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RETHINKING JUDICIAL REVIEW OF ADMINISTRATIVE ACTION:
A NINETEENTH CENTURY PERSPECTIVE

Jerry L. Mashaw*

INTRODUCTION

Nearly a decade ago, Paul Verkuil published an article titled An Outcomes Analysis of Scope of Review Standards. Paul’s article begins with a wonderfully candid quotation from Judge Pat Wald: “After fifty years ... 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.” Judge Wald was, of course, talking about the fifty years from the passage of the Administrative Procedure Act in 1946, which codified the then-evolving practice of the federal courts under diverse, specific statutory review provisions and their general federal question jurisdiction.

I. SCOPE OF REVIEW IN ACTION

Congress routinely attempts to manage the “partnership” between courts and agencies to which Judge Wald’s law review title refers by specifying the standards defining a reviewing court’s “scope of review.” And, as Paul points out, “one might reasonably expect that Congress wants outcomes . . . to vary according to the scope of review standard chosen . . . . But it seems the outcomes question is rarely asked and its premise remains unexamined.”

Paul’s article proceeds to provide that examination in three contexts: district court review of Social Security Administration disability determinations under the “substantial evidence” standard; Court of Veterans Appeals review of disability determinations in

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3 Verkuil, supra note 1, at 682.
4 Id.
veterans' claims under the "clearly erroneous" standard; and federal district court review of determinations to withhold Freedom of Information Act data under the "de novo" standard. Hypothesizing, plausibly, that affirmance rates should be lowest under de novo review, highest under substantial evidence review, and somewhere in between (perhaps close to the substantial evidence standard) under clearly erroneous review, Paul finds that the outcomes are almost the reverse of his hypothesized outcomes. District courts affirm ninety percent of agency determinations under the Freedom of Information Act (de novo review) but only fifty percent under the substantial evidence standard applicable to social security disability appeals. Only the Article I Court of Veterans Appeals, reviewing VA disability determinations under the clearly erroneous standard, comes close to Paul’s original hypothesis.

Of course, administrative lawyers have long understood that the verbal formulae for the scope of review of administrative actions seldom control individual cases. On the other hand, that we see strikingly counter-intuitive results across thousands of cases should, as Paul’s article points out, give us pause. If we believe that Congress should be able to determine which is the “senior partner” in the agency-court partnership, and that the definition of the scope of review of administrative action is a conscious attempt to do so, something is not working.

Good lawyer and legal academic that he is, Paul goes on to suggest a series of potential remedial approaches, mostly tailored to the particular judicial review regimes that he investigated. My approach in this Article is to be more provocative, and surely less useful. I will argue that the Administrative Procedure Act codified an almost accidental development in the relationship between courts and agencies that occurred in the first half of the twentieth century. I will then compare the judicial review regime that these common law and statutory developments produced with the system of judicial review that operated throughout the first century of the Republic. As we shall see, that earlier regime allocated power between courts and agencies quite predictably. I will then argue, in a very tentative way, that we might be better off returning to something like the presuppositions of that earlier approach.

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5 Id. at 702-20.
6 Id. at 711.
II. THE APPELLATE MODEL

Scope of review issues arise in the context of what Thomas Merrill has recently characterized as the “appellate review model” of judicial review of administrative action. On Merrill’s account that model is the dominant paradigm for contemporary judicial review and exhibits three distinctive characteristics: One, the evidentiary record is compiled by the agency and any need for additional information generates a remand to the agency to take further evidence. Two, the standard of review varies based on ideas of the special competences of the initiating and reviewing institutions. Three, the judgment about comparative competence is characterized generally as a distinction between questions of law (for the court) and questions of fact (for the agency).

Of course, as every administrative lawyer also understands, the crucial question in managing the agency-court partnership involves the allocation of policy discretion, and questions of policy are not easily characterized either as questions of fact or as questions of law. The Supreme Court has experimented with a number of different means for allocating policy choice to agencies or to courts. In the justly famous *Hearst* case of 1944, for example, the Court characterized the legal conclusion of whether particular “newsboys” employed by the Hearst Corporation were employees or independent contractors as a question of fact for the Labor Board. And, in what may now be the twentieth century’s most cited and commented-upon decision, the *Chevron* case, the Court implicitly redefined the questions of statutory interpretation that the APA seems to allocate firmly to de novo judicial determination to encompass first the question of whether Congress has implicitly delegated questions of statutory interpretation to the agency. If so, and the statute is not otherwise clear and unambiguous, the agency’s interpretation is reviewed only for reasonableness. The *Chevron* opinion’s explicit merger of issues of policy with statutory interpretation is of a piece with the *Hearst* Court’s fictional treatment of legal conclusions as questions of fact. In both cases the Court is attempting to manage the same problem—how to allocate policy discretion between court and agency—while operating within the basic structure of the law/fact distinction.

Both *Hearst* and *Chevron* are deferential in allocating policy choice to the relevant agency, but the deference is qualified. In *Hearst*,

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the Court noted that the record before the Labor Board would have to contain sufficient evidence to make its factual determination reasonable or non-arbitrary. In *Chevron*, the Court placed the same reasonableness limitation on the EPA’s interpretation of the relevant statutory terms. Indeed, as David Zaring has recently argued,¹⁰ reasonableness has become the overarching standard for judicial review of agency action.

But, reason lies in the eyes of the beholder and deference may not be forthcoming as other iconic cases, like *Overton Park,¹¹ State Farm,¹²* and the *Benzene Case¹³* amply demonstrate. Moreover, even broad statements of deference doctrine like that contained in *Chevron* seem to have little effect on the outcomes of cases. In a massive study of Supreme Court determinations since the *Chevron* opinion was handed down, William N. Eskridge, Jr. and Lauren Baer¹⁴ find that *Chevron* coexists with a host of other deference doctrines concerning statutory interpretation, and that in a majority of Supreme Court statutory interpretation cases reviewing agency determinations, the Court invokes no deference regime of any sort. To be sure, agencies win a significant percentage of cases when the court invokes *Chevron* in its decisions, but that finding is consistent with the formal use of the *Chevron* formula to bolster a decision reached on other, less articulate grounds.

In short, the struggle to manage the court-agency partnership continues because it is built into the appellate model of judicial review and the law-fact distinction that characterizes its allocation of institutional competence. Tom Merrill’s recent treatment echoes Paul Verkuil’s suggestion that the malleability of the scope of review under the appellate review model is one of its principle political virtues. It allows courts to maintain a stance of non-intervention in agency policy choice while stepping in to correct what the reviewing court believes is a clear mistake, or to rein in agencies in which the reviewing courts have generally lost confidence. But this political advantage comes, as Paul’s article notes, at the cost of predictability and of congressional capacity to exercise political control over the nature of the agency-court partnership in particular domains.

III. A Nineteenth Century Alternative

The appellate model now dominates American legal consciousness, but it is not the only model of judicial review on offer. Indeed, as Merrill demonstrates, this was not the dominant model until well into the twentieth century. He further makes a reasonably persuasive case that the appellate model’s ascendency originates with the Hepburn Act of 1906, which, although failing to explicitly address the standard of judicial review of federal court supervision of the Interstate Commerce Commission, nevertheless signaled that “the public and the politicians were deeply unhappy with the Court’s existing practices regarding judicial review of ICC rate orders.” After the Hepburn Act, the Supreme Court beat a hasty retreat from its previously intrusive review of ICC orders and adopted a similar stance with respect to Federal Trade Commission decisions under the Federal Trade Commission Act of 1914. But what was judicial review like before 1906?

The nineteenth century approach to judicial review employed what I have previously characterized as a “bi-polar” model of judicial review. Indeed, the model was bi-polar in two different senses: From one perspective it was bi-polar because it employed both private law causes of action—for damages or specific relief—and an essentially public law action when ruling on petitions for prerogative writs, principally mandamus. It was also bi-polar in its stance toward the scope of judicial power. Review was either de novo or nonexistent. By de novo I mean both that facts were tried out and records made in court and that the court decided the case independently based on the judicial record. By “nonexistent” I mean that courts would simply decide whether the plaintiff had stated a cause of action in a common law action or a bill in equity, or had satisfied the requirements of the relevant prerogative writ. If the answer was yes, the court decided both issues of fact and law. If the answer was no, the court simply found that the suit would not lie.

There is, of course, a long and complicated story here, which I have told in some detail elsewhere. In short form, the bi-polar model

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15 Merrill, supra note 7, at 397.
worked like this: If a customs officer detained your vessel or goods for nonpayment of duties owed, or a naval officer seized your vessel for violation of an embargo or non-intercourse statute, you could sue the officer for return of the goods or vessel and for damages. The case would be tried in court, state or federal, and often before a local jury. Officers generally had no immunity, either absolute or qualified, and the court or jury would determine whether they had properly exercised their authority. Remedies might include return of the goods or vessel and damages for loss of value or lost business.\(^\text{18}\)

Similarly, errors in the Land Office in the issuance of land patents, or in the Patent Office in the issuance of invention patents, might be challenged in a common law action. Because the land officers would not be in possession of the land and the patent officers would not be exploiting inventions, these suits were between private parties and brought the validity of official action into issue only collaterally. Once again, in these collateral actions the approach to scope of review was bipolar, or nearly so. The largest class of cases involved the issuance of land patents. Here the courts' basic approach was to treat the Land Office as a concurrent tribunal whose determinations were controlling so long as it had jurisdiction. On the question of jurisdiction, usually whether a parcel of land conveyed was in fact a part of the public domain, the court decided the facts and law for itself. If the Land Office was found to have had jurisdiction the case was over; if it was found not to have had jurisdiction the court then decided the competing claims to the contested parcel for itself.\(^\text{19}\)

De novo judicial review might occur in other collateral forms. For example, if the Secretary of War canceled an Indian trader's license, that cancelation entailed the forfeiture of the trader's bond. But collection of the bond amount required a judicial proceeding in which the court would make a de novo determination of whether the license should have been canceled and the bond forfeited for failure to comply with one or another regulation governing trading with the Indians. Similarly, many statutes provided *qui tam*, or informer suits, to police the behavior of government officers, particularly those handling government funds. A suit to recover funds for the United States,

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\(^{18}\) Naval seizures of vessels might also go before prize courts at the behest of the seizing naval officers and would result in a similarly de novo proceeding.

\(^{19}\) This jurisdictional or "res judicata" approach to Land Office determinations is described in more detail in Ann Woolhandler, *Judicial Deference to Administrative Action: A Revisionist History*, 43 ADMIN. L. REV. 197, 216-19 (1991). It began to break down in a limited class of cases in the post-Civil War era. See, e.g., Marquez v. Frisbie, 101 U.S. 473 (1879); Johnson v. Towsley, 80 U.S. (13 Wall.) 72 (1871); Lindsey v. Hawes, 67 U.S. (2 Black) 554 (1862). In these later cases, something like the law-fact distinction began to emerge.
whether brought by a *qui tam* relator or by the government itself, entailed a de novo proceeding in which the court, or the court and a jury, would determine both facts and law.

The alternative form of judicial review proceeding was one for a writ of mandamus or injunction. The possibility of mandamus review begins, of course, with *Marbury v. Madison*, but there the Court was found not to have jurisdiction to issue the writ. Marbury’s promise of mandamus review was redeemed in *Kendall v. United States ex rel. Stokes*. But the writ was severely circumscribed. It would lie only if the officer’s determination were purely ministerial, and in a long series of cases, beginning with *Decatur v. Paulding*, the Supreme Court made clear that it was loath to find official actions nondiscretionary. This limiting doctrine applied to injunction suits as well. In *Gaines v. Thompson*, the Supreme Court described the mandamus jurisprudence as part of a “general doctrine, that an officer to whom public duties are confided by law, is not subject to the control of the courts in the exercise of the judgment and discretion which the law reposes in him as a part of his official functions.” That doctrine, the court said, “is as applicable to the writ of injunction as it is to the writ of mandamus.”

*Gaines* also explicitly excluded the notion that a law-fact distinction might apply to wrest discretion from the Secretary of the Interior and vest it in a reviewing court. The Court found the Secretary’s discretion precisely in the fact that the determination of the validity of the plaintiff’s entry onto public lands was “a question which requires the careful consideration and construction of more than one act of Congress.” In short, in actions for mandamus or injunction, if the court found that the officer had any discretion under the statute, the plaintiff lost. On the other hand, if the suit involved a non-discretionary duty, the court would decide for itself whether that duty had been violated.

Nor was the Court inclined to relax its non-interventionist posture in response to claims that the underlying administrative process violated due process of law. As late as 1904, for example, the Supreme Court opined:

> It is too late to argue that due process of law is denied whenever the disposition of property is affected by the order of an executive

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20 5 U.S. (1 Cranch) 137 (1803).
24 74 U.S. (7 Wall.) 347 (1868).
25 Id. at 352.
26 Id.
27 Id. at 353.
That due process of law does not necessarily require the interference of the judicial power is laid down in many cases and by many eminent writers upon the subject of constitutional limitations.²⁸

The nineteenth century federal courts and federal administrative agencies were not in a partnership. They operated in separate spheres. Courts either decided questions de novo on records made in court, or they effectively declined jurisdiction. Once one knew what form of action a lawsuit would take, the "reviewing" courts' scope of review was seldom in doubt. Lower court attempts to broaden the scope of mandamus review were routinely rejected by the Supreme Court²⁹ and attempts to protect officers' reasonable missteps from common law liability were rejected by Congress.³⁰ Predictability reigned and Congress's expectations were presumably respected, for it neither broadened nor limited mandamus jurisdiction, modified the scope of official common law liability, nor provided alternative forms of judicial review.

IV. SOME ADVANTAGES OF THE BI-POLAR MODEL

The struggle by federal reviewing courts to properly apply the available scope of review standards is, at base, a struggle about separation of powers. The appellate model of judicial review puts the courts in an awkward position. That awkwardness is evident from iconic cases like NLRB v. Hearst Publications that review agency adjudication, the agency function most like the determinations of lower courts.

The situation is much more awkward when the appellate model comes to be applied to agency rulemaking. The conventional lawyerly moves for separating law and policy when reviewing agency adjudications, or for camouflaging their inseparability, are largely unavailable in this context. It is simply preposterous to claim that the

²⁹ The Supreme Court of the District of Columbia was at times sympathetic to the extension of mandamus jurisdiction, but in case after case the United States Supreme Court reaffirmed the narrowness of the writ. See, e.g., United States v. Comm'r, 72 U.S. (5 Wall.) 563 (1866) (denying mandamus to compel the issuance of a patent by the Commissioner of the General land Office); Comm'r of Patents v. Whiteley, 71 U.S. (4 Wall.) 522 (1866) (denying mandamus to compel the Commissioner of Patents to reexamine the patent application).
³⁰ In Cary v. Curtis, 44 U.S. (3 How.) 236 (1845), Justice Daniel interpreted a statute requiring that customs collectors immediately pay over all funds received to the Treasury of the United States as intending to eliminate a collector's liability for funds improperly collected. Congress responded almost immediately, reaffirming both the availability of common law actions against collectors and the right to trial by jury in those proceedings. Act of Feb. 26, 1845, ch. 22, 5 Stat. 727.
court is addressing an agency's application of law to fact in the adjudication of an individualized claim of right. Rules are promulgated to establish or implement legislative policy.

Moreover, scope of review formulae like "substantial evidence," "clearly erroneous," and the like, make sense when applied to an adjudicatory record. But, rulemaking produces no closed record like a trial court proceeding. There are no obvious boundaries on the rulemaking record, no accepted standards of proof for policy judgments, and no procedural vehicles that sharply delineate the issues in a rulemaking proceeding.

Reviewing courts have managed to force rulemaking review into something like the appellate model by demanding that records be made, focusing on the adequacy of the record to sustain the agency's judgment and remanding where records are inadequate. But this has only papered over the incongruity of treating a legislative function like a judicial one. And, when the Chevron litigation revealed the policy skunk at the legal review garden party, the Supreme Court was required to honor what it viewed as the Court's proper role in judicial review of agency action by simply eliding policy and law through the invention of a fictitious congressional delegation of authority to agencies to interpret their statutes.

The obvious virtue of the bi-polar model of judicial review from the separation of powers perspective is its capacity to keep claims of legal right and claims of policy mistakes separate. Claimants under that model could sue officers for damages or specific relief only if they could enunciate a cause of action in some cognizable tort, contract, property or prerogative writ form. In standard common law actions, officers were sued in their individual capacities and raised their official duties as a defense. There was no separation of powers embarrassment in a federal court hearing a common law claim, and it made its determination based on a record compiled in court and applying legal standards that were wholly judicially determined. In a few exceptional cases Congress statutorily provided that officers might escape liability if their actions, although erroneous, were nevertheless reasonable. But this insertion of judicial judgment into the evaluation of an exercise of administrative discretion was extremely rare (indeed, I have found only that one instance). And, of course, as we have seen, in mandamus and injunction proceedings, once it was determined that the officer had discretion to exercise, the lawsuit was at an end.


32 Act of March 3, 1791, ch. 15, 1 Stat. 199, § 43.
The structure of nineteenth century review was meant to maintain a strict separation between judicial and executive power. Courts and commentators doubted the constitutionality of providing appellate judicial review of administrative determinations. When Congress first provided appeal from an administrative adjudication by statute, the Court balked at applying the statute as written.

United States v. Ritchie involved an appeal provided by statute from a determination of the Board of Commissioners empowered to settle land claims in California. The defendants objected that an appeal from commissioners to a federal district court was unconstitutional. Because the Board of Commissioners was not a court, and therefore not vested with the judicial power, appellees argued that for a district court to take an appeal from the Board would be for the district court to exercise a non-judicial jurisdiction.

The Supreme Court upheld the statute by misreading it. It treated the suit in the district court as a de novo or original proceeding. Noting the embarrassment of the plain language of the statute, the Ritchie Court said “[t]he transfer, it is true, is called an appeal; we must not, however, be misled by a name, but look to the substance and intent of the proceeding.” Under the statute, the district court was allowed to take additional evidence, and on that basis the Supreme Court found that the requirement for transferring the record before the commissioners to the district court was “but a mode of providing for the institution of a suit in that court.”

The Supreme Court finally relented in United States v. Duell, upholding a statute providing an appeal to the Court of Appeals of the District of Columbia from decisions of the Commissioner of Patents. This innovation was roundly criticized by the first treatise on American administrative law. Bruce Wyman argued that the statute was clearly unconstitutional because it made an executive department subordinate to a separate and independent branch of the government. We may well agree with the late-nineteenth century Supreme Court that Congress is entitled to provide an appeal from administrative determinations if it is so inclined, but that carries with it the immersion in the separation of powers soup in which we now find ourselves.

Modern courts, of course, have other devices for avoiding sticking their tongues into that soup when it is too hot for comfort. The deployment of standing doctrine is an obvious example. But few

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33 58 U.S. (17 How.) 525 (1854).
34 Id. at 534.
35 Id.
36 172 U.S. 576 (1899).
commentators are happy with the doctrinal morass that characterizes standing doctrine since the 1970s. And, however much one might sympathize with courts struggling to avoid being dragged into policy controversies at the behest of ideological or tangentially affected interests, it is hard to disagree with conventional wisdom that contemporary standing cases describe a line between the justiciable and the non-justiciable that is difficult to discern.

The happy fact of the matter under nineteenth century understandings of judicial review of administrative action was that standing was not really a problem. Separation of powers issues were handled by the simple requirement that the plaintiff state a cause of action against the officer that was recognizable at common law, or identify a non-discretionary duty that could be policed by mandamus or injunction. While this to some degree limited standing to what we once understood as the “legal wrong” requirement, it could expand it as well. Nineteenth century courts understood that mandamus actions might often seek to enforce a duty owed to the public at large.

For example, in Union Pacific Railroad Company v. Hall, the plaintiffs were attempting to obtain an order mandating the extension of service by the Union Pacific Railroad to the full extent of the territory authorized and required by Congress when chartering the company. The plaintiffs seeking mandamus were merchants who would benefit from an extension of the Union Pacific service, but the Court recognized that they “had no interest other than such as belonged to others engaged in employments like theirs, and the duty they seek to enforce by the writ is a duty to the public generally.” The defendants, therefore, urged that the Court could not hear the case unless it were brought by the Attorney General of the United States, or at least the federal prosecutor for the affected district. The Supreme Court rejected that argument: “There is, we think, a decided preponderance of American authority in favor of the doctrine that private persons may move for a mandamus to enforce a public duty, not due to the Government as such, without the intervention of the government law officer.”

In short, the Union Pacific Court recognized what we would call a public action, a form of action that has now all but disappeared from our jurisprudence. The public action did not threaten to involve the

38 91 U.S. 343 (1875).
39 Id. at 354.
40 Id. at 355.
42 Elizabeth Magill, Standing for the Public: A Lost History, 95 VA. L. REV. 1131 (2009).
judiciary in non-judicial business so long as mandamus jurisdiction was restricted to enforcing non-discretionary legal duties.

To be sure, there is now too much water over the dam to return to the practices of judicial review as exercised by nineteenth century federal courts. We would surely balk at making officials liable in damages for mere error either of a fact or law in the carrying out of their administrative duties. Relegating all judicial review of administrative action that could not be stated in a common law form, or articulated as the failure to carry out a non-discretionary duty, to the enforcement stage would also strike the modern administrative lawyer as an unduly burdensome approach to relief from administrative error. And, we now seem wedded to the notion that courts may always review for “reasonableness” notwithstanding the degree to which we also understand that this inserts courts deeply into policy processes that, at least abstractly considered, seem much more appropriately dealt with by Congress and its administrative delegates.

Still, there is much to be learned, it seems to me, from contemplating the nineteenth century approach. First, it seems to give the control of judicial review back to Congress. If the appellate model is wanted, Congress can and should specify it for particular agency functions. To be sure, Congress may grant that review where the appellate model has a poor fit with the realities of administration, as in the provisions for preenforcement review of rules attached to a number of modern regulatory statutes. But, that is no reason, it seems to me, to generalize from those provisions, as the Supreme Court now has, that preenforcement review of rules in an appellate form is appropriate general practice.

Moreover, imagining that the appellate model only applies to the extent that Congress has so specified would eliminate the Supreme Court’s Overton Park presumption that all agency action is reviewable provided there is a “law to apply.” Presumably there is always some law to apply, or else we are in the presence of one of those rare instances in which the statute provides no intelligible principle and should be struck down on non-delegation grounds. For, it also seems to me, that problems of separation of powers, understood as a problem of judicial usurpation of administrative discretion, can more easily and functionally be approached through notions of reviewability than notions of standing. And by dropping the notion that all administrative actions are presumptively reviewable, we can ask the question of reviewability in the straightforward form of whether the plaintiff has stated a cause of action. The question would then be whether the plaintiff had stated a cognizable common law claim, a claim that can be

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pursued under some relevant extraordinary writ or has been given a cause of action by statute. If we ask the question that way, we would also be returning standing doctrine to its original meaning under the APA, before the ADAPSO\textsuperscript{45} case ripped it free from historical context\textsuperscript{46} and plunged the courts into the murky, indeed incoherent, search for "injury-in-fact."


\textsuperscript{46} On this again, see Magill, supra note 42.