2004

In Praise of a Skeletal APA: Judicial Discretion, Remedies for Agency Inaction and APA Amendment

William D. Araiza
Brooklyn Law School, bill.araiza@brooklaw.edu

Recommended Citation
56 Administrative Law Review 979 (2004)

IN PRAISE OF A SKELETAL APA: *NORTON V. SOUTHERN UTAH WILDERNESS ALLIANCE*, JUDICIAL REMEDIES FOR AGENCY INACTION, AND THE QUESTIONABLE VALUE OF AMENDING THE APA

WILLIAM D. ARAIZA*

TABLE OF CONTENTS

INTRODUCTION

This Article takes a slightly different tack on the symposium's topic of amending the Administrative Procedure Act (APA). It considers a case

* Professor of Law and Richard A. Vachon, S.J., Fellow, Loyola Law School, Los Angeles. The author wishes to thank Brian Ewing for his patient and excellent research assistance. As a matter of disclosure, the author was one of the authors of an amicus brief in *Norton v. Southern Utah Wilderness Alliance*, the case discussed in this Article. The co-author of that brief was Robert Dreher, of the Georgetown University Environmental Law Clinic, to whom the author of this Article owes much thanks for his insight and critique of the ideas expressed here.

recently decided by the Supreme Court, *Norton v. Southern Utah Wilderness Alliance*,[1] which deals with the availability of judicial review to remedy agency inaction, and uses it as an example of the difficulties that might accompany attempts to amend the APA. Part I briefly presents *Southern Utah*. Part II discusses how proper resolution of the reviewability and remedy issues the case poses depends heavily on the particular type of statutory duty alleged to have been neglected. Part III builds on that discussion to argue that the diversity of types of agency actions that exist today makes it difficult to codify more precise statutory guidance with regard to both reviewability and deference standards. This Article concludes by considering the appropriate scope and subject matter for amendments to the APA.

I. THE *SOUTHERN UTAH* CASE

Southern Utah involves a challenge by environmentalists to alleged failures by the Bureau of Land Management (BLM) to manage certain public lands in Utah in conformance with the Federal Land Policy Management Act of 1976 (FLPMA).[2] The lands at issue have been designated as "Wilderness Study Areas" (WSAs), which identifies them as eligible for congressional designation as wilderness lands under the Wilderness Act of 1964.[3] Once a parcel is designated as a WSA, the BLM is required to manage it so it retains unimpaired its characteristics as wilderness, and thus its suitability for later congressional designation as wilderness.

Environmental groups sued BLM in 1999, claiming that the agency failed this "non-impairment" standard by neglecting to take several actions necessary to preserve the lands as required by statute.[4] For example, the plaintiffs claimed that BLM failed to keep its promise to designate routes for use by off-road vehicles (ORVs), effectively keeping the entire area open to ORV use and impairing the land's wilderness characteristics.[5] The district court dismissed the claims, but a divided panel of the U.S. Court of Appeals for the Tenth Circuit reversed, holding that the non-impairment standard was a mandatory statutory duty that the courts had jurisdiction to enforce under the APA.[6]

---

1. Norton v. S. Utah Wilderness Alliance, 124 S. Ct. 2,373 (2004).
2. 43 U.S.C. § 1701 (2000).
3. 16 U.S.C. § 1131 (2000).
4. *S. Utah Wilderness Alliance*, 124 S. Ct. at 2,378.
5. *Id.* at 2,381-82 (finding plaintiff's claims moot due to BLM's completion of a route designation plan).
6. *Id.* at 2,378 (noting the Tenth Circuit's decision that BLM could be compelled to comply with a non-impairment obligation).

In reaching the Supreme Court, the case presented the issue of whether federal courts had jurisdiction to order BLM to protect the WSAs or, contrarily, whether the challenged agency conduct was not "final agency action" that could be reviewed pursuant to APA § 704 or be subject to judicial compulsion under § 706 (1). The Supreme Court, in a unanimous opinion by Justice Scalia, reversed the Tenth Circuit and held that federal courts did not have jurisdiction to review claims that the agency inaction violated of FLPMA's non-impairment standard.[7]

II. "AGENCY ACTION," FINALITY, AND JUDICIAL DISCRETION IN *SOUTHERN UTAH*

Southern Utah raised questions about the proper understanding of "agency action" generally, the finality of such action, and the appropriate conditions under which courts should compel agencies to act. This part of the Article examines those issues, considers the Supreme Court's resolution of them, and explains how their appropriate resolution should have turned more on the particular nature of the duties the agency was alleged to have violated.

A. "Agency Action"

The APA's definition of "agency action" explicitly includes a "failure to act" within its exemplars.[8] A moment's reflection on the realities of the modern administrative state reveals the logic behind the breadth of that definition. If part of the purpose of the definition of "agency action" is to identify the proper subjects of judicial review—and surely this is one of its purposes—then agency "action" must include failures to act for the simple reason that judicial correction of agency nonfeasance is every bit as important to the rule of law as judicial correction of agency malfeasance.[9]

---

7. *Id.* The Supreme Court's reasoning is discussed below. *See* discussion *infra* Parts I and II. The environmental groups also claimed that the BLM had violated mandatory duties located in Land Management Plans adopted by the agency and had failed to consider whether increased ORV use necessitated a supplemental environmental impact statement under the National Environmental Policy Act (NEPA). *See generally* 42 U.S.C. § 4321 (2000). Like the first claim, the Supreme Court rejected these latter claims, which this Article does not discuss. *Id.*

8. Administrative Procedure Act, 5 U.S.C. § 551(13) (2000). For convenience, this Article refers to APA sections by their placement in Title 5 of the United States Code.

9. The term "agency action" appears in § 701 ("agency action" committed to agency discretion by law is not subject to judicial review), § 702 (authorizing suit by any person "suffering legal wrong because of agency action" or "adversely affected or aggrieved by agency action"), § 704 ("Agency action made reviewable by statute and final agency action . . . are subject to judicial review"), § 705 (authorizing courts to postpone the effective dates of "an agency action" when required), § 706 (authorizing courts to "compel agency action unlawfully withheld or unreasonably delayed" and to "hold unlawful and set aside agency action" that fails the appropriate standard of review"). 5 U.S.C. §§ 701-706. Indeed, the term "agency action" appears more in Chapter 7 than any other place in the APA. *Id.*

The similarity between administrative malfeasance and nonfeasance has been understood since the New Deal. Courts and commentators during that era began to understand that statutorily granted rights enjoy equal importance and dignity as the common law rights that had previously occupied a preferred station.[10] The basis for this doctrinal shift was the recognition that common law rights and statutory rights equally reflect policy judgments by government decisionmakers and thus merit equal judicial vindication. This understanding has greatly influenced modern administrative law doctrine, from procedural due process[11] to APA standing[12] to Article III standing.[13] Because vindication of statutory rights often requires affirmative government action in a way that vindication of common-law rights generally does not, according equal status to both means that courts must sometimes compel government action, not just restrain it.

This straightforward explanation, however, fails to capture the full complexity of the issue. In *Southern Utah,* BLM argued that its alleged failure to maintain the WSAs did not constitute "agency action," much less "final agency action." The agency argued that § 551(13)'s inclusion of "a failure to act" as an example of an "agency action" should be read in light of that provision's other examples of "agency action," which it argued were

---

10. *See, e.g.*, Nebbia v. New York, 291 U.S. 502 (1934) (holding that a state statute that fixed milk prices did not violate equal protection or due process principles); West Coast Hotel v. Parrish, 300 U.S. 379 (1937) (upholding a minimum wage law for women against a due process attack); Kimberlé Crenshaw & Garry Peller, *The Contradictions of Mainstream Constitutional Theory*, 45 UCLA L. REV. 1683, 1691 (1998) ("The [legal] realists uncovered how the common law baseline . . . was itself constituted through policy decisions. . . . Accordingly, to permit legislatures rather than common-law judges to set those necessarily regulative baselines would not *introduce* regulation, but instead substitute one set of policy decisions for another.").

11. *See* Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972) (holding that once a state college instructor completed the terms of his contract, he had no protected 14th Amendment interest in continued employment).

12. *See* Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970) (noting that standing is partially dependent upon the interests protected or regulated by a statute). This progression of administrative standing law has had the effect of allowing suit by holders of statutorily based interests. *See* Richard Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1723-24 (1975) (describing the traditional standing model where common law rights were the only ones whose deprivation provided a plaintiff with standing, and explaining the evolution of administrative law to allow plaintiffs to sue when statutorily-granted rights were impaired); *see also* LOUIS JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 505-13 (1965) (reviewing early developments of the federal law of standing).

13. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring) ("As Government programs and policies become more complex and far reaching, we must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition. . . . In my view, Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before . . . ."); Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982) (finding Article III injury in the deprivation of a statutorily-granted right to truthful information about the availability of rental housing).

all discrete, rather than ongoing, actions.[14] Based on BLM's conclusion that the affirmative agency *actions* included in § 551(13) were all discrete, rather than ongoing, the agency argued that the converse must be true, too—that the *failures to act* brought under the definition of "agency action" should be limited to failures to take such discrete actions.[15]

The Supreme Court agreed. It stated that "a failure to act" was "properly understood to be limited, as are the other items in § 551(13), to a *discrete* action."[16] To understand the Court's reasoning, it is useful to have the text of § 551(13) close at hand: "'agency action' includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act."[17] Before getting to "failure to act," the Court first considered the previous phrase, "or the equivalent or denial thereof," which appears after the list of examples of specific affirmative agency actions. The Court first reasoned that this phrase required that other affirmative actions coming under the umbrella of "the equivalent . . . thereof" must be similarly discrete to the listed examples, since otherwise they would not be "equivalent."[18] Second, the Court reasoned that the same phrase's inclusion of "or denial thereof" must refer to denials that were either denials of the five listed examples of affirmative agency action (and thus, of course, discrete), or, at most, denials of the "equivalents" the statute referenced (those equivalents being, as just noted, also discrete actions).[19] The Court then asserted that "'failure to act' is . . . properly understood as a failure to take . . . one of the agency actions (including their equivalents) defined in § 551(13)."[20] As support for this assertion, the Court simply cited the interpretive canon of *ejusdem generis* to "attribute to . . . 'failure to act' the same characteristic of discreteness shared by all the preceding items."[21]

Despite its neatness (or indeed, perhaps because of it), the Court's analysis cuts against the logic of modern administrative law. Just as modern administrative law rejects a distinction between reviewability of agency malfeasance and nonfeasance generally, the evolution of administrative regulation counsels against a per se rule immunizing *ongoing* nonfeasance from judicial review. Administrative responsibilities have progressed far beyond the traditional focus on licensing and rate

14. *See* 5 U.S.C. § 551(13) (2000) (stating that "'agency action' includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act").
15. Norton v. S. Utah Wilderness Alliance, 124 S. Ct. 2,373 (2004).
16. *Id.* at 2,379 (emphasis in original).
17. 5 U.S.C. § 551(13).
18. *S. Utah Wilderness Alliance*, 124 S. Ct. at 2378.
19. *Id.* at 2,379.
20. *Id.*
21. *Id.* (parentheses omitted).

setting that characterized administrative action during the late nineteenth and early twentieth centuries.[22] Such traditional functions are marked by discrete points of contact between the agency and private parties, most notably, the licensing and ratemaking proceedings that set the terms under which private parties can then go into and act in a market. Those functions remain important, but have been supplemented by more direct regulation of relationships between private parties. Examples of such direct regulation include ongoing governmental supervision of capital markets, the government's direct provision of ongoing benefits such as income maintenance and social insurance payments, and, as in *Southern Utah*, government commitments to manage its own activities and assets in ways responsive to interests championed by private parties.[23] These types of functions involve more intensive and continuous regulation than periodic licensing or rate-setting.

Such ongoing regulatory mandates reflect the same type of policy choices reflected in grants of more discrete regulatory authority. The only difference is that the nature of the regulatory problems requires a different form of administrative action. The existence of these diverse forms of regulation requires that courts consider the particular nature of the agency's mandate when deciding reviewability issues.

The APA's judicial review provisions reflect a spirit of flexibility. The APA's presumption of judicial review indicates the drafters' unwillingness to see formalistic barriers frustrate the availability of a judicial check on agency action.[24] Judicial flexibility is also reflected in the APA's grant of broad latitude with regard to the proper form of proceeding.[25] It is also apparent in the broad definition of "agency action" in § 551(13), as understood by the drafters and the Court itself on other occasions.[26] These provisions, by making agency action presumptively reviewable, defining

22. *See* Richard E. Levy & Sidney A. Shapiro, *Administrative Procedure and the Decline of the Trial*, 51 U. KAN. L. REV. 473, 473 (2003) (noting that "administrative agencies have assumed an increasingly important role in the legal regulation of economic and social activity. . . ."); STEVEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT AND CASES 19 (5th ed. 2002) (outlining the rise of administrative regulation from 1875-1930).

23. *See* Levy & Shapiro, *supra* note 22, at 482 (contrasting early administrative agency adjudicatory with more recent administrative rulemaking).

24. *See* Block v. Cmty. Nutrition Inst., 467 U.S. 340 (1984) (noting the presumption of judicial review).

25. *See* 5 U.S.C. § 703 (2000) (outlining that "[t]he form of proceeding for judicial review is the special statutory proceeding relevant to the subject matter in a court specified by statute, or, in the absence or inadequacy thereof, any applicable form of legal action . . . ."); *see also* 5 U.S.C. § 705 ("On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court . . . may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.").

26. *See infra* note 29.

"agency action" broadly, and providing reviewing courts with latitude in regard to both the forms of proceeding and relief available to parties challenging agency action, combine to paint a coherent overall picture of the APA in which maximum opportunities are available for parties to seek meaningful judicial review consistent with a respect for the discretion retained by the agency.

Against this understanding, the Court's statutory interpretation analysis appears remarkably weak. Section 551(13)'s list of types of specific affirmative agency actions begins with "includes" rather than the more restrictive "means;" the significance of this difference is suggested by the care with which the APA's drafters distinguished between them when defining the statute's terms.[27] Thus, it is at least a bit inaccurate to characterize affirmative agency actions brought under the APA's umbrella as necessarily sharing the common characteristic of discreteness.[28] If that step by the Court is inappropriate, then the *ejusdem generis* argument adds nothing. When this weak analysis is put up against the legislative history of the Act[29] and the policy analysis presented above, the weakness of the Court's conclusion becomes apparent.

Still, striking the proper balance between ensuring maximum review opportunities and respecting agency discretion requires courts to consider the details of the particular agency action. Judicial review of ongoing agency responsibilities runs the risk of interfering with the agency's exercise of its discretion. The complexities inherent in striking this balance and the corresponding need for case-by-case decisionmaking are illustrated when concerns about finality are added into the analysis.

B. The Finality Requirement

Section 704 of the APA confines the default availability of judicial review to instances of "final" agency action.[30] Confining judicial review to

---

27. *Compare* 5 U.S.C. §§ 551 (1), (4), (5), (6), (7), (12), (14) (beginning the definition with "means" rather than "includes"), *with* §§ 551(2), (3), (8), (9), (10), (11), (13) (1945) (beginning the definition with "includes" rather than "means").

28. *Cf.* Norton v. S. Utah Wilderness Alliance, 124 S. Ct. 2,373, 2,378 (2004) (stating that "an 'equivalent . . . thereof' must also be discrete (or it would not be equivalent)"); *id.* (adding that "a 'denial thereof' must be the denial of a discrete listed action (and perhaps denial of a discrete equivalent)").

29. *See* S. REP. NO. 752 (1945), *reprinted in* ADMINISTRATIVE PROCEDURE ACT, LEGISLATIVE HISTORY, S. DOC. NO. 248, at 198 (1946) (defining "agency action" broadly to "assure the complete coverage of every form of agency power, proceeding, action or inaction."); *see also* H.R. REP. NO. 1980 (1946), *reprinted in* ADMINISTRATIVE PROCEDURE ACT, LEGISLATIVE HISTORY, S. DOC. NO. 248, at 255 (1946) (defining "agency action" broadly to "assure the complete coverage of every form of agency power, proceeding, action or inaction."); Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 478 (2001) (stating that the APA "is meant to cover comprehensively every manner in which an agency may exercise its power").

30. 5 U.S.C. § 704 (2000). Section 704 authorizes Congress to make non-final agency

final agency action allows the agency to correct its own mistakes and ensures that judicial review is not premature and is instead conducted on a complete administrative record.[31] These justifications for the finality requirement apply to the review of claims of ongoing administrative nonfeasance and require the development of appropriate rules to guide judicial review when such claims are made.

Administrative law has developed what the Supreme Court has described as a "pragmatic" approach to finality.[32] The Court most recently expressed the test for administrative action finality in *Bennett v. Spear*: "First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow."[33]

The *Bennett* formula thus focuses both on the regulator and the regulated party in determining finality, requiring both that the regulator have definitively decided the issue and that the regulated party have experienced some change in its legal status or rights. The *Bennett* formula also looks to the underlying rationales for the finality requirement: in particular, the first prong, by requiring that the administrative process has reached a conclusion, guards against inappropriate judicial interference in ongoing administrative decision-making and ensures that judicial review will be conducted using as full a record as possible. For its part, the second prong

---

actions reviewable as well. *See id.* ("Agency action *made reviewable by statute* and final agency action . . . are subject to judicial review.") (emphasis added). This authorization is merely declaratory, of course, since Congress always has the power to prescribe procedures for a particular agency or regulatory program different from the default procedures of the APA.

31. *See* SENATE COMM. ON THE JUDICIARY, 79TH CONG., ADMINISTRATIVE PROCEDURE (Comm. Print 1945), *reprinted in* ADMINISTRATIVE PROCEDURE ACT, LEGISLATIVE HISTORY, S. DOC. NO. 248, 79TH CONG., at 37 (explaining that subsection 10(c), "defining reviewable acts, [was] designed also to negative [sic] any intention to make reviewable merely preliminary or procedural orders."); *see also In re* Int'l Chem. Workers Union, 958 F.2d 1144, 1149 (D.C. Cir. 1992) (en banc) (noting that the finality requirement serves to ensure that judicial review is conducted on a factual record compiled by the agency); Silvia Serpe, Note, *Reviewability of Environmental Impact Statements of Legislative Proposals After Franklin v. Massachusetts*, 80 CORNELL L. REV. 413, 438 (1995) (suggesting that a bar to judicial review until after final agency action is not an obstacle to gaining judicial review); E. Gates Garrity-Rokous, Note, *Preserving Review of Undeclared Programs: A Statutory Redefinition of Final Agency Action*, 101 YALE L.J. 643, 646-49 (1991) (noting the APA's broad jurisdictional mandate over final agency action); Raymond Murphy, Note, *The Scope of Review of Agencies' Refusal to Enforce or Promulgate Rules*, 53 GEO. WASH. L. REV. 86, 90 n.28 (1984) (highlighting the practical implications of the Supreme Court's failure to adopt a rule that all decisions to terminate rulemakings constitute final agency action on future cases).

32. *See* Abbott Labs. v. Gardner, 387 U.S. 136, 149 (1967) ("The cases dealing with judicial review of administrative actions have interpreted the 'finality' element in a pragmatic way."); *see also* FTC v. Standard Oil Co. of Cal., 449 U.S. 232, 239 (1980) (quoting *Abbott Labs.*, 387 U.S. at 149).

33. 520 U.S. 154, 177-78 (1997) (internal quotations and citations omitted).

ensures that judicial review is restricted to its proper purpose of vindicating legal rights.

Still, the underlying logic of the *Bennett* requirements does not mean that the *Bennett* test is easy to apply. Indeed, both of its requirements raise difficult issues with regard to the type of action challenged in *Southern Utah*. While the Supreme Court did not reach the finality question, since it decided that there was no "agency action" to begin with,[34] it remains useful for the purposes of this Article to consider how courts should deal with the finality issue when considering claims of ongoing agency inaction.

With regard to the first *Bennett* prong, it is often difficult to determine when an agency has concluded its decision-making process when the plaintiff alleges ongoing nonfeasance. For example, in *Southern Utah*, BLM's failure to designate ORV routes on the WSAs in Utah was not marked by an identifiable decision point. Indeed, the plaintiffs alleged that the agency simply failed to act. The agency never granted or denied their request, nor did it even resolve to decide it. Rather, it was as if the issue never left the agency's metaphorical in-box.

The APA appears to contemplate that inaction of this sort would be subject to judicial correction. Section 706(1) authorizes courts to "compel agency action unlawfully withheld *or unreasonably delayed*."[35] The reference to action "delayed," especially when distinguished from action "withheld," clearly suggests judicial authority to review not just an agency's failure to act but also its failure to decide whether to act.[36] The only real question is whether that reference authorizes courts to correct *ongoing* failures to decide. Delay in the performance of a discrete action—for example, in the issuance of a license—can easily be understood as satisfying the first prong of *Bennett*, since at some point a delay, for all intents and purposes, ripens into a denial. By contrast, an ongoing duty is, at least conceptually, continuously in the agency's decision-making pipeline. This fact allows the agency to insist that the matter is still properly before the agency.

At some point, however, a failure to decide whether to perform an ongoing duty must also ripen into a final act, unless the agency is to have the power to thwart judicial review by simply defaulting on a particular regulatory responsibility. Moreover, the fundamental purpose behind

34. *See* Norton v. S. Utah Wilderness Alliance, 124 S. Ct. 2,373, 2,378-81 (2004).

35. 5 U.S.C. § 706 (1) (2000) (emphasis added).

36. *See* Nat'l Parks Conservation Ass'n v. Norton, 324 F.3d 1,229, 1,238 (11th Cir. 2003) (quoting *Bennett*, 520 U.S. at 177-78, referring to "inaction that can be said to 'mark the "consummation" of the agency's decisionmaking process'"); *see also S. Utah Wilderness Alliance*, 124 S. Ct. at 2,379 (finding that "[a] 'failure to act' is not the same thing as a 'denial.' The latter is the agency's act of saying no to a request; the former is simply the omission of an action without formally rejecting a request—for example, the failure to promulgate a rule or take some decision by a statutory deadline").

Bennett's first prong—to allow agency procedures to take their course before courts enter the picture—is not served by allowing the ongoing nature of the action to serve as an excuse for denying judicial review. By hypothesis, the agency is not acting on the issue; thus, there is no agency procedure and record creation that warrants judicial delay. Furthermore, it makes sense in cases such as *Southern Utah* to read *Bennett*'s first requirement as satisfied when an agency's delay is so egregious as to justify a court's conclusion that the agency has effectively defaulted on the question. Such a rule would prevent a plaintiff from obtaining judicial review immediately upon discovery that the agency was not fulfilling some part of its mandate, thus maintaining respect for the agency's decisionmaking process. At the same time, it would prevent an agency from evading judicial review by simply never taking a request out of its inbox.[37]

Concededly, a determination whether an agency has effectively defaulted on a regulatory responsibility would require a great degree of judgment by courts. This is especially true given the variety of ways in which agencies can default. Did the agency never act, take some steps toward deciding and then simply stop, or promise to take some action at a future time,[38] or was the process commenced and moving forward, albeit slowly? Perhaps more importantly, what was the nature of the statutorily mandated task? Did it require a simple binary choice, a multi-stage decisional process, or a continuously ongoing evaluation?[39] These questions matter to the finality inquiry because ultimately the authoritativeness of the agency's failure to act can only be determined in the context of the decisional responsibilities the statute placed on the agency. Ongoing agency responsibilities are, by definition, continuously performed by the agency, with individual components of that responsibility continually working their ways up and

37. *Cf.* City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283 (1982) (finding an exception to Article III's mootness requirement when the defendant voluntarily ceases the complained-of activity, on the theory that the defendant should not be able to control the plaintiff's access to the courts through strategic behavior).

38. *See* Ctr. for Biological Diversity v. Veneman, 335 F.3d 849, 856-57 (9th Cir. 2003) (finding a genuine failure to act when the agency had merely promised to address its statutory responsibilities in the normal course of revising its management plan for that particular resource).

39. *See Ctr. for Biological Diversity*, 335 F.3d at 856 (finding a genuine failure to act when the statute mandated the agency to consider taking certain action, analogizing this type of mandate to that in *Mont. Wilderness*, 314 F.3d at 1146). *Compare* Mont. Wilderness Ass'n v. U.S. Forest Serv., 314 F.3d 1146, 1151 (9th Cir. 2003) (finding a final "genuine failure to act" even though the Forest Service had taken some actions, given the statutory standard which required a particular result, namely, non-impairment of the land's wilderness values), *with* Ecology Ctr., Inc. v. U.S. Forest Serv., 192 F.3d 922, 926 (9th Cir. 1999) (finding no "genuine failure to act" when the statutory standard required monitoring and the agency performed extensive monitoring even if it "failed to conduct its duty in strict conformance with" its own regulations).

down the decisional hierarchy.[40] Thus, determining the authoritativeness of an alleged failure to perform that sort of duty requires sensitivity to the functions the agency was ordered to perform, the particular action on which the agency is alleged to have defaulted, and, indeed, the agency's structure for making the relevant decisions.[41]

The second *Bennett* prong—that "the action must be one by which rights or obligations have been determined, or from which legal consequences will flow"[42]—also requires awareness of the regulatory context. Because these rights, obligations or consequences ultimately flow from the statute, it becomes necessary to understand the statutory scheme in order to know when those rights attach. For example, in *Southern Utah*, the statute imposed a performance standard—that is, the agency was required to maintain a certain substantive state of affairs: namely, non-impairment of WSA's wilderness qualities. Thus, the legal right to non-impaired WSAs was affected the moment that agency inaction impaired those qualities of a WSA. This type of statutory responsibility might be contrasted with an agency's responsibility, for example, to monitor a particular resource for potential damage,[43] or a responsibility to take certain action in pursuit of a statutory goal.[44] In such cases, rights might attach later in the regulatory process. For example, rights or obligations under a licensing statute might not attach until the agency has in fact granted, denied, or defaulted on a license application. The point here is simply that the type of duty placed on an agency influences the rights the statute might be said to have created.

---

40. *See* Daniel P. Selmi, *Jurisdiction to Review Agency Inaction Under Federal Environmental Law*, 72 IND. L.J. 65, 81-82 (1996) (exploring the difficulties in determining whether agency action is 'final action').

41. *See id.*:

> The complexity of EPA regulatory proceedings compounds the problem of determining whether the agency has taken 'final action.' The statutes setting forth the court's jurisdiction to review EPA action seem to envision a process by which the agency's decisionmaking will occur in discrete blocks with easily identifiable beginnings and endings. In fact, however, the administrative process of implementing federal environmental law . . . has in practice become vastly more complicated. The EPA often takes a series of sequential actions to address a common problem, and determining when the Administrator's action is final on any particular issue in an ongoing regulatory process is problematic, to say the least.

42. Bennett v. Spear, 520 U.S. 154, 178 (1997) (internal quotations and citations omitted).

43. In *Mont. Wilderness*, the court drew just such a contrast in determining that an agency's failure to maintain lands governed by the Montana Wilderness Act constituted a genuine failure to act. 314 F.3d at 1151. In distinguishing *Ecology Ctr.*, 192 F.3d at 922, the *Mont. Wilderness* court noted that the agency in *Ecology Ctr.* had performed more of its duty than in the instant case. *Id.* However, the court also noted the different natures of the mandates in those two cases and implied that that difference mattered when evaluating whether the agency had in fact genuinely failed to act. *Id.*

44. For example, a statute, such as the Federal Communications Act, might authorize the agency to issue licenses in pursuit of some statutory goal, such as the public interest.

The nature of those rights in turn influences when, per *Bennett*, the agency's inaction can be said to have impacted those rights.

C. Liability and Remedial Considerations

Ultimately, the most promising locus for appropriate limits on judicial control of agency inaction may be at the level of liability and remedy, rather than jurisdiction. Section 706(1)'s mandate to courts to "compel agency action . . . unreasonably delayed" clearly contemplates fact-sensitive judicial examinations of agency decisionmaking when deciding whether and how to grant relief to parties challenging agency inaction.

In *Southern Utah*, however, the Supreme Court pretermitted this issue by concluding that FLPMA's non-impairment mandate did not require particular discrete action by the agency, and thus did not constitute a legal requirement to act that could be enforced by a court under § 706(1).[45] The Court described the non-impairment standard as "mandatory as to the object to be achieved [i.e., non-impairment], but [leaving] BLM a great deal of discretion in deciding how to achieve it."[46] According to the Court, that implementation discretion immunized the agency from judicial review.[47] The Court based its conclusion in part on the tradition of mandamus review, which the Court said is limited to the enforcement of duties a government official has no discretion in deciding to perform, even if the official may have indeed had discretion in making the actual decision under that duty.[48] The Court also cited the need to prevent courts from interfering with agency policy discretion, which it feared would happen when plaintiffs brought court challenges to alleged agency failures to comply with broad statutory mandates.[49]

The Court's discussion of mandamus review hearkens back to this Article's earlier discussion of discrete and ongoing agency responsibilities.[50] As suggested there, the evolution of statutory mandates to include agency responsibilities of a more ongoing nature should be matched by a similar evolution of judicial review. Properly conceived, judicial review of ongoing agency mandates can be consistent with mandamus practice, and thus with the spirit underlying § 706(1). This can occur, as long as that review respects the basic distinction between actions where agencies should retain decisional autonomy and those that are a matter of statutory duty. For example, statutory duties such as FLPMA's

45. *See* Norton v. S. Utah Wilderness Alliance, 124 S. Ct. 2,373, 2,381 (2004).
46. *Id.* at 2,380.
47. *See id.* at 2,381.
48. *See id.* at 2,379-80.
49. *See id.* at 2,380-81.
50. *See supra* text accompanying notes 18-21 (discussing the Supreme Court's decision in *Southern Utah*).

non-impairment mandate provide no discretion as to the final result—the covered lands must remain in a non-impaired state—but they do allow the agency discretion with regard to how to achieve that goal.[51] By remaining aware of this distinction, courts performing judicial review under § 706(1) can remain faithful to mandamus practice while still enforcing the non-discretionary components of such statutory mandates.

The legal authorization of judicial review under this understanding of § 706(1) does not, however, give courts a blank check to compel agency inaction wherever it exists. Even when enforceable legal duties exist, § 706(1) authorizes courts to compel agency action only when "unreasonably" delayed.[52] A D.C. Circuit opinion, *Telecommunications Research Action Center v. FCC (TRAC),* has become the leading case when considering what constitutes such unreasonable delay.[53] *TRAC* announced that six factors should be considered when determining whether it was appropriate to compel a delayed agency action.[54] When boiled down, these factors inquire into the relative importance of the actions not performed and competing priorities, as determined both by Congress and by the court's own investigation and subject to a rule of reason. Unquestionably, this type of inquiry is intensely fact-specific.

Moreover, courts in § 706(1) cases have shown a great deal of flexibility in actually wielding their remedial powers to compel agency action found to have been unreasonably delayed. Recall the *Southern Utah* Court's concern that judicial review of broad statutory mandates would enmesh the courts in policy disputes that were properly the agency's province.[55] The Court expressed its concern thusly:

> If courts were empowered to enter general orders compelling compliance with broad statutory mandates, they would necessarily be empowered, as well, to determine whether compliance was achieved—which would mean that it would ultimately become the task of the supervising court,

---

51. *See S. Utah Wilderness Alliance*, 124 S. Ct. at 2,380 (finding that "Section 1782(a) is mandatory as to the object to be achieved, but it leaves the BLM a great deal of discretion in deciding how to achieve it").

52. *See* 5 U.S.C. § 706(1) (2000).

53. *See* 750 F.2d 70, 80 (D.C. Cir. 1984) (holding that, in determining whether an agency's action was unreasonably delayed under § 706(1), the court should apply a rule of reason and examine, among other factors, "the effect of expediting delayed action on agency activities of a higher or competing priority").

54. *See id.* (listing these six factors as: (1) a general rule of reason; (2) the existence of a legislative timetable for agency action; (3) whether human health and welfare are at stake because of the delay; (4) the effect expediting agency action would have on other agency activities; (5) "the nature and extent of interests prejudiced by delay;" and (6) that agency impropriety is immaterial in determining that the agency's action is "unreasonably delayed").

55. *See supra* note 49.

> rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management.[56]

This fear reflects a pessimistic view of courts' own capacities for self-restraint in the use of their equitable powers. This pessimism is surprising, given the examples of courts exercising § 706(1) power judiciously, not just with regard to liability, but also with regard to remedy. In some cases, courts have simply retained jurisdiction of the case in order to supervise the agency's progress.[57] Other courts have set general timetables for agency action,[58] while still others have issued relatively detailed remedial orders compelling particular activities.[59]

This variety of approaches reflects lower courts' recognition that compelling agency action raises difficult issues of judicial usurpation of agency discretion and resource allocation. Courts must balance that concern against the rights impaired by the agency's failure to act, viewed against the backdrop of the nature of the agency's regulatory responsibilities. Thus, for example, a judicial remedy for an agency's failure to decide a license application or commence a rulemaking might look very different from a remedy for a failure to engage in the management of a WSA. The variety of approaches courts have used indicates sensitivity to this problem.[60]

It makes sense that the nature and context of the agency's delay should influence the nature of the remedy, just as it should influence the court's decision whether the agency's delay has been unreasonable. When these inquiries are combined with the contextual nature of the underlying finality issue, the appropriate result from *Southern Utah* should have been a doctrine that would have developed incrementally, via case-by-case adjudication of cases arising under widely varying types of statutory mandates. However, unless the Court turns away from the approach it took in *Southern Utah,* that incremental evolution will be stunted.

---

56. *S. Utah Wilderness Alliance*, 124 S. Ct. at 2381.

57. *See* Air Line Pilots Ass'n Intern. v. Civil Aeronautics Bd., 750 F.2d 81, 88-89 (D.C. Cir. 1984) (articulating that CAB shall report its progress to the court every thirty days); MCI Telecomm. Corp. v. FCC, 627 F.2d 322, 346 (D.C. Cir. 1980) (declaring that the court will retain jurisdiction to ensure compliance with the order).

58. *See* Nader v. FCC, 520 F.2d 182, 207 (D.C. Cir. 1975) (requiring the agency whose decisions were held to be "unreasonably delayed" to submit within thirty days a schedule for resolving issues).

59. *See* Adams v. Richardson, 480 F.2d 1159, 1161 (D.C. Cir. 1973) (en banc) (upholding most of the district court's injunction against the Department of Health, Education and Welfare requiring it to commence various enforcement proceedings against school districts found to be out of compliance with conditions of federal education grants).

60. *See supra* notes 57-59.

III. TOWARD A PROPER SCOPE FOR APA AMENDMENTS

Southern Utah illustrates the difficulties that can arise when applying the APA's general provisions to evolving forms of administrative action. Despite the weaknesses in the Court's analysis, the above discussion reveals room for reasonable debate as to whether and how courts should police ongoing agency management responsibilities. Room for disagreement exists because of the complexity of administrative action and the need, in turn, for a nuanced approach to judicial review. But if resolution of that issue largely depends on the particular nature of the action the agency is alleged not to have performed, then amending the APA to "resolve" such issues at a macro level would appear to be a fruitless endeavor.

Indeed, the conclusion that emerges from the above discussion of *Southern Utah* is that the diversity of agency actions makes it difficult to render any more precise the APA's general provisions, such as the definitions of "agency action" and "finality," and the authorization to courts to compel agency action "unreasonably delayed." In a case such as *Southern Utah*, the basic principles animating these provisions are provided by the APA's text, understood against the backdrop of Congress's intent and pre-APA administrative law. Those principles tell us that judicial review should be widely available, that it should be stayed until an individual suffers some sort of injury to a legally protected interest, and that courts should take care to respect agency decisionmaking processes when considering the timing of review, the liability determination (i.e., the determination whether the agency action was unreasonably delayed) and the remedy.

The Court's opinion in *Southern Utah* hides much of the difficulty inherent in applying these principles by adopting a restrictive overall approach to judicial review of administrative action. This Article's critique of that approach attempts to reveal a more context-rich problem than the Court's opinion lets on. The problem presented by *Southern Utah* should demonstrate that application of these general principles can best occur through case-by-case consideration of how each principle applies in a given regulatory context, without unduly precise legislative prescription. To support this argument, the next subpart of this Article considers a completely separate administrative law issue that shares many of its fundamental characteristics with the *Southern Utah* problem.

A. Chevron, Southern Utah, *and the Limits of Statutory Language*

A conclusion similar to the one just reached might also apply to the problem of substantive standards of judicial review of agency action.

Indeed, examination of that issue reveals the same problems that would arise if the *Southern Utah* reviewability issue were the subject of congressional "resolution."

Consider the long running controversy over *Chevron*[61] deference to agency statutory interpretations.[62] Cases dealing with both *Chevron*'s applicability and its meaning suggest how difficult it is to derive a predictable rule regarding the deference due such interpretations when those interpretations come in so many shapes and sizes.[63] A particular problem in the *Chevron* context is that, after *United States v. Mead Corp.*,[64] two distinct types of deference, *Chevron* and *Skidmore*,[65] compete for adoption in every case. For this reason the *Chevron* issue poses an additional layer of difficulty beyond simply the correct application of a standard: before a court can decide how properly to apply the standard, it must first determine which standard to apply. Thus, consideration of the proper role for APA amendment on this issue begins with the choice of standard. At first blush, at least, it would seem that if Congress has any proper role in resolving the *Chevron* confusion, it would be in choosing between *Chevron* and *Skidmore* deference.[66]

But even such a seemingly straightforward choice is quickly muddied by the real world of administrative diversity. Simply put, different contexts for agency statutory interpretation decisions justify different levels of deference. For example, there is something intuitively appealing about *Mead*'s statement that *Chevron* deference should be accorded an agency interpretation when that interpretation results from a process that involves public input[67]—that statement seems fundamentally true to the ideal that

---

61. Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837 (1984).

62. This Article presumes a basic familiarity with the problem of *Chevron*'s application and meaning. The academic discussion of *Chevron* is enormous. Readers seeking to gain familiarity with the issue would be do well to start with Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833 (2002) (discussing how *Chevron* altered the judicial deference paradigm for agencies' statutory interpretations).

63. *See* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363 (1986); STEPHEN BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES 298-359 (5th ed. 2002) (supplying samples of post-*Chevron* cases that deal with both its applicability and meaning). On the diversity of agency interpretations and how that diversity affects the level of judicial deference, compare Packard Motor Car Co. v. NLRB, 330 U.S. 485, 490 (1947) (reaching independent conclusion about whether factory foremen are covered by the National Labor Relations Act), with NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 132 & 135 (1944) (deferring to NLRB determination of same issue with regard to newsboys).

64. 533 U.S. 218 (2001).

65. Skidmore v. Swift & Co., 323 U.S. 134 (1944).

66. Indeed, Congress has in the past expressed interest in making this choice by mandating *de novo* judicial review of agency legal interpretations. For a discussion of this history see Ronald M. Levin, *Identifying Questions of Law in Administrative Law*, 74 GEO. L.J. 1, 5-9 (1985).

67. *See Mead*, 533 U.S. at 220 (explaining that deference should be given for "notice-and-comment rulemaking or formal adjudication").

legitimate lawmaking requires the people's participation, and that such participation justifies the label "lawmaking." At the other end of the spectrum, interpretations that are made without such a participatory process,[68] in large numbers by a decentralized bureaucracy,[69] on which the agency specifically warns against third-party reliance,[70] and that are conclusive even as to the requesting party only until the agency decides otherwise,[71] seem the opposite of "law," and thus not binding on a court. But because agencies legitimately engage in both types of interpretive processes there is at least a respectable argument in favor of multiple deference standards, even at the cost of some legal uncertainty.

This is not to say that *Mead* provides a perfect roadmap for when to apply *Chevron* or *Skidmore* deference. *Mead* relies on the fiction of congressional intent when deciding the *Chevron* applicability issue and finds public participation important, but not dispositive, in determining that intent.[72] These features of the opinion allow courts significant leeway in deciding whether or not to apply *Chevron*, thus creating no small amount of uncertainty.[73] Still, the hope remains that the process of case-by-case adjudication may perhaps yield a rule that, while unclear around the edges, still provides relatively stable guidance for deciding which deference standard to apply. Of course it is true that Congress could create such stability at the stroke of a pen. But to create such stability a congressional rule would have to be expressed as a relatively terse verbal formula, rather than as a set of factors to take into account, as in *Mead*. Such a formula might produce stability only at the cost of responsiveness to the context of the particular agency interpretation.

Indeed, even a theoretically clear congressional choice might not be completely clear in application. For example, Congress could simply prescribe de novo review of all agency statutory interpretations. If any standard would be stable, the argument might go, it would be simple de novo review.[74] Yet true de novo review may be a chimera. A court conducting an independent search for the proper interpretation of a statute would surely be tempted to give credit to *Skidmore*-type factors such as the agency's procedural carefulness, its expertise in the area and the

68. *See id.* at 233.
69. *See id.*
70. *See id.*
71. *See id.*
72. *See Mead*, 533 U.S. at 229-31.
73. *See id.* at 245 (Scalia, J., dissenting) (characterizing the majority's test for *Chevron*'s applicability as "wonderfully imprecise" and "utter[ly] flabb[y]").
74. For a discussion of the history of congressional attempts to mandate de novo review of agency legal interpretations, see Craig N. Oren, *Be Careful What You Wish For: Amending the Administrative Procedure Act*, 56 ADMIN. L. REV. 1187-93 (2004).

consistency of its explanation,[75] and to import those factors, perhaps *sub silentio*, into its analysis, even though these factors do not directly reveal the correct interpretive choice. The process of becoming persuaded that a particular statutory interpretation is correct involves more than applying interpretive tools in a vacuum, at least when one of the parties is the agency familiar with and responsible for administering the statute. Deference of some sort will inevitably creep in and cannot be mandated out of existence by a statutory command. If a congressional command of *de novo* review would not translate into true *de novo* review, then one might well conclude that other, vaguer, review standards would be even more susceptible to varying applications.

Similarly, one might wonder how a statutory formula could capture the complexity of the reviewability issue presented in *Southern Utah*. If one accepts that agency actions legitimately come in all shapes and sizes, and that ideally judicial review of such actions should guarantee a judicial forum to vindicate rights while respecting agency discretion, then a terse, clear statutory formula that would appropriately resolve every reviewability issue seems out of the question.

For proof, one need only examine *Southern Utah* itself. In that case, the Court was confronted with a statutory formula—§ 701's[76] general presumption of review, § 551(13)'s seemingly broad definition of "agency action," § 704's[77] authorization of judicial review of such action when it is "final," and § 706(1)'s[78] grant of authority to courts to compel action "unreasonably delayed"—that seems to do a fairly good job of striking that balance. Yet, to quote Justice Souter from another context, "we know what happened"[79] in *Southern Utah*. In particular, we know that the language of these provisions did not convince the Court of the need to make a serious effort to balance the need for agency discretion with the presumption of meaningful judicial review. Instead, the Court's analysis of "agency action" and the limits of mandamus relief was highly formalistic, turning on restrictive interpretive canons rather than on the framers' vision of a statute that enshrines fundamental principles.[80]

---

75. *See generally* Skidmore v. Swift & Co., 323 U.S. 134 (1944).
76. 5 U.S.C. § 701 (2000).
77. 5 U.S.C. § 704 (2000).
78. 5 U.S.C. § 706(1) (2000).
79. United States v. Lopez, 514 U.S. 549, 615 (1995) (Souter, J., dissenting).
80. *See supra* text accompanying note 27 (discussing the Court's interpretation of "agency action"); *see also* Norton v. S. Utah Wilderness Alliance, 124 S. Ct. 2,373, 2,379 (2004) (rejecting the plaintiffs' argument that mandamus review in this case would be consistent with an agency possessing some discretion to act, on the ground that an action subject to mandamus review must be discrete, as the Court explained in its analysis of "agency action"). This Article's criticism of the Court's analysis as unduly formalistic is not in tension with the understanding that APA must be understood as a compromise between competing interests. *See* Wong Yang Sung v. McGrath, 339 U.S. 33, 40-41 (1950)

It may simply be that the *Southern Utah* Court was hostile to the kind of claim raised by the plaintiffs, and that no statutory language short of an unambiguous command would have led it to allow judicial review. But such an unambiguous command would have skewed the playing field too far in the other direction, given the variety of administrative actions that should remain within the agency's sole discretion, at least until a latter phase. This insight only reinforces the basic point that in a world where administrative action comes in all shapes and sizes, statutory language is prone to failure when it attempts to mandate a careful, context-specific balancing between two fundamental but opposing principles. In short, if context inevitably colors administrative law questions in shades of gray, then the black and white of statutory ink simply cannot yield the desired results.

B. The Value of Legislatively Prescribed Factors

One response to the fact of agency diversity and the unhelpfulness of terse statutory formulas is to suggest that an APA amendment only prescribe factors that a court could take into account with regard to questions such as deference standards and the availability of review. Congress might prescribe factors either in the context of directing binary choices (e.g., prescribing a list of factors for courts to consider in deciding whether to apply *Chevron* or *Skidmore* deference) or directing how the ultimate issue should be decided (e.g., prescribing a list of factors for courts to consider when determining the proper scope of a court's power to compel agency action under § 706(1)).

But it is far from clear that Congress is the appropriate body to set forth multi-factor tests. At the very least, there appears to be no advantage in congressional, as opposed to judicial, prescription of such tests. If *Mead* is

---

(stating that "[t]he [APA] thus represents a long period of study and strife; it settles long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest. It contains many compromises and generalities and, no doubt, some ambiguities."). Respecting a legislative compromise does not necessarily require reading the statute as literally as the Court does here, even assuming that that literal reading is correct. *But see supra* notes 24-25, where the court notes the drafters' care in using either "means" or "includes" when defining statutory terms, and noting that the term "agency action" began with "includes." In this case, the compromise should properly be understood at a higher level of generality: while agencies were allowed significant discretion to act, *see* 5 U.S.C. § 706(2)(a) (authorizing courts to strike down agency actions that are "arbitrary, capricious [or] an abuse of discretion"); 5 U.S.C. § 704 (1989) (confining judicial review to "final agency action" unless Congress states otherwise), judicial review was also presumed to be available, *see supra* notes 19-21. These principles are clearly in some tension, but that tension may sometimes best be resolved by a sensitive judicial balancing rather than an overly close reading of the text. Indeed, as quoted above, Justice Jackson, after noting that the APA was a compromise, also acknowledged that "it contains many compromises and generalities and, no doubt, some ambiguities." By definition, resolution of such ambiguities requires an interpretative decision couched at a higher level of generality. *Wong Yang Sung*, 339 U.S. at 40-41.

open to criticism because it is unpredictable, or if litigants can dispute when the *TRAC* factors justify judicial correction of agency inaction, there is no reason to think that factors supplied by Congress will be any more determinative. Multi-factor tests may present problems, but the origin of the factors in a judicial decision as opposed to a statute is presumably not one of them.

Indeed, a congressionally prescribed test of this sort might ultimately prove inferior to a similar one developed by a court, if statutory factors would not be revisited in response to regulatory evolution. One might wonder about the likelihood of Congress regularly revisiting administrative law rules, at least in the abstract (that is, outside the context of a particular organic statute). The advantage of judicially crafted tests is that they are constantly tested in litigation, leading to their refinement and alteration as agency action evolves. For example, the arbitrary and capricious test evolved significantly between 1946, when the test was essentially one of minimum rationality, and the 1970s, when courts enunciated a requirement that the agency take a "hard look" at its regulatory options.[81] The same might be said for considerations of finality: as rights become conceptualized as attaching at earlier stages of the administrative process and as statutes prescribe hard and fast agency duties earlier in the regulatory process,[82] our ideas not just when of an action is final, but indeed of how to determine finality, may well evolve. Again, one might wonder if Congress would likely keep pace with such evolution by regularly amending the nation's foundational public law statute.

Moreover, such evolution may derive not only from explicit changes in verbal formulas, but also from their application in cases. Often, textual formulas—"hard look," "final agency action," "whether Congress has directly spoken to the precise question at issue"[83]—cannot capture the full complexity of the concepts they represent, regardless of whether those

81. *See* 2 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE §11.4, at 200-01 (3d ed. 1994) (briefly discussing the difference between the original and the modern understandings of the arbitrary and capricious standard); *see also* Oren, *supra* note 74, at 3-4 ("*Vermont Yankee* instructed the lower courts that they could not add to the requirements of the APA. Yet, the Supreme Court itself found in *Overton Park*—probably contrary to anyone's expectations when the APA was enacted in 1946—that the Act calls for a 'thorough, probing, in-depth review' of agency action. This requirement led in turn to a demand by the Court for reasoned explanation of agency views—a requirement not found in the APA's express terms—and finally to the declaration that an agency must engage in whatever procedure is necessary to enable a reviewing court to carry out its judicial review responsibilities").

82. *See* Ctr. for Biological Diversity v. Veneman, 335 F.3d 849, 856 (9th Cir. 2003) (holding that the agency had a mandatory duty to take rivers that qualify as wild and scenic into account while planning for the use and development of federal land, and that failure to perform this duty could be corrected by a court).

83. *See* Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837, 842 (1984).

formulas originate in a statute or a groundbreaking judicial opinion.[84] Therefore, even assuming that congressional amendment can keep the APA current with regard to our evolving understanding of the regulatory process, it is open to question whether the only tool Congress can wield—the power to amend statutory text—can fully express the desired change.

Thus, codifying more precise standards in the APA runs two very different risks. At one extreme, such statutory formulas may become too rigid, thus hindering desirable administrative evolution. At the other, they may fail to capture the full complexity of the issue they attempt to address, thus becoming empty vessels that find meaning only in judicial application. The latter is a less severe consequence, but if the former turns out to be closer to the truth, the ossifying effect on administrative law would be troubling. One of the strengths of the American administrative system is its flexibility. The key provisions of the APA have survived several significant changes in regulatory philosophy and the role of judicial review, from the initial era of trust in expertise to the public participation revolution of the 1960s and 1970s, and finally to the current era's focus on cost-efficient regulation. These provisions—§§ 553, 704 and 706 to name the most prominent—have survived because they are worded broadly enough to accommodate these changes.[85] If statutory formulas rigidify the process then the APA will be less able to do its work of providing the basic ground rules for a constantly changing administrative regime.

Indeed, *Southern Utah* should cause concern that well-meaning statutory precision may in fact end up increasing the rigidity of the administrative system. The Court's statutory analysis places what is probably fair to describe as undue weight on the five exemplars of "agency action" found in the statutory definition.[86] Recall that in the Court's analysis those five exemplars became transformed into the model-types for the entire universe of affirmative agency action. In turn, those model-types became, through the alchemy of *ejusdem generis*,[87] the model-types for the *failures to act* that the drafters intended to bring within the APA's coverage. Thus, by providing examples, the drafters of the APA, as read by the Court, ended

84. Even the seemingly precise *Chevron* formula has led to significant disagreement on approaches when courts attempt to apply it. *See* STEPHEN BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES 319-64 (5th ed. 2002).

85. *See* Oren, *supra* note 74, at 1183 ("In short, the APA lasted so long because it represented scaffolding rather than new construction. Its provisions left plenty of room for the federal courts to continue to develop administrative law.").

86. *See* 5 U.S.C. § 551(13) (2000) ("agency action" includes the whole or part of *an agency rule, order, license, sanction, relief*, or the equivalent of denial thereof, or failure to act") (emphasis added).

87. *See supra* note 21 and text accompanying.

up restricting what the legislative history suggests was intended to be a much broader provision.[88]

A final observation further counsels in favor of judicial, rather than legislative, prescription of the factors courts should apply in reviewing agency action. Judicially prescribed factors can always be understood as responsive to the pragmatic goal of making the system work, consistent with its fundamental principles. Courts may ultimately ground such factors in the APA, but concepts such as hard look review, and the *Chevron* and *Bennett* finality tests are not ineluctably compelled by the APA's skeletal text.[89] Because such tests are glosses on, rather than interpretations of, the APA, they can be employed fully, partially, or not at all, depending on their relevance to a given problem, using reasoning akin to that employed by common-law courts. *Mead* is an example of such a process, as it narrowed *Chevron*'s scope in the service of determining an appropriate level of judicial scrutiny of the particular agency action challenged in that case.[90] Another example is when the Court in *Pension Benefit Guaranty Corp. v. LTV Corp.*[91] narrowed *Vermont Yankee*'s[92] admonition against imposing extra-APA procedural requirements on agencies to ensure that courts have a record when reviewing informal adjudications.[93]

By contrast, legislatively prescribed factors might become seen as requirements in and of themselves, disconnected from their underlying purpose of helping to rationalize administrative procedure or judicial review. *Chevron* serves as a rough analogy. Just as one value of *Chevron* deference is that it allows agencies to shift between regulatory ideologies without requiring congressional action to unfreeze a statutory interpretation, so too keeping the APA at a broad level allows courts to change course to account for changes in our underlying conceptions of the regulatory process or the judicial role in that process.[94]

---

88. *See* S. REP. NO. 752, *supra* note 29 (detailing the legislative history of the APA).
89. *See* DAVIS & PIERCE, *supra* note 81.
90. *Mead*, 533 U.S. 218 (2001).
91. Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633 (1990).
92. Vermont Yankee Nuclear Power Corp. v. Nat'l Res. Def. Council, Inc., 435 U.S. 519 (1978).
93. *See* DAVIS & PIERCE, *supra* note 81.
94. *Southern Utah* ultimately may not be an example of this dynamic. Justice Scalia's generally restrictive reading of the language of § 551(13) is consistent with his approach to judicial review of agency action. *Compare, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 555-78 (1992) (considering injury in fact to challenge agency action) *with* Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871 (1990) (considering "agency action" and "finality"). Of course, it is impossible at this point to know whether other justices in *Southern Utah* might have been willing to embrace a broader conception of judicial review had they not considered themselves bound by their reading of the statutory language.

CONCLUSION

None of this suggests, a la Dr. Pangloss, that we live in the best of all possible administrative regimes. Nor does it mean that APA amendments are always ill-considered. This Article thus concludes with some thoughts as to the appropriate subjects for APA amendment.

One situation where it might be appropriate to amend the APA is where a need exists to provide agencies with authority that they do not currently possess, and could not be thought to possess even under generous and flexible judicial interpretation of the current text. An example is the power to experiment with negotiated rulemaking, a process that deviates fundamentally from the clear requirements of § 553.[95] Fundamental changes in our values might also warrant amendment, as they did with the Freedom of Information Act[96] and Government in the Sunshine Act.[97] It also might be appropriate to amend the APA when the evolution of administrative practice has created a large gap in the regulatory regime that was originally envisaged. For example, it might be appropriate to amend the APA to mandate general procedures governing informal adjudication, given the large numbers of such informal proceedings and their perhaps unanticipated rise in importance since 1946.[98]

The basic idea governing this theory of APA amendment is that the APA should function as a skeletal outline of both the rules governing agency action and the powers that agencies possess.[99] As regulatory practice and fundamental values evolve it may become appropriate to amend the APA at this broad level of generality. This approach explains the actual and suggested amendments above.

Beyond these broad changes, caution should be the watchword before amending the APA to prescribe significantly more precise procedures or

---

95. *See* Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648, 104 Stat. 4969 (1990).

96. Act of July 4, 1966, Pub. L. No. 89-487, 80 Stat. 250 (1966).

97. Pub. L. No. 94-409, 90 Stat. 1241 (1976).

98. *Cf.* Attorney General's Manual on the Administrative Procedure Act 9 (1947) (stating that one of the purposes of the APA was to provide a uniform rule with regard to agency adjudications). Even here, though, the vast variety of issues decided by informal rulemaking suggests the difficulty in drafting a reasonably comprehensive set of rules governing them. A number of the papers in this symposium address this issue. *See* Michael Asimow, *The Spreading Umbrella: Extending the APA's Adjudication Provisions to All Evidentiary Hearings Required by Statute*, 56 ADMIN. L. REV. 1041 (2004); Cooley R. Howarth, Jr., *Restoring the Applicability of the APA's Adjudicatory Procedures*, 56 ADMIN. L. REV. 1081 (2004); Ronald J. Krotoszynski, Jr., *Taming the Tail That Wags the Dog: Ex Post and Ex Ante Constraints on Informal Adjudication*, 56 ADMIN. L. REV. 1095 (2004); John H. Reese, *Regularizing Informal Adjudication Under the APA* (2004) (unpublished article) (on file with author); Sidney A. Shapiro & Robert L. Glicksman, The APA and the Back-End of Regulation: Procedures for Informal Adjudication, 56 ADMIN. L. REV. 1197 (2004).

99. *Cf.* Oren, *supra* note 74, at 1183 (describing the APA as "scaffolding rather than new construction").

review provisions.[100] Ultimately, the diversity of regulatory action might make an amendment unhelpful for one of two polar opposite reasons. First, an amendment might constrict the evolution of administrative law by enacting rules that, figuratively speaking, not only re-fight the last war but also freeze the results until Congress is roused to "resolve" the situation yet again. At the other extreme, amendments that seek to preserve evolutionary flexibility may do nothing more than what is currently accomplished by the process of case-by-case adjudication. As explained earlier, it might be better for flexible rules (or prescriptions of factors) to emanate from courts, rather than Congress, as in the latter case they might come to be seen as congressional commands to be obeyed for their own purpose, and not as pragmatic aids in the pursuit of getting the job done.

Finally, it is important to note that none of this analysis precludes congressional prescription of procedural or judicial review requirements unique to a particular agency or regulatory program. Indeed, the thesis of this Article is that agencies engage in widely varying types of action depending in part on the type of program they are administering. Thus, for example, should Congress decide that a particular program demands delayed judicial review, expeditious judicial review, or even no judicial review at all, there is every reason for Congress to enact that rule with regard to that particular program. But the proper place for such detailed rules is in that program's organic statute, not the APA.

In sum, much of this Article's caution about amending the APA flows ultimately from the maxim that administrative law is applied constitutional law. If there is any truth at all to that statement, then it might bear keeping in mind Chief Justice Marshall's dictum that "it is a Constitution we are expounding," which should not "partake of the prolixity of a legal code."[101]

100. It almost goes without saying that, at the other end of the spectrum, amendments to the APA's relatively minor details should not pose a significant problem. Of course, distinguishing "relatively minor details" from more significant changes is not an easy task, and is well beyond the scope of this Article. One thing that can be said, however, is that seemingly innocuous amendments such as those changing the definitions of terms used in the statute, may in fact carry significant weight. For example, a lot rides on the distinction between a "rule" and an "order," or, as noted above, on the definition of "agency action."

101. McCulloch v. Maryland, 17 U.S. 316, 407 (1819).