — Three Examples as an Object Lesson*, 61 ADMIN. L. REV. 171, 180 (2009).

[190] R. Shep Melnick, *The Political Roots of the Judicial Dilemma*, 49 ADMIN. L. REV. 585, 594 (1997).

[191] Pojanowski, *supra* note 14, at 901.

[192] *See* 467 U.S. 837, 843 (1984).

[193] *Cf.* Toilet Goods Ass'n v. Gardner, 387 U.S. 167, 187 (1967) (Fortas, J., concurring in part and dissenting in part) ("I again note that no constitutional issues are raised, and, indeed, no issues as to the authority of the agency to issue regulations of the general sort involved. The only issue is whether that authority was properly exercised.").

[194] Pojanowski, *supra* note 14, at 893.

[195] Bamzai, *supra* note 35, at 954.

[196] *Id.* at 960.

quently and firmly refused to interfere" with policy decisions or fact-finding through mandamus, but asserted the "power to give . . . relief" when the agency committed a "misconstruction of the law."[197]

Third, despite the tension between committed-to-agency-discretion doctrine and a revived nondelegation doctrine,[198] Justice Alito's *Commerce* opinion is compatible with nondelegation revival efforts. Both doctrines today apply the "same test — whether there is an intelligible principle or law to apply to the executive action."[199] Justice Scalia rejected both: he considered the intelligible principle test not "readily enforceable by the courts,"[200] and, as section II.B established, he rejected centering § 701(a)(2) on the "no law to apply" test. Similarly, Justice Alito downplayed the "no law to apply" test and, while he expressed interest in reviving the nondelegation doctrine, he worried that without a more predictable test "it would be freakish to single out the provision at issue here for special treatment."[201] However, in replacing these doctrines, both Justices Gorsuch and Alito are attuned to the distinction between public and private rights. Just as agency action affecting private rights is more likely subject to judicial review, it is delegation to make rules that affect private rights that offends delegation skeptics.[202]

IV. CONCLUSION

As tensions between the Article II and Article III camps threaten to sharpen, the committed-to-agency-discretion doctrine is one possible flashpoint. A more coherent framework can unite both sides by finding common ground in APA originalism and the law/policy distinction: specifically, it rejects a broad "presumption of review," replaces the "no law to apply" test, and doesn't explicitly factor in "practical consequences." This approach provides a way through the dispute between Chief Justice Roberts and Justice Alito, illustrating that commitment to APA originalism and limited judicial role can unite these factions.

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[197] Johnson v. Towsley, 80 U.S. 72, 86–87 (1871).
[198] *See* Thomas W. Merrill, *Delegation and Judicial Review*, 33 HARV. J.L. & PUB. POL'Y 73, 82 (2010).
[199] Lovei, *supra* note 167, at 1048.
[200] Mistretta v. United States, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting).
[201] Gundy v. United States, 139 S. Ct. 2116, 2131 (2019) (Alito, J., concurring).
[202] *See id.* at 2133 (Gorsuch, J., dissenting).