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 (APA) has returned to the forefront. While the APA generally allows anyone “adversely affected or aggrieved by agency action” to seek judicial review, the APA makes agency action unreviewable under § 701(a)(1) if the organic statute “preclude[s] judicial review,” or under § 701(a)(2) if the “agency action is committed to agency discretion by law.” Two recent cases, Department of Commerce v. New York and Department of Homeland Security v. Regents of the University of California, 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).

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, 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.” On Vermeule’s view, Article II conservatives are generally “deferential to presidential

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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 1891 (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/2019/06/18/6b8782128c-91e6-14e5-6b78-a6a1afaac3e_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).
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.”

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.” 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 and challenged the expansive “role that the Federal Judiciary now plays.”

Despite their differences, both sides share a commitment to “original, positive law over judge-made doctrines” and to the distinction between legal judgments (where courts belong) and policy decisions (where they do not). 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” and the view that “the law itself includes restraints on the authority of courts” to keep them removed from policy judgment — 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, centered his preferred test on the specific action challenged and its tradi-

10 Id.
11 Id.
12 Commerce, 139 S. Ct. at 2597 (Alito, J., concurring in part and dissenting in part).
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).
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
Defense Council, Inc.\textsuperscript{24} and Perez v. Mortgage Bankers Ass’n\textsuperscript{25} swept away administrative common law in favor of original meaning of the APA’s text, and in Kisor v. Wilkie,\textsuperscript{26} both sides focused on the text of § 706.\textsuperscript{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.”\textsuperscript{28}

Despite this basis for APA originalism, APA reviewability has in many ways retained a common law flavor,\textsuperscript{29} including in Abbott Laboratories v. Gardner,\textsuperscript{30} a case decided at the “zenith of the New Federal Common Law era.”\textsuperscript{31} By contrast, APA originalism “proceed[s] by seeking to ascertain the original public meaning of the APA’s text,”\textsuperscript{32} relying on a familiar hierarchy of evidentiary sources — text and structure, evidence of public meaning, history, and postenactment practice.\textsuperscript{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,”\textsuperscript{34} with attention to terms of art and the original methods of interpretation.\textsuperscript{35} After all, the APA is “not remotely a self-contained statute, but assumes an entire underlying jurisprudence and practice.”\textsuperscript{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.
A. Modern Supreme Court Case Law

In *Citizens to Preserve Overton Park v. Volpe*, 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” that applied when “statutes are drawn in such broad terms that in a given case there is no law to apply.” 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. In *Dunlop v. Bachowski*, the Court held that an agency’s decision to accept a union election was reviewable. 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.

In *Heckler v. Chaney*, 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. *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. Then, in *Webster v. Doe*, 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. In dissent, Justice Scalia rejected the “no law to apply” test as the only standard for...
§ 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 reviewable55 and that unreviewability was more likely in cases that “do not involve private right.”56

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.


51 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. 504, 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\(^5\) 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.”\(^6\) 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.\(^7\) Professor Louis Jaffe argued that this regime was transformed into a “presumption of reviewability”\(^8\) by American School of Magnetic Healing v. McAnnulty,\(^9\) which held that “courts generally have jurisdiction to grant relief” when an agency violates the law.\(^10\) 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.\(^11\) This tradition has “survived” to the present, though limited to constitutional claims or to claims that the agency has acted ultra vires.\(^12\) Since “the entitlement to judicial review comprises both statutory and nonstatutory elements,”\(^13\) 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.\(^14\)

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,”\(^15\)

\(^5\) 80 U.S. 72 (1871).
\(^6\) Id. at 81, 86.
\(^7\) Id. at 84. While administrative law of this era was “compartmentalized,” 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).
\(^9\) 187 U.S. 94 (1902).
\(^10\) 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).
\(^12\) 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)).
\(^13\) Beermann, supra note 29, at 11.
\(^14\) 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

68 310 U.S. 113 (1940).
69 *Id.* at 129; cf. *Stark v. Wickard*, 321 U.S. 188, 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.
75 DEP’T OF JUST., ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 93, 95–96 (1947) [hereinafter ATTORNEY GENERAL’S MANUAL].
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 (1944), 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
source. In an early case, the Fifth Circuit held that the choice of companies from whom insurance for federal housing was bought — a quintessential “privilege” — was unreviewable in the absence of fraud. 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.” 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. The Supreme Court in Panama Canal Co. v. Grace Line, Inc. determined that the § 701(a)(2) inquiry was “no different than if mandamus were sought,” referring to review “restrict[ing] judicial intervention to executive action lacking any legal authority.” In 1970, the Court in Barlow v. Collins “abandoned 1946 meaning” in applying a presumption of judicial review — but even then, regarding only “judicial review of administrative action adjudicating private rights.” 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.’”

C. Applying an Originalist Methodology

With this evidence, the original methods originalist methodology, which rejects the use of a “construction zone” to resolve ambiguity.

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.”).
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]”).
96 Id. at 318.
99 Strauss, supra note 73, at 402 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)).
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

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.”).
110 Davis, supra note 62, at 417–21.
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.\textsuperscript{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,\textsuperscript{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.\textsuperscript{114}

\section*{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.\textsuperscript{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.”\textsuperscript{116} APA reviewability bears directly on the law/policy distinction because “hard look” review thrusts the courts into policy questions.\textsuperscript{117} Correspondingly, in the § 701(a)(2) context, Justice Scalia consistently

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\item \textsuperscript{111} Nicholas Bagley, The Puzzling Presumption of Reviewability, 127 HARV. L. REV. 1285, 1304 (2014).
\item \textsuperscript{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.
\item \textsuperscript{113} See 401 U.S. 402, 410 (1971) (quoting S. REP. NO. 79-752, at 26 (1945)).
\item \textsuperscript{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. . . . [I]t 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.
\item \textsuperscript{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).
\item \textsuperscript{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).
\item \textsuperscript{117} See, e.g., Aaron L. Nielsen, Sticky Regulations, 85 U. CHI. L. REV. 85, 98 (2018).
\end{itemize}
rejected a dice-loading presumption of reviewability and the “no law to apply test,” which “renders the concept of unreviewability superfluous.” 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” since Abbott Labs found that the APA “embodies the basic presumption” in sections 702 and 704 and in the House Committee Report. 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.” The canon has “increase[d] significantly the likelihood that a court will find an administrative action reviewable.” Although the Abbott Labs presumption is usually invoked in determining whether an organic statute precludes review under § 701(a)(1), courts often treat the § 701(a)(1) and § 701(a)(2) analyses as “indistinguishable.” Recently, the Commerce and Regents majorities both applied the Abbott Labs presumption.

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, 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. Then-Judge Scalia was wary of “narrowing the ‘agency discretion’ exception by an across-the-board application of a ‘presumption of reviewability.’”

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.
121 Bagley, supra note 111, at 1305.
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.3d 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.”

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, 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. Although the public rights framing does not appear in his § 701(a)(2) opinions, it may help explain his intuitions 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. 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.” 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. 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 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.”


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”).


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.\textsuperscript{137} While the public rights concept may seem out of place — are not all agency actions related to a public regulatory scheme?\textsuperscript{138} — this confusion is a result of “modern” definitions that have “made [the concept] seem less coherent than it actually was.”\textsuperscript{139} When public and private rights are understood \textit{not} as “a way of classifying . . . entire cases,” but instead as discrete “legal interests,” their usefulness here is clear:\textsuperscript{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.”\textsuperscript{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.\textsuperscript{142} Indeed, the \textit{Abbott Labs} dissenters made this point: “Where personal status or liberties are involved, the courts may well insist upon” review,\textsuperscript{143} while in “a regulatory scheme designed to protect the public,” unreviewability can be justifiable.\textsuperscript{144}

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

\begin{itemize}
  \item \textsuperscript{137} \textit{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.”).
  \item \textsuperscript{138} \textit{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”).
  \item \textsuperscript{139} Nelson, supra note 108 (manuscript at 4).
  \item \textsuperscript{140} \textit{Id.} (manuscript at 5).
  \item \textsuperscript{141} \textit{Id.}
  \item \textsuperscript{142} \textit{Id.} As Professor Caleb Nelson has noted elsewhere, this original understanding of public rights is not current doctrine. \textit{See} Nelson, supra note 91, at 604–05.
  \item \textsuperscript{143} Toilet Goods Ass’n v. Gardner, 387 U.S. 167, 187 (1967) (Fortas, J., concurring in part and dissenting in part).
  \item \textsuperscript{144} \textit{Id.} at 188.
  \item \textsuperscript{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. \textit{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 \textit{Commerce} and \textit{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. \textit{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.”

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. By contrast, Congress cannot — as an original matter — “authorize . . . agencies to make binding determinations that . . . forfeit vested private rights” without judicial review.

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. 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.

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.

**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,” 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.”

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

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)).
158 Id. at 607 (quoting Chaney, 470 U.S. at 831).
159 Id. at 609–10.
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. However, the “no law to apply” test, like the intelligible principle test that Justice Scalia found unadministrable in the nondelegation context, is “not over a point of principle but over a question of degree.” Parsing a statute to determine whether it was “drawn” too broadly leads to judicial analysis centered on whether the text “meanders.” As many have feared with the intelligible principle test, such analysis becomes difficult to separate from policy preferences. 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).

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.” 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.” This familiar “levels of generality” problem threatens to blow up the law/policy distinction, as selecting the level of generality involves policy judgment.

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

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”).
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 (2016).
173 Id. at 2604 (Alito, J., concurring in part and dissenting in part).
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 \textit{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 \textit{based on claims of material error}. \(^{177}\) In a similar disagreement in \textit{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 \textit{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 \textit{COMMERCe} DISSERT AS A MODEL**

In many ways, Justice Alito’s opinion in \textit{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 \textit{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 \textit{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.
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.’”\(^\text{182}\) While the phrase is drawn from Southern Railway Co. v. Seaboard Allied Milling Corp.\(^\text{183}\) 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.\(^\text{184}\) 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).\(^\text{185}\) This consideration is not discussed as a separate factor to be analyzed, but is cited as “confirmation” that its statutory construction for purposes of the § 701(a)(1) analysis is correct — “Congress intended” preclusion of § 15(8)(1) investigations.\(^\text{186}\)

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.\(^\text{187}\) 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.

\(^{182}\) 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.

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 courts189 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 lawmaker 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-

188 Scalia, supra note 116, at 896–97.
191 Pojanowski, supra note 14, at 901.
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 intel-
ligible 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 ex-
pressed 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 dis-
tinction between public and private rights. Just as agency action affect-
ing 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: spe-
cifically, 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.

197 Johnson v. Towsley, 80 U.S. 72, 86–87 (1871).
199 Lovei, supra note 167, at 1048.
202 See id. at 2133 (Gorsuch, J., dissenting).