Tulsa Law Review

Volume 32
Number 2 *The Fiftieth Anniversary of the Administrative Procedure Act: Past and Prologue*

Volume 32 | Number 2

Winter 1996

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Recommended Citation

Patricia M. Wald, *Judicial Review in Midpassage: The Uneasy Partnership between Courts and Agencies Plays on*, 32 Tulsa L. J. 221 (2013).

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JUDICIAL REVIEW IN MIDPASSAGE: THE UNEASY PARTNERSHIP BETWEEN COURTS AND AGENCIES PLAYS ON

Patricia M. Wald†

By the time the Administrative Procedure Act[1] (the APA) entered the scene in 1946, the modern regulatory state was already well launched, thanks to the combined efforts of the New Deal and World War II. Even so, the next fifty years witnessed a significant expansion in the number and powers of federal administrative agencies and their extension into newly defined areas of the law, such as health and the environment. In that time our experience with the benefits and costs of regulation, including judicial review of agency action, has grown exponentially. Judicial review doctrine, for example, has undergone several transformations, ricocheting between extreme deference and intense scrutiny with intermittent, not always successful, attempts to merge the two.

Given the endless paper trail of articles about judicial review that have appeared over the years, I admit to some reticence to adding yet another — I'm not sure that I have anything new to say. So, after offering a macro-whirlwind tour of the hot spots of judicial review over a half-century, I will hone in on the microcosm of my own D.C. Circuit to see how some of the current doctrines and dilemmas of judicial review are working out in practice, and along the way I will offer a few suggestions for how agency review could be improved.

I. IN THE BEGINNING

The appropriate scope of judicial review was one of the most hotly debated topics leading to the enactment of the APA. Once the constitutionality of New Deal legislation was securely established, its opponents switched gears from challenging the legislation itself to issuing dire warnings about the potential danger of bureaucratic tyranny inherent in the new regulatory regime, which

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1. Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

created myriad alphabet agencies with broad ranging powers but ignored the need for judicial or procedural controls over their actions.[2] In 1939, the Walter-Logan bill, a precursor to the APA,[3] proposed more procedural requirements and increased judicial review of agency decisions. Among its provisions, the Walter-Logan bill allowed any person "substantially interested in the effects of any administrative rule"[4] to seek review in the D.C. Circuit and provided for agency actions to be set aside if a court believed them to be either not supported by substantial evidence (the then established standard for review) or based on findings of fact that were clearly erroneous.[5] New Deal supporters, on the other hand, fresh from the historic judicial battles over the constitutionality of economic reform, tended to view an escalated level of judicial review as a device for stymying — through defeat or delay — regulation at the hands of a hostile judiciary. They conjured up the specter of Supreme Court decisions that at the turn of century had effectively decimated the powers of Interstate Commerce Commission and had more recently restricted those of the Federal Trade Commission.[6]

In the end, President Franklin Roosevelt heeded the cries of New Deal supporters and vetoed the Walter-Logan bill. The debate about the need for oversight and control of administrative agencies continued throughout the next several years. Roosevelt justified his veto on the importance of waiting for the report of the Attorney General's Committee on Administrative Procedure, commissioned in 1939. This report was issued in 1941 and formed the basis for the APA, passed five years later in 1946.[7] Given the struggle over the Walter-Logan bill, the unanimous and uncontested passage of the APA was anticlimactic. Although some members of Congress hoped that in practice the APA would lead to greater judicial curbing of agency action, the APA essentially retained existing arrangements for judicial review and preserved the agency's primary control over fact finding.[8] As Walter Gellhorn, the director of the Attorney

2. *See generally* James M. Landis, *Crucial Issues in Administrative Law: The Walter-Logan Bill*, 53 HARV. L. REV. 1077, 1078 (1940); Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 452-54 (1986); Paul R. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 268-70, 273 (1978).

3. *See* S. 915, H.R. 6324, 76th Cong. (1939); Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1263-64 (1986); Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219, 221-26 (1986); Verkuil, *supra* note 2, at 271-74.

4. Verkuil, *supra* note 2, at 271.

5. *See* Landis, *supra* note 2, at 1090-94; Verkuil, *supra* note 2, at 271-72. In the eyes of the Walter-Logan bill's opponents, the provision for setting aside clearly erroneous factual findings was meant to allow independent judicial weighing of the evidence and enable courts to second-guess agency credibility determinations. *See* Landis, *supra* note 2, at 1090-94. For a discussion of the established standards for judicial review at the time, *see id.* at 1092-93 n.30; ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, REPORT: ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES 87-92 (1941) [hereinafter ATTORNEY GENERAL'S COMMITTEE REPORT].

6. *See* RICHARD J. PIERCE ET AL., ADMINISTRATIVE LAW AND PROCESS 29-31 (2d ed. 1992): Rabin, *supra* note 2, at 1208-15, 1230-36, 1254-1259. Two examples of these Supreme Court decisions are *ICC v. Cincinnati, New Orleans & Texas Pacific Railway*, 167 U.S. 479 (1897) (holding that the ICC had no power to set railroad rates), and *FTC v. Gratz*, 253 U.S. 421 (1920) (holding that courts, and not the FTC, have authority to determine what constitute "unfair methods of competition" and that practices traditionally accepted as part of free and fair competition could not be classified as unfair).

7. *See* Gellhorn, *supra* note 3, at 224-26; Verkuil, *supra* note 2, at 274-78.

8. *See* Rabin, *supra* note 3, at 1265-66; 1 KENNETH C. DAVIS & RICHARD J. PIERCE, ADMINISTRATIVE

General's Committee put it, "what was forestalled [— the Walter-Logan bill —] was more significant than what was enacted. For the most part the new statute was declaratory of what had already become the general, though not yet universal, patterns of good behavior [for agencies]."[9] The APA granted a right of review to "any person suffering legal wrong because of agency action, or adversely affected or aggrieved by such action within the meaning of the statute."[10] All final agency actions were made subject to review, provided the applicable statute did not preclude judicial review or the action was not committed to agency discretion by law.[11] Section 706 of the APA instructed courts to hold unlawful agency actions found to be arbitrary and capricious, in violation of the constitution or authorizing statute, procedurally improper or not supported by substantial evidence. Section 706 also bestowed on courts the power to "compel agency action unlawfully withheld or unreasonably delayed."[12]

The consensus in 1946 was that administrative procedure, rather than judicial review, was the best mechanism for controlling agency discretion. In the words of Senator McCarran, one of the APA's sponsors, "for most practical purposes the Congress and the people must look to the agencies themselves for fair administration of the laws and for compliance with [the APA]."[13] According to the Attorney General's Commission Report, judicial review should serve only as a retrospective check on the legality and rationality of administrative action, not as a means of influencing or insuring "correct" administrative decisions; while review must be available, it "must not be so extensive as to destroy the values — expertness, specialization, and the like — which . . . were sought in the establishment of administrative agencies."[14] On the procedural front, the most significant features of the APA were its authorization of agencies to act by means of either case-by-case adjudication, the prevailing mode of agency action at the time, or rulemaking, and its distinction between informal and formal rulemaking, with the former subject only to minimal notice and comment requirements and the latter requiring stricter, trial-like procedures.[15]

LAW TREATISE § 1.04, at 9 (3d ed. 1994); *see also* S. Rep. No. 752, 79th Cong. app.B (1945), *reprinted in* ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY 230 (1946) [hereinafter LEGISLATIVE HISTORY] (APA "declares the existing law concerning scope of judicial review"). Even though substantial evidence was the generally established standard for reviewing agency action, critics complained that in practice courts were sustaining some agency actions, particularly NLRB decisions, whenever there was any supporting evidence in the record, regardless of its weight or of the extent of conflicting evidence. *See* Universal Camera Corp. v. NLRB., 340 U.S. 474, 477-91 (1950) (reviewing debate over substantial evidence standard in the period leading up to the APA's enactment). Legislators hoped that this practice would be curbed by the explicit requirement in the APA that courts must overturn agency action not supported by substantial evidence. *See* LEGISLATIVE HISTORY, *supra*, at 321, 325, 375.

9. Gellhorn, *supra* note 3, at 232.

10. 5 U.S.C. § 702 (1994).

11. *See* 5 U.S.C. § 701(a) (1994).

12. 5 U.S.C. § 706 (1994).

13. LEGISLATIVE HISTORY, *supra* note 5, at 326 (remarks of Sen. McCarran).

14. ATTORNEY GENERAL'S COMMITTEE REPORT, *supra* note 5, at 77-79.

15. *See* 5 U.S.C. §§ 553-554, 556 (1994); David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965); Verkuil, *supra* note 2, at 276-78 n.103.

By 1946 there had also been a sea change in the attitude of the judiciary towards administrative agencies. In 1937 the Supreme Court "turned" and thereafter had a majority of Justices who accepted the necessity for national economic regulation, believed in agency expertise, and opposed judicial interference in substantive policy matters.[16] An almost obsequious deference to agency decisions, as to substance and procedure, became the norm for judicial review.[17] This deference was achieved in part by limiting the occasions for review on the merits. Despite seemingly expansive language allowing anyone aggrieved to seek judicial review, the APA was not interpreted to expand standing beyond the previously existing framework wherein petitioners had to show some legal right that had been infringed to bring a challenge; mere competitive harm ordinarily did not suffice.[18] Thus, many important kinds and aspects of agency action continued to be largely immune from judicial challenge. On those occasions when the Court reached the merits of an agency challenge, it construed the APA's procedural requirements with an eye towards preserving agency control over procedure. In *SEC v. Chenery Corporation*,[19] for example, the Court stated that the choice of whether to use rulemaking or adjudication procedures "lies primarily in the informed discretion of the administrative agency."[20] The Court also interpreted regulatory statutes to allow agencies to exercise their authority to the fullest extent.[21]

Deference remained the linchpin of judicial review until the late 1960s and early 1970s, when some courts, particularly the D.C. Circuit, began to subject agency action to much more stringent review. They did so in the wake of a legislative explosion that focused on the problems of consumers and the environment and at the behest of newly formed (or newly energized) public interest lawyers and legal advocacy groups. In *Calvert Cliffs' Coordinating Committee, Inc. v. AEC*,[22] decided in 1971, Judge Skelly Wright struck a blow for the burgeoning environmental movement when he promised that the court would

16. *See* Rabin, *supra* note 3, at 1266-71; Alfred C. Aman Jr., *Administrative Law in a Global Era: Progress, Deregulatory Change, and the Rise of the Administrative Presidency*, 73 CORNELL L. REV. 1101, 1109-31 (1988). For a discussion of changes on the Court after 1937, *see* BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 231-45 (1993).

17. *See, e.g.*, NLRB v. Hearst Pubs. Inc., 322 U.S. 111 (1944); *see generally* Aman, *supra* note 16, at 1120-25; LOUIS L. JAFFE, JUDICIAL CONTROL OF AGENCY ACTION 575 (1965).

18. The legal right approach is evident in *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940) and *Alabama Power Co. v. Ickes*, 302 U.S. 464 (1938). The Court basically retained the legal right test until its decision in *Association of Data Processing Service Orgs. v. Camp*, 397 U.S. 150 (1970), where it held that the APA granted standing to anyone who could demonstrate injury in fact and an interest within the zone of interests Congress had sought to protect in the applicable statute. For an overview of the Court's approach to standing in administrative law cases during the period, *see* 3 DAVIS & PIERCE, *supra* note 8, at § 16; Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1434-42 (1988).

19. 332 U.S. 194 (1947).

20. *Id.* at 203.

21. A prime example is *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954), where the Court held that the Federal Power Commission had jurisdiction under the Natural Gas Act to review the rates charged by a company that did not itself sell gas in interstate commerce but instead sold gas to interstate pipeline companies, even though the Commission had come to the conclusion that it did not have such jurisdiction. *See id.* at 685. *See generally* Aman, *supra* note 16, at 1121-25.

22. 449 F.2d 1109 (D.C. Cir. 1971).

insist that agencies fully implement the National Environmental Policy Act[23] requirement that every major federal action be preceded by an environmental impact statement.[24] The D.C. Circuit not only scrutinized agency adherence to congressional mandates, but also infused the procedural requirements of the APA with new life, creating in the process a new form of rulemaking, termed "hybrid rulemaking." Hybrid rulemaking fell somewhere between formal and informal rulemaking in terms of the strictness of its procedural requirements, and frequently consisted of combining informal rulemaking procedures with the requirement that the agency permit cross-examination.[25] In *Portland Cement Ass'n v. Ruckelshaus*,[26] Judge Harold Leventhal held that under the APA's notice and comment requirements an agency must provide notice of the data on which a proposed rule is based and must respond to public comments.[27] Sometimes the court mandated procedures that it acknowledged went beyond those required by the APA. For example, in *Kennecott Copper Corp. v. EPA*[28] Judge Leventhal ruled that an agency must supply a sufficiently detailed statement of the basis and purpose for a rule to allow the courts to determine whether the agency had made a reasoned decision, even though the APA itself only required a concise and general statement.[29] Indeed, a well-publicized debate between Judges Bazelon and Leventhal titillated academics and administrative lawyers of the time; Judge Bazelon argued that courts should limit themselves to insuring that the agency procedures were designed to elicit the necessary information for an informed agency decision, and Judge Leventhal maintained that courts must go beyond procedures to ensure that agencies had taken a "hard look" at all sides of the substantive issue if they were to perform their judicial review activities adequately.[30]

What happened in this 1960s-70s period to diminish judicial deference? There was, of course, the dramatic increase already mentioned in the number and scope of regulatory statutes emanating from the environmental and consumer movements so prominent in these years. Between 1966 and 1981, "Congress enacted 182 regulatory statutes and created 24 new regulatory agencies . . . compared with 58 statutes and 8 new agencies between 1946 and 1965."[31] These new laws expanded and redirected the country's regulatory agenda, typically contained more specific directives to implementing agencies than earlier

23. National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83. Stat. 852 (1970).

24. *See Calvert Cliffs'*, 449 F.2d at 1110.

25. *See* 1 DAVIS & PIERCE, *supra* note 8, at § 7.8; Antonin Scalia, Vermont Yankee: *The APA, The D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 348-52; Stephen F. Williams, *"Hybrid Rulemaking" Under the Administrative Procedure Act: A Legal and Empirical Analysis*, 42 U. CHI. L. REV. 401 (1975).

26. 486 F.2d 375 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974).

27. *See id.* at 392-94.

28. 462 F.2d 846 (D.C. Cir. 1972).

29. *See id.* at 849-50.

30. *Compare* International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 650-51 (D.C. Cir. 1973) (Bazelon, J., concurring) *with* Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 394 (D.C. Cir. 1973) (Leventhal, J., writing for the court).

31. *See* Aman, *supra* note 16, at 1134 (quoting WEST & COOPER, THE RISE OF ADMINISTRATIVE CLEARANCE IN THE PRESIDENCY AND PUBLIC POLICY MAKING 192, 207-208 (G. Edwards II et al. eds., 1985)).

legislation and in some cases employed "citizen suit" provisions that allowed any person to sue agency administrators to force them to perform statutorily required duties.[32] This period was also characterized by a growing skepticism towards established bureaucracies based on the theory of "agency capture," which posited that agencies over time tended to pursue the interests of the industries they regulated and not the general public interest, since the regulated industries had far better access and opportunity to influence agency decisions in their favor. Repeated instances in which agencies acted to protect regulated industries, such as the Interstate Commerce Commission's (ICC) protection of the existing common carriers against new entrants to the motor freight industry, made courts wary of agency motivations and unwilling any longer to accept their rationales on faith.[33] Not to be overlooked as well was the emergence of judicial activism, from the level of the Supreme Court down, in recognizing fundamental individual rights in the Constitution and in protecting members of disadvantaged and discriminated against groups, such as minorities, women, and the disabled. The judicial tenor of the times did not leave the field of administrative law untouched.[34]

The Supreme Court initially indicated its support for reviewing courts' enhanced scrutiny of agency decisions in 1971 in *Citizens to Preserve Overton Park v. Volpe*,[35] where the Court overturned the Secretary of Transportation's decision to finance a highway that would run through Overton Park, a 342 acre park near the heart of Memphis, on the grounds that the statute providing funds for highway construction gave paramount importance to protecting parkland as opposed to minimizing cost and disruption.[36] The Court next resolved the Bazelon-Leventhal controversy over how enhanced judicial review should be conducted. In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*,[37] decided in 1978, the Court sided with Judge Leventhal and told courts not to expand procedural requirements beyond those provided in the statute being implemented or in the APA.[38]

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32. The Clean Air Act is an example:

> [T]he Clean Air Act, which by 1977 had expanded to cover almost 200 pages, specifies which industries must comply with emissions limitations by 1977, which by 1979, and which by 1981; that the levels of sulfur dioxide in the air over national parks increase by only two micrograms per cubic meter over 1977 levels; and that cars produced in 1981 can emit no more than one gram of nitrogen oxides per mile.

R. SHEP MELNICK, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT 7-8 (1983) [hereinafter MELNICK, REGULATION AND THE COURTS]. The Clean Air Act also contains a broad citizen suit provision. *See* 42 U.S.C. § 7604 (1988).

33. *See* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1681-88, 1713-15 (1975); Robert Glicksman & Christopher H. Schroeder, *EPA and the Courts: Twenty Years of Law and Politics*, 54 LAW & CONTEMP. PROBS., Autumn 1991, at 249, 264-68. For discussions of agency capture at the ICC, *see generally* ROBERT C. FELLMETH, THE INTERSTATE COMMERCE OMISSION: THE PUBLIC INTEREST AND THE ICC (1970); LAWRENCE S. ROTHENBERG, REGULATION, ORGANIZATIONS, AND POLITICS: MOTOR FREIGHT POLICY AT THE INTERSTATE COMMERCE COMMISSION (1994).

34. *See* Aman, *supra* note 16, at 1131-35, 1149-53; *see also* Glicksman & Schroeder, *supra* note 33, at 268-72 (arguing that expanded judicial review in environmental cases reflected a judicial perception of a significant public commitment to environmental protection).

35. 401 U.S. 402 (1971).

36. *See id.* at 411-13, 419-20.

37. 435 U.S. 519 (1978).

38. *See id.* at 540-49. The issue in *Vermont Yankee* was whether the Atomic Energy Commission had to

Later, in *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Auto Insurance Co.*,[39] the Court explicitly adopted Judge Leventhal's "hard look" doctrine as the means by which a reviewing court should determine if agency reasoning is "arbitrary and capricious," but emphasized that the court must always be careful not to substitute its judgment for the agency's.[40] According to the Court, an agency's decision could be arbitrary and capricious under the hard look doctrine if the agency did not consider all relevant factors or considered factors that Congress deemed irrelevant, offered an explanation that ran counter to the evidence or was too implausible, or failed to offer an explanation at all.[41] Interestingly, the Court refused to differentiate between regulatory and deregulatory agency actions in terms of the standards for judicial review; even though *State Farm* concerned an agency decision to deregulate — specifically a NHTSA decision to rescind an existing regulation requiring passive restraint systems in new cars — the agency still had to provide a "reasoned explanation" for its actions.[42] In the mid-eighties, in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[43] the Court adopted a more pro-agency stance for reviewing an agency's interpretation of a statute it is charged with administering. Under the *Chevron* two-step approach, a court must first determine whether Congress has spoken to the precise question at issue and if so, ensure that congressional intent prevails; but if Congress has not spoken precisely, the court asks only if the interpretation offered by the agency is a permissible one and not whether the agency's interpretation is the most plausible one or the one that the court itself would choose.[44] Finally, in 1985 the Court in *Heckler v. Chaney*[45] held that certain agency decisions *not* to act, namely non-enforcement decisions, should be presumptively unreviewable.[46]

The *State Farm-Chevron-Chaney* trilogy continues to this day as the backbone of contemporary judicial review of agency action, although the Supreme Court's simultaneous move in the 1980's to a more textualist mode of statutory interpretation has subtly contracted the effect of *Chevron*.[47] The three cases all aim to marry the requirement of scrutiny with due deference but utilize quite different methods of doing so. *State Farm* — which originated in an era where

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allow cross-examination of witnesses during an informal rulemaking. Although the Supreme Court struck down judicial attempts to fashion new agency procedures, the expanded understanding of the procedural requirements of the APA enunciated in *Portland Cement* and *Kennecott Copper* continue to this day.

39. 463 U.S. 29 (1983).

40. *See id.* at 43.

41. *See id.*; *see also* Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 532-34, 553-61 (1985).

42. *See State Farm*, 463 U.S. at 42; *see also* Garland, *supra* note 41.

43. 467 U.S. 837 (1984).

44. *See id.* at 842-43.

45. 470 U.S. 821 (1985).

46. *See id.* at 832-33.

47. *See generally* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 900-93 (1992); Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749 (1995) [hereinafter Pierce, *Hypertextualism*]; Peter L. Strauss, *On Resegregating the Worlds of Statute and Common Law*, 1994 SUP. CT. REV. 429 (1994).

courts were encouraged to make administrators toe the line—gives a bare nod to deference by admonishing courts to practice judicial self-restraint. *Chevron* attempts to structure judicial deference in a hierarchial fashion — Congress first, then the agency, with the courts on the lowest tier. *Chaney* takes the more radical approach of removing certain agency decisions from judicial review altogether. However, it is not clear that any of these approaches has fully succeeded in balancing deference and scrutiny; *State Farm* and *Chevron* step one leave ample room for intrusive review, whereas *Chaney* errs in the opposite direction. More recently, the Court appears to be receptive to expanding the *Chaney* approach in other areas, such as standing and ripeness, as witnessed by its decisions in *Lujan v. Defenders of Wildlife*[48] and *Reno v. Catholic Social Services, Inc.*[49] But the Court has also on occasion deviated from this approach of limiting the opportunities for judicial review, as for example in *Darby v. Cisneros*,[50] when it held that the APA only requires petitioners to exhaust available administrative remedies if the relevant statute or agency rules mandate exhaustion.[51] These mixed signals given from on high may account for the alleged inconsistency in the lower courts' review standards that is the scourge of so many academics and practitioners.

It is not just judicial attitudes toward deference to agencies that have fluctuated over the fifty years of the APA. Academic commentary on judicial review of agency action has undergone its own metamorphosis. Initially, many administrative law scholars viewed the rebirth of judicial scrutiny as a means of counteracting agency capture and improving agency decisions.[52] But in the 1980s criticism surfaced that too-strict judicial review was paralyzing agencies by imposing unrealistic demands on what kind of support they must provide for their decisions and by forcing reallocation of agency resources to deal with a plethora of legal challenges.[53] Commentators in favor of deference revived the old argument that judges lacked the specialized knowledge or understanding of

48. 504 U.S. 555 (1992).

49. 509 U.S. 43 (1993).

50. 509 U.S. 137 (1993).

51. *See id.* at 146-47. Moreover, in *Gutierrez de Martinez v. Lamagno*, 115 S. Ct. 2227 (1995), the Court indicated its continued adherence to the principle that agency action is presumptively reviewable. *See id.* at 2231.

52. *See* William F. Pedersen, Jr., *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 59-60 (1975); Richard B. Stewart, *The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decisionmaking: Lessons from the Clean Air Act*, 62 IOWA L. REV. 713, 727-40, 762-69 (1977); *see also* BRUCE ACKERMAN & WILLIAM T. HASSLER, CLEAN COAL/DIRTY AIR 104-15 (1981) (judicial review can have beneficial effects by ensuring a full and focused airing of options before policy decisions are made, but courts should avoid expanding procedural requirements); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 59-75 (1985) (arguing that the move to enhanced judicial scrutiny was intended to ensure that agency decisions result from deliberation and not interest group politics and advocating an expansion of judicial review).

53. *See* MELNICK, REGULATION AND THE COURTS, *supra* note 32, at 343-93 (effects of judicial review on the Clean Air Act); Loren A. Smith, *Judicialization: The Twilight of Administrative Law*, 1985 DUKE L.J. 427 (criticizing the hard look doctrine as hiding the political nature of administrative decisions); Richard B. Stewart, *The Discontents of Legalism: Interest Group Relations in Administrative Regulation*, 1985 WIS. L. REV. 655, 666-82 (judicial review has led to an increase in administrative litigation and wasted resources); *see generally* R. Shep Melnick, *Administrative Law and Bureaucratic Reality*, 44 ADMIN. L. REV. 245 (1992) (describing effects of judicial review).

the technical matters involved in regulation and that in some cases they were superimposing their own legislative priorities through the guise of review and usurping the policy-setting role that Congress had delegated to the agencies.[54] Empirical studies have focused on unintentional consequences of strict judicial review in encouraging agencies to substitute adjudication or policy statements and directives for legislative rulemaking, since adjudications are more likely to be upheld on review and consume fewer resources, and policy directives are not reviewed as strictly as binding rules. These alternatives, of course, decrease opportunities for outside groups to participate in policy formation.[55]

All commentators are not, however, universally on board with these criticisms of judicial review. Many still adhere to the 1970s attitude that court scrutiny should be tough to assure fidelity to Congressional intent and protect statutory frameworks.[56] Indeed, even conservatives who deplore regulation look to the courts for solace. A bill proposed in the 104th Congress would have expanded the court's reviewing responsibilities to include new and complex analysis of the costs and benefits of regulation.[57] Similar attempts have been made in the past, most notably the Bumper Amendment which would have subjected agency interpretations of laws to *de novo* judicial review.[58]

So what, if anything, have we learned from fifty years of judicial review under the APA? The contours of the debate about the appropriate role and scope of judicial review are remarkably unchanged. The concerns that animate that debate — the desire for a check on agency absolutism or arrogance and a

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54. *See* Richard J. Pierce, Jr., *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 DUKE L.J. 300, 303-04 (1988) [hereinafter Pierce, *Two Problems*]; Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 383-94 (1986).

55. *See* CARNEGIE COMM'N ON SCIENCE, TECHNOLOGY, & GOV'T, RISK AND THE ENVIRONMENT: IMPROVING REGULATORY DECISIONMAKING 106-09 (1993); Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidelines and the Like—Should Federal Agencies Use Them to Bind the Public?*, 1992 DUKE L.J. 1311; Jerry L. Mashaw & David L. Harfst, *Regulation & Legal Culture: The Case of Motor Vehicle Safety*, 4 YALE J. ON REG. 257, 276-289, 293-99, 302-09 (1987); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 1992 DUKE L.J. 1385; Richard J. Pierce, Jr., *The Unintended Effects of Judicial Review of Agency Rules: How Federal Courts Have Contributed to the Electricity Crisis of the 1990s*, 43 ADMIN. L. REV. 7, 20-29 (1991) [hereinafter Pierce, *Unintended Effects*]; *see generally* Patricia M. Wald, *Regulation at Risk: Are Courts Part of the Solution or Most of the Problem?*, 67 S. CAL. L. REV. 621, 625-29 (1994) (summarizing criticisms of the effect of judicial review on rulemaking).

56. *See, e.g.*, Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989); Mark Seidenfeld, Demystifying Deossification: A Comment on Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking (1996) (unpublished manuscript, on file with the *Tulsa Law Journal*); Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387; Cass R. Sunstein, *In Defense of the Hard Look: Judicial Activism and Administrative Law*, 7 HARV. J.L. & PUB. POL'Y 51 (1984).

57. *See* S. 343, H.R. 821, 104th Cong. (1995); *see also* Symposium, *Fiftieth Anniversary of the Administrative Procedure Act*, 48 ADMIN. L. REV. 309, 321-40, 350-54 (1996) (various comments on the regulatory reform proposals). In addition, the President signed legislation this past spring that delays adoption of rules with an annual cost of $100 million or more for sixty days to give Congress the opportunity to overrule the rule by means of a joint resolution of both houses. *See* Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 1996 U.S.C.C.A.N. (110 Stat.) 847; *see also* Pantelis Michalopoulos, *Holding Back Time to Hold Back Rules*, LEGIS. TIMES, May 13, 1996, at 25 (criticizing the new provisions).

58. *See* S. 1080, 97th Cong. (1982); *see also* Ronald M. Levin, Comment, *Review of "Jurisdictional" Issues Under the Bumpers Amendment*, 1983 DUKE L.J. 355 (criticizing Bumpers Amendment).

means of insuring that laws are actually carried out as intended — are still pitted against a deep-seated conviction, rooted in our constitutional format of separation of powers, that the courts should not take control of public policy from the two political branches.[59] This may result in an unavoidable and irreducible tension inherent in any attempt to accommodate deference and scrutiny in the same jurisprudential doctrine. At different periods, one goal trumps the other, and usually the winner reflects forces outside the boundaries of the law, the government or the courthouse. In an era where groups were demanding and getting legislative and political attention denied them for centuries, laws passed on their behalf could be expected to receive close attention from the courts as to the faithfulness of their implementation. In an era where the integrity of government was for a time subjected to intense criticism, it was almost inevitable that courts looked hard at decisions made by that government and its agencies. Later on, in an era where regulation was billed politically as the problem and not the solution and widespread moves toward deregulation were made in other branches, it should not have been surprising that the Supreme Court reasserted the need for courts to let agencies adjust their implementation of old statutes, so long as the precise text was not violated, and adopted a similar hands-off approach regarding their allocations of limited resources. Now, as the courts are more in line philosophically with the legislative branch — at least temporarily — that branch proposes enlarging the scope of judicial review to ensure that the agencies perform new tasks required before they can regulate. It is perhaps the wonder, or maybe the impossible mission, of a single tersely worded law like the APA's section 706 that it remains the source of all this activity and the changing hue of judicial review.

But some dramatic alteration in the semantics of the fifty-year-old APA or in the judicial approach toward review, even in the structure of reviewing courts, is always on the table. Over the years, for instance, there have been many proposals for the creation of specialized administrative courts patterned after the Federal Circuit, or for consolidating all major administrative cases in one court, usually the D.C. Circuit.[60] I have serious doubts about the practicality and wisdom of this approach. In the first place, how specialized could any court be, given the hundreds of agencies that are currently reviewed? Certainly we could not tolerate a court for every one of them — yet what would be gained over the present system by concentrating administrative cases from all these agencies in one court? Secondly, in my experience judges who come to

59. Interestingly, other countries may not share our fear of policy formation by a politically unaccountable branch, or fear this less than other outcomes, such as corrupt and ineffective agencies. For example, the Supreme Court of India has recently taken an extremely activist role in environmental clean up and corruption investigations. *See* Peter Waldman, *India's Supreme Court Makes Rule of Law A Way of Governing*, WALL ST. J., May 6, 1996, at A1, A8.

60. *See* Thomas E. Baker & Douglas D. MacFarland, *The Need for a New National Court*, 100 HARV. L. REV. 1400, 1410-16 (1987); James A. Martin, *The Proposed "Science Court,"* 75 MICH. L. REV. 1057 (1977); *see generally* Harold H. Bruff, *Coordinating Judicial Review in Administrative Law*, 39 UCLA L. REV. 1193, 1221-48 (1992) (describing and critiquing various proposals for specialized courts and advocating the creation of a national panel to allocate en banc review of appellate decisions to particular circuits).

the bench equipped with specialized prior knowledge in a field are apt to dominate internal panel discussions, and in many cases definitely tilt toward their prize theories and even endeavor to get them translated into law. I predict it would be harder for a specialized court made up of such experienced administrators to preserve an appropriately impartial or deferential approach towards the agencies it oversees than for the generalist courts we now use.[61]

A more radical suggestion, but one which has from time to time been made, would be to dispense with judicial review altogether, leaving the only review of agency action that which is performed by the agencies themselves, the Office of Management and Budget (OMB) or other executive branch officials.[62] One model for such an approach is the French system of limiting administrative review to the *Conseil d'Etat*, a specialized administrative tribunal located within the executive branch.[63] Again, even if this were politically feasible, the costs would far outweigh the benefits. It is true that judges can be, and sometimes have been, bulls in the agency china shops and perhaps on occasion have set back statutory goals. Yet, were there no review at all by an independent third branch, it seems hard to believe that agencies would be self-restrained enough — especially where impacts on important political constituencies are involved — to faithfully follow congressional intent in implementing a law of which they did not approve, or that, even if the agency stayed faithful, White House officials would not succumb to interpretive temptation. Certainly, close calls would likely be made on political grounds. Moreover, if the judges were not there to listen, critics of agency actions would not themselves invest in bringing errors and challenges to the attention of the agency personnel as often as they now do, and the agency product itself might not reflect the best compromise possible.[64]

Solving the conundrum of successfully merging deference and vigilance may have to continue to rely on fine tuning current doctrines and procedures for judicial review. As we judges become more familiar with particular agencies and statutory programs over time and more aware of the effects that both overstrict and overindulgent review can have on their activities, the quality of our decisions should rise, and on balance, I think it has.[65] Judicial review is and

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61. *See* Patricia M. Wald, *Making "Informed" Decisions on the D.C. Circuit*, 50 GEO. WASH. L. REV. 135, 149-50 (1982); *but see* Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 38 U. PA. L. REV. 111, 1139-53 (1989) (arguing that specialized courts will be biased in favor of the agency).

62. Currently, the only formal extra-agency executive branch review that occurs is the analysis of major rules conducted by the Office of Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB). *See* Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (1993); Wald, *Regulation at Risk*, *supra* note 55, at 629-32; Alan Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059, 1062-71 (1986).

63. For a suggestion on how aspects of the French system could be incorporated in the United States, *see* STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 55-81 (1993).

64. *See* Pedersen, *supra* note 52, at 59-60; Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 87-93 (1995) [hereinafter Pierce, *Seven Ways*].

65. Such familiarity has beneficial effects in a variety of ways. Most obviously, as we hear more and more challenges to a particular statute we gradually clarify the major questions regarding its meaning and purpose, and thus our decisions in future cases challenging the agency's application of the statute become more predictable. In addition, we gain a sense of how certain agencies operate and how they respond to our

always will be an art, not a science. Still, however, there is room for improvement, and with this in mind I turn now to an examination of how judicial review is faring in the D.C. Circuit.

II. THE PRESENT

At the present time, the federal courts dispose of about 3,300 agency appeals a year, over 20% of them in the D.C. Circuit.[66] Agency appeals currently consume 45% of the D.C. Circuit's docket.[67] In the course of a year, we publish on average 137 full-scale opinions on agency adjudications or rulemakings, and many more unpublished judgments.[68] And the percentage of instances in which we send the agency decision or rule back for retooling stays roughly the same, 22%, during regulatory expansion or deregulation, during downsizing and regulatory "reform," and across the spectrum of regulatory philosophies, administrations and judges.[69]

To probe beneath these general statistics, I propose to examine three categories of administrative law decisions which reflect the *State Farm-Chevron-Chaney* trilogy: arbitrary and capricious review, statutory interpretation, and access to judicial review.[70] Of the 131 administrative law opinions that the

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decisions. For example, in *Charlotte Amphitheater Corp. v. NLRB*, 82 F.3d 1074 (D.C. Cir. 1996), we voiced our frustration with the NLRB's refusal to adhere to our rulings regarding the need to assess the appropriateness of a bargaining order at the time it is issued. Judge Buckley remarked, "[G]iven the changes in its own membership, it may well be that the Board is devoid of an institutional memory; but this court is not. Perhaps it believes it can wear us down; after more than twenty years, it should have learned that it cannot." *Id.* at 1079.

66. *See* ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE U.S. COURTS: 1995 REPORT OF THE DIRECTOR 87 tbl.B-1 [hereinafter U.S. COURTS 1995 REPORT] (D.C. Circuit disposed of 661 of the 3,264 agency appeals terminated during twelve-month period ending September 30, 1995). In addition, 19% of new agency appeals are commenced in the D.C. Circuit. *See id.* (617 of 3,295 new agency cases commenced in D.C. Circuit for twelve month period ending September 30, 1995). The percentage of agency appeals handled by the D.C. Circuit increases when pending cases are examined, since 37% of pending agency appeals are in the D.C. Circuit and agency appeals represent 57% of the D.C. Circuit's pending caseload. *See id.* (1,226 of 3,324 pending agency appeals as of September 30, 1995 are in the D.C. Circuit); *see also* 1995 REPORT: U.S. COURTS FOR THE D.C. CIRCUIT 41 [hereinafter D.C. CIRCUIT 1995 REPORT] (D.C. Circuit disposes of 37% of all administrative agency proceedings in federal courts and direct review of administrative agency proceedings represented 57% of the D.C. Circuit's pending caseload in 1995). Although agency appeals continue to make up a substantial percentage of the D.C. Circuit's docket, the number of agency cases filed with the circuit has declined significantly in recent years. *See* Bruce D. Brown, *Agency Appeals in Decline: D.C. Circuit's Workload Faces New Scrutiny*, LEGAL TIMES, Nov. 25, 1996, at 1, 6.

67. *See* U.S. COURTS 1995 REPORT, *supra* note 66, at 98 tbl.B-3. In some years, such as 1994, agency appeals represented above 50% of the D.C. Circuit's docket. *See* D.C. CIRCUIT 1995 REPORT, *supra* note 66, at 41 (agency appeals represented 58% of D.C. Circuit pending caseload in 1994 and 57% in 1995).

68. According to my count, we published 132 opinions in agency appeals in 1993, 145 in 1994 and 135 in 1995. For a description of my methodology in determining the number of agency cases each year, *see infra* note 70. The Office of the Circuit Executive of the D.C. Circuit began to keep track of the number of published decisions by type of case in September, 1994. According to the Circuit Executive's data, we published 118 opinions in agency cases during the 1994-95 term, from September 1, 1994 through August 31, 1995.

69. *See* U.S. COURTS 1995 REPORT, *supra* note 65, at 110 tbl.B-5 (out of total of 165 agency cases terminated on the merits, thirty-seven were reversed, and eight remanded).

70. The data on administrative cases used in this article come from a survey I conducted, and some comments on my methodology are necessary. I excluded all unpublished opinions, Freedom of Information Act (FOIA) cases and cases involving statutes that are either not unique to government, such as Title VII of the Civil Rights Act of 1964, or not administered by agencies, such as the Federal Tort Claims Act. This produced a pool of 135 agency appeal cases. Often, however, a single case will raise several different issues;

Court issued in 1995, the vast majority, 111 or 85%, raised at least one of these three issues. While much about the judicial approach to these three aspects of judicial review is similar, each presents its own particular set of problems and has been the arena for specific doctrinal developments under the APA.

A. Are We Arbitrary and Capricious About "Arbitrary and Capricious"?

Section 706 of the APA says the reviewing court shall hold unlawful and set aside "agency action . . . found to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law."[71] As *State Farm* indicated, the basis for a holding of arbitrary and capricious agency action is that the agency failed to engage in reasoned decisionmaking.[72] "Arbitrary and capricious" has turned out to be the catch-all label for attacks on the agency's rationale, its completeness or logic, in cases where no misinterpretation of the statute, constitutional issues or lack of evidence in the record to support key find-

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for example, a petitioner may challenge both an agency's interpretation of a statute, which triggers *Chevron* review, and the agency's application of that statute to the petitioner, which triggers arbitrary and capricious review. In my survey, 219 issues were raised in the pool of 135 cases. In calculating percentages, I used the following formula: (number of times a particular issue was raised)/(number of agency cases = 135). As a result, the percentages for how often different types of issues were raised do not add up to 100%.

I do not discuss two major areas of agency appeals apart from arbitrary and capricious review, statutory interpretation and access to judicial review. These two areas are procedural challenges and substantial evidence challenges. As discussed in Part I, disagreement over what procedures agencies must use prefigured in agency cases in the late 1960s and 1970s. Although we continue to hear challenges to agency procedures — procedural challenges were raised in thirteen of our agency case sample of 135, or 10% of cases — such procedural debates for the most part faded into the background after the Supreme Court's decision in *Vermont Yankee*. Our contemporary disagreements over agency procedures are usually not over what the legal rule should be regarding an aspect of agency procedure, but rather how the existing rules should be applied in a particular case. For example, the rule for when notice and comment are required is well established — they must be provided when the rule being issued is a legislative rule as opposed to an interpretive rule or a policy statement. *See* McClouth Steel Prods. v. EPA, 838 F.2d 1317, 1319-22 (D.C. Cir. 1988). But determining whether a rule is legislative or interpretive can sometimes be tricky. *See, e.g.*, American Mining Cong. v. MSHA, 995 F.2d 1106, 1108 (D.C. Cir. 1993). One exception to this general agreement on procedural requirements concerns when an agency must hold an evidentiary hearing and when a "paper hearing," without live testimony or cross-examination, will suffice. In general, the occasions where an evidentiary hearing is required seem to be steadily diminishing. *See, e.g.*, SBC Communications, Inc. v. FCC, 56 F.3d 1484, 1496-97 (D.C. Cir. 1995) (full evidentiary hearing not required where agency compiled extensive record and disputed factual issues concerned what legal and economic conclusions agency should draw).

Substantial evidence challenges were raised in eighteen, or 13%, of the pool of 135 cases. The main arenas for substantial evidence challenges are NLRB and OSHA cases, but we also receive substantial evidence challenges in FERC adjudications and other formal hearings. Again, in the early days of the APA much ink was spilled on distinguishing substantial evidence review from arbitrary and capricious review, but the consensus in recent years is that they are one and the same. *See* Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951); Association of Data Processing Serv. Orgs. v. Board of Governors, 745 F.2d 677, 684 (D.C. Cir. 1984). Substantial evidence review has become further intertwined with arbitrary and capricious review because substantial evidence challenges are often coupled with attacks on the reasoning framework into which evidence is poured, and the arbitrary and capricious standard applies to such attacks on agency reasoning. To the extent there has been any significant development in substantial evidence review in recent years, it has been in regard to the application of the substantial evidence standard in NLRB cases. There is significant divergence among judges as to what constitutes substantial evidence, and a case that is slated for *en banc* review next term, *Diamond Walnut v. NLRB*, is indicative of the controversy. *See* 88 F.3d 1064 (D.C. Cir. 1996) (vacating panel opinion and ordering rehearing *en banc*).

71. 5 U.S.C. § 706(2)(A) (1994).

72. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983); *see also* Greater Boston Television Corp. v. FCC, 444 F.2d 841, 850-51 (D.C. Cir. 1970) (Leventhal, J.) (coining phrase "hard look" review).

ings is alleged. Frequently the arbitrary and capricious charge is grounded on the complaint that the agency has departed from its prior rationale in other cases without admitting it or explaining why.[73] Sometimes the agency is rebuffed because it did not give adequate consideration to an alternative solution.[74] But most often the court simply finds the agency's explanation for what it is doing "inadequate."[75] (The same rubric also covers cases where the challenge is to an agency's interpretation of its own regulations.[76]) In a surprising number of cases, the court is most frustrated about the agency's failure to communicate any reason for taking certain actions. For example, in *United Transportation Union v. ICC*,[77] a frustrated court held forth on its inability to discern the rationale for the Commission's jurisdictional determination: "We do not understand — and the Commission did not explain"; "It is not clear why"; "[T]he Commission has some explaining to do"; "[W]e are completely in the dark about the Commission's reasoning on this subject."[78]

The claim that an agency failed to engage in reasoned decisionmaking is the most frequent cause for overturning agency action in the D.C. Circuit. In my survey universe of 135 cases, sixty-two cases, or 46%, involved such challenges. We sent twenty-six back to the agency to fix up the rationale, compared with thirteen remands for misinterpretation of the statute, two remands for procedural problems and eight remands for absence of substantial evidence in the record. For all our frenetic activity in this area, the so-called "inadequate explanation" is still difficult to quantify or even explicate. If a judge on reflection finds that some material aspect of the agency's rationale doesn't seem to make sense or seems inconsistent with another part of the decision, or if she simply finds an omission of some important consideration and can convince a second judge, that is enough.

The acknowledged impossibility of specifying the components of "adequate explanation" inevitably leaves courts open to the charge that the results of our review are inconsistent and reflect the political or philosophical preferences of the judges on the panel rather than any objective standard.[79] The fact that we scour long records and sift through very dense and technical material in order to determine if an agency has successfully justified its decision yields a secondary complaint that we lack the ability to assess the significance of different factors in the agency's decisional calculus or understand how the agency's decision will play out in practice.[80] Actually, as I have previously commented,

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73. *See, e.g.*, Trans Union Corp. v. FTC, 81 F.3d 228, 232 (D.C. Cir. 1996).

74. *See, e.g.*, Achenar Broad. Co. v. FCC, 62 F.3d 1441, 1447 (D.C. Cir. 1995).

75. *See, e.g.*, Mobile Communications Corp. v. FCC, 77 F.3d 1399, 1406-07 (D.C. Cir. 1996).

76. *See, e.g.*, S.G. Loewendick & Sons, Inc. v. Reich, 70 F.3d 1291 (D.C. Cir. 1995).

77. 52 F.3d 1074 (D.C. Cir. 1995).

78. *See id.* at 1078-79; *see also* Oil, Chem., & Atomic Workers v. NLRB, 46 F.3d 82, 88 (D.C. Cir. 1995) (Board's position "unfathomable").

79. *See, e.g.*, Pierce, *Two Problems*, *supra* note 54; *but see* Harry T. Edwards, *Public Misperceptions Concerning the "Politics" of Judging: Dispelling Some Myths About the D.C. Circuit*, 56 U. COLO. L. REV. 619 (1985).

80. *See, e.g.*, Richard J. Pierce, *Unruly Judicial Review of Rulemaking*, NAT. RESOURCES & ENV'T, Fall 1990, at 23, 24 (courts possess a "remarkable instinct for the capillary").

I think our results and reasons are more consistent and less personal than our critics admit.[81] I also believe that, on the whole, we do relatively well in grasping the basic underlying issues despite filtering them through the quite differently calibrated lens of opposing counsel and a mission-oriented agency. Yet there is certainly some merit in the oft-heard complaint that different judges consider different factors significant or important enough to corrode a rationale and that circumstance not only prevents our decision in any particular case from offering much general guidance to agencies, but worse still, can force agencies to devote excessive time to marginal considerations they think unimportant in the fear that one or two judges might disagree. Moreover, we do occasionally get wrong the mechanics of what is actually going on in the real world transactions being regulated, and that kind of misunderstanding can lead to a badly skewed decision.

My main suggestion for rectifying these problems of rationale inadequacy is a deceptively simple one: agencies should focus more on the importance of basic communication skills, using simple English whenever possible to explain what the underlying dispute is (supplemented by graphs, charts, and pictures when helpful) and why they have acted as they have to resolve it. Because administrative law cuts across so many substantive areas and involves so many different factual scenarios, I sense that precedent is not of as much importance in agency cases as in other legal areas. It is more the power of the agency to persuade judges it has done right in a given case, to pacify their fears and doubts, that counts. Given the arcane subject matter of agency appeals in the D.C. Circuit — permissible amounts of hazardous chemicals in the air, required distances between broadcasting antennas, legitimate changes in utility rate base — the need for explanations and rationales in simple English is particularly acute. This need to communicate should be on regulators' minds from the first moment they take up a problem, and they should constantly remind themselves that one day they will be defending their actions, no matter how specialized or partaking of expertise, before a panel of three generalists. It will not be enough that the agency's lawyers then talk a good line; it will be necessary that the agency itself has described in its own decision what it is doing and why, in a way that will be clear to the judicial reviewers. When agency heads write or approve their final decision or publish the Statement of Basis and Purpose for an agency rule, that is where a cogent explanation must be presented of why they did this and not that, why they found this evidence convincing and that not, why they considered this problem important or not, how they regarded this comment and why they rejected that one. Over the years, several agencies claimed to be schooling their lawyers (and more importantly, opinion writers) in this skill, but in all honesty I have not seen any quantum leaps yet, and I remain convinced that a large proportion of agency reversals turn on this elementary level of communication.

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81. *See* Wald, *Regulation at Risk*, *supra* note 55, at 645-46.

Much can also be done by altering the procedures used in agency appeals. When an agency rule is remanded because of a faulty explanation, the court is faced with the choice of whether to vacate the rule until an adequate explanation is forthcoming or leave it in place until the new rationale comes up again for review.[82] Whether the latter is a legitimate course of conduct for the court to take is still an unsettled question in our Circuit. One side argues that section 706 of the APA compels the court to vacate any regulation that it finds to be arbitrary and capricious.[83] The other side, myself included, believes that there are inherent powers in a reviewing court to postpone vacation until the agency has a chance to make things right. In many cases the agency, following the compass points of the court's opinion, can fill in the needed rationale on the second go-round and automatic vacation would be disruptive and wasteful in the meantime.[84] So far, the wait-and-see *modus operandi* appears in the lead as a further nod to agency control by the courts.[85] I have also advocated, so far unsuccessfully, that we alter our current practice of treating remands as terminated cases with the result that second-time-round challenges to a reconstituted rationale do not come back to the same panel. This can mean that agencies that seek to accommodate their new rationale to the concerns of one panel will meet new and different concerns when they appear again before a different set of judges. While adopting this approach would impose administrative burdens on the court in terms of reassembling old panels off schedule, the effort would be worthwhile to help ensure that agencies get clearer and more consistent guidance when we do reject their original rationale on review.[86]

Judicial review has been excoriated for the delay it causes before the legality of a ruling is secure. With the advent of crowded appellate dockets this may be a real problem, although most agency decisions go into effect on issuance with stays limited to situations where harms for the decision would be irreparable to the injured party even if the decision were later reversed. Although the D.C. Circuit has not suffered the steep escalation in appeals of several other

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82. *See, e.g.*, Allied-Signal, Inc. v. NRC, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (whether inadequately supported rule should be vacated depends on seriousness of problems in reasoning, and extent of disruption interim change would cause); *see also* Ronald M. Levin, *"Vacation" at Sea: Judicial Remands and the APA*, 21 ADMIN. & REG. L. NEWS, Spring 1996, at 4 (discussing D.C. Circuit procedure of remand without vacating); Pierce, *Seven Ways*, *supra* note 64, at 75-78.

83. *See, e.g.*, Checkosky v. SEC, 23 F.3d 452, 490-92 (D.C. Cir. 1994) (opinion of Randolph, J.) (arguing that the court does not have the authority to remand for a fuller statement of reasons without vacating).

84. *See, e.g.*, A.L. Pharma v. Shalala, 62 F.3d 1484, 1492 (D.C. Cir. 1995) (appropriate course is to remand without vacating); *see also* BB&L, Inc. v. NLRB, 52 F.3d 366, 372-73 (D.C. Cir. 1995) (Tatel, J., concurring in part and dissenting in part). There is also some dispute about how remand without vacating should be justified. *Compare Checkosky*, 23 F.3d at 462-66 (D.C. Cir. 1994) (opinion of Silberman, J.) (justifiable to remand without vacation if court finds inadequate reasoning because only if agency fails to supply adequate reasoning is agency action arbitrary and capricious) *with* Levin, *supra* note 82, at 4-5 (remand without vacating is justifiable even if court finds agency action arbitrary and capricious because power to do so is based on broad equitable discretion of federal courts).

85. The Council on the ABA Section of Administrative Law and Regulatory Practice adopted a resolution urging courts to follow the practice of remanding without vacating, unless special circumstances exist. The resolution has not yet been adopted by the ABA House of Delegates. *See* ABA Section of Administrative Law and Regulatory Practice: Report to the House of Delegates (February 1997).

86. *See* Wald, *Regulation at Risk*, *supra* note 55, at 640-41.

circuits, we have taken steps that may provide a model for producing decisions in agency cases more quickly. The two most significant developments operate at the opposite ends of the spectrum, for not so hard decisions and for extremely complex and multi-issue agency appeals. These procedural devices are not restricted to arbitrary and capricious review — often, for example, the complex cases present substantial *Chevron* issues. But their potential impact for mitigating the disruption caused by judicial review is probably greatest in the "arbitrary and capricious" area because that is the basis for the largest number of challenges on review.

1. The Two-Tiered Level of Review

When I first came on the court 17 years ago, it was virtually unheard of for an agency case to get summary treatment. By summary treatment I mean perusal by the special panel that sits for several months at a time and reviews cases on the briefs only (in truth usually on the bench memoranda prepared by staff counsel) — often dispensing with twenty or thirty a session by unpublished order and a short memorandum, not qualifying as circuit precedent. Several years ago, we began disposing of agency appeals in a summary fashion with some regularity, often briefed to the hilt by high-powered and high-priced counsel.[87] In practice, this means that a staff counsel has eyeballed the case and decided it has no serious issues and has written a memorandum saying so, and recommending a disposition. Although any of the judges can put the case back on the regular docket, it will almost surely go down the summary route, often to the consternation of the challenger's counsel and the delight of the agency.[88]

Thus it appears that we are approaching a two-tiered level of review for agency appeals, the last category of our cases to be disaggregated in this fashion. In my view, the time for this innovation has come. Although as in any summary procedure there is always an increased danger of missing a jewel in the haystack, enormous amounts of paper, eyesight, and billable hours have been traditionally wasted on virtually hopeless agency appeals.[89] To move the flow courts will inevitably have to consign the least worthy appeals, no matter how well outfitted in fancy dress, to a more cursory review.[90] It may be that a

87. This trend toward summary disposition is also evidenced by the issuance of orders instead of opinions even in argued cases. Witness a recent one-liner: "Affirmed substantially for the reasons given by the agency" in a case with 113 pages of briefing, a 291 page appendix and 30 minutes of argument. *See* Wisconsin Distribs. Corp. v. FERC, No. 95-1301, 1996 WL 250443, at *1 (D.C. Cir. April 24, 1996); *see also* Peter H. Schuck & E. Donald Elliot, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 999-1003, 1055-56 (describing the increased use of table decisions for administrative cases).

88. Agency cases can also be mediated in court-annexed mediation programs. Six or seven are handled by the D.C. Circuit's Appellate Mediation Program each year, usually — but not always — involving one-on-one proceedings. *See* Memorandum from Nancy Stanley, Director, Alternative Dispute Resolution Programs, D.C. Circuit (July 16, 1996) (on file with the *Tulsa Law Journal*).

89. I have always been particularly critical of intervenors' briefs, the majority of which say little if anything different from the agency's briefs. Any special input from the intervenor on the agency's side can usually be advanced in a few pages at most or kept for oral argument.

90. In the 1994-95 term, the average time from filing to termination in a summary track case was 242

curt one-liner or paragraph affirming an agency will make counsel stop and think before they launch the vast machinery of the appeal apparatus without any real chance of succeeding. For the present, they stand to risk embarrassment when the client inquires why it took several hundred billable hours to produce a one-line order.

2. The Rise of the Complex Case

It is my distinct impression that during my judicial tenure the number of complex administrative law cases has risen dramatically. I say this despite the fact that my longest opinion (maybe anyone's longest) was written in 1981, *Sierra Club v. Costle*,[91] affirming the EPA's new source power rules under the Clean Air Act — 280 pages in slip opinion form.[92] Nonetheless, that was a rarity for the period. In 1986 we created a special "complex" track for those cases where the number of issues and parties is so great that normal briefing cannot do the job. Cases that are appropriate for the complex track are identified either when petitions for review are filed or at screening, once the time for dispositive motions has expired. There is no set formula for when a case must go on the complex track; instead the decision is based on the number of petitions for review that have been filed and consolidated in regard to a particular agency action, the size of the agency record, and the number and technical or complicated nature of the issues presented. Another relevant factor relates to the number of cases already on our complex track docket. Complex track cases are a chore over and above a D.C. Circuit judge's regular docket and judges expect to be saddled with only one or two per year. Consequently, cases on the borderline are given a regular briefing schedule but not assigned to a special panel in the hope that the complex track will prove unnecessary, either because the parties settle or because on post-briefing review the issues raised by the different petitioners will prove separable from one another and thus will not require consolidated treatment. Not surprisingly, the agency appeals slotted for complex track procedure have most frequently been appeals of FERC orders and EPA rules, with appeals of FCC decisions a close runner-up.[93] Occasionally complex track cases can include petitions for review transferred to the D.C. Circuit by the multidistrict panel, or alternatively the multidistrict panel may transfer petitions initially filed with us to other circuits — who in turn may send them back![94]

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days, while the average time from filing to termination in cases going to oral argument was 623 days. *See Summary of the 1995-96 Term*, CIRCUIT WRITER (U.S. Court of Appeals, D.C. Circuit), Oct. 1996, at 4.

91. 657 F.2d 298 (D.C. Cir. 1981).

92. *See id.*

93. Interview with Martha J. Tomich, Director, Legal Division, D.C. Circuit (June 25, 1996) [hereinafter Tomich Interview]. In recent years, the complex track increasingly has been used for consolidated criminal appeals as well.

94. In one recent complex track case, dealing with FERC's Order 636, petitions for review were filed in both the D.C. and 11th Circuits. The multidistrict panel initially transferred our petitions to the 11th Circuit which then consolidated the petitions and transferred the whole case back to us.

The logistics of complex track cases are impressive. Parties must consolidate filings, normal page limits must be extended — often into the thousands — and oral argument may occur all day or for several days. Given the enormous reading and writing required in a complex track case, the job of preparing for the case is divided among the panel judges. Accordingly, like the cert pool at the Supreme Court, all three judges are reading from the same bench memoranda and the heavy opinion writing chore is split among them. From the 1992-93 term to the 1995-96 term, twenty-six cases have been screened for complex track treatment, eighteen were argued (an average of 4.5 a year), three are currently held in abeyance and three are yet to be argued.[95] On average, a case on the complex track takes thirty-two months from filing to issuance of a decision.[96] This pace would be significantly slower if regular routines were followed. This past year, for instance, one of these special panels considered the appeal of the already four-year-old FERC Order 636 (some jokers among the clerks labeled it "666" after the sign of the devil) which totally restructured the natural gas pipeline industry. The 636 order took 339 small-type Federal Register pages and the appeal involved 151 parties and amici, 949 pages of briefing and a 86 page opinion in the Federal Reporter.[97] The number of these complex track cases has been increasing. It appears that even in an anti-regulatory climate the legislators simply can't do it all themselves; like it or not, they are forced to delegate substantial discretion to the agencies in spelling out how regulatory schemes will work.[98]

I believe that on the whole, the complex track procedure enhances the quality of our review of agency actions and helps us strike the right balance between deference and scrutiny. Always one is aware — if only from reading the list of counsel — that the stakes in most of these complex track cases are enormous for both sides.[99] However, it is simply not possible to give the same attention to every one of forty-six separate issues in a single case as one would in a case with two or three issues; the broad scope of our review forces us to adopt more of an overall stand-or-fall perspective and focus with particularity on only the most important issues. As a result, the chance that we will elevate a relatively insignificant issue to center stage is lessened. Indeed, since these cases almost invariably deal with dense and arcane questions that push the limits of a generalist judge's understanding — such as the detailed restructuring of the gas and electricity industry by FERC or the rate making minutiae of telecommunications in an FCC proceeding — an overall perspective is especial-

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95. *See* Tomich Interview, *supra* note 93.

96. *See id.*

97. *See* United Distrib. Cos. v. FERC, 88 F.3d 1105 (D.C. Cir. 1996).

98. Recent examples of legislation that has led to complex track cases in our circuit are the Telecommunications Act of 1994, *see* Time Warner Entertainment Co. v. FCC, 56 F.3d 151 (D.C. Cir. 1995), and the Energy Policy Act of 1992, *see* Association of Oil Pipe Lines v. FERC, 83 F.3d 1424 (D.C. Cir. 1996).

99. *See* Dave Kansas, *Deregulation of Natural Gas to Pose Risks for Utilities*, WALL ST. J., Sept. 1, 1993, at B6 (transition costs of FERC Order 636 estimated at $4.4 billion over three years). When the judges disagree with the agency, years of effort and an entire regulatory scheme may be back to square one or wiped out entirely. *See* CARNEGIE COMM'N, *supra* note 55; Wald, *Regulation at Risk*, *supra* note 60.

ly useful to help keep us on target. A wide lens and familiarity with so many aspects of the regulatory scheme also allows us to appreciate how different elements of an order work (or do not work) together coherently, even though one or more might appear unreasonable on its own. The complex track has beneficial lateral effects as well, since it permits the court to carry on with its regular docket without leaving any one judge to cope alone full-time with a monster case.

In general, however, I believe that the complex track procedure tilts to the agency's advantage. In a complex track case, the momentum is with the agency. Not only are we unable to focus on the fine details that can trip up agencies in other contexts, but more importantly complex track treatment allows one panel to deal in an integrated fashion with all the issues that might otherwise be the subject of dozens or even hundreds of appeals in several circuits, thus increasing the chances of inconsistent rulings. These "satellite" appeals are instead held in abeyance until the lead case is decided, at which point the agency can move for summary judgment on the others. Also the press of time and paper in these complex track cases creates a disincentive to dissenting; producing even a consensus opinion requires an ungodly amount of work. In none of the complex track administrative law cases I remember over the past years has there been a full-fledged dissent. It is true that putting together a huge record and producing massive briefs on strict schedules can pose a significant administrative burden for agencies, particularly in a time of diminishing agency resources. But this burden seems well worth bearing when the benefits are better focused review and achieving resolution of the major issues associated with an agency action all at once.

However, whether the complex track procedure lives up to its potential depends a great deal on how willing the agency is to use it as an exclusive avenue ofjudicial review. The temptation on the agency's part is sometimes to get the court to duck some of the issues at stake, usually via heavy deployment of ripeness and waiver doctrines. By doing so the agency delays review and potential reversal for another day, knowing that petitioners may drop their challenges in the meantime and that the issue may then come up for review in the context of an adjudication, where the chances of affirmance are higher.[100] Obviously, there are some occasions when an issue is not adequately presented for review, but my sense is that agencies often try to exploit these avoidance doctrines even in complex track cases beyond what is necessary. For example, in the FERC Order 636 litigation our opinion identified six occasions where FERC raised ripeness or waiver defenses.[101] The cost of postponement is that when judicial review of the issue does occur, it may lack the overall perspective and familiarity with subject matter that the complex track procedure provides, thereby risking inconsistency in the overall regulatory scheme.

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100. *See* Mashaw & Harfst, *supra* note 55, at 273; Pierce, *Unintended Effects*, *supra* note 55, at 12-15.

101. *See* United Distrib. Cos. v. FERC, 88 F.3d 1105, 1163, 1172 n.85, 1178-79, 1182-83 (D.C. Cir. 1996).

B. *The* Chevron *Syndrome*

Chevron,[102] in my view, is as much of a landmark decision as exists in administrative law. Until 1984, when *Chevron* was issued, the prevailing wisdom was that a court could decide what a statute meant, giving whatever deference it considered "due" to agency expertise in interpreting it. Since 1984 most courts faced with a challenge to the agency's interpretation or its statutory authority invoke the *Chevron* two-step litany verbatim. In their empirical study of the effects of *Chevron* during the period 1984 to 1988, Peter Schuck and Donald Elliott found a significant impact on the judicial disposition of agency cases, a decline in remands and reversals of around 40%.[103] Interestingly, the 1988 affirmance rate on the D.C. Circuit, 61.5%, was noticeably lower than other circuits, 75.5%.[104] My survey of a year's worth of D.C. Circuit administrative cases suggests that this affirmance rate has remained fairly steady. *Chevron* challenges were raised in twenty-nine of the pool of 135 administrative law cases, and nineteen, or 66%, were affirmed in whole or part.[105]

Recently, much attention has focused on the effect that the rise of textualism, particularly on the Supreme Court, has had on the application of *Chevron*. Textualism is a mode of statutory interpretation that relies on text and dictionaries to determine the meaning of statutory provisions and eschews reference to legislative history.[106] According to Richard Pierce and Thomas Merrill, this turn to textualism has seriously undercut *Chevron* deference. Implicit in textualism is the belief that the plain meaning of statutory provisions can usually be discerned. This belief makes textualism's advocates more inclined to find under the *Chevron* step one inquiry that Congress has spoken with precision as to the meaning of a statutory provision, thereby obverting the need to defer, under *Chevron* step two, to any reasonable interpretation offered by the agency.[107] Merrill's study of Supreme Court decisions from 1984 to

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102. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

103. *See* Schuck & Elliott, *supra* note 87, at 1030, 1041-42, 1059.

104. *See id.* at 1042.

105. A statutory interpretation challenge was raised in forty-one of the 135 cases in the survey; however, in ten of these cases *Chevron* was not applied because the statute was not entrusted to the agency to administer or interpreting the statute involved analyzing general legal principles and in two cases *Chevron* was not applied because no agency interpretation was available. *See, e.g.*, American Fed'n of Gov't Employees v. FLRA, 46 F.3d 73 (D.C. Cir. 1995) (no *Chevron* deference because agency does not administer statute); International Longshoreman's Ass'n v. NLRB, 56 F.3d 205 (D.C. Cir. 1995) (no deference because validity of Board's interpretation of NLRA turned on analysis of principles of general agency law); Oil, Chem. & Atomic Workers Int'l Union v. NLRB, 46 F.3d 82 (D.C. Cir. 1995) (no *Chevron* deference because no rationale adopted by Board majority).

106. On the recent rise of textualism and the form that it has taken, *see* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 640-66 (1990); Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 281-300 (1990).

107. *See* Pierce, *Hypertextualism*, *supra* note 47, at 777-81; Merrill, *supra* note 47, at 990-92, 1001-03. Justice Scalia, the leading adherent to textualism, agrees that the textualist approach limits the opportunities for *Chevron* step two deference to govern: "One who finds *more* often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds *less* often that the triggering requirement for *Chevron* deference exists." Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521.

1990 upholds the thesis that *Chevron* deference is diminishing: the percentage of *Chevron* cases decided at step two has declined from 66% in 1985 to 33% in 1990.[108] There have also been notable examples where the Court's textualist bent has prevented agencies from infusing individual statutory directives with the overriding purposes of the statute at issue in order to ensure a coherent enforcement regime. In *Maislin Industries U.S. v. Primary Steel*,[109] the Supreme Court held on the basis of the Interstate Commerce Act that the ICC must enforce the rates that a motor carrier has on file, even though the carrier had contracted to ship at a lower rate and even though filed rates had become obsolete as a result of the passage of the Motor Carrier Act in 1980. The result was that the ICC was forced to adhere to an anachronistic regulatory regime and prevented from protecting shippers who had reasonably relied on contracts with carriers.[110]

Textualism has not taken as big a hold on the D.C. Circuit as on the Supreme Court, although it should be noted that textualism still is not the prevailing mode of statutory interpretation on the High Court either.[111] Even in *Chevron* step one we usually supplant our textual reading with references to legislative history.[112] And unlike the Supreme Court,[113] we continue to use the *Chevron* formula consistently as the governing standard for deciding any challenge to an agency interpretation. In my mini-survey, *Chevron* was regularly cited in cases raising an interpretive challenge, and if the court did not apply *Chevron* it usually indicated why.[114] We decided on *Chevron* step one grounds in only eleven of the twenty-nine times an interpretive challenge was made, although we reversed in eight of these eleven occasions or 73% of the time — as opposed to two of the eighteen occasions, or 11%, when we decided on *Chevron* step two grounds.

Although we have avoided undue reliance on the textualist mode, several other debates have marked D.C. Circuit *Chevron* jurisprudence of late. One dispute that had continued for many years was recently resolved. It concerned whether agency discretion must be given equal deference under *Chevron* step two where the ambiguity involves the agency's jurisdictional limits.[115] Several

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108. *See* Merrill, *supra* note 47, at 981.

109. 497 U.S. 116, 130-36 (1990).

110. *See* Pierce, *Hypertextualism*, *supra* note 47, at 766-76.

111. *See* Laurence H. Silberman, Chevron — *The Intersection of Law and Policy*, 58 GEO. WASH. L. REV. 821 (1990); A. Raymond Randolph, *Dictionaries, Plain Meaning, and Context in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 71 (1994). For discussions of the reaction to textualism on the Court, *see* Wald, *The Sizzling Sleeper*, *supra* note 106; Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992).

112. *See, e.g.*, Qi-Zhuo v. Meissner, 70 F.3d 136, 139-41(D.C. Cir. 1995); NRDC v. Browner, 57 F.3d 1122, 1127-29 (D.C. Cir. 1995); Florida Public Telecommunications Co. v. FCC, 54 F.3d 857, 859-61 (D.C. Cir. 1995); Ethyl Corp. v. EPA, 51 F.3d 1053, 1058 (D.C. Cir. 1995); *but see* Southwestern Bell Corp. v. FCC, 43 F.3d 1515, 1521-23 n.3 (D.C. Cir. 1995) (rejecting agency's interpretation of term "schedule" without reference to legislative history and citing dictionary definitions of "schedule").

113. *See* Merrill, *supra* note 47, at 982 (*Chevron* applied in only one-third of the cases where the Court found a deference question presented).

114. *See supra* note 105; *see, e.g.*, American Fed'n of Gov't Employees v. FLRA, 46 F.3d 73 (D.C. Cir. 1995) (*Chevron* not applicable because agency does not administer statute).

115. The Supreme Court has upheld agency interpretations of jurisdictional limits in practice without

members of our court resisted that notion because of the agency's obvious self interest in interpreting the scope of its own authority.[116] Others argued that distinguishing jurisdictional questions from non-jurisdictional ones would force us into a line-drawing nightmare.[117] In the final analysis, we held that *Chevron* step two did cover jurisdictional as well as substantive provisions.[118]

In addition, we often disagree about whether a case should be decided under *Chevron* step one or *Chevron* step two, that is, whether Congress has made its intent crystal clear or whether there is an ambiguity for the agency to resolve.[119] This may come down to how judges identify the precise question at issue, since at one level of generality the statute may answer it under *Chevron* step one, but at a more refined level there may be an ambiguity.[120] Occasionally, identifying the precise question at a narrower level will avoid ambiguity, as occurred in *Ohio v. Department of the Interior*.[121] There we found that although CERCLA was generally ambiguous as to what measure of damages should be used in any or all actions brought under it, Congress had manifested a distinct preference for using restoration cost over use value as the measure in suits against despoilers of natural resources. Accordingly, we overturned under *Chevron* step one the agency regulation giving the two measures equal presumptive legitimacy.[122] Usually, however, the ambiguity will be more apparent at the more specific level, since the more detailed one gets, the less likely it is that Congress considered and had a specific intent with regard to every discrete issue that may come up in applying the statute. I sense another unarticulated factor at play as well in our *Chevron* one or two disagreements, which is simply that if the agency's position is to be upheld, many judges — or at least judges who are not ardent foot soldiers in the new textualist brigade — would prefer to do so under *Chevron* step two than *Chevron* step one. Proceeding to *Chevron* step two allows the court in close cases to acknowledge linguistic and structural ambiguities identified by the petitioners, yet conclude that the

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stating whether *Chevron* deference applies. *See, e.g.*, Reiter v. Cooper, 504 U.S. 258, 270 (1993); *see generally* Quincy M. Crawford, Comment: Chevron *Deference to Agency Interpretations that Delimit the Scope of the Agency's Jurisdiction*, 61 U. CHI. L. REV. 957 (1994). For an indication of the Justices' differing views on the question, *compare* Mississippi Power & Light Co. v. Mississippi, 487 U.S. 354, 381 (1988) (Scalia, J., concurring) (*Chevron* applies) *with id.* at 386-87 (Brennan, J., concurring) (*Chevron* does not apply).

116. *See, e.g.*, New York Shipping Ass'n v. Federal Maritime Comm'n, 854 F.2d 1338, 1363 n.9 (D.C. Cir. 1988).

117. *See, e.g.*, Railway Labor Executives' Ass'n v. National Mediation Bd., 29 F.3d 655, 676-77 (D.C. Cir. 1994) (en banc) (Williams, J., dissenting).

118. *See* Oklahoma Natural Gas Co. v. FERC, 28 F.3d 1281, 1283-84 (D.C. Cir. 1994).

119. *Compare* Indianapolis Power & Light Co. v. EPA, 58 F.3d 643 (D.C. Cir. 1995) (*Chevron* step two) *with id.* at (Silberman, J. concurring) (*Chevron* step one) *and* Time Warner Entertainment Co. v. FCC, 56 F.3d 151 (D.C. Cir. 1995) (reversing in part on *Chevron* step one grounds) *with id.* at 134 n.8 (Tatel, J., dissenting in part) (*Chevron* two should apply and agency's interpretation is reasonable).

120. *See* Merrill, *supra* note 47, at 990-93, where he makes a similar point in explaining the effects of textualism on the Court's treatment of agency interpretation cases. He argues that occasions for deference under *Chevron* step two have also been limited by the fact that textualism has led the Court to ask not *Chevron*'s narrow question of whether Congress has spoken to the precise question in issue, but instead the broader question of whether the statute is ambiguous, given statutory language and the structure and design of the statute, as a whole and that an affirmative answer is much more likely under this reformulation.

121. 880 F.2d 432 (D.C. Cir. 1989).

122. *See id.* at 442-44.

agency's interpretation is still reasonable, given the broad deference to which the agency is entitled. It also allows the agencies some elbow room to change its practices in the future if events and experience dictate.

A third (and perhaps to the outside world somewhat esoteric) dispute concerns the question of when a case should be decided on *Chevron* grounds as opposed to ordinary arbitrary and capricious review.[123] Obviously, there is substantial overlap between the two inquiries. An agency which comes up with an impermissible interpretation of a statute will almost automatically be found to have acted in an arbitrary and capricious manner, and the failure to consider factors made relevant by the statute may render an agency's interpretation unreasonable under *Chevron* step two as well as exposing its actions as arbitrary and capricious. But in fact there are important reasons to keep the two analyses distinct. Arbitrary and capricious review focuses on an agency's decisionmaking processes and explanations. *Chevron*, on the other hand, focuses on statutory language, structure and purpose. Consequently, factors that may make an agency's action arbitrary, such as failure to articulate an adequate rationale or account for apparently irrational effects in application, are not particularly relevant to *Chevron* analysis in light of its focus on congressional intent and statutory language. Additionally, *Chevron* was basically meant as a device to enhance the power of agencies vis-a-vis the courts and Congress; the courts were excluded from the policy judgments involved in interpreting ambiguous statutes and Congress was told to speak its mind clearly or risk ceding substantial control over policy to the executive branch. By confusing and collapsing *Chevron* step two with arbitrary and capricious review, the balance of power between courts and agencies is tilted back somewhat in the courts' favor. Courts obtain an opening through which to subject agency interpretations to greater scrutiny because it is no longer enough for an agency to select one of several permissible statutory interpretations, rather the agency must justify its selection of one particular permissible interpretation. Similarly, requiring agency interpretations to consider all relevant factors could mean that agencies must take account of vague expressions of congressional intent, thereby releasing Congress from *Chevron*'s mandate that it must speak clearly.

One final note on current *Chevron* practice in the D.C. Circuit. On an increasing number of occasions *Chevron* is not the paradigm governing our analysis, even though the question presented is one of the validity of an agency's statutory interpretation.[124] The major instance when *Chevron* is displaced is when an interpretive dispute implicates constitutional questions. The rule in our circuit, as elsewhere, is that *Chevron* deference gets trumped by the

123. *Compare* Arent v. Shalala, 70 F.3d 610, 614-16 (D.C. Cir. 1995) (Edwards, C.J.) (arbitrary and capricious and *Chevron* step two are identical) *and* National Ass'n of Regulatory Util. Comm'rs v. ICC, 41 F.3d 721, 726-27 (1994) *with Arent*, 70 F.3d. at 619-20 (Wald, J., dissenting) (arbitrary and capricious and *Chevron* step two are distinct analyses) *and* Continental Air Lines v. Department of Transp., 843 F.2d 1444, 1452 (D.C. Cir. 1988); *see also* Gary Lawson, *Outcome, Procedure, and Process: Agency Duties of Explanation for Legal Conclusions*, 48 RUTGERS L. REV. 313 (1996); Silberman, *supra* note 111, at 827-28.

124. *See generally* Merrill, *supra* note 47, at 985-90.

canon requiring avoidance of unnecessary constitutional determinations.[125] Consequently, we do not ordinarily defer to an agency's interpretation of a statute if that interpretation raises a serious constitutional question that another interpretation might avoid.[126] But *Chevron* has also been displaced outside the constitutional arena. In *Kelly v. EPA*,[127] for example, we held that Congress had delegated the responsibility of interpreting private right provisions in a statute to the judiciary, and therefore refused to defer to the EPA's interpretation of an "owner or operator" of a vessel or facility containing hazardous substances.[128] The *Kelly* opinion can be read more broadly as refusing to apply *Chevron* deference when the issue in question specifically concerns judicial enforcement of a statute.[129]

On the surface, this constitutional exception to *Chevron* is unexceptional. Judicial deference to agency interpretations of an ambiguous statute is designed in large part to circumvent the danger of a politically unaccountable branch determining matters of public policy. The argument for deference is much weaker when constitutional values transcending any parochial agency interests are implicated, and where the courts still reign as the supreme arbiters. Hence, the effort by judges to recapture part of their turf in the constitutional area is in most cases correct. Yet this exception represents a substantial potential for intrusion into agency deference. For example, in the D.C. Circuit eleven constitutional cases came up through the administrative route in 1995. We can expect more and more constitutional questions to arise in the administrative context, as a result of further expansions of government and constitutional law developments, such as changes in Establishment Clause and First Amendment jurisprudence, that hold significant implications for how government can operate.[130]

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125. The Supreme Court has given conflicting answers to this question of whether the canon of avoiding unnecessary constitutional interpretations trumps *Chevron*. In *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Trades Council*, 485 U.S. 568 (1988), the Court held that *Chevron* deference in this context was inappropriate where the agency's interpretation will raise serious constitutional problems that are otherwise avoidable. *See id.* at 575. But in *Rust v. Sullivan*, 500 U.S. 173 (1991), the Court refused to interpret Title X differently than the agency in order to avoid passing on the constitutionality of the gag rules. *See id.* at 190-91.

126. *See, e.g.*, Chamber of Commerce of the United States v. FEC, 69 F.3d 600, 604-05 (D.C. Cir. 1995); Bell Atl. Tel. Cos. v. FCC, 24 F.3d 1441, 1445 (D.C. Cir. 1994); *but see* National Treas. Emp. U. v. FLRA, 986 F.2d 537, 539 (D.C. Cir. 1993) (one reason agency must consider constitutionality of interpretation is that otherwise, under *Chevron*, court would be forced to reach potentially avoidable constitutional issue); Syracuse Peace Council v. FCC, 867 F.2d 654, 673-677 (D.C. Cir. 1989) (Starr, J., concurring) (court cannot require that agency avoid constitutional questions).

127. 15 F.3d 1100 (D.C. Cir. 1994), *cert. denied* 115 S. Ct. 900 (1995).

128. *See id.* at 1105.

129. Another *Chevron* exception is the refusal to grant *Chevron* deference when an agency's interpretation conflicts with an earlier judicial construction of the statute. Although this "stare decisis" exception has made repeated appearances in recent Supreme Court decisions, it has not played a substantial role in D.C. Circuit jurisprudence. *See* Neal v. United States, 116 S. Ct. 763 (1996); Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992); Maislin Indus. U.S. v. Primary Steel, 497 U.S. 116 (1990). To the extent that we have addressed the stare decisis exception, our approach has generally been to grant *Chevron* deference unless the prior judicial construction was held to represent the plain meaning of the statute or when the same exact provision was at issue. *See* Kerr-McGee Coal Corp. v. FMSRC, 40 F.3d 1257, 1265 (D.C. Cir. 1994); United States Postal Serv. v. NLRB, 969 F.2d 1064, 1070-71 (D.C. Cir. 1992).

130. In *Rosenberger v. University of Virginia*, 115 S. Ct. 2510 (1995), the Court held that the Establishment Clause did not prevent the government from funding religious student groups and further that the First Amendment compelled such funding in some circumstances. Attempts to regulate new technologies, such as

Given this potentially intrusive effect, courts should exercise restraint in pushing into the constitutional arena head first. The mere fact that an agency is acting in an area with constitutional implications, as the FEC and the FCC commonly do, should not be enough. Rather, the agency's interpretation must raise a concrete and avoidable constitutional question, in order to trump *Chevron* deference. One obstacle to judicial restraint in cases with constitutional issues hovering in the shadows is that agency decision makers are not allowed to overturn the statutes they implement or their own regulations on constitutional grounds.[131] This means that agency action will usually come to the reviewing court without any initial decision on the intersection of the constitution and the applicable statute. Even though agencies cannot decide that the statutes they are implementing are unconstitutional, they should, as we have indicated on several occasions, take background constitutional issues into account in interpreting and implementing the laws they administer.[132]

Similarly, according increased or *de novo* scrutiny to private right provisions instead of *Chevron* deference is often appropriate. Private rights of action are implemented by courts and not by agencies. Thus, arguably the private right exception is not an exception at all, but is rather a manifestation of the general rule that agencies only receive *Chevron* deference in regard to matters entrusted to their care.[133] Moreover, there is a practical reason to not defer to agency interpretations of private right provisions. These provisions often serve in part as mechanisms for controlling agency action, and thus agencies may have a self-interested motive to interpret these provisions narrowly.[134] While the same argument was made — and rejected — in regard to agency jurisdictional interpretations, private right provisions are more discrete and more easily severed from the substantive terms of a statute than are jurisdictional questions. But

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the Internet, are also bound to raise serious First Amendment issues. *See* ACLU v. Reno, 969 F. Supp. 824 (E.D. Pa. 1996); Turner Broad. Corp. v. FCC, 512 U.S. 622 (1994). First Amendment issues also arise with some frequency in regard to government efforts to control or restrict the speech of government employees. *See* Weaver v. United States Info. Agency, 87 F.3d 1429 (D.C. Cir. 1996); Sanjour v. EPA, 56 F.3d 85 (D.C. Cir. 1995). The Court's increasing application of strict scrutiny to race-related issues is also likely to increase the number of constitutional questions arising in regard to administrative regulations. *See, e.g.*, Adarand Constr., Inc. v. Pena, 115 S. Ct. 2097 (1995).

131. *See, e.g.*, Weinberger v. Salfi, 422 U.S. 749, 765-66 (1975); Alliance for Community Media v. FCC, 10 F.3d 812, 830 (D.C. Cir. 1995), *rev'd in part on other grounds sub nom.* Denver Area Educ. Telecommunications Consortium, Inc. v. FCC, 116 S. Ct. 2374 (1996); Rafeedie v. United States, 880 F.2d 506, 513-14 (D.C. Cir. 1989).

132. *See, e.g.*, Alliance, 10 F.3d at 830; Allnet Communication Serv. v. National Exch. Carrier Serv., 965 F.2d 1118, 1121 (D.C. Cir. 1992); National Treasury Employees Union v. FLRA, 986 F.2d 537, 539 (D.C. Cir. 1993); Meredith Corp. v. FCC, 809 F.2d 863, 872-74 (D.C. Cir. 1987).

133. *See* Adams Fruit Co. v. Barrett, 494 U.S. 638 (1990). Seen in this light, *Kelly v. EPA*, 15 F.3d 1100 (D.C. Cir. 1994), fits with our earlier decision in *Tucson Medical Center v. Sullivan*, 947 F.2d 971 (D.C. Cir. 1991), interpreting an amended provision Social Security Act. The provision instructed reviewing courts to award interest to Medicare service providers who prevail in challenges of the reimbursement amounts they are granted by the Health Care Financing Administration; since the provision was expressly directed to the judiciary and not entrusted to the agency to administer, we held that *Chevron* deference was inapplicable. *See generally* Christopher J. Hayes, *Kelly v. EPA: Judicial Review of Statutory Interpretations of Administrative Agencies*, 63 GEO. WASH. L. REV. 641, 651-56 (1995) (discussing parallels between *Kelly* and earlier D.C. Circuit cases).

134. *See* Cass Sunstein & Richard B. Stewart, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1267-89 (1982).

nonetheless, there are contexts when denying deference can represent a significant intrusion into the agency's field of operations, for example when, as in *Kelly*, the question is not the scope of a private right to sue the agency to compel enforcement but instead involves the scope of a private right to sue another party for violating the statute.[135] In this latter context, determining whether a private right of action exists requires determining who is liable under the statute and thus is much more intertwined with determining how a statute should be implemented; moreover, concerns about agency self-dealing are dissipated since the agency is not the defendant.[136] Here, agency interpretations, when they exist, deserve greater deference. The private right exception should not be applied across-the-board without regard to the context in which questions about the scope of private right exceptions arise and the effect that denying deference may have on the agency's implementation of the statute.

Chevron was a preemptive strike to force the courts out of the business of telling the agencies what they could do, or could not do, when the law itself was not clear. The Supreme Court said, in effect, we will find a general congressional intent to leave it to the agency where there is any doubt about what the law means. Congress could of course change that canon of construction at any time and say no, our intent is to leave interpretation to the courts and not to the agency, as indeed they have done on some occasions by granting courts *de novo* review of interpretive questions. For now, however, *Chevron* operates as a basic canon for reviewing courts where statutory interpretation is involved, and probably does result in fewer judicial reversals of agency decisions. But the ongoing debates suggest that *Chevron* is still a work in progress. It clearly has critics who would like to return to an era of greater judicial freedom to construe statutes as judges see fit. I believe these critics are unlikely to prevail, but it is indisputably true that not even *Chevron*'s one-two exercise can cabin judicial discretion entirely, as the D.C. Circuit's 34% reversal rate even under *Chevron* shows. With the power to decide such matters as what the precise issue is, whether Congress has spoken clearly to it, and if not, whether the agency has come up with a reasonable construction, all things considered, judges retain significant control over the interpretation of agency-administered statutes.

C. Chaney, *Standing, and Other Access Barriers to Judicial Review*

In 1985, the Supreme Court came down with another administrative law bombshell. In *Heckler v. Chaney*,[137] it held that the FDA's decision not to prevent the unauthorized use of certain drugs in state executions was not reviewable, because enforcement decisions are presumptively entrusted to the discretion of the agencies and there was no law for a reviewing court to apply

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135. *See id.* at 1208-16 (distinguishing private rights, through which a private party can sue another private party, from initiation rights, through which a private party can sue the agency).

136. *See* Richard J. Pierce, Jr., *Agency Authority to Define the Scope of Private Rights of Action*, 48 ADMIN. L. REV. 1, 8-9, 23-29 (1996).

137. 470 U.S. 821 (1985).

under section 706 of the APA.[138] The presumption of nonreviewability for enforcement decisions set forth in *Chaney* is in one sense *sui generis*; it is grounded on a long tradition of prosecutorial discretion and it relies on a specific provision of the APA that precludes review of matters committed to agency discretion. But in another light *Chaney* represents one aspect of a broader and increasingly critical question, namely, which kind of cases should be excepted from the presumptive omnipresence of judicial review under the APA. This question implicates other administrative law doctrines in addition to *Chaney*, most notably standing, ripeness, waiver and exhaustion of administrative remedies. Questions of access to judicial review have continued to take front stage over the past decade and a half, both in the Supreme Court and on the D.C. Circuit. Overworked agencies tend to raise threshold jurisdiction issues whenever they pass the snicker test: last year such issues were litigated in sixty-nine, or 51%, of the 135 cases in my survey. Since success with a jurisdictional challenge precludes review on the merits — making the case, at least temporarily, disappear — it is not surprising that agencies jump to take advantage of structural barriers to review.

The access area receiving the most attention has been standing doctrine. We have held many times that simply because the agency lets an interested party into its proceedings does not mean that the party automatically gets access to the courts for judicial review.[139] She must have independent Article III standing, which according to the Supreme Court means she has suffered (1) a cognizable injury that is (2) fairly traceable to the regulation and (3) likely to be redressed by the court's action.[140] She may also need to satisfy statute-based requirements for standing; for example, the APA grants standing to anyone "suffering a legal wrong," "adversely affected" or "aggrieved";[141] the Hobbs Act, which confers jurisdiction over most agency appeals in the U.S. Courts of Appeals, speaks of an "aggrieved party";[142] and several organic statutes allow review to be sought by anyone "adversely affected," or in some cases, such as the Freedom of Information Act, the law itself provides for suits by any citizen on the theory that failure by the government to comply with the statute constitutes sufficient injury to satisfy standing requirements.[143] The same courts that engaged in intensified scrutiny of agency actions in the late 1960s and 1970s dramatically expanded the grounds for standing under the APA; a party was allowed to obtain judicial review if she alleged an injury in fact stemming from the disputed agency action that fell within the zone of interests that Congress sought to protect, even if she could not claim a legal right that was being violated.[144]

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138. *See id.* at 832-33.

139. *See, e.g.*, Shell Oil v. FERC, 47 F.3d 1186, 1200-03 (D.C. Cir. 1995).

140. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-60 (1992); Allen v. Wright, 468 U.S. 737, 750-52 (1984).

141. 5 U.S.C. § 702 (1994).

142. 28 U.S.C. § 2344 (1994).

143. 5 U.S.C. § 552(a)(4)(B) (1994).

144. *See supra* note 18. For examples of cases taking a more expansive view of standing, see United

The Supreme Court has been imposing tighter requirements for judicial review of agency action for the last two decades.[145] In *Lujan v. Defenders of Wildlife*[146] the Court recently expanded on the requirements that an injury must meet before it satisfies Article III; a party must show not only an injury in fact but one that is concrete, particularized, and actual or imminent before she has standing to challenge administrative action. The Court went even further and found that the fact that Congress had provided for citizens' suits to enforce the statute was not a sufficient basis on which to conclude that parties challenging non-enforcement of the statute had met these injury requirements.[147] While the Court has not yet retreated to the legal right approach to standing used in the early days of the APA, its particularized and concrete requirements for a cognizable injury signal a rocky road ahead for non-regulated entities or individuals seeking review.

Our court has seized the Supreme Court's invitation to narrow the availability of standing on several occasions.[148] In 1994 we held that in order to fall within the zone of interests created by Congress, a requirement for standing under the APA, it is not enough for an organization to demonstrate that its "purpose is to promote the interests to which the statute is addressed"; rather, the organization must demonstrate "a congressional intent to benefit the organization" or some indication that the organization is "a peculiarly suitable challenger."[149] Last year in *Humane Society of the United States v. Babbitt*[150] we held that no one had standing to challenge the Department of the Interior's certificate permitting the transfer of an elephant formerly housed in the Milwaukee Zoo to a commercial exposition as violative of the Endangered Species Act — not the Humane Society or any of its members who regularly visited the elephant in the zoo.[151] The denial of standing turned in large part on the court's refusal to credit the petitioners' claims of injury; their distress at the elephant's absence was insufficient because "general emotional harm, no matter how deeply felt" is never a sufficient injury on which to base standing, and since other elephants were still at the zoo the absence of this particular elephant caused no more concrete injury-in-fact to visitors.[152] This year, we surpassed

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States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973); Associated Data Processing Orgs. v. Camp, 397 U.S. 150 (1970).

145. For example, the Court began to require increased evidence that the challenged action caused plaintiff's injury before standing is found. *See, e.g.*, Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976).

146. 504 U.S. 555 (1992).

147. *See id.* at 560-61. For discussions of the implications of *Lujan*, *see* 3 DAVIS & PIERCE, *supra* note 8, at § 16.16; Cass R. Sunstein, *What's Standing After* Lujan? *Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992).

148. The D.C. Circuit has lead the evolution of standing doctrine for some time now. *See* Patricia M. Wald, *The D.C. Circuit: Here and Now*, 55 GEO. WASH. L. REV. 718, 719-20 (1987).

149. *See* Animal Legal Defense Fund v. Espy, 23 F.3d 496, 503 (D.C. Cir. 1994) (quoting Hazardous Waste Treatment Council v. EPA, 861 F.2d 277, 283 (D.C. Cir. 1988)).

150. 46 F.3d 93 (D.C. Cir. 1995).

151. *See id.* at 95.

152. *See id.* at 97-100.

our previous efforts. In *Florida Audobon Society v. Bentsen*[153] we held that in order to have standing so as to force the government to prepare an environmental impact statement (EIS) on the effects of tax subsidies for ethanol, a party must demonstrate:

> [A] particularized injury . . . fairly traceable to the passage of the tax credit . . . . For the tax credit to pose a substantial probability of a demonstrably increased risk of particularized environmental damage, the credit must prompt third-party fuel producers to undertake the acquisition of production facilities for ETBE and begin to produce ETBE in such quantities as to increase the demand for ethanol from which ETBE is derived. This increased demand for ethanol must then not simply displace existing markets for currently-produced ethanol, but in fact increase demand for the agricultural products from which ethanol is made. Again, this demand must not be filled by existing corn or sugar supplies, but instead spur new production of these products by farmers, who must be shown to have increased production at least to some measurable extent because of the tax credit, rather than any one of other innumerable farming considerations, including weather, the availability of credit, and existing subsidy programs. Moreover, any agricultural pollution from this increased production must be demonstrably more damaging than the pollution formerly caused by prior agricultural production or other prior use of land now cultivated because of the ETBE tax credit. Finally, the farmers who have increased production (and pollution) as a result of the tax credit must include farmers in the regions visited by appellants, and they must use techniques or chemicals in such fashion and to such extent as to threaten a demonstrably increased risk of environmental harm to the wildlife areas enjoyed by appellants.[154]

Some might say it would have been more economical, and more direct, to simply insert the heading "Standing: Tax Subsidies" and under it provide a one word analysis — "never."[155]

The way different panels apply the standing test is at times hard to reconcile. In one case this year we refused to find "aggrievement" when a company had endorsed a railroad car rate change on the condition that the ICC expressly save jurisdiction to monitor its outcome and the ICC then failed to provide for such monitoring in its final rule. But we said later that a company could appeal a settlement it signed agreeing to changes in the methodology used to calculate the value of petroleum shipped to which it agreed.[156] In another example, we said in one case that a party could not challenge a FERC determination that its gas was not "tight formation" gas because such a determination was only advisory as far as an IRS tax credit was concerned, the only benefit to be gained from the determination. But in another case we said that a similarly situated challenger could challenge the same determination because it might affect some

153. 94 F.3d 658 (D.C. Cir. 1996).
154. *Id.* at 669-670.
155. *See id.* at 672 (Buckley, J., concurring).
156. *Compare* Southern Pac. Transp. Co. v. ICC, 69 F.3d 583, 588-89 (D.C. Cir. 1995) *with* Oxy USA, Inc. v. FERC, 64 F.3d 679, 689 (D.C. Cir. 1995).

of the prices it could charge by contract for its gas.[157] In a third set of cases, we held that a party could not appeal the agency's disclaimer of jurisdiction under one statute when the party prevailed under another statute, because any injury that the party might suffer from the loss of the additional statutory protections was hypothetical. But in another case we found sufficient aggrievement where the federal government granted primary enforcement jurisdiction to the states and retained backup enforcement jurisdiction on the grounds that the party might be caught in a federal and state enforcement crossfire, even though there was no evidence in the record that such a crossfire had occurred.[158] These are subtle differences indeed.

Practically every standing case can be distinguished from every other in some manner, but the net result of many of the Talmudic distinctions in our standing decisions is the absence of any coherent system for separating out those appeals which should go forward from those which should not. Establishing such a system has admittedly become more difficult as the number of legislative-like rules that are the subject of appeals increases. These rules go through an internal rulemaking process that is very much akin to real legislation — interest groups, coalitions, informal and even off-the-record comments. In complex regulatory schemes, the number of anticipated (let alone unintended) beneficiaries or sufferers may be myriad, all interacting with one another in chain-like fashion.

The development of our standing doctrine to its current state of juristic refinement is in my view a prime example of a good idea gone awry. The tripartite formula, injury traceable to the action complained of and redressable by the courts, is a pliable one, and in fact courts, not bound in any way to defer to agency discretion in this area, have molded the doctrine to their liking. The result — at least in our court — has been excessively restrictive requirements on how closely the petitioner's injury must be linked to the challenged regulation and how effectual judicial action must be at redressing this injury. Such stinginess in granting standing is not compelled by Article III nor by prudential concerns to limit unwarranted judicial interference in policy. A simpler standing rule could require a challenger to show she had participated at the agency level to make the point she (or a proxy) has argued on appeal and that there is a substantial likelihood she will suffer from the way the rule will be applied. Surely that is enough to make a "controversy" and insure that a judicial response would yield real relief.

Our circuit has also been responsive to agency claims that a dispute is not yet ripe for decision. Ripeness doctrine in agency cases has several elements.[159] The seminal case of *Abbott Laboratories v. Gardner*[160] set the con-

157. *Compare* Marathon Oil Co. v. FERC, 68 F.3d 1376, 1378-79 (D.C. Cir. 1995) *with* Grynberg v. FERC, 77 F.3d 517, 520 (D.C. Cir. 1996).

158. *Compare* Shell Oil Co. v. FERC, 47 F.3d 1186, 1200-03 (D.C. Cir. 1995) *with* National Mining Ass'n v. Dep't of Interior, 70 F.3d 1345, 1348-49 (D.C. Cir. 1995).

159. *See* 2 DAVIS & PIERCE, *supra* note 8, at § 15.

160. 387 U.S. 136 (1967).

tours of our ripeness inquiry in agency cases. The key consideration in this inquiry is whether the petitioner's claim is sufficiently crystallized and concrete to allow for meaningful review.[161] This concreteness requirement, like standing law, has both constitutional and prudential elements. It prevents courts from issuing advisory opinions in contravention of Article III, and also ensures that when review occurs the issues will be clearly presented and courts will not waste resources deciding disputes that would dissipate on their own. But we often push the requirement of concreteness to its extremes, to the extent that it becomes difficult for many pre-enforcement cases, where factual records are the least developed, to survive a ripeness challenge.[162] Here again the Supreme Court has taken the lead. The Court a few years ago in *Reno v. Catholic Social Services, Inc.*[163] significantly limited the availability of pre-enforcement review in regard to rules that governed alien's eligibility for amnesty, on the ground that such a rule only became ripe for challenge when it was applied to deny an individual alien the benefit she sought.[164] The Court emphasized that the rule was not ripe on pre-enforcement review because aliens always had to apply for amnesty in order to become eligible for it. However, since this is true of many benefit-conferring rules, the case has been broadly read as representing a broader proposition, namely that rules limiting benefit eligibility are generally not ripe for review prior to enforcement.[165] Another requirement is that agency action must be final before review is available, and we often find ripeness lacking because some agency action is still pending.[166] This finality requirement is generally viewed as separate from ripeness doctrine because it is based on the language of APA section 704, but it represents basically the same claim that the time is not ready for judicial action. Finality does differ from ripeness, however, in that it is rooted primarily in respect for a coordinate branch of government, rather than concerns about ensuring courts function in a constitutional and effective fashion.

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161. *See id.* at 151-52 (to determine if case is ripe, examine whether petitioner raises a purely legal question that has sufficiently crystallized and whether delaying review would cause hardship to parties); Comstat Corp. v. FCC, 77 F.3d 1419, 1422 (D.C. Cir. 1996) (even if claim presents legal question, not fit for review unless impact of agency decision on parties' primary conduct is clear); Public Citizen Health Research Group v. FDA, 740 F.2d 21, 31 (D.C. Cir. 1984) (hardship will rarely overcome finality and concreteness requirements).

162. *See, e.g.*, Cronin v. FAA, 73 F.3d 1126, 1131-32 (D.C. Cir. 1996) (pre-enforcement challenge to drug testing regulation not ripe for review because method in which rule is implemented may affect procedural due process challenge); Public Citizen, Inc. v. NRC, 940 F.2d 679, 682-84 (D.C. Cir. 1991) (pre-enforcement challenge to policy statement not ripe for judicial review because applications of statement needed to determine if statement will have binding effect); *but see* Chamber of Commerce v. Reich, 57 F.3d 1099, 1100 (D.C. Cir. 1995) (challenge to executive order authorizing Secretary of Labor to disqualify employers who hire permanent replacements during a lawful strike from government contracts was ripe for review, even though Secretary had discretion to exempt contractors from the general rules).

163. 509 U.S. 43 (1993).

164. *See id.* at 57-58.

165. *See* 2 DAVIS & PIERCE, *supra* note 8, at § 15.14; Pierce, *Seven Ways*, *supra* note 64, at 88-93; Bernard Schwartz, *"Apotheosis of Mediocrity"? The Rehnquist Court and Administrative Law*, 46 ADMIN. L. REV. 141, 163-65 (1994).

166. *See, e.g.*, Committee For Effective Cellular Rules v. FCC, 53 F.3d 1309 (D.C. Cir. 1995) (individual appellants' claims not "ripe" because of pending proceedings before agency).

Demanding greater concreteness before a challenge to agency action qualifies as ripe for review often puts petitioners in a catch-22. Although pre-enforcement review of rules is still theoretically available, if a challenger files on the basis of the rule alone the challenge will be dismissed as premature, unless the dispute can be settled on a legal ground that will not require application in a concrete factual setting or unless the statute has a deadline for facial or procedural challenges. But if the challenger waits, the court may say that the challenge was waived because it was not brought when the rule was initially issued. In one recent instance, a challenge was initially dismissed on ripeness grounds, but when the petitioner refiled, following our guidance as to when the challenge would be ripe, the agency prevailed on a statute of limitations defense.[167] Consequently, most petitioners file early to preserve the viability of their challenge, even at the cost of a dismissal for lack of ripeness. We have tried to lessen the drain on counsel and the court by requiring these threshold dismissal motions to be filed within 45 days from docketing, but to be honest, if they are not they still get heard because they are "jurisdictional."

Our insistence that agency action must be final works better. It is easier for petitioners to determine where their action stands at the agency level and what agency procedures are available to them than to guess at how a court will respond to a pre-enforcement challenge. But even here our decisions occasionally force petitioners — and agencies — into exercises in futility. If the agency is not empowered to provide the relief that the petitioner seeks — for example, to declare a statute unconstitutional — or if the agency has either indicated its position is not likely to change or delayed unreasonably in acting, a court should not have to rigidly adhere to finality requirements. The focus should be not simply on whether an avenue for agency review formally exists, but also on whether this avenue is truly available in practice.[168] The Court's decision in *Darby*, holding that the APA itself does not mandate exhaustion of remedies, is a hopeful sign that the finality requirement will not be unduly expanded.[169]

Waiver is another popular ground on which to dismiss appeals. Waiver doctrine holds that if a challenger has not raised an issue, whether legal or factual, in the agency proceedings below, the issue has been waived for purpos-

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167. *See* Daingerfield Island Protective Soc. v. Babbitt, 40 F.3d 442, 448 (D.C. Cir. 1994) (Wald, J., dissenting in part).

168. Support for such flexibility exists in our case law. *See, e.g.*, Natural Resource Defense Council v. EPA, 902 F.2d 962, 987-88 (D.C. Cir. 1990) (EPA's deferral of issuing fine particle standard regulating acid deposition indefinitely constitutes final agency action); Washington Ass'n for Television & Children v. FCC, 712 F.2d 677, 682 & n.9 (D.C. Cir. 1983) (no need to pursue futile remedies to preserve a claim for review). Our recent decisions, however, appear to apply ripeness doctrine more inflexibly. *See, e.g.*, Mississippi Valley Gas Co. v. FERC, 68 F.3d 503 (D.C. Cir. 1995) (challenge to FERC ratemaking not ripe for review because of pending hearings, even though court was "skeptical" and "doubtful" that FERC will revisit issue); Northern Indiana Pub. Serv. Co. v. FERC, 954 F.2d 736 (D.C. Cir. 1992) (challenge to FERC order approving open-access service on interconnected neighboring utility not ripe for review because FERC did not approve specific open-access transaction, even though FERC did address and deny petitioner's challenges on the merits); Ayuda, Inc. v. Thornburgh, 948 F.2d 742 (D.C. Cir. 1991) (challenge to INS' application of IRCA not ripe because agency had not yet interpreted statutory provision, even though dismissing suit meant that filing date mandated by statute would pass and aliens could not file for amnesty).

169. *See* Darby v. Cisneros, 509 U.S. 137, 146-47 (1993).

es of appeal.[170] Underlying the doctrine is the same principle that motivates the insistence on finality, namely that an agency should be given an opportunity to address an issue before the issue is examined by a court. Waiver is also closely intertwined with the requirement that petitioners must exhaust their administrative remedies before seeking judicial intervention. Finally, waiver doctrine is rooted in statutory provisions granting judicial review on appeal only for those questions raised before the agency.[171]

In the past, we often applied the waiver doctrine with an eye to practical reality and focused on whether the agency has had a "fair opportunity" to address the petitioner's argument; if so, deficiencies in the petitioner's presentation of the argument to the agencies could be excused.[172] This practical approach is reflected in our rule that in some circumstances an argument that the petitioner did not raise below will not be deemed waived if another party raised the issue before the agency.[173] It is my impression, however, that our cases increasingly treat waiver as an absolute bar to considering a matter not fully vetted by an agency in the proceedings below.[174] As a guiding principle of respect for agency control of policy, the waiver doctrine has a salutary effect. But again, as a rigid rule waiver can lead to an enormous waste of resources. We are prevented from addressing questions that have been fully briefed on appeal and that the agency always knew were at stake in the controversy, even if not raised in detail below. We are even foreclosed from reviewing such issues when our decision would uphold the agency's action, a result that the agency — the party seeking waiver — would definitely prefer.

The temptation to raise a jurisdictional challenge to judicial review is particularly strong in regard to the *Chaney* defense, because success on the grounds that there is "no law to apply" in the case can permanently short-circuit review on grounds of arbitrary or capricious agency action, lack of substantial evidence, or misinterpreted statutory intent. It is my sense that the government currently pushes *Chaney* to its limits, raising it in situations that do not involve prosecutorial-like functions or even direct resource allocations. One recent case in the D.C. Circuit involved the government's discretion to allocate funds designed to cover overhead expenses to Indian tribes when the amount of such funds falls short of the original budget request.[175] The government argued, cit-

170. *See* Ohio v. EPA, 997 F.2d 1320, 1328-29 (D.C. Cir. 1993).

171. *See, e.g.*, 47 U.S.C. § 405 (1994) (Communications Act of 1934); 15 U.S.C. § 3416(a)(4) (1994) (Natural Gas Policy Act of 1978).

172. *See, e.g.*, AT&T Co. v. FCC, 974 F.2d 1351, 1354 (D.C. Cir. 1992).

173. *See* 2 DAVIS & PIERCE, *supra* note 8, at 341-44; National Resources Defense Council v. EPA, 824 F.2d 1146, 1151 (D.C. Cir. 1987).

174. *See, e.g.*, American Scholastic TV Programming Found. v. FCC, 46 F.3d 1173, 1177 (D.C. Cir. 1995) (petitioner waived question of whether wireless cable is a cable system under the Act by not raising it below, even though FCC had explicitly ruled that wireless cable was not a cable system in an earlier order); *see also* Natural Resources Defense Council, Inc. v. EPA, 25 F.3d 1063, 1079 (D.C. Cir. 1994) (Wald, J., dissenting in part) (since agency had "abundant notice" of petitioner's argument, court should not bar review because party raised claim in reply brief); *but see* Blount v. SEC, 61 F.3d 938, 940 (D.C. Cir. 1995) (real question is whether agency had a chance to address the general claim before being challenged in court, not whether agency was presented with a particular version of the claim).

175. *See* Ramah Navajo Sch. Bd. v. Babbitt, 87 F.3d 1338 (D.C. Cir. 1996).

ing *Chaney*, that in light of statutory language stating that allocations of such funds were "subject to the availability of appropriations," any shortfall meant that the agency could allocate the available funds however it wanted, despite clear statutory language entitling tribes to full compensation and condemning the agency for its failure to provide adequate funding in the past.[176] We rejected that argument, but the panel was a split one.

In general we have been cooler to this effort to expand the "no law to apply" *Chaney* barrier than I would have expected, especially where the agency on its own has narrowed its discretion.[177] This reluctance to expand *Chaney* to novel situations is somewhat surprising, given our predilection for denying access to review in other areas, and is likely traceable to the longstanding presumption of reviewability embodied in the APA.[178] Whatever its roots, the reluctance to expand *Chaney* is a welcome inconsistency in our jurisprudence. Applied to traditional-type prosecutorial decisions to investigate or to enforce, *Chaney* has validity. But expanded beyond this to any and all decisions on the grounds that the law does not sufficiently spell out the factors to inform agency discretion, even though those factors may reasonably be inferred from the rest of the statute, it has a mischievous potential.

Yet we could still end up moving towards a broader application of *Chaney*. Agencies continuously push in that direction to achieve a back-door escape from judicial review under the APA. More importantly, I expect we will be tempted to turn to *Chaney* as the solution to the problems caused by judicial review in an era of starkly diminished agency resources. For example, in the 1996 federal budget skirmishes the House initially proposed reducing funding for the EPA by 28%, or $1.8 billion; and other regulatory agencies faced similar cuts.[179] Although in the end the EPA escaped without a significant reduction in funding, in the current move towards a balanced budget it is likely that many agency budgets will be slashed to the point that agencies will not have

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176. *See id.* at 1345.

177. For instance, we have held that interpretive rules and policy statements can overcome *Chaney*'s presumption of nonreviewability, whereas the First Circuit has held the opposite. *Compare* Padula v. Webster, 822 F.2d 97, 100-101 (D.C. Cir. 1987) *with* Public Interest Research Group v. NRC, 852 F.2d 9, 17-18 (1st Cir. 1988); *see also* UAW v. Brock, 783 F.2d 237 (D.C. Cir. 1986) (judicial review possible if agency gives a reviewable reason for decision). Recently, we reiterated our adherence to the presumption of reviewability in holding that the refusal of the Army Board for Correction of Military Records to waive, "in the interests of justice," the time limits on filing petitions to correct military records was subject to judicial review. *See* Dickson v. Secretary of Defense, 68 F.3d 1396 (D.C. Cir. 1995). We do, however, sustain *Chaney* claims in the enforcement context. *See* Sprint v. FCC, 76 F.3d 1221 (D.C. Cir. 1996) (decision not to investigate fraud unreviewable); Block v. SEC, 50 F.3d 1078 (D.C. Cir. 1995) (only Commission decides if hearing required to determine who is "interested party"). On the application of *Chaney* more generally, *see* Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689 (1990).

178. *See* Abbott Labs. v. Gardner, 387 U.S. 136, 140 (1967); 3 DAVIS & PIERCE, *supra* note 8, §§ 17.6-17.7.; David B. Rodriguez, *The Presumption of Reviewability: A Study In Canonical Construction and Its Consequences*, 45 VAND. L. REV. 743 (1992).

179. *See* Dan Morgan, *Withdrawing Their Big Weapons, Republicans Chip Away at Budget*, WASH. POST, Jan. 29, 1996, at A4 (Congress insisting on big cuts in budgets of thirteen departments, related agencies and programs); Dan Morgan, *Bid to Curb EPA Fails in House*, WASH. POST, Nov. 11, 1996, at A1 (although House riders on budget bill restricting EPA enforcement were overturned, budget provides only $4.8 billion in funding, down from $6.6 billion in 1995).

the resources necessary to meet their statutory mandates and responsibilities.[180] The proper judicial response to diminished agency resources is difficult to determine. On the one hand, legislative mandates for agencies remain the law of the land. Indeed, these budget cuts reflect an attempt to achieve a legislative agenda that cannot be easily achieved directly; for example, although House Republicans could pass a resolution significantly decreasing the resources available to the EPA, they could not enact legislation repealing the Endangered Species Act and other environmental statutes.[181] It could be argued that legislative supremacy leave courts with no alternative but to enforce laws on the books.[182] On the other hand, attempting to force agencies to meet their responsibilities when they lack the resources to do so is a futile endeavor. My sense is that realization of this agency funding dilemma will make access restricting doctrines ever more attractive to courts as a way of justifying their reluctance to prod a weakened body on grounds of principle rather than pragmatics. Difficult as the dilemma is, however, this is the wrong solution. As courts we have an obligation to enforce the law that cannot be abdicated wholesale. The dilemma of diminished funding can only be resolved on a case-by-case basis, taking into account specific statutory language, the ramifications of court enforcement in a given context, and the explanations offered by the agency.

The net effect of our standing, ripeness, waiver and *Chaney* doctrines is to create a checklist of hoops that every potential appellant must go through to get to the merits on appeal, and 28% of our appeals fail one of the tests, at least in part. Restricting access to judicial review causes significant practical problems: it leads to doctrinal inconsistency, creates an obstacle course for litigants and ultimately wastes judicial resources by preventing us from deciding questions that have been fully briefed and argued on appeal and that need to be decided. It also enhances the danger that agencies will be able to thwart Congressional intent, because courts can only force agencies to abide by statutes if they are asked to do so by litigants. These considerations alone should caution against indiscriminately tightening our approach towards granting access, particularly since respect for agency policy setting and expertise can best be achieved by allowing access to review but deferring appropriately to agency judgments on the merits. But there are additional pressing reasons why I find the turn towards restricting access a disturbing development. Restrictions on access do not have the same impact on all litigants; rather, they fall hardest on those who are seek-

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180. *See* Jackie Chalms & David Rogers, *Politics & Policy: Historic Budget Battle Ends With a Whimper, As Congress Approves Funding Deal*, WALL ST. J., Apr. 26, 1996, at A14 (while budget cuts not as extensive as first proposed, large enough to have an effect on government programs); *see generally* Richard J. Pierce, Jr., *Judicial Review of Agency Actions in a Period of Diminishing Agency Resources*, 48 ADMIN. L. REV. (forthcoming 1996) [hereinafter Pierce, *Diminishing Agency Resources*], and the symposium on the effects that diminishing agency resources will have on administrative law in the Fall and Winter 1996 issues of Administrative Law Review.

181. *See* Gary Lee, *GOP Environmental Tactics Scored*, WASH. POST, Feb. 27, 1996, at A17 (Clinton administration accuses congressional Republicans of using budget cuts to scale back environmental laws); Patricia M. Wald, *Environmental Postcards From the Edge: The Year That Was and the Year That Might Be*, 26 ENV. L. REV. 10182 (1996).

182. For such an argument, see Pierce, *Diminishing Agency Resources*, *supra* note 180.

ing to vindicate public rights and benefits. Challengers who allege more traditional common-law claims, such as firms attacking enforcement efforts, get through the courthouse doors with ease.[183] The fact that our restrictions on access have this one-sided ideological impact should give pause. Our concern on this score should be heightened by the fact that in some cases, such as our latest application of Article III standing requirements, our decisions may undermine Congressional attempts to increase access to the courts. One also cannot help but be troubled by the symbolic implications of the accumulation of access restrictions. The message sent to challengers of regulatory actions is that the courts are more concerned with who can survive the jurisprudential tournament than getting to the merits. As the courts cease to be an arena in which people feel that they can force the government to listen to their complaints, alienation and the sense that the government is above the law are bound to grow. Yet despite my reservations on the track we are taking in restricting access to judicial review, I do not foresee much change in the coming years.

III. CONCLUSION

Any discussion of administrative law doctrines is almost surely destined to make the reader's eyes glaze over. This one is no different. Underneath the parsing of arcane text, however, real people and issues huddle; "law's stories"[184] live in administrative law as elsewhere. Over the past year and a half D.C. Circuit APA appeals made a difference in ordinary people's lives: we granted discharged servicemen petitioning for waivers of the time limits on filing for a correction of military records judicial review of waiver denials for the first time;[185] we sent back regulations governing the proficiency training of lab technicians who process women's PAP smears for signs of cancer to ensure that the testing is carried out under working conditions comparable to those technicians will experience in real life when they make their critical decisions;[186] we upheld the EPA's decision to list the Tulalip landfill on Puget Sound as a Superfund priority cleanup site because PCBs and hazardous metals were leaking into the surrounding waters;[187] we overturned the EPA's refusal to allow the manufacturer of MMT, a fuel additive designed to prevent automobile engine knocking, the right to put its product on the market based on public health concerns;[188] we held a domestic labor union did not commit an unfair labor practice in seeking the support of Japanese unions, which resulted in the Japanese unions' refusing to handle cargo loaded by nonunion stevedores;[189]

183. *See* Wald, *Environmental Postcards*, *supra* note 181, at 10185-86.

184. *See* PAUL GEWIRTH & PETER BROOKS, LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW (1996).

185. *See* Dickson v. Secretary of Defense, 68 F.3d 1396 (D.C. Cir. 1995).

186. *See* Consumer Fed'n of Am. v. HHS, 83 F.3d 1497 (D.C. Cir. 1996).

187. *See* Board of Regents v. EPA, 86 F.3d 1214 (D.C. Cir. 1996).

188. *See* Ethyl Corp. v. EPA, 51 F.3d 1053 (D.C. Cir. 1995).

189. *See* Int'l Longshoreman's Ass'n v. NLRB, 56 F.3d 205 (D.C. Cir. 1995).

and we vacated and set down for reconsideration a panel decision that had held striking workers, returning to work while the strike was still on, could be given less desirable jobs because of the employers' undocumented fear they might sabotage the plant.[190] This, in my view is the stuff on which the real APA is made, the flesh on its bareboned structure for judicial review, the *raison d'etre* for its existence.

After fifty years, we appear to have reached some degree of consensus on the theoretical framework for judicial review of agency action. But we have yet to agree on how this review should operate in practice. We are still struggling with where to draw the line between obsequious deference and intrusive scrutiny. Nor is it likely that we will ever fully surmount this dilemma, no matter how many procedural alterations and doctrinal shifts we endure. Perhaps, in the end, the most effective remedy is for those of us on the bench to pay ever closer attention to the effects of our decisions in practice on litigants and on agency operation. As a result of the interbranch dynamic of agency appeals, an emphasis on pragmatic flexibility over formalistic and abstract principle is particularly appropriate. No matter how appealing we believe a doctrinal modification to be, or how troubling we find application of settled doctrine in a particular case, we must always think about how our decision will play out in terms of agency functioning and the next case coming down the pike. In ensuring that our doctrines are flexible enough to preserve the reality of judicial review without unduly curtailing agency action, we should take heart as well as guidance from the spout of all contemporary administrative law, the APA itself. The pragmatic focus that inspired the APA and the flexibility of its requirements are the sources of its continued vitality as our pilot fifty years later.

190. *See* Diamond Walnut Groves, Inc. v. NLRB, 80 F.3d 485, *vacated and set for rehearing en banc*, 88 F.3d 1064 (D.C. Cir. 1996).