FOREWORD

Administrative Law's Shadow

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ABSTRACT

This Essay explores the shadow of administrative law. A good deal of government authority that is administrative for all intents and purposes is wielded by organizations and institutions that are not legally classified as administrative agencies. Some of these entities are private firms; some are hybrid organizations within the government. Others are traditional parts of the bureaucracy that have been deemed non-agencies for purposes of the Administrative Procedure Act ("APA"), as a matter of statutory or regulatory interpretation. Across a range of heterogenous contexts, federal courts often apply administrative law principles, derived primarily although not exclusively from the APA, as legal constraints on these actors, even though the law on its terms does not apply. Although formally outside the domain of administrative law proper, they remain covered by administrative law's shadow. The Essay assembles and analyzes some of the cases in the shadows in an attempt to clarify the judicial practice, locate it in the context of conventional debates about administrative common law, and then offer some speculation about new contexts in which judging from the shadows may emerge.

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INTRODUCTION

My target in this Essay is *administrative law's shadow*. Although the Essay uses the term in several senses, my main goal is to describe and analyze a set of judicial practices and doctrines in which federal courts apply administrative law principles, requirements, and standards of review outside the genuine or formal domain of administrative law proper. The phenomenon relates to several familiar areas of inquiry, including administrative common law.[1] Yet, the practice is not quite, or at least not just, administrative common law.

The argument, at its core, is that in the United States, administrative law casts a long shadow. Gaps within the standard administrative law domain, what might be called administrative law proper, are regularly and perhaps predictably filled by federal courts. Outside the formal domain of administrative law proper, federal courts are adopting administrative law principles to constrain institutional decisionmakers that are not federal agencies. Within this practice, the Essay suggests,

[1] Administrative common law was the subject of a Foreword from several years ago. Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293 (2012).

are the seeds not so much of the old administrative common law but of a new common administrative law.

Judicial action in the shadow of administrative law is subject to a range of critiques, as discussed below. It relates to longstanding tendencies of the federal courts to tinker with administrative law principles in response to new forms of agency designs and regulatory structures.[2] I will attempt a clear account of administrative law's shadow, provide examples from several areas of the law and then point to a possible, if not likely, area of further development in the next decade. The first part of this Essay contextualizes the shadow of administrative law by exploring the boundaries of administrative law proper and the historical scope of administrative common law. It then catalogues the bureaucratic actors and activities that operate in the shadow of administrative law. The second part considers the future of this practice, using Title IX as an area of possible (if not likely) further development in the next decade. As actors and institutions outside and apart from the standard administrative apparatus utilize authority that would be classified as administrative if exercised by a federal agency, this Essay cautiously predicts the shadow of administrative law will not only persist, but grow in to new areas of law. Of course, it is also possible that the examples discussed below amount to little more than judges dipping a proverbial toe in uncertain legal waters—a toe that will be quickly drawn back once the chill is felt.[3]

I. Administrative Law's Domain

What is the domain of administrative law?[4] I was taught and therefore teach that administrative law is the set of legal rules that

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2 For example, the attempt by some judges in the D.C. Circuit to calibrate procedural requirements to the nature and magnitude of an agency's decisions. *See, e.g.*, NRDC v. Nuclear Regulatory Comm'n, 547 F.2d 633, 653 (D.C. Cir. 1976), *rev'd sub nom.* Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978). The impulse to calibrate agency procedures and the intensity of judicial review to the nature of the underlying agency decision is still evident in much of modern administrative law. Consider the possibility of a major questions exception to *Chevron* deference. *See* Cass R. Sunstein, Chevron *Step Zero*, 92 Va. L. Rev. 187, 231, 242 (2006) (considering the view that "*Chevron* deference is not owed for agency decisions involving questions of great 'economic and political significance.'"). *See generally* Research Handbook on Public Choice and Public Law (Farber & O'Connell, eds. 2010) (examining the relationship between public choice and public law including in agency design and specific statutory schemes).

3 *Cf.* Oliver Wendell Holmes, *The Path of the Law*, 110 Harv. L. Rev. 991 (1997) (theorizing that law is a prediction of how courts will behave).

4 With some embarrassment, I limit my discussion to federal administrative law for most of the Essay.

governs the structure and process of government agencies.[5] The source of law for these rules consists of the U.S. Constitution, the Administrative Procedure Act ("APA"), agency organic statutes, and on rare occasion administrative common law.[6]

A. Administration by Whom?

In most cases, the threshold question in an administrative law case—often unstated because the answer is obvious—is whether the actor allegedly causing harm is an agency. The scope of federal administrative law proper is limited to judicial review of federal agencies. The APA applies *only* to agencies. It says that an "'agency' means each authority of the Government of the United States, whether or not it is within or subject to review by another agency."[7] This definition is hardly self-executing. What is an authority? That term is unfortunately undefined. Congress is not an agency by virtue of statutory definition, nor is a court.[8] Although the text of the APA is silent on the matter, the Supreme Court has determined that the President is not an agency.[9] Given the lack of clear definition of agency within the APA, another approach to the what-is-an-agency question is to use government handbooks like the United States Government Manual[10] (listing 118 executive agencies), USA.gov (listing more than 600 government departments and agencies), or reports like the ACUS Sourcebook.[11] The ACUS definition is "a federal executive instrumentality directed by one or more political appointees nominated by the President and confirmed by the Senate."[12] No matter how it is defined, the universe of federal agencies is extensive and therefore the domain of administrative law is vast. It is nevertheless, not without limits. And its limits exclude a good deal of activity that would commonly be described as administration.

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5 *See generally* Jacob E. Gersen, *Designing Agencies*, *in* RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW, *supra* note 2, at 333 (detailing the public choice theories of the federal bureaucracy).

6 *See id.* at 340.

7 5 U.S.C. § 551 (2018).

8 *Id.*

9 *See* Franklin v. Massachusetts, 505 U.S. 788, 800–01 (1992).

10 THE UNITED STATES GOVERNMENT MANUAL (2019), https://www.govinfo.gov/content/pkg/GOVMAN-2019-11-21/pdf/GOVMAN-2019-11-21.pdf [https://perma.cc/6CE5-HVSH].

11 JENNIFER L. SELIN & DAVID E. LEWIS, ADMIN. CONFERENCE OF THE UNITED STATES, SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES (2d ed. 2018).

12 *Id.* at 13–14.

1. *The Revisionist Account*

In this light, consider three significant trends in administrative law scholarship in the past few decades. One is an increasing emphasis on what might be called "Unorthodox Administration."[13] For example, Farber and O'Connell argue that the modern administrative process is increasingly divergent from the casebook description of agency rulemaking and adjudication.[14] Rather than notice being given, comments being received, and a final decision being reached, the Notice of Proposed Rulemaking ("NPRM") often comes long after the policy has been debated and decided by the agency and the Office of Information and Regulatory Affairs ("OIRA").[15] Many agencies, such as the Food & Drug Administration almost never utilize rulemaking and rely on supposedly voluntary guidance documents to accomplish policy goals.[16] It is the possibility of future binding action that seems to facilitate compliance rather than anything legally binding in the current period. On this view, our academic understanding of administrative agencies is wrong and getting worse. Agencies do not develop policy in a way that fits with the APA model. To the extent that the administrative law apparatus is premised on the incorrect old academic view of the administrative state, our administrative law is becoming less and less relevant.

This trend, though real, conflicts with a second. During the first several years of the Trump Administration, it has seemed like administrative law is everywhere and everything. A growing number of administration actions have been struck down by the courts as arbitrary and capricious.[17] Many actions have been stayed pending litigation such that administrative law has stopped them from going into effect at all.[18] Rather than growing increasingly irrelevant, on this view, administrative law is ascendant or even dominant.

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13 *See* Abbe R. Gluck, Anne Joseph O'Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789 (2015).

14 Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1140 (2014); Gluck et al., *supra* note 13, at 1794.

15 Farber & O'Connell, *supra* note 14, at 1138–39.

16 *See id.*

17 *See* Connor Raso, *Trump's Deregulatory Efforts Keep Losing in Court—and the Losses Could Make It Harder for Future Administrations to Deregulate*, BROOKINGS (Oct. 25, 2018), https://www.brookings.edu/research/trumps-deregulatory-efforts-keep-losing-in-court-and-the-losses-could-make-it-harder-for-future-administrations-to-deregulate/ [https://perma.cc/LG9A-8UZR].

18 *Compare* Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017), *with* Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. 920 (2020).

Third, and related to the first, a growing literature describes institutions that are exercising administrative authority but that are not technically administrative agencies. Many bureaucratic organizations exist on the border between the public and private sphere, the Federal and State domains, and the respective branches of the federal government.[19] Drawing on these accounts, I want to emphasize four kinds of institutions that exercise significant administrative authority, but do so in the shadows of administrative law.

a. Exempt Actions

Section 701 of the APA exempts agency action from review if: "(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law."[20] Although I do not want to tarry over statutory preclusion and actions that are committed to agency discretion by law,[21] I do want to note that these exemptions create holes within the administrative fabric. To be clear, this is a descriptive claim, not a normative one. There are many reasons for insulating certain agency actions from judicial review or committing a matter solely to administrative discretion.[22] The result, however, is a pocket within administrative law to which ordinary standards of review do not apply.

b. Exempt Agencies

Related but distinct from exempt administrative actions are exempt administrative agencies, some of which are often referred to as quasi-agencies.[23] Because of their organic statutes' terms, many of these entities are exempt from review under the APA. Many of these are government corporations, like Amtrak, which inhabit a hybrid public-private role, being classified as government entities for some purposes but private entities for others. Amtrak is an agency for some constitutional purposes, but not for purposes of the APA.[24] Most commonly, the classification question involves an allegedly unconstitutional action by a nominally private actor. For example, in *Brentwood*

19 Anne Joseph O'Connell, *Bureaucracy at the Boundary*, 162 U. PA. L. REV. 841, 851 (2014).

20 5 U.S.C. § 701(a) (2018).

21 *See* Webster v. Doe, 486 U.S. 592 (1988); Heckler v. Chaney, 470 U.S. 821 (1985).

22 *See* Jacob E. Gersen & Matthew C. Stephenson, *Over-Accountability*, 6 J. LEGAL ANALYSIS 185, 211 (2014).

23 *See* O'Connell, *supra* note 19, at 847; *see also* JONATHAN G.S. KOPPELL, THE POLITICS OF QUASI-GOVERNMENT: HYBRID ORGANIZATIONS AND THE DYNAMICS OF BUREAUCRACY CONTROL 3 (2003); SELIN & LEWIS, *supra* note 11, at 49–50.

24 *See* Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 394 (1995).

Academy v. Tennessee Secondary School Athletic Ass'n,[25] the Court concluded a state athletic association could be sued for constitutional violations because its conduct was state action given the close relation of public and organization officials. There are dozens of agencies that are, as entities, not covered by the APA.[26]

c. State Agencies

The term cooperative federalism denotes regulatory frameworks in which regulatory power is shared between federal entities and state entities.[27] In virtually all cooperative federalism structures the state administrative agency ultimately exercises the shared regulatory power.[28] Structures like this are quite common, including in environmental law, energy law, and telecommunications.[29] State agencies exercise federal statutory authority—authority that if exercised by a federal agency would clearly be governed by the APA.[30] Yet, because state agencies are not authorities of the United States government, they are not formally covered by the APA.[31] State agencies may be governed by state administrative procedure acts, but the precise content of those laws varies significantly.[32] State agencies are therefore outside the domain of federal administrative law proper.

d. Non-Agencies

All of the above examples entail the exercise of administrative authority by entities that represent variants on the traditional government institution. They are excluded from administrative law for one reason or another but resemble traditional administrative agencies. A final category involves the exercise of administrative authority by non-administrative agencies. The privatization literature is by now very well established.[33] Scholars have documented and debated the exten-

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25 531 U.S. 288, 290–91 (2001).

26 *See* O'Connell, *supra* note 19, at 916.

27 Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692, 1693 (2001).

28 *Id.* at 1695.

29 *Id.* at 1695, 1733.

30 Josh Bendor & Miles Farmer, Note, *Curing the Blind Spot in Administrative Law: A Federal Common Law Framework for State Agencies Implementing Cooperative Federalism Statutes*, 122 YALE L.J. 1280, 1283 (2013).

31 *Id.*

32 *Id.*

33 *See generally* MARTHA MINOW, PARTNERS, NOT RIVALS: PRIVATIZATION AND THE PUBLIC GOOD (2002) (examining privatization in areas such as education, wealth, and medicine); Kenneth A. Bamberger, *Regulation as Delegation: Private Firms, Decisionmaking, and Account-*

sive grants of authority to nonpublic entities. Some argue these grants are unconstitutional delegations to private parties.[34] Others decry the lack of accountability that accompanies such grants.[35] Still others worry that the traditional checks of judicial review of administrative action are being avoided when nonpublic entities exercise administrative authority.[36] Some scholars are less pessimistic, urging that public-private partnerships can maintain government accountability while also drawing on the expertise and efficiency of private parties.[37] I do not want to wade into this debate in earnest. For the moment, I want to add non-agencies to the list of domains where federal administrative authority is exercised, but that are outside the purvey of administrative law proper.

B. Administrative Law Proper and Less So

1. Basics

The APA adopts a familiar four-part classification of virtually all agency actions. Actions are either classified as Rules or Orders with a rule unsurprisingly being the result of a rulemaking and an order being the result of an adjudication.[38] Either process may be formal or informal.[39] Therefore, for purposes of the APA, all agency actions fall into one of four categories: (1) formal rulemaking, (2) formal adjudication, (3) informal rulemaking, or (4) informal adjudication. This last category is the most variable, covering a broad swath of relatively formal actions and completely informal letters from low-level agency officials.

Absent limited circumstances, and regardless of whether the agency process consummates in a rule or an order, the final agency action is subject to judicial review. A party seeking judicial review must establish that the reviewing court has jurisdiction, that a cause of action exists for the suit, that sovereign immunity does not bar the

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ability in the Administrative State, 56 DUKE L.J. 377 (2006); Jody Freeman, *Extending Public Law Norms Through Privatizatio*n, 116 HARV. L. REV. 1285 (2003); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367 (2003); Dru Stevenson, *Privatization of Welfare Services: Delegation by Commercial Contract*, 45 ARIZ. L. REV. 83 (2003).

34 *See, e.g.*, Metzger, *supra* note 33, at 1374.

35 *See, e.g.*, Bamberger, *supra* note 33, at 384.

36 *See, e.g.*, Metzger, *supra* note 33, at 1373.

37 *See, e.g.*, MINOW, *supra* note 33 (particularly chapter 5).

38 *Compare* 5 U.S.C. § 553 (2018), *with* 5 U.S.C. § 554 (2018) (defining rulemaking and adjudications, respectively).

39 5 U.S.C. § 556 (2018) (defining the procedural requirements for formal rulemakings and adjudications).

action, and that venue is proper.[40] Beyond establishing finality,[41] a party seeking to challenge the action must have exhausted their administrative remedies[42] and show that the action is ripe for review.[43] Depending on whether the action was issued using formal rulemaking or adjudication, or informal rulemaking or adjudication, the decision will be reviewed according to either the substantial evidence standard,[44] or the arbitrary and capricious standard.[45]

2. Federal Common Law

Although somewhat out of fashion at the moment, debate over the legal and normative status of federal common law resurfaces every decade or so.[46] As is often noted, "Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision."[47] *Erie*'s admonition that "[t]here is no federal *general* common law"[48] is sometimes colloquially confused with the statement there is "no federal common law." As many others have described and theorized, there are extensive pockets of federal common law.[49] The claim that there is no general federal common law simply means that some other source of law, be it constitutional or statutory, must undergird federal common law.[50]

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40 RICHARD J. PIERCE, JR. & KRISTIN E. HICKMAN, ADMINISTRATIVE LAW TREATISE §§ 16.1, 19.8, 20.6, 20.9 (6th ed. 2019).

41 *See* Bennett v. Spear, 520 U.S. 154, 177–78 (1997).

42 *See* Darby v. Cisneros, 509 U.S. 137, 153–54 (1993).

43 *See* Abbott Labs. v. Gardner, 387 U.S. 136, 148 (1967).

44 *See* Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951) (holding the agency decision must be supported by the balance of evidence, considering the whole record).

45 Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (requiring that an agency "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'").

46 *See, e.g.*, George D. Brown, *Of Activism and* Erie*—The Implication Doctrine's Implications for the Nature and Role of the Federal Courts*, 69 IOWA L. REV. 617 (1984); Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881 (1986); Henry J. Friendly, *In Praise of* Erie*—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964); Paul J. Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797 (1957); Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 Nw. U. L. REV. 585 (2006).

47 City of Milwaukee v. Illinois, 451 U.S. 304, 312 (1981). *See generally* Seth Davis, *Implied Public Rights of Action*, 114 COLUM. L. REV. 1, 28–29 (2014) (providing a brief overview of the debate on federal common law.).

48 Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938) (emphasis added).

49 *See* Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245 (1996).

50 *See* Ernest A. Young, *Preemption and Federal Common Law*, 83 NOTRE DAME L. REV. 1639 (2008).

This background presumption against federal common law has its own application in the context of administrative law. Prior to the enactment of the APA in 1946, a good deal of administrative common law had been developed.[51] Part of this debate concerns whether the APA displaced the preexisting common law, incorporated it, or simply set out a domain in which the APA would apply, leaving the remainder of the administrative common law to survive.[52]

The standard account is that the Supreme Court put a final nail in the administrative common law coffin in *Vermont Yankee Nuclear Power Corp. v. NRDC*.[53] In what is a familiar story to administrative law scholars, during the 1970s, the D.C. Circuit was developing a set of doctrines that tailored the extent of requisite procedures to the nature of the decision being made by the agency.[54] Put simply, the more important the decision, the more extensive the procedures that the agency had to use to make the decision.[55] This practice—known as *hybrid rulemaking*, because it required a process more involved than informal notice-and-comment rulemaking, but less involved than formal rulemaking—was held unlawful by the Supreme Court.[56] Agencies may do more than the APA requires, but federal courts may not, as a matter of common law, require more.[57]

Rather than halting the elaboration of judicially required procedures, *Vermont Yankee* largely had the effect of changing the source of law cited for such procedures. After the Court clarified that judicially imposed procedural requirements could not be grounded in administrative common law, judges had to derive any requirements from statutory terms: either the APA itself, the agency's organic statute, or another statute like the Freedom of Information Act[58] or National Environmental Policy Act.[59] Thus, procedural requirements for agencies emerged as a matter of statutory interpretation, rather than common law reasoning. For example, the APA requirements that regulated parties be given notice and an opportunity for comment has given rise

51 *See* John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 117–19 (1998).

52 *See id.* at 119.

53 *See* 435 U.S. 519, 524 (1978).

54 *See* NRDC v. U.S. Nuclear Regulatory Comm'n, 547 F.2d 633, 644–45 (1976).

55 *See generally* Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 MICH. L. REV. 1355, 1376–77 (2016) (arguing courts adopt a less demanding rationality standard when evaluating whether an agency's action was arbitrary or capricious).

56 *See Vermont Yankee*, 435 U.S. at 524.

57 *Id.* at 523–24.

58 Pub. L. No. 89-487, 80 Stat. 250 (1967).

59 Pub. L. No. 91-190, 83 Stat. 852 (1970).

to the "logical outgrowth" doctrine: if an agency's final rule is not a "logical outgrowth" of its initial proposal, it cannot take effect until the agency provides further opportunity for public comment.[60] Indeed, because so much is required of agencies based on so little statutory text, some have suggested that almost all administrative law is common law.[61] For example, the *Chevron* doctrine is nowhere stated in the APA and yet there is perhaps no more bedrock principle in administrative law.[62] Gillian Metzger's Foreword a few years ago in this publication offered an extensive justification of this practice,[63] which might be thought of as common law statutory interpretation.

Notwithstanding Metzger's defense, the Supreme Court has seemingly remained resistant. Recently, in *Perez v. Mortgage Bankers Ass'n*, the Supreme Court struck down the D.C. Circuit's *Paralyzed Veterans* doctrine that required agencies to engage in notice-and-comment rulemaking when they substantially alter an "interpretive rule."[64] Said the Court, "The *Paralyzed Veterans* doctrine is contrary to the clear text of the APA's rulemaking provisions, and it improperly imposes on agencies an obligation beyond the 'maximum procedural requirements' specified in the APA."[65] That is, any judicially imposed procedural requirements for agencies must have a hook or source of law in statutory text.[66]

The state of the blackletter law therefore is relatively clear: there is no federal common administrative law. Yet, judge made doctrinal rules that arise from statutory interpretation may resemble, or even be indistinguishable from, judge made doctrinal rules that arise from common law.[67] Both will regulate political institutions and their interactions with private parties. Both will be different than the clear terms

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60 Long Island Care at Home v. Coke, 551 U.S. 158, 174–75 (2007); Nat'l Black Media Coal. v. FCC, 791 F.2d 1016, 1022 (2d Cir. 1986).

61 Cass R. Sunstein, *Factions, Self-Interest, and the APA: Four Lessons Since 1946*, 72 VA. L. REV. 271, 271 (1986).

62 *See* Metzger, *supra* note 1, at 1300–01.

63 *Id.* at 1297–98; *see also* Sunstein, *supra* note 61, at 271; Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479 (2010).

64 Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 97 (2015).

65 *Id.* at 100.

66 *See* Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 782–83 (2010); Duffy, *supra* note 51 at 116–17.

67 Metzger, *supra* note 1, at 1310–11; *see also* Jeffrey A. Pojanowski, *Reason and Reasonableness in Review of Agency Decisions*, 104 NW. U. L. REV. 799, 822 (2010) (describing how common law reasoning operates).

of any statutory text or else the rule would not be an expansion or change.

3. Common Administrative Law

My interest in this essay is not in debating whether administrative common law is normatively attractive or consistent with constitutional constraints. Nor is it to engage disputes in the commentary about how best to characterize judicial practice—whether it is *really* common law judging or is *best described* as a different form of judicial reasoning with a more legitimate source of law. Rather, I want to canvas a handful of recent examples in which administrative law requirements do not formally apply at all, yet federal courts are crafting new procedural doctrines to constrain institutional behavior.

C. Review in the Shadow

1. Exempt Agencies & Non-APA Review

The APA does not apply to agencies when "statutes preclude judicial review."[68] Two examples of largely exempt agencies are the U.S. Post Office and the Legal Services Corporation.[69] There is, however, a rough consensus that *some form* of judicial review applies to these agencies' actions notwithstanding their APA exemption. At the least, courts have suggested that judicial review is appropriate when these agencies act *ultra vires*—that is, when they exceed their statutory authority.[70] Deciding whether an agency has exceeded their statutory authority, of course, requires a judicial proceeding on the proper scope of that authority.

Most traditional reviews of agency action might be described in largely the same terms. When an agency takes an action that a court subsequently finds to be arbitrary and capricious, the agency has, by definition, done something outside their statutory authority. When an agency adopts an interpretation of a statute or a regulation that is unreasonable in either the *Auer* or *Chevron* framework, the agency has acted outside of its statutory authority too. The *ultra vires* framework usually applies then, when an agency or action is otherwise exempt from that traditional framework.[71]

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68 5 U.S.C. § 701(a)(1) (2018).

69 *See* O'Connell, *supra* note 19, at 845, 857.

70 *See, e.g.*, Mittleman v. Postal Regulatory Comm'n, 757 F.3d 300, 306–07 (D.C. Cir. 2014); Aid Ass'n for Lutherans v. USPS, 321 F.3d 1166, 1173 (D.C. Cir. 2003).

71 *See* Thomas W. Merrill, *Delegation and Judicial Review*, 33 HARV. J.L. & PUB. POL'Y

To illustrate, consider *Sears, Roebuck & Co. v. USPS*.[72] The case involved a challenge to a determination that Sears did not qualify for a bulk mailing discount for mailers that were sealed in accordance with Post Office rules.[73] Clarifying the standard of review, the D.C. Circuit explained that apart from two very limited exceptions, the judicial review provisions of the APA are not applicable to the Post Office.[74] The court continued, "Nevertheless, under the law of this circuit, Postal Service decisions are still subject to non-APA judicial review in some circumstances."[75] This scope of non-APA review has been construed by the D.C. Circuit as follows:

> (1) a straightforward question of statutory interpretation, (2) a question concerning whether a regulation in the Manual was a valid exercise of the Postal Service's authority, and (3) a question focusing on whether a Postal Service decision was supported by the agency's contemporaneous justification or, instead, reflected counsel's *post hoc* rationalization.[76]

Students of administrative law will recognize a familiar APA-like ring of these statements. As the court said, the "'reasoned decision-making' standard . . . is the paradigm of APA review."[77] Even though the decisions of the Post Office are exempt from APA review, the courts have settled on a standard that seems quite close to APA review.

In *National Ass'n of Postal Supervisors v. USPS*,[78] the court sought to link the scope of review to that appropriate in mandamus actions:

> The judicial role is to determine the extent of the agency's delegated authority and then determine whether the agency has acted within that authority. In this as in other settings, courts owe a measure of deference to the agency's own construction of its organic statute, but the ultimate responsibility for determining the bounds of administrative discretion is judicial.[79]

73, 84 (2010); Henry P. Monaghan, *Jurisdiction Stripping Circa 2020: What* The Dialogue *(Still) Has to Teach Us*, 69 DUKE L.J. 1, 58 (2019).

72 844 F.3d 260 (D.C. Cir. 2016).

73 *Id.* at 262.

74 *Id.* at 265.

75 *Id.*

76 *Id.* (citations omitted).

77 *Id*.

78 602 F.2d 420 (1979).

79 *Id.* at 432–33 (citations omitted).

This form of non-APA review is sometimes called *ultra vires* review because it asks whether the agency has stayed within the bounds of its own jurisdiction. Whether this deference is more akin to *Chevron* deference or *Skidmore* deference, the same basic doctrinal structure seems to apply.

Indeed, in a series of Post Office cases over the years, this ultra vires evaluation has been cashed out by looking to pre-APA administrative common law and imposing a requirement of "reasoned decision-making"—a requirement that is functionally equivalent to the APA's arbitrary and capricious provision.[80] Like the Post Office, most actions of the Legal Services Corporation are exempt from APA review. Yet, in *Texas Rural Legal Aid, Inc. v. Legal Services Corp.*,[81] the court imposed a largely identical reasoned decision-making requirement on the agency:[82]

> We therefore conclude, along with every other court that has addressed the issue, that LSC's substantive policy decisions, although exempt from the APA, are subject to the pre-APA requirement that administrative decisions be rationally based—a standard that courts have held is equivalent to the APA's requirement that agency action not be arbitrary or capricious.[83]

Other cases suggest that something like an APA standard of review are appropriate when a non-APA agency violates its own regulations.[84] In *Village of Palatine v. USPS*,[85] the court found that statutory preclusion aside, "courts may nevertheless apply the statute's [(APA's)] standards of review when litigants complain that the agency violated its own regulations."[86] The court in *Texas Rural Legal Aid* went on to conclude that "[t]he general principle that informal agency action must be reviewed on the administrative record predates the

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80 *See* LINDA A. ELLIOTT & HARRY T. EDWARDS, FEDERAL COURTS STANDARDS OF REVIEW 167–74 (2007).

81 940 F.2d 685 (D.C. Cir. 1991).

82 *Id.* at 697–98.

83 *Id.* at 697.

84 *E.g.* Vill. of Palatine v. USPS, 742 F. Supp. 1377, 1381 (N.D. Ill. 1990); Carter Chevrolet Agency, Inc. v. USPS, 19 F. Supp. 2d 1246 (W.D. Okla. 1997); *but see* Eagle Tr. Fund v. USPS, 365 F. Supp. 3d 57, 68–69 (D.D.C. 2019) ("But as has by now been stated repeatedly, it is well-settled law that APA review does not apply to USPS determinations. And Plaintiffs' failure to point to any cause of action outside the APA that would allow the Court to enjoin USPS to follow its own regulations means that their request for relief based on USPS's alleged failure to abide by its own regulations . . . must be dismissed." (citations omitted)).

85 742 F. Supp 1377 (N.D. Ill. 1990).

86 *Id.* at 1381.

APA and therefore applies with equal force to actions taken by LSC."[87]

Ultra vires, non-APA, or non-statutory review is supposed to be narrow,[88] but in practice, it is not radically different, if different at all, from a standard APA case. Indeed, the line between an agency acting outside the scope of their statutory authority and acting within their statutory grant but nevertheless arbitrarily (failing arbitrary and capricious review) can be vanishingly small. Put somewhat differently in *Aid Ass'n for Lutherans v. USPS*:[89]

> [T]he case law in this circuit is clear that judicial review is available when an agency acts *ultra vires*. In other words, the APA's stricture barring judicial review "to the extent that statutes preclude judicial review", "does not repeal the review of *ultra vires* actions that was recognized long before . . . When an executive acts *ultra vires*, courts are normally available to reestablish the limits on his authority."[90]

All judges agree that the APA does not technically apply in these cases. Nevertheless, the doctrines, procedural requirements, and substantive standards of review being applied to agency actions are closely related if not identical to those that would apply in an APA case. The courts are essentially filling holes or gaps in the coverage of the administrative law framework.

2. *Quasi-Agency Doctrine*

All of the above cases entail applying APA-like standards of review to either exempt agencies or actions that have been precluded from APA review. A second group of cases arising in administrative law's shadow involves what are sometimes called quasi-agencies.[91] One group of quasi-agencies consist of interstate compacts.[92] An interstate compact is an entity that is formed with the agreement of several states, usually to help manage a problem or resource that spans sev-

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87 940 F.2d at 698.

88 Mittleman v. Postal Regulatory Comm'n, 757 F.3d 300, 307 (D.C. Cir. 2014).

89 321 F.3d 1166 (D.C. Cir. 2003).

90 *Id.* at 1173 (citations omitted).

91 Entities like the Post Office and government corporations are sometimes referred to as quasi-agencies as well. *See* O'Connell, *supra* note 19, at 847; KEVIN R. KOSAR, CONG. RESEARCH SERV., RL30533, THE QUASI GOVERNMENT: HYBRID ORGANIZATIONS WITH BOTH GOVERNMENT AND PRIVATE SECTOR LEGAL CHARACTERISTICS (2011).

92 *See* Daniel E. Andersen, *Straddling the Federal-State Divide: Federal Court Review of Interstate Agency Actions*, 101 IOWA L. REV. 1601, 1608 (2016); William S. Morrow, Jr., *The Case for an Interstate Compact APA*, ADMIN. & REG. L. NEWS, Winter 2004, at 12 (2004).

eral states.[93] The Washington Metropolitan Area Transit Authority ("WMATA") is a classic example. WMATA is a municipal corporation created by the Washington Metropolitan Area Transit Authority Compact. It manages the public transportation system across Washington, D.C.; Virginia; and Maryland.[94] It is also subject to frequent litigation. In *Seal & Co. v. WMATA*, a bidder challenged a contract award made by WMATA.[95] The court had to consider whether WMATA qualifies as a federal agency and therefore is governed by the dictates of the APA.[96] The court concluded that the corporation was not a federal agency, but rather "an instrumentality and agency of each of the signatory parties" of the Compact.[97] Thus, the court concluded that WMATA was not subject to the APA.[98]

However, the court went on to develop a legal standard virtually identical to the one that would apply if the APA did apply: "As Congress intended that federal agencies be subject to the APA in their procurement activities, and as WMATA replaced [the National Capital Transportation Agency], it is likely that Congress also intended that WMATA be subject to APA-like review of its procurement activities."[99] Therefore, the Court held that WMATA was subject to suits by aggrieved bidders for procurement activities.[100] The logic of the opinion is roughly as follows. The court reasoned that it was Congress's intent that "WMATA be subject to APA-like review of its procurement activities" because Congress intended that federal agencies be subject to the APA in their procurement activities, and WMATA replaced a prior agency that engaged in procurement.[101] Other factors that together pointed "collectively and persuasively" to imposing APA-like legal constraints included that legislators sought to "protect the federal interest" in the compact.[102] Because the federal agency would have been subject to the APA's dictates, the non-agency should be subject to similar legal constraints.

This doctrine has become known as the *quasi-agency doctrine*. It may not be long for this world, but the basic idea is that when an

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93 *See* Andersen, *supra* note 92, at 1608.

94 *See* Seal & Co. v. WMATA, 768 F. Supp. 1150, 1152 (E.D. Va. 1991).

95 *Id.*

96 *See id.* at 1154–55.

97 *See id.* at 1154 (quoting WMATA v. One Parcel of Land, 706 F.2d 1312, 1314 (4th Cir. 1983), *cert. denied*, 464 U.S. 893 (1983)).

98 *Id.*

99 *Id.* at 1157.

100 *Id.*

101 *Id.*

102 *Id.*

entity is not classified as a federal agency for purposes of the APA, but performs tasks and functions in the same way that a federal agency did or could, then it should be treated as though it is a federal agency.[103] This is different than saying the entity will be *deemed to be* a federal agency and the strictures of the APA will therefore apply. Rather, the quasi-agency doctrine takes as a starting place the legal fact that the APA does not apply. Then, reasoning that because the actor performs tasks like those that a federal agency would perform, it should be subject to similar legal restrictions on the way those actions are taken.

What is the source of law for such a conclusion? There are two possibilities. One is that the statute authorizing the creation of WMATA implicitly suggests such a requirement.[104] This is not an easy argument to make, but it is certainly not impossible. A second possibility is that the requirement is a form of federal common law. Even if it is the latter, it is not clearly precluded by *Vermont Yankee*.[105] Rather, the question is whether the WMATA-authorizing statute contains authorization for the creation of federal common law of administrative practice and procedures, a point discussed further below.[106]

Applying the quasi-agency doctrine, in *Heard Communications, Inc. v. Bi-State Development Agency*, the court held that Bi-State Development Agency, "a body corporate and politic created in 1949 through a compact between Missouri and Illinois," was not a quasi-federal agency.[107] The court applied a three-factor test to determine whether a body is a quasi-federal agency.[108] First, is the originating compact governed, either explicitly or implicitly, by federal procurement regulations?[109] Second, is a private right of action available under the compact?[110] Third, what is the level of federal participation, through the creation of the compact and federal funding?[111] Applying the factors to the interstate compact, the court concluded that the Bi-State Development Agency was not a quasi-federal agency, and there-

103 O'Connell, *supra* note 19, at 917.

104 *See, e.g.*, Davis, *supra* note 47.

105 *See* Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 524 (1978).

106 *Cf.* Textile Workers Union of Am. v. Lincoln Mills of Ala., 353 U.S. 448, 450–51 (1957) (discussing whether the Labor Management Relations Act of 1947 authorized federal courts to create common law to enforce it).

107 18 Fed. App'x 438, 441 (8th Cir. 2001).

108 *Id.* at 439.

109 *Id.* at 440.

110 *Id.*

111 *Id.*

fore no APA-like requirements applied. Nevertheless, the court employed the basic doctrinal framework.

Similarly, *New York v. Atlantic States Marine Fisheries Commission*[112] involved a challenge to a decision of an interstate Fisheries Commission. The court first concluded the entity created by interstate compact was not an agency under section 701 of the APA, so no APA review applied.[113] The court then proceeded to ask whether the entity qualified as a quasi-agency for purposes of the quasi-agency doctrine.[114] The court was, it is fair to say, somewhat skeptical about the validity of the "judge-created" "quasi-federal agency" doctrine, but nevertheless applied the framework to conclude that the Fisheries Commission did not qualify.[115]

To this point, the quasi-agency doctrine has not exactly taken the administrative law world by storm. But rather than relegate it to the doctrinal dustbin, I want to suggest there is something interesting in it. Under current law, it is not clear what, if any, source of federal administrative law applies to such interstate compacts; and state administrative law does not seem to apply either.[116] Yet, such compacts do exercise what could be described as core administrative authority.

One need not subscribe to the view that any administrative wrong implies an administrative remedy to be unsurprised that judges and private parties are anxious about administrative power being exercised without the ordinary constraints of administrative law.[117] Thus, while the Second Circuit expressed skepticism about judge-made rules,[118] the judicial impulse that led to the quasi-agency doctrine is entirely predictable. Indeed, to the extent that more governmental decision making is done by actors outside the formal administrative law apparatus, there will be an inevitable temptation for judges to bring administrative law principle to bear, even if the source of law for those principles is somewhat muddled. Understood in this light, the quasi-agency doctrine is closely related to judicial decisions that speak of *Chevron* deference to the President. The President is not an agency for purposes of the APA; therefore, none of the standard accounts

112 609 F.3d 524, 527 (2d Cir. 2010).

113 *Id.* at 531–33.

114 *Id.* at 533–37.

115 *Id.* at 534.

116 Morrow, Jr., *supra* note 92.

117 *See, e.g.*, Gerald Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1984).

118 *Atl. States Marine Fisheries Comm'n*, 609 F.3d at 534.

underlying *Chevron* apply.[119] Nevertheless, courts sometimes reach for a doctrinal framework that is close, deferring to Presidential judgment, citing *Chevron*.[120]

3. Review of State Agencies

Yet another instance of general administrative law principles being applied outside of the domain of federal administrative agencies is in the context of federal judicial review of state administrative agencies.[121] A range of so-called "cooperative federalism" statutes distribute administration of regulatory authority between states and the federal government.[122] State agencies often implement federal legal requirements.[123] As noted above, the APA applies only to each authority of the Government of the United States. State agencies are not authorities of the Government of the United States. Nevertheless, state agencies exercise significant federal administrative authority. When private parties wish to challenge the legality of the state agency's action, does federal or state administrative law apply? Which actions may be reviewed? Which are precluded? What happens when state courts review state agency actions implementing federal law? What standard of review is applicable? Are doctrines like *Chevron* or *Auer* applicable?[124]

When faced with these questions, courts have taken a diversity of views.[125] Bendor and Farmer suggest that federal courts tend to apply federal administrative law and state courts tend to apply state administrative law, without giving much discussion to the underlying quandaries or conflicts.[126] In an extensive analysis of the issues, Bendor and Farmer build on an older Supreme Court decision, *United States v.*

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119 *See* Franklin v. Massachusetts, 505 U.S. 788, 800–01 (1992).

120 *See* Al-Bihani v. Obama, 619 F.3d 1, 45 (D.C. Cir. 2010); United States v. Lindh, 212 F. Supp. 2d 541, 556–57 (E.D. Va. 2002). *See generally* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2376 (2001) (arguing that more deference is warranted when there is presidential involvement); Nicholas J. Leddy, *Determining Due Deference: Examining When Courts Should Defer to Agency Use of Presidential Signing Statements*, 59 ADMIN. L. REV. 869, 872 (2007) (discussing the level of deference given to presidential signing statements).

121 *See* Bendor & Farmer, *supra* note 30; Davis, *supra* note 47; Miriam Seifter, *Further From the People? The Puzzle of State Administration*, 93 N.Y.U. L. REV. 107 (2018); Emily Stabile, *Federal Deference to State Agency Implementation of Federal Law*, 103 KY. L.J. 237, 237 (2014–2015).

122 Bendor & Farmer, *supra* note 30, at 1282.

123 *Id.* at 1288.

124 *See* Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534, 551–53 (2011).

125 *See* Bendor & Farmer, *supra* note 30, at 1283.

126 *See id.* at 1283.

Kimbell Foods, to argue that state law should be folded into a federal common administrative law because of an interest in national uniformity when a federal statute is being implemented.[127] Regardless of the optimal resolution, federal courts must regularly decide what law to apply when reviewing state agencies implementing federal law. When faced with that reality, many federal courts reviewing non-agencies—for APA purposes—are applying APA administrative law principles outside their formal domain of applicability.

Although the APA simply does not apply to state agencies,[128] courts seem to be routinely applying the APA's standards to state agencies exercising federal administrative authority.[129] For example, in *Sierra Club v. State Water Control Board*,[130] the Fourth Circuit entertained a challenge to a state agency certification that certain activities regarding the construction of a natural gas pipeline would not degrade the state's water. The court acknowledged that although courts often apply the arbitrary and capricious standard, the APA does not apply to state agencies.[131] Nevertheless, the court looked to the arbitrary and capricious standard to guide its review.[132] In a later case, the circuit went even further: "This Court applies the arbitrary and capricious standard of the APA to the State Agencies' challenged findings and conclusions."[133]

Reviewing a decision of another state agency implementing a different statute, the Second Circuit adopted a similar stance:

> By definition, the APA applies only to federal agency actions, however, in the context of the TCA, federal courts have used the arbitrary and capricious standard when reviewing the merits of state agency decisions made pursuant to federal law. . . . Courts first review de novo whether the state agency complied with the requirements of the relevant federal law. "If no illegality is uncovered during such a review," the court then analyzes the state agency's factual determinations "under the more deferential arbitrary-and-

127 *See id.* at 1308–24.

128 *See* Merryfield v. Disability Rights Ctr. of Kan., 439 F. App'x 677, 679 (10th Cir. 2011); Hunter v. Underwood, 362 F.3d 468, 477 (8th Cir. 2004); Gilliam v. Miller, 973 F.2d 760, 761 (9th Cir. 1992).

129 *See* Bendor & Miles, *supra* note 30, at 1296–99 (collecting cases).

130 898 F.3d 383, 403 (4th Cir. 2018) ("We review Virginia's Section 401 certification under the arbitrary-and-capriciousness standard.").

131 *Id.* at 403 n.13.

132 *Id.* at 403.

133 Appalachian Voices v. State Water Control Bd., 912 F.3d 746, 753 (4th Cir. 2019).

> capricious standard of review usually accorded state administrative bodies' assessments of state law principles."[134]

This trend is not uniform. There are also examples of federal courts declining to review the decisions of state agencies on grounds that these entities are not covered by the APA. Nevertheless, many courts reviewing actions of state agencies simply apply the APA's standards of review, even while acknowledging the APA does not formally apply.[135]

4. Quasi-Public Non-Agencies

State agencies may not be federal agencies, but they are at least government agencies. But administrative law's shadow extends further. This section details the application of federal administrative law principles to private entities exercising something akin to administrative authority.

Accreditation agencies are private entities but wield significant power as gatekeepers to federal funding. They are not governed by the APA. However, they exercise accreditation authority delegated by the Secretary of Education, "act[ing] on behalf of the Secretary and wield[ing] the quasi-governmental power of deciding which [ ] schools are eligible for federal funds."[136] Put another way, they are "a proxy for the federal department whose spigot [they] open[ ] and close[ ]."[137]

Although not considered agencies for purposes of the APA, accreditation agencies have nevertheless been deemed subject to a variety of federal administrative law standards. For example, accreditation agencies are subject to a *federal common law duty* "to employ fair procedures when making decisions affecting their members."[138] This duty is justified on two grounds. First, the enormous power wielded by these entities—denial of accreditation—is likely to lead to the shuttering of an institution as federal funds dry up.[139] Second, that Congress

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134 Islander E. Pipeline Co. v. Conn. Dep't of Envtl. Prot., 467 F.3d 295, 309–10 (2d Cir. 2006) (citations omitted).

135 *See* Bendor & Farmer, *supra* note 30, at 1297.

136 Thomas M. Cooley Law Sch. v. Am. Bar Ass'n, 459 F.3d 705, 712 (6th Cir. 2006).

137 Chi. Sch. of Automatic Transmissions, Inc. v. Accreditation Alliance of Career Schs. & Colls., 44 F.3d 447, 449 (7th Cir. 1994).

138 Prof'l Massage Training Ctr., Inc. v. Accreditation All. of Career Schs. and Colls., 781 F.3d 161, 169 (4th Cir. 2015) (quoting McKeesport Hosp. v. Accreditation Council for Graduate Med. Educ., 24 F.3d 519, 534–35 (3d Cir. 1994)).

139 *Id.* at 170.

gave exclusive jurisdiction to federal courts over accreditation disputes suggests that federal rather than state law should apply.[140]

This last sentence connotes a federal case from a different generation. *Textile Workers Union of America v. Lincoln Mills of Alabama*[141] read a grant of exclusive federal court jurisdiction to hear disputes regarding a federal statute to authorize the creation of federal common law. The case predates the significant contraction of implied private rights of actions by the Supreme Court in recent decades,[142] and it is a good bet that the case would come out differently today. Nevertheless, in the Labor Management Relations Act of 1947, Congress authorized federal courts to entertain suits for violations of collective bargaining agreements without respect to the amount in controversy or the citizenship of the parties.[143] The Supreme Court found the jurisdictional grant to empower federal courts to apply substantive federal law and fashion common law consistent with the policy of national labor laws.[144] In administrative contexts, is a grant of exclusive jurisdiction to federal courts over certain disputes akin to a grant of authority to create federal common law?

Consider *Professional Massage Training Center v. Accreditation Alliance of Career Schools and Colleges*.[145] A massage therapist school brought an action against a private accreditation agency after the agency denied the schools' application for re-accreditation. Accreditation allows a school to access their federal student aid funding, which for many schools, is essential to their survival. The Fourth Circuit explained that "[a]ccreditation agencies are private entities, not state actors, and as such are not subject to the strictures of constitutional due process requirements. Moreover, . . . there is no express private right of action available to enforce the Higher Education Act ("HEA"), which governs accreditation of higher education institutions."[146] The court continued:

> This is not to say however that accreditation agencies are wholly free of judicial oversight. They, like all other bureaucratic entities, can run off the rails. We thus recognize, along with our sister circuits, that there exists a "common law duty

140 *See* 20 U.S.C. § 1099b(f) (2018); *Prof'l Massage Training Ctr.*, 781 F.3d at 170; *Chi. Sch. of Automatic Transmissions*, 44 F.3d at 449.

141 353 U.S. 448 (1957).

142 *See, e.g.*, Alexander v. Sandoval, 532 U.S. 275 (2001).

143 Pub. L. 80-101, 61 Stat. 136 (1947).

144 *Textile Workers*, 353 U.S. at 456.

145 781 F.3d 161 (4th Cir. 2015).

146 *Id.* at 169 (citations omitted).

> on the part of 'quasi-public' private professional organizations or accreditation associations to employ fair procedures when making decisions affecting their members."[147]

This is an important and powerful passage. There exists against *private entities* a *federal common law duty* to use *fair procedures* when making decisions affecting their members. Put differently, notwithstanding the lack of constitutional or APA constraints, accreditation agencies "nevertheless must conform [their] actions to fundamental principles of fairness."[148]

What exactly is the foundation for this process duty? First, the Higher Education Act delegates to accreditation agencies enormous power:

> [A]ccreditors wield enormous power over institutions—life and death power, some might say—which argues against allowing such agencies free reign to pursue personal agendas or go off on some ideological toot. Their duty, put simply, is to play it straight.[149]

The federal common law duty also "derives in part from the fact that Congress has given exclusive jurisdiction to United States district courts over 'any civil action brought by an institution of higher education seeking accreditation from, or accredited by, an accrediting agency . . . .'"[150] While the court acknowledged that the grant of jurisdiction does not by itself give rise to federal common law authority, it recognized that an exclusive grant places a thumb on the scale for federal common law.[151] In essence, the court reasoned that the high stakes combined with an exclusive grant of federal court jurisdiction should be taken to authorize the creation of federal common administrative law: a common law due process obligation.

To give content to this duty, federal courts have looked primarily to federal administrative law analogues. For example, in a challenge to an American Bar Association action, the Sixth Circuit found that "[m]any courts, including this one, recognize that 'quasi-public' pro-

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147 *Id.* (quoting McKeesport Hosp. v. Accreditation Council for Graduate Med. Educ., 24 F.3d 519, 534–35 (3d Cir. 1994)).

148 Med. Inst. of Minn. v. Nat'l Ass'n of Trade & Tech. Schs., 817 F.2d 1310, 1314 (8th Cir. 1987).

149 *Prof'l Massage Training Ctr.*, 781 F.3d at 170.

150 *Id.* (quoting 20 U.S.C. § 1099b(f)).

151 *Id.* ("If a grant of federal jurisdiction sometimes justifies creation of federal common law, a grant of exclusive federal jurisdiction necessarily implies the application of federal law." (quoting Chi. Sch. of Automatic Transmissions, Inc. v. Accreditation Alliance of Career Schs. & Colls., 44 F.3d 447, 449 (7th Cir. 1994))).

fessional organizations and accrediting agencies such as the ABA have a common law duty to employ fair procedures when making decisions affecting their members."[152] It explained that, "Courts developed the right to common law due process as a check on organizations that exercise significant authority in areas of public concern such as accreditation and professional licensing."[153] Again, because only federal courts have jurisdiction over disputes, it makes little sense to apply state law. "[T]he ABA . . . wields the quasi-governmental power of deciding which law schools are eligible for federal funds. Thus, while the [Administrative Procedure Act] does not specifically apply to the ABA, principles of administrative law are useful in determining the standard by which we review the ABA's decision-making process."[154] Finally, the court explained that,

> courts have uniformly looked to administrative law in reviewing accreditation decisions. We agree and apply the standard of review that has developed in the common law. This court reviews only whether the decision of an accrediting agency such as the ABA is *arbitrary and unreasonable or an abuse of discretion* and whether the decision is based on *substantial evidence*.[155]

Professional Massage Training Center and *Cooley* appear to be representative of the state of the law. Most courts take a deferential approach, looking to (1) whether the agency's action was "arbitrary and unreasonable or an abuse of discretion" and (2) "whether the decision is based on substantial evidence."[156] Obviously, these are the standards of the APA. Courts also look to see whether the accrediting agency followed its own procedures.[157] This common law duty is justified by many of the traditional agency deference rationales such as technocratic expertise.[158]

The *Professional Massage Training Center* court rightly noted that its approach accorded with that of other circuits,[159] and subsequent courts have favorably cited the decision. But at least one court

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152 Thomas M. Cooley Law Sch. v. Am. Bar Assn., 459 F.3d 705, 711 (6th Cir. 2006).

153 *Id.* at 712.

154 *Id.*

155 *Id.* (emphasis added).

156 *See, e.g.*, *Prof'l Massage Training Ctr.*, 781 F.3d at 171 (quoting *Cooley*, 459 F.3d at 712).

157 *See id.* (citing Wilfred Acad. of Hair & Beauty Culture v. S. Ass'n of Colls. & Schs., 957 F.2d 210, 214 (5th Cir. 1992)).

158 *See id.* (citing Chevron, U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984)).

159 *See id.* at 169–70.

has expressed concern about the trend.[160] The court applied the commonly accepted approach, but expressed doubt about the "legal fiction" that accrediting agencies are not state actors, particularly after the 1992 Higher Education Act amendments increased federal control over accrediting agency standards and operating procedures.[161] Indeed, at least one recent article has advocated for courts to treat accreditors as state actors.[162] The concerns or objections, however, are not really about applying APA requirements outside their formal domain. Rather, they are objections to having non-agencies exercise administrative authority at all. The accreditation institution cases illustrate that such entities are formally administrative law, common law doctrines that have emerged that mirror the substantive and procedural requirements of the APA.

One sees similar dynamics in other gatekeeper scenarios. Consider decisions by hospital review boards of public or quasi-public hospitals about whether a particular doctor may practice there. These entities are obviously not federal agencies, but their denials are often reviewed under an arbitrary or capricious standard. For example, in *Sosa v. Board of Managers of Val Verde Memorial Hospital*, the court reviewed the board of a public hospital's decision to reject a doctor's application.[163] The Fifth Circuit wrote that although the governing board of a hospital must be given great latitude in prescribing necessary qualification for potential applicants, "in exercising its broad discretion the board must refuse staff applicants only for those matters which are reasonably related to the operation of the hospital. Arbitrariness and false standards are to be eschewed."[164]

The regulation of university communities is similar. In *Connelly v. University of Vermont & State Agricultural College*,[165] the court

160 *See* Auburn Univ. v. S. Ass'n of Colls. & Schs., 489 F. Supp. 2d 1362, 1373 (N.D. Ga. 2002).

161 *Id.*; *see generally* William A. Kaplin & J. Philip Hunter, Comment, *The Legal Status of the Educational Accrediting Agency: Problems in Judicial Supervision and Governmental Regulation*, 52 CORNELL L.Q. 104 (1966–1967) (providing a broad, if dated, overview of the position of accreditation agencies).

162 Julee T. Flood & David Dewhirst, *Shedding the Shibboleth: Judicial Acknowledgment that Higher Education Accreditors Are State Actors*, 12 GEO. J.L. & PUB. POL'Y 731, 741 (2014) (arguing that state actor treatment is warranted because of increased government involvement with accreditors and because "accreditors have the power to violate fundamental liberties").

163 437 F.2d 173 (5th Cir. 1971).

164 *Id.* at 176–77; *see also* Lew v. Kona Hosp., 754 F.2d 1420, 1424–25 (9th Cir. 1985) (evaluating whether the doctor whose staff privileges were terminated received an adequate procedural hearing); Pac. Radiation Oncology, LLC v. Queen's Med. Ctr., 861 F. Supp. 2d 1170, 1183 (D. Haw. 2012) (discussing whether hospital is quasi-public and thus is subject to judicial review).

165 244 F. Supp. 156 (D. Vt. 1965).

stated that "courts do not interfere with the management of a school's internal affairs unless 'there has been a manifest abuse of discretion or where [the school officials'] action has been arbitrary or unlawful.'"[166] Language in other cases is similar:[167]

> University officials should have broad discretionary power to determine the fitness of a student to continue his studies. There is a compelling need and very strong policy consideration in favor of giving local school officials the widest possible latitude in the management of school affairs. Only when there is a clear and convincing showing that an official acted in an arbitrary and capricious manner will the federal courts interfere with the exercise of such discretionary power.[168]

The school and hospital cases are close to judicial review of professional associations and accrediting organizations. Similarly, there is a long tradition of judicial review of *voluntary organizations*. Although it is often thought that voluntary organizations can organize how they want and decide membership admission without legal restrictions, courts have often regulated those decisions using something like administrative law principles.[169]

To summarize, in a range of contexts in which the APA and federal administrative law do not formally apply, similar or even identical legal requirements are nevertheless applied by federal courts. This is not meant to be a condemnation. The tendency to apply off-the-shelf standards of review to the exercise of administrative discretion by exempt, quasi-, or non-agencies is entirely understandable and may even be normatively desirable, a point to which the Essay now turns.

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166 *Id.* at 159 (alteration in original) (quoting State *ex rel.* Sherman v. Hyman, 171 S.W.2d 822, 827–28 (1942), *cert. denied*, 319 U.S. 748 (1942)).

167 *See, e.g.*, Keys v. Sawyer, 353 F. Supp. 936, 940 (S.D. Tex. 1973).

168 *Id.* (citation omitted); *see also* Greenhill v. Bailey, 519 F.2d 5, 10 n.12 (8th Cir. 1975) ("For a court to overturn a student's dismissal on substantive grounds[,] it must find that such dismissal was arbitrary and capricious."); Mahavongsanan v. Hall, 529 F.2d 448 (5th Cir. 1976) (distinguishing between court's review of academic institution disciplinary and academic decisions).

169 *See, e.g.*, Plummer v. Am. Inst. of Certified Pub. Accountants, 97 F.3d 220, 227–28 (7th Cir. 1996); Cal. Dental Ass'n. v. Am. Dental Ass'n, 590 P.2d 401, 406 (Cal. 1979); Morgan v. Okla. Secondary Sch. Activities Ass'n, 207 P.3d 362, 365 (Okla. 2009); *see generally* Lucille C. Andrzejewski, *Reeling in the Supreme Court of North Carolina: Judicial Intervention in the Internal Dispute Resolution of Voluntary Associations under* Topp v. Big Rock Foundation, Inc., 92 N.C. L. REV. 2119, 2127 (2014); John Frieden, Note, *Judicial Review of Expulsion Actions in Voluntary Associations*, 6 WASHBURN L.J. 160 (1966).

II. Frontiers and Extensions

To this point, the Essay argues that common forms of administrative law are being formulated and developed outside the formal domain of the Administrative Procedure Act. In the main, these examples involve non-agencies formulating policies or enforcing public law obligations.[170] That is, they involve the exercise of what looks to be government authority by parties who are sometimes private, sometimes public, and sometimes a mix. This Part looks to the future by returning to some old law from the past.

It is probably no accident that entities with gatekeeper authority like accreditation organizations have featured prominently in the discussion so far. In fact, many common law due process cases historically arose from membership decisions of voluntary organizations. The school, hospital, and professional organization cases all implicate a somewhat older case line about procedural restrictions on voluntary organizations like clubs and other organizations, and even occasionally churches and religious organizations.[171] Although voluntary organizations were said to be largely free to decide on membership without judicial intervention, courts actually imposed a surprising number of legal requirements for procedural regularity, non-arbitrariness, and reasoned decision-making.[172]

Regulation of the school community and decisions about membership and discipline have prominent modern analogues as well. ln the past several years, sanctioned or expelled students have brought a slew of legal challenged after universities found them responsible for sexual misconduct.[173] These decisions are made by schools implementing the federal sex discrimination regime of Title IX. Schools, in this framework, are non-agencies exercising a mix of public and private administrative authority. After describing the basic legal framework, this Part discusses the typical litigation, and then suggests that federal courts may well turn to administrative law's shadow to resolve such disputes.[174]

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170 *See infra* Section I.A.1.d.

171 *See, e.g.*, Zechariah Chafee, Jr., *The Internal Affairs of Associations Not for Profit*, 43 Harv. L. Rev. 993 (1930); Louis L. Jaffe, *Law Making by Private Groups*, 51 Harv. L. Rev. 201 (1937); F. Eric Fryar, Note, *Common-Law Due Process Rights in the Law of Contracts*, 66 Tex. L. Rev. 1021 (1988).

172 *See* Chafee, Jr., *supra* note 171, at 1014.

173 *See Campus Due Process Litigation Tracker*, FIRE, https://www.thefire.org/research/campus-due-process-litigation-tracker/ [https://perma.cc/U5R2-QM9F].

174 For more discussion around the intersection of Title IX and administrative law, see gen-

A. Title IX

Title IX of the Education Amendments of 1972 states that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[175] Title IX authorizes federal agencies to implement the anti-discrimination mandate by regulating funding recipients, and by terminating funding for the failure to comply with the agencies' regulations.

Title IX is administered by the Department of Education and the Office of Civil Rights ("OCR"). During the years after Title IX was enacted, what it meant to "discriminate on the basis of sex" evolved. Most important, courts recognized sexual harassment as a form of sex discrimination.[176] In 1997, the OCR promulgated its "Sexual Harassment Guidance" explaining that sexual harassment of students is a form of sex discrimination, and that "[s]chools are required by the Title IX regulations to have grievance procedures through which students can complain of alleged sex discrimination, including sexual harassment."[177] The OCR's "Revised Sexual Harassment Guidance" clarified that schools must "end the harassment, prevent its recurrence, and, as appropriate, remedy its effects."[178] But "[a]s long as the school, upon notice of the harassment, responds by taking prompt and effective action to end the harassment and prevent its recurrence, the school has carried out its responsibility under the Title IX regulations."[179]

How is it that a statutory command for schools to not discriminate on the basis of sex transformed into a legal obligation to adjudicate student-to-student allegations of sexual misconduct? Under the guidelines, a school that does not take adequate steps to end harassment and prevent its recurrence has, in effect, discriminated on the

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erally Jacob Gersen & Jeannie Suk Gersen, *Administering Sex*, ADMIN. & REG. L. NEWS, Fall 2016, at 18; Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CALIF. L. REV. 881 (2016).

175 20 U.S.C. § 1681(a) (2018).

176 Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 72–73 (1986).

177 Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,038 (Mar. 13, 1997). The regulations also state that "a school's failure to respond to the existence of a hostile environment within its own programs or activities permits an atmosphere of sexual discrimination to permeate the educational program and results in discrimination prohibited by Title IX." *Id.* at 12,039.

178 OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES, at iii (2001).

179 *Id.* at 12.

basis of sex. If one student's actions were severe enough to create a hostile environment for another student, and if the school did not have effective *policies* and grievance *procedures* in place to discover and correct the problem, the school would have violated Title IX.

This was made explicit during the Obama Administration when in 2011, the OCR issued a Dear Colleague Letter ("DCL") that introduced the term "sexual violence" into the Title IX discussion and stated that "the requirements of Title IX pertaining to sexual harassment also cover sexual violence."[180] The 2011 DCL focused on student conduct and explained that it was "schools' responsibility to take immediate and effective steps to end sexual harassment and sexual violence."[181] These issues have been extensively canvassed elsewhere, but importantly "the Title IX regulation requires schools to provide *equitable grievance procedures*. As part of these procedures, schools generally conduct investigations and hearings to determine whether sexual harassment or violence occurred."[182] The DCL stated that any disciplinary or other procedures to resolve complaints "must meet the Title IX requirement of affording a complainant a *prompt and equitable* resolution."[183]

The federal prohibition on sex discrimination means that schools must prevent and adequately respond to any allegation of sexual misconduct. The 2011 Dear Colleague Letter was subsequently withdrawn by the Department of Education under President Trump.[184] An interim guidance was issued in September of 2017.[185] After a Notice and several hundred thousand public comments, a new Final Rule was published in May of 2020.[186] The final rule contains a set of procedural requirements for schools, including a live hearing, a presumption of non-responsibility, and allowance for some form of cross-examina-

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180 Letter from Russlyn Ali, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., to Colleague 1 (April 4, 2011), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf [https://perma.cc/EBW3-C3C8].

181 *Id.* at 2.

182 *Id.* at 10 (emphasis added).

183 *Id.* at 8 (emphasis added).

184 Letter from Candice Jackson, Acting Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., to Colleague (Sept. 22, 2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf [https://perma.cc/48XM-3556].

185 Office of Civil Rights, U. S. Dep't of Educ., Q&A on Campus Sexual Misconduct (2017), https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf [https://perma.cc/X7YF-GUAY].

186 Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026 (May 19, 2020) (to be codified at 34 C.F.R 106).

tion.[187] The final rule is likely to be challenged in litigation and the line of argument may be that the OCR lacks the authority to require procedural protections for accused students.[188]

This particular legal structure entails a delegation of authority from Congress to a standard administrative agency, here the Department of Education. In the exercise of that authority, the agency requires that directly regulated private parties—schools in this case—formulate new policies and procedures to regulate the conduct of their own members (here students) in a way that (a) complies with, and (b) also enforces the federal law (Title IX and implementing regulations).[189] If a school has failed to develop and implement procedures for investigating and responding to allegations of sexual misconduct, the school has failed to comply with Title IX and is itself subject to sanction from the federal agency.[190] The result of the DCL was an extensive formulation—or reformulation—of substantive school rules and the creation of new procedures for investigation and adjudication of allegations of sexual misconduct. If the new rules are upheld, they too will impose a new set of procedural requirements for the investigation, adjudication, and discipline by universities of student sexual conduct.

This entire model of legal regulation could be considered another example of administrative law's shadow. The mandates being imposed by the Department of Education are almost entirely procedural: notice, a live hearing, cross-examination, rights of appeal, and so on. To be sure, the substantive legal obligation is to "not discriminate" but the actual requirements to comply with that substantive requirement are all procedural. In order to not discriminate on the basis of sex, a school has to establish "adequate procedural or administrative regularity." But, a school could have adequate procedures and still discriminate on the basis of sex in other ways.

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187 34 C.F.R. § 106.45(b)(6)(i), (b)(1)(iv).

188 *See* Michael C. Dorf, *The Department of Education's Title IX Power Grab*, VERDICT (Nov. 28, 2018), https://verdict.justia.com/2018/11/28/the-department-of-educations-title-ix-power-grab [https://perma.cc/JZ3U-39QG]; Letter from Kristina M. Johnson, Chancellor, State Univ. of N.Y., to Betsy Devos, Sec'y of Educ., Dep't of Educ. (Jan. 29, 2019), https://www.suny.edu/media/suny/content-assets/documents/chancellor/SUNY-Chancellor-Johnson-Comment-on-ED-Title-IX-Prop-Regs.pdf [https://perma.cc/F33K-22QL].

189 *See* OFFICE FOR CIVIL RIGHTS, *supra* note 178, at 3.

190 *See* JARED P. COLE & CHRISTINE J. BACK, CONG. RESEARCH SERV., R45685, TITLE IX AND SEXUAL HARASSMENT: PRIVATE RIGHTS OF ACTION, ADMINISTRATIVE ENFORCEMENT, AND PROPOSED REGULATIONS 1 (2019) ("Title IX makes compliance with its antidiscrimination mandate a condition for receiving federal funding in any education program or activity.").

That aside, what is the law that governs when a student is ultimately sanctioned by the school using procedures developed to comply with federal legal mandates? Who if anyone may the student sue, under what source of law, and for what substantive claim? Because of the regulatory structure, it turns out this question abuts several doctrines that together render such challenges quite difficult as a formal matter. Nevertheless, like those already considered, these cases arise in, and are increasingly being regulated by, administrative law's shadow.

B. Structure of Litigation

1. Suits by a Student Against the Department of Education

Given that school policies and procedures were adopted to comply with a federal requirement, some students have sought to challenge the lawfulness of the federal agency's actions directly.[191] Many obstacles exist, however. Such suits are challenges by *indirectly regulated actors* challenging regulations that affect them through the actions of *directly regulated actors*. Any of the directly regulated actors, here the schools, could clearly challenge the agency's action under the APA for procedural or substantive defect. Virtually no school challenged the 2011 DCL, but it seems very likely that some schools will challenge the Trump Administration's 2020 Final Rule.

The problem of suits by indirectly regulated actors, however, is a general one. For example, some students may be harmed by policies of the university (the directly regulated actor) that are enacted in response to the OCR's actions. One possibility is that these indirectly regulated actors could be adequately represented by associations. But such associations have standing to sue on their behalf only if (1) the actors "would otherwise have standing to sue in their own right," (2) "the interests it seeks to protect are germane to the organization's purpose," and (3) "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."[192]

For that, the actor must be able to allege (1) "an injury in fact," (2) that the injury was caused by "the challenged government action," and (3) that "it must be 'likely,' as opposed to merely 'speculative,'

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191 *See id.* at 30.

192 *E.g.*, Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 343 (1977). The big hurdle for the associations is to show that the actors would have standing under Article III. *See, e.g.*, Nat'l Wrestling Coaches Ass'n v. Dep't of Educ., 366 F.3d 930, 937, 949 (D.C. Cir. 2004) (finding lack of standing), *overruled on other grounds by* Trudeau v. FTC, 456 F.3d 178 (D.C. Cir. 2006).

that the injury will be 'redressed by a favorable decision.'"[193] To have an "injury in fact, economic or otherwise," the actors can pick from a broad range of court-recognized injuries.[194] In the economic category, aside from the obvious monetary damages, courts have also recognized the "competitive injury" in the form of "exposure to competition."[195] The non-economic category includes "aesthetic, conservational, and recreational" injuries.[196] Finally, section 704 of the APA imposes another hurdle by allowing judicial review of an agency action only when "there is no other adequate remedy in a court."[197]

In the *indirectly regulated actor* context, the more significant hurdle is causation and redressability. Causation and redressability are high hurdles for indirectly regulated parties because these elements "hinge on the independent choices of the regulated third party."[198] Although causation and redressability are different requirements, in suits by indirectly regulated actors they are heavily intertwined because redressability depends on whether the regulation caused the third-party conduct.

First, the actor can establish redressability if the regulation "permits or authorizes third-party conduct that would otherwise be illegal."[199] The regulation, however, does not have to *mandate* the previously illegal behavior.[200] For example, in *Animal League Defense Fund v. Glickman*, the court found redressability satisfied in a suit by a zoo visitor challenging a regulation by the USDA allowing zoos to keep their animals in inhumane conditions, which was previously illegal.[201] If this redressability requirement is satisfied, causation follows

193 *Nat'l Wrestling Coaches Ass'n*, 366 F.3d at 937 (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 561 (1992)).

194 *See* Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 152 (1970).

195 Bristol-Myers Squibb Co. v. Shalala, 91 F.3d 1493, 1499 (D.C. Cir. 1996).

196 Scenic Hudson Pres. Conference v. Fed. Power Comm'n, 354 F.2d 608, 616 (2d Cir. 1965); *see also* Animal Legal Def. Fund, Inc. v. Glickman , 154 F.3d 426, 431–32 (D.C. Cir. 1998) (en banc) (listing cases recognizing "an aesthetic interest in the observation of animals . . . ."). The injury can also be spiritual. *See, e.g.*, *Ass'n of Data Processing Serv. Orgs.*, 397 U.S. at 154 (recognizing "a spiritual stake in First Amendment values sufficient to give standing to raise issues concerning the Establishment and the Free Exercise Clauses").

197 5 U.S.C. § 704 (2018); *see also Nat'l Wrestling Coaches Ass'n*, 366 F.3d at 933.

198 *Nat'l Wrestling Coaches Ass'n*, 366 F.3d at 938.

199 *Id.* at 940.

200 *Animal Legal Def. Fund*, 154 F.3d at 442; *see* Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 45 n.25 (1976); Consumer Fed'n of Am. v. FCC, 348 F.3d 1009, 1012 (D.C. Cir. 2003); Am.'s Cmty. Bankers v. FDIC, 200 F.3d 822, 827–29 (D.C. Cir. 2000).

201 *See* 154 F.3d 426, 428–29 (D.C. Cir. 1998) (en banc).

because but for[202] the government legalizing the injurious conduct, the third party would have not engaged in it.[203]

Second, the actor can establish redressability if the actor alleges "substantial evidence of a causal relationship between the government policy and the third-party conduct."[204] For example, in *Block v. Meese*, the government classified as "political propaganda" certain films that the plaintiff was purchasing from a Canadian company and distributing domestically.[205] The plaintiff alleged that the classification harmed their economic interests and submitted affidavits from former customers stating that they declined to purchase the films due to their disparaging label.[206] The court found that this evidence sufficiently established the causal relationship between the economic injury and the government action.[207] In *Americans for Safe Access v. Drug Enforcement Administration*, the Drug Enforcement Administration ("DEA") classified marijuana as a Schedule I drug causing the Veterans Affairs ("VA") to refuse to sponsor a veteran's participation in a medical marijuana program.[208] The veteran then challenged the DEA's classification and the court found standing because the VA would sponsor the veteran but for the DEA's ruling.[209] Finally, in *Tozzi v. United States Department of Health & Human Services*, a PVC tube manufacturer challenged the government's decision to place dioxin, a chemical present in PVC tubes, on the list of "known" carcinogens.[210] The manufacturer successfully established redressability by alleging that his economic injury occurred because the healthcare companies, pressured by environmental groups, refused to purchase the dioxin-rich PVC tubes.[211]

However, the government can rebut the "substantial evidence of a causal relationship between the government policy and the third-party conduct" if it can show that additional factors contributed to the third-party conduct. For example, in *National Wrestling Coaches Ass'n*

202 The causation standard "requires no more than *de facto* causality." Block v. Meese, 793 F.2d 1303, 1309 (D.C. Cir. 1986).

203 *Nat'l Wrestling Coaches Ass'n*, 366 F.3d at 940–41.

204 *Id.* at 941.

205 793 F.2d 1303, 1308 (D.C. Cir. 1986).

206 *Id.* at 1308–09.

207 *Id.* at 1309–10.

208 706 F.3d 438, 445–46 (D.C. Cir. 2013).

209 *Id.* at 448–49.

210 271 F.3d 301, 303 (D.C. Cir. 2001).

211 *Id.* at 307–08.

v. Department of Education,[212] redressability and causation were rebutted because the universities also considered "the absence of league sponsorship for wrestling, budgetary concerns, and the need to balance the athletic program with other University priorities," when terminating the wrestling varsity team in order to comply with Title IX requirements.[213] Similarly, in *Simon v. Eastern Kentucky Welfare Rights Organization*, the plaintiff challenged an IRS order granting favorable tax treatment to hospitals that only offered emergency room services to indigent patients.[214] The court found a lack of redressability because, even absent the tax incentive, it was "plausible" that the hospitals would elect to stop offering non-emergency medical assistance to indigent customers as they often failed to pay for the services.[215]

To illustrate, in the Title IX setting, even if a court allowed a suit against the Department of Education by a student alleging procedural defects in the Department's Rule, it is entirely possible that the student's school would choose to keep the policies and procedures that were adopted to comply with the federal requirement. That is, even if the agency's action, rule, or guidance is struck down as unlawful, it would not be redressable in a court.

Moreover, section 704 of the APA imposes the final hurdle by allowing judicial review of an agency action only when "there is no other adequate remedy in a court."[216] Thus, if a cause of action against the directly regulated actor is available, the indirectly regulated actor may not be able to bring a suit against the agency.[217] That is, so long as an adequate suit against the university exists, then section 704 may preclude judicial review of the OCR and the Department of Education.

All of this is to say that suits by students as indirectly regulated parties are far from easy to bring. Schools may easily challenge Department of Education rules or policies implementing Title IX, but when those schools implement their own policies and procedures to comply with the federal requirements, it is typically quite challenging for students affected by those policies to challenge the legality of the federal agency action.

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212 366 F.3d 930 (D.C. Cir. 2004), *overruled on other grounds by* Trudeau v. FTC, 456 F.3d 178 (D.C. Cir. 2006).

213 *Nat'l Wrestling Coaches Ass'n*, 366 F.3d at 942.

214 426 U.S. 26, 30–31 (1976).

215 *Id.* at 43.

216 5 U.S.C. § 704 (2018); *see Nat'l Wrestling Coaches Ass'n*, 366 F.3d at 945.

217 *See, e.g.*, *Nat'l Wrestling Coaches Ass'n*, 366 F.3d at 945–46.

2. *Suits Against the Directly Regulated Party*

Instead, indirectly regulated parties must generally sue the directly regulated party if possible. Suppose a student wishes to challenge the procedural regularity of a school's policies, procedures, or enforcement of Title IX procedures. What are the sources of law for such a challenge? There have been dozens, perhaps hundreds of suits by students—both accusers and accused—against their schools alleging unfair treatment in the investigation and adjudication of allegations of sexual misconduct.[218] Most typically, such suits involve several sorts of claims. First, some involve a state law claim for breach of contract.[219] Second, some allege a violation of state law due process requirements if those exist.[220] Third, some allege that the school violated Title IX itself, either because the procedures the school used to adjudicate the case are not "fair and equitable" as Title IX regulations require,[221] or the school's treatment discriminated because of sex.[222] Lastly, for public schools, a student may allege a due process violation as a matter of federal constitutional law.[223] For example, the First Circuit recently held that due process requires some provision for cross-examination in cases of serious campus misconduct.[224] Although stylized differently, the core claim in all these cases is that either the school's procedures themselves or the particular application of those procedures to the accused or accusing student lacked procedural regularity or basic fairness. There is no due process right when a student sues a private school because there is no state action. Thus, the procedural obligations of public universities and private universities within the same state may vary significantly in the current regime.

The final, most difficult, and most pertinent question is whether the federal courts might—lawfully—craft federal common administrative law requirements for schools (non-agencies) implementing federal regulatory obligations. Put differently, does administrative law cast a shadow over Title IX? Title IX does create a private right of

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218 *See* FIRE, *supra* note 173.

219 *See, e.g.*, Doe v. Univ. of Dayton, 766 F. App'x 275, 284 (6th Cir. 2019).

220 *See, e.g.*, Porubsky v. Macomb Cmty. Coll., No. 10-13591, 2012 U.S. Dist. LEXIS 95184, *29 (E.D. Mich. July 10, 2012).

221 *See, e.g.*, Doe v. Univ. of the Scis., No. 19-358, 2019 U.S. Dist. LEXIS 125592, at *27 (E.D. Pa. July 29, 2019).

222 *See, e.g.*, Doe v. Univ. of Dayton, 766 F. App'x at 281.

223 *See, e.g.*, Nat'l Wrestling Coaches Ass'n v. Dep't of Educ., 366 F.3d 930, 936 (D.C. Cir. 2004), *overruled on other grounds by* Trudeau v. FTC, 456 F.3d 178 (D.C. Cir. 2006).

224 Haidak v. Univ. of Massachusetts-Amherst, 933 F.3d 56, 69 (1st Cir. 2019).

action, as the Supreme Court held.[225] Federal courts also clearly have jurisdiction to hear claims that universities violated Title IX. Although the accreditation agency case line found statutory authorization to craft common law requirements as a result of an exclusive jurisdictional grant to hear disputes, the jurisdictional grant in *Lincoln Mills* (like Title IX) was not exclusive.[226] Might the authority to hear Title IX claims by students against schools authorize the creation of federal common law obligations that echo federal administrative law?

On the one hand, many concerns found in the *Erie* doctrine and related cases apply. If there is state law that could be applied to schools, why should federal courts craft new federal rules? Still, these current cases present a recurrent challenge to the federal courts. The overwhelming majority of cases are brought in federal court because the state law claims are intertwined with the federal law Title IX claims. A federal judge applying state law is, of course, supposed to predict what a state court would do if faced with the question.[227] Yet, because challenges to campus sexual misconduct tribunals almost always arise in federal courts, there is often not much in the way of state decisions to apply. The current state of affairs might be thought of as more of an afront to state sovereignty because it amounts to federal judges *making* state common law. To be sure, state courts could always later displace the federal judgement. Yet, so long as state law claims are consistently brought in federal court, those instances will be few and far between. Although the federal jurisdictional grant in Title IX is not formally exclusive, in function it is something quite close.

An alternative—perhaps even a desirable alternative—would be for federal courts to develop a *common administrative law of Title IX*. This suggestion is similar to others made in the cooperative federalism context, for example in telecommunications and environmental law.[228] The move would follow the practices described above as federal courts derive administrative law principles to govern exempt agencies, state agencies, and non-agencies when they are exercising federal administrative authority. A federal common administrative law of Title IX would have all the standard hallmarks of federal common law, such as uniformity across states, and would have the benefit of ensuring federal regulatory mandates are consistently enforced and en-

225 Cannon v. Univ. of Chi., 441 U.S. 677, 717 (1979).

226 *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 456 (1957).

227 *See, e.g.*, RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 597 (7th ed. 2015).

228 *See, e.g.*, Weiser, *supra* note 27, at 1694.

forced consistently. Moreover, it would avoid the awkwardness of federal judges consistently applying not-yet-existent state law. Is a common administrative law of Title IX on the horizon? As of yet it is unclear, but there are hints in the cases.

Conclusion

In a classic article on bureaucracy, Jerry Frug once wrote that each generation of administrative law scholarship crafts a new account of bureaucratic power that renders it safe and constrained by other governmental structures.[229] Part of his point is that there is inevitable anxiety about a bureaucracy exercising extensive government authority. Different historical moments seek to render this state of affairs acceptable using a mix of tropes, most often involving accountability and expertise.[230] When a bureaucracy seems too independent, too expert, and too insulated, courts and commentary will seek to make agencies more *accountable*. When the bureaucracy seems too much at the whim of the President, courts and commentary will seek to make agencies more *independent* so that their neutrality and expertise can produce desirable policy. In Frug's account, this process is inevitably unstable and always partially unsatisfying.[231]

Whether satisfying or not, it is largely predictable. The goal of this essay is not to point to a set of judicial practices and urge that judges are making mistakes that should be fixed. Nor is it that judges are acting unlawfully and must be stopped. To be sure, critics might well object that applying the legal standards of the APA to contexts in which the statute has no formal application is an instance of judicial mistake. But I am more interested in the fact that this is occurring and understanding what it means for governance.

As noted earlier, a common theme in recent administrative law scholarship has been "the real world doesn't look like that."[232] Administration "on the ground" is different than "administration on the books."[233] Agencies no longer—if they ever did—simply give notice that an action is being contemplated, consider public input, and then issue a final rule. Lots of bureaucratic entities fail easy classification in the federal bureaucracy. The border between branches of the federal

229 *See generally* Frug, *supra* note 117 (elaborating upon four attempts to legitimize bureaucratic power by administrative and corporate law scholarship).

230 *See id.* at 1286.

231 *See id.*

232 *See supra* text accompanying note 14.

233 *Id.*

government, between states and the federal government, and between public and private is littered with institutions that exercise significant authority that we would traditionally call administrative. Yet, much of that authority is no longer regulated by administrative law proper. To add another example, in a recent paper, Nestor Davidson convincingly argues that a good deal of administrative power is exercised by local agencies engaging in regulation, adjudication, enforcing, licensing, and the like.[234] Because neither federal nor statute administrative procedure acts apply, the article argues that we need a new "localist administrative law."[235]

Administrative action is increasingly taking place outside the purview of administrative law. Although one possible reply is alarm, the point of this Essay is that alarm may be premature. Administrative law casts a long shadow. Administrative law's empire is more vast than standard statutory definitions would suggest. Indeed, the idea that administrative discretion must be constrained by administrative law is so ingrained and ubiquitous that it may be administrative law all the way down unless and until the Supreme Court says otherwise.

A concern that bureaucratic power might be exercised in the holes or gaps in the administrative law framework relates to an old but recurrent anxiety about privatization.[236] One version of this anxiety dates at least back to the 1920s and 1930s and the Court's nondelegation jurisprudence.[237] With the nondelegation doctrine's demise, grants of statutory authority to private actors have grown and the anxiety over private parties exercising public power has never really abated. A lurking anxiety of how much government authority is exercised by non-governmental entities remains.[238] Some of this anxiety does take a constitutional form, lending critics to claim such arrangements raise constitutional problems.[239] Others urge that privatization blurs the lines of democratic accountability and insulates too much ordinary administration from judicial review.[240] If the above examples are representative, even where there is no APA review, there may still

234 *See* Nestor M. Davidson, *Localist Administrative Law*, 126 YALE L.J. 564, 571 (2017).

235 *See id.* at 604, 612.

236 *See, e.g.*, Jaffe, *supra* note 171, at 220–21; George W. Liebmann, *Delegation to Private Parties in American Constitutional Law*, 50 IND. L. J. 650 (1975); *cf.* Metzger, *supra* note 33; Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 HARV. J.L. & PUB. POL'Y 931 (2014).

237 *See* Jaffe, *supra* note 171, at 205–06.

238 MINOW, *supra* note 33, at 3; Bamberger, *supra* note 33, at 384; Metzger, *supra* note 33; Freeman, *supra* note 33.

239 *See, e.g.*, Metzger, *supra* note 33, at 1373–74; Volokh, *supra* note 236.

240 *See* Bamberger, *supra* note 33; Metzger, *supra* note 33.

be APA-like review—that is, judicial review over entities engaged in administration that closely resembles, if not quite perfectly mirrors APA review itself. If there is a justified anxiety then, it is really about the relationship between the source of law and the rule of law.

This Essay has sought to expose the shadows of administrative law. Throughout the article, I have played upon a deliberate ambiguity. There is important judicial action both in the remedial holes within the administrative law domain and in efforts to draw on administrative law in increasingly expansive domains. There is a sense in which the Trump Administration has pushed administrative law into the mainstream public, into the light as it were. But administrative law's shadows are important as well. Challenge after challenge to administration policy is being resolved on administrative law grounds. Some days it can seem like everything is administrative law now. Examining the shadow that administrative law casts indicates that there is something to this sense.

Within the formal domain of administrative law, there have long been jurisdictional or remedial holes. Yet, more often than not, judges tend to fill those holes with administrative law standards and doctrines that do not quite apply. Outside the formal domain, the same ideas, doctrine, and procedural requirements are regularly applied even when the formal law suggests they do not. Administrative law is—again—becoming a set of procedural and substantive dictates that can be applied wherever administrative discretion can be found. I do not mean to suggest that these examples are the norm, only that they are genuine instances and examples. My hope is that these exceptions reveal something important about the rule.

Although I recognize there will be skeptics of this practice, this article is not an indictment. Indeed, much of it has the flavor of inevitability. The ideas of administrative law have been ubiquitous, nearly coterminous with the administrative state. When administrative power is exercised by new actors outside the system, it should not be surprising that administrative law's empire edges outward as well.