

The Administrative Law Legacy of Kenneth Culp Davis

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I. INTRODUCTION

Just over thirty years ago, I was a student in Kenneth Culp Davis's class in Administrative Law at the University of Chicago Law School. Davis's casebook and teaching style exemplified an approach that many law professors of today would consider too didactic. Every chapter of the book offered generous servings of Davis's own teachings, along with queries that could only be described as leading questions.¹ In class, too,

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1. See, e.g., KENNETH CULP DAVIS, ADMINISTRATIVE LAW: CASES-TEXT-

there was seldom any suspense about the direction in which Davis was going to steer the discussion. A student who was unprepared to respond to a question posed to him or her could regularly expect to hear Davis point out where the answer could be found: "It's in the book!"

And yet, no matter how freely students parodied his classroom style in private, Davis attracted large enrollments in Administrative Law. Why did practically every student at Chicago in the early 1970s regard this elective as a must-take course? A large part of the answer, I think, is that they realized that in this course they were in the presence of a true Authority. In every chapter of his casebook, and on every day of class, Davis left no doubts about his passionate conviction that the challenges of inducing agencies to perform their functions fairly and effectively were important, and that he had a host of worthwhile ideas about possible solutions to those problems. So what if many of the cases excerpted in the casebook contained references to the teachings of Kenneth Culp Davis? Many of them were, after all, leading cases. Such was the formidable reputation that this professor possessed, and we knew it.

Davis passed away in September 2003, and this commemorative Essay seeks to take stock of his legacy. I can still recall Davis's commanding presence at the lectern, and some of his favorite phrases have stayed with me, such as his prescriptions for control of agency discretion: "Open rules! Open standards! Open findings! Open precedents!" After thirty years' time, however, I am scarcely in the best position to write a memoir of Davis as a teacher. Similarly, because I had little contact with him after law school, others can more reliably reminisce about him as an academic colleague.² Instead, my principal task in this Essay is to survey and assess Davis's scholarly contributions to administrative law.

PROBLEMS 42 (5th ed. 1973) ("Do you think that one basic need of the non-delegation doctrine in the state courts is for further spread of the movement toward emphasizing safeguards instead of standards?"); *id.* at 473 ("Do you get the uneasy feeling that the quality of justice for the aliens in the Santos and Jarecha cases may be inferior to the quality of justice for the businesses in the Crowther and Greater Boston cases?").

2. See *In Memoriam: Kenneth Culp Davis*, 29 ADMIN. & REG. L. NEWS, Fall 2003, at 2 (an obituary that includes biographical information as well as colleagues' perceptions). Paul Verkuil once related that his first article on administrative law elicited from Davis "a five page single-spaced letter that made me wonder whether I had chosen the right field." He called Davis's forceful critique "a high compliment" and "a rite of passage for young scholars in the field." K.C. Davis & Walter Gellhorn, *Present at the Creation: Regulatory Reform Before 1946*, 38 ADMIN. L. REV. 507, 511 (1986) (panel discussion remarks). Although I cannot generalize, a letter that I received from Davis about one of my early projects for the American Bar Association supports Verkuil's account. The following excerpt aptly captures the thrust of the letter: "Your project is a worthy one, and you have carried it out very well, but I think that all of us have to conclude that the final product would do much more harm than good." Letter from Kenneth Culp Davis, to Ronald M. Levin (Apr. 10, 1985) (on file with author).

That task is daunting enough! My treatment here will be highly selective. How could it be otherwise? Davis's contributions are too manifold to fit within the short confines of this Essay.³ I feel a bit as though I had been asked to sum up "the contributions of Sigmund Freud to psychoanalysis." If I cannot provide a full intellectual biography, however, I can at least record some highlights of a most distinguished career. The passage of more than a decade since Davis withdrew from active scholarship allows me to aim for a degree of critical perspective. The world has embraced some of Davis's ideas and spurned others. I will comment on some of each. I will then conclude with some short reflections on what this mixed record tells us about the evolution of contemporary thinking about administrative law.

II. THE AUTHORITY

Although the subject of "administrative law" was familiar well before Davis entered the scene,⁴ his 1951 book on the subject⁵ was the first systematic exposition of the field. He then expanded that work into a much more comprehensive four-volume treatise in 1958.⁶ With Davis's capacity for broad research, incisive analysis, and moral passion on full display, the treatise immediately overshadowed all prior work in the area.⁷

The longtime preeminence of Davis's treatise and other writings in the administrative law firmament is, perhaps, difficult to appreciate today.

3. See *Writings of Kenneth Culp Davis*, 44 U. CHI. L. REV. 3, 3-5 (1976) (a bibliography of Davis's writings, as of the time of his retirement from the Chicago faculty).

4. See, e.g., Felix Frankfurter, *The Task of Administrative Law*, 75 U. PA. L. REV. 614, 615-16 (1927) (noting that "the term has now established itself in the vocabulary of the United States Supreme Court" and "[h]ardly a volume of bar association proceedings is now without some reference to this phenomenon").

5. KENNETH CULP DAVIS, *ADMINISTRATIVE LAW* (1951).

6. KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* (1st ed. 1958). The second edition was published on a staggered schedule: volume 1 in 1978, volume 2 in 1979, volume 3 in 1980, volume 4 in 1983, and volume 5 in 1984. Hardcover supplements were published in 1970, 1976, and 1989. (The 1976 supplement carried the catchy title "Administrative Law of the Seventies.") Citations to *TREATISE* in this Essay refer to the second edition, except where otherwise specified.

7. In a book review of the first two volumes of the second edition of the Davis treatise, Judge Henry Friendly warmly praised the contributions of some two dozen of the leading administrative law scholars of the mid-twentieth century, but identified Davis as the "unquestioned leader" of the group. Henry J. Friendly, *Book Review*, 8 HOFSTRA L. REV. 471, 471-72 (1980).

Often the Supreme Court not only cited to Davis's work, but seemed to take shelter in his reputation as a way of validating its assertions.⁸ In the lower courts, where high-volume caseloads naturally put a premium on the ready availability of a handy reference work, his influence has been even more pronounced.⁹ Following Davis's retirement from scholarship, the treatise has been revised and maintained, ably and diligently, by his coauthor and successor, Richard J. Pierce, Jr.¹⁰ It is still the most frequently cited work in the field. Over the years, however, other works on administrative law have proliferated, and thus the once-dominant position of the Davis treatise will likely never be equaled.

An example of Davis's leadership about which I have firsthand knowledge was his early writing about the Freedom of Information Act (FOIA).¹¹ Enacted in 1966, FOIA was a major overhaul of the relatively obscure provisions of the Administrative Procedure Act (APA) on disclosure of government information. The new statute rested on the then-novel premise that any document in the government's possession should be available to every member of the public upon request, unless it fell within any of nine statutory exemptions. The relatively brief text of FOIA invited numerous controversies, particularly about the scope of the nine exemptions. Davis responded quickly. In an article published in 1967, he surveyed numerous issues of construction that had arisen or would likely arise in the administration of the Act.¹² Today, of course, the literature on FOIA has burgeoned, and entire multivolume treatises have been written about the complexities posed by the Act (and subsequent amendments). As of 1974, however, when I read through the case law in preparation for writing a student comment on the Act, it became obvious to me that the courts were treating Davis's article (which he subsequently incorporated into the 1970 supplement to his

8. See, e.g., *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 612 (1991) (stating that "a noted scholar" supports the Court's statutory interpretation); *Univ. of Tenn. v. Elliott*, 478 U.S. 788, 798 n.6 (1986) ("As one respected authority on administrative law has observed . . ."); *Linda R. S. v. Richard D.*, 410 U.S. 614, 617 n.4 (1973) (citing to "[o]ne of the leading commentators on standing"); *McGautha v. California*, 402 U.S. 183, 273-74 (1971) (Brennan, J., dissenting) (stating that Davis "has been instrumental" in showing the validity of delegations where standards have been supplied). Other examples are discussed in detail in the next section of this Essay.

9. A favorite example is a case reprinted in my casebook, in which the participating jurists argued at length about the proper interpretation of Davis's work. Compare *Cal. Hotel & Motel Ass'n v. Indus. Welfare Comm'n*, 599 P.2d 31, 44-46 (Cal. 1979) (Christian, J., concurring), with *id.* at 42 (Newman, J., dissenting).

10. RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* (4th ed. 2002); KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* (3d ed. 1994).

11. 5 U.S.C. § 552 (2000).

12. Kenneth Culp Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761 (1967).

treatise) as the principal scholarly resource on the subject.

Although the main purpose of this Essay is to review Davis's work from an academic standpoint, I should mention in passing some of the features of his treatise that made it a godsend for an administrative law practitioner (as I once was). The chapters were arranged in a straightforward plan of organization, and each chapter was broken down into bite-size subsections. Over the years, displaying a degree of productivity that most other scholars can only envy, Davis frequently updated the set with pocket parts, softbound supplements and, as needed, hardcover supplements. Perhaps most importantly, he wrote with exceptional clarity. In scanning much of Davis's work in preparation for writing this Essay, I don't think I found a single paragraph that was not easy to read. His writing contained no academic jargon that an intelligent practitioner or jurist would find off-putting. It was manifestly the work of someone who took pride in his prose. Virtues such as these are sometimes overlooked by many of us in academia, who often have plenty of time on our hands, but I am sure they vastly improved the accessibility of the treatise for busy practitioners and judges.

Needless to say, Davis did not have the field of administrative law to himself. The most serious competitor to his treatise was Louis L. Jaffe's *Judicial Control of Administrative Action*,¹³ published in 1965. Most administrative law scholars would probably agree that, as between the two authors, Jaffe was the more subtle and profound thinker.¹⁴ Davis's treatise had other comparative strengths, however. In the first place, Jaffe's book, essentially a compilation of essays, did not have the straightforward, systematic structure that, as I have just explained, made Davis's treatise such an accessible reference work. Furthermore, the limited scope of Jaffe's purview appeared right in his title. His book was mainly about the complex interplay of relationships between courts and agencies. Davis's much lengthier work covered not only that terrain, but also issues of administrative procedure such as adjudication and rulemaking, which Jaffe barely addressed. Indeed, about half of the chapters in each edition of Davis's treatise were devoted to procedure at the agency level. Finally, Jaffe's work was a powerful synthesis of themes that had been explored piecemeal in the administrative law

13. LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* (1965).

14. For a thoughtful assessment of Jaffe's contributions to administrative law thinking, see Daniel B. Rodriguez, *Jaffe's Law: An Essay on the Intellectual Underpinnings of Modern Administrative Law Theory*, 72 *CHI.-KENT L. REV.* 1159 (1997).

literature for many years.¹⁵ Davis's work, in contrast, was more forward-looking and directed toward improvement of the administrative process. I elaborate on his ideas for reform in the next section of this Essay.

III. THE REFORMER

Davis rarely limited himself to neutrally describing the law. He routinely encouraged progressive trends, by publicizing cases that he thought were well reasoned or had found good solutions to ongoing problems. He also raised doubts about other trends, by criticizing decisions or commentaries that he thought had gone wrong or said something careless. A talented debunker, he was not shy about telling the Supreme Court that it was dead wrong.¹⁶ In this fashion, his writings undoubtedly served to shape the law in countless small ways that would be difficult to track.

On a wide range of topics, however, Davis's reform agenda was deliberate, explicit, and vigorously argued, and this dimension of his scholarship invites particular attention here. I will survey a variety of proposals that he made over the years, noting some successes, some failures, and some matters regarding which the law has not yet stabilized.

A. Adjudication

If one had to choose a single familiar concept in American law that is routinely linked with the name of Kenneth Culp Davis, the choice almost inevitably would be the distinction between "adjudicative facts" and "legislative facts." Davis introduced this terminology in a 1942 article.¹⁷ As he later summed up the difference between these two categories:

Adjudicative facts usually answer the questions of who did what, where, when, how, why, with what motive or intent; adjudicative facts are roughly the kind of facts that go to a jury in a jury case. Legislative facts do not usually concern the immediate parties but are the general facts which help the tribunal

15. As Judge Posner has observed, Jaffe's book was the "*summa theologica* of [the postwar] era of administrative law scholarship." Richard A. Posner, *The Rise and Fall of Administrative Law*, 72 CHI.-KENT L. REV. 953, 955 n.1 (1997).

16. One of my favorite examples of Davis's scolding was his slashing attack on one lengthy section of *Morton v. Ruiz*, 415 U.S. 199 (1974), concluding with the remark that "[a]dministrative law would benefit if part V of the *Ruiz* opinion could be erased from the reports." Kenneth Culp Davis, *Administrative Law Surprises in the Ruiz Case*, 75 COLUM. L. REV. 823, 843 (1975). Not coincidentally, I think, *Ruiz* has exerted little influence on the law subsequently.

17. Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402-16 (1942).

decide questions of law and policy and discretion.¹⁸

The core insight underlying the distinction was that the evidentiary processes of the courtroom are, generally speaking, better suited to resolution of adjudicative fact disputes than legislative fact disputes. The purpose of the distinction, Davis once wrote, “is to provide protection of trial procedure to named parties when disputed facts about them are to be found, and to allow freedom for tribunals to use facts that bear on law or policy without using such procedure.”¹⁹

The idea has had a variety of applications. One of the most prominent has been its use in the law of judicial and official notice. In that context, the thrust of Davis’s argument was that a court or agency can more easily justify noticing a fact that has not been substantiated in the trial record if the fact is legislative than if the fact is adjudicative. This analysis received a measure of official recognition in Rule 201 of the Federal Rules of Evidence. The rule is limited, by its terms, to adjudicative facts, and the Advisory Committee’s notes accompanying the rule relied extensively on Davis’s work as the source of this limitation.²⁰

As Davis liked to point out, notice of legislative facts has to be relatively unrestricted, because courts and agencies routinely rely on hundreds of assumptions about the world every day, even where these assumptions have not been tested through the adversary process. Among many illustrations he mentioned were the Supreme Court’s reliance on extrarecord facts about abortion in *Roe v. Wade*²¹ and about alcoholism as a disease in *Powell v. Texas*.²² The Court still does more or less the same thing, of course, and the practice is still generally taken for granted. A very recent example that is familiar to many people was the Court’s reliance on amicus curiae briefs filed by corporate executives and retired military officers in *Grutter v. Bollinger*,²³ attesting to the social benefits of a well-educated, racially diverse work force. Despite the millions of disputatious words that have been written about that controversial case, I have seen no suggestions that the Court committed a *procedural* impropriety when it took account of the information

18. 2 TREATISE § 12:3, at 413.

19. 3 *id.* § 15:3, at 146.

20. FED. R. EVID. 201 advisory committee’s note.

21. 410 U.S. 113, 160 (1973) (referring to various religions’ views as to when life begins).

22. 392 U.S. 514, 523–25 (1968); see 2 TREATISE § 12:6, at 425–26; 3 *id.* § 15:2, at 140.

23. 539 U.S. 306, 333–34 (2003).

contained in these briefs, which of course had not been made part of the trial record.²⁴

Davis's position on official notice constituted one facet of a sustained campaign on his part to reduce the role of trial-type procedure in the administrative process.²⁵ During his scholarly career, he saw administrative law evolve in ways that dramatically fulfilled this objective. He was not the only proponent of this shift, of course, but he was one of its most sustained and vigorous champions.²⁶ Probably the most important component of this revolution was the increased use of notice and comment rulemaking to narrow the range of issues that would need to be adjudicated at all. This development is discussed more fully in the next section. But even within the sphere of adjudication, Davis contributed to a trend toward streamlining. He taught courts and agencies that a trial-type hearing is unnecessary if no facts are in dispute,²⁷ or if the only controversy is about broad legislative facts.²⁸ He also promoted the development of summary judgment techniques at the agency level²⁹ and sternly criticized the application of restrictive evidence rules in administrative proceedings.³⁰

This is not to say that Davis was a proponent of streamlining adjudication in all circumstances. In distinguishing between adjudicative facts and legislative facts, for example, he did not argue that serious testing of legislative facts should never be a feature of the adjudicative process. Rather, his position was that this testing, where needed, could usually be accomplished by means that fell short of a trial-type hearing.³¹ He suggested that the amount of procedural protection that a tribunal should

24. A less famous but quite interesting recent example of the Court's use of judicial notice occurred in *Verizon Communications, Inc. v. FCC*, 535 U.S. 467 (2002). This was a challenge to FCC regulations that required incumbent telephone companies to lease their facilities to new entrants. The incumbents argued that the rules would discourage their investments in new facilities. In rejecting this attack, the Court relied in part on the apparently undisputed fact that the rules had been in effect for years without suppressing investments. *Id.* at 516–17. The Court's reliance on secondary sources for information that was not in the rulemaking record has troubled some administrative law scholars, but it strikes me as a defensible example of what Davis was talking about.

25. 3 TREATISE § 14:1.

26. *Id.* § 14:2, at 5, 7 (noting that “[t]he author of the 1958 Treatise raised his voice against the use of trial procedure to develop law or policy, but could find little or no support for his view either in law or literature”; however, the “tide began to turn during the 1970s, with the strong surge of rulemaking”).

27. 2 *id.* § 12:1.

28. 3 *id.* § 14:3.

29. *Id.* § 14:7.

30. *Id.* §§ 16:3, 16:4.

31. As he explained, Rule 201 does not say that courts (or by extension agencies) should always feel free to take notice of a legislative fact. The rule simply says nothing about legislative facts. *Id.* § 15:6. Thus, the propriety of notice with respect to such facts remains open for case law development.

make available to those who wish to challenge a noticed fact should depend not only on whether the fact is adjudicative or legislative, but also on whether the fact is important to the ultimate decision and whether it seems to be disputable.³² For situations in which courts or agencies choose to resolve a controversy about legislative facts in the ordinary course of business (i.e., without “taking notice” of them), he advised them to rely on a similar balancing of several variables.³³

Indeed, Davis had interesting ideas for *augmenting* the procedures used in adjudication—but these ideas have had less influence than his streamlining recommendations have. In the second edition of his treatise, he propounded an ambitious thesis: that the appropriate procedures for a tribunal to use in resolving a given controversy should be essentially the same, regardless of whether the controversy arises in adjudication or in rulemaking.³⁴ One striking corollary of this thesis was his claim that, when a court or agency intends to formulate new law or new policy during an adjudication, it should resort to a notice and comment procedure *within the adjudication*, in order to solicit input from nonparties. Davis acknowledged that this suggestion was unsettling and probably unprecedented, but he invited courts and agencies to experiment with it.³⁵ As far as I know, none has yet accepted the invitation.³⁶ Davis predicted, however, that a time when the legal system will recognize the merit of his idea “will come, even though it now seems far away.”³⁷

One of Davis’s last prominent proposals carried this unorthodox line of argument a step further. In a 1986 lecture, he argued that “the law

32. *Id.* § 15:15; see also Ernest Gellhorn, *Rules of Evidence and Official Notice in Formal Administrative Hearings*, 1971 DUKE L.J. 1, 46–49 (elaborating on Davis’s analysis and concluding that the characterization of a fact as adjudicative or legislative in this context is “helpful, but not dispositive”).

33. 2 TREATISE § 12:8.

34. *Id.* § 12:5, at 423 (arguing that a written argument procedure should be used to resolve a question of law or policy, or a dispute over broad and general legislative fact, whereas trial procedure should be used to resolve a dispute over adjudicative facts or *perhaps* a narrow and specific dispute over legislative facts); see also 3 *id.* § 14:4 (similar); 3 *id.* Preface, at xiii–xiv (highlighting this theme).

35. 3 *id.* § 14:6.

36. The judicial branch has no antipathy to notice and comment procedure as such. It does routinely use the functional equivalent of that procedure when it drafts revisions of its procedural rules—an overt rulemaking function. The procedures are spelled out at <http://www.uscourts.gov/rules/proceduresum.htm> (last visited Mar. 13, 2005). Presumably, then, the reason for the courts’ failure to take Davis’s advice is that they do not consider the procedure a suitable component of the adjudicative process.

37. 3 TREATISE § 15:9, at 177.

made by judges seems to me clearly inferior to statutes and administrative rules in clarity, reliability, and freedom from conflict.”³⁸ More particularly, he drew attention to the somewhat haphazard manner in which judges resolve issues of legislative fact that underlie their precedential rulings. The briefs of parties and amici curiae can be helpful, but courts often fall back on their own informal research, or on outright speculation. Accordingly, Davis called on Congress to provide a research service for the Supreme Court, comparable to the Congressional Research Service (CRS), to which the Court could turn for specialized research assistance as needed.³⁹ Needless to say, this has not happened. Nor do I think the Court would be likely to seek it. Part of the Court’s mystique derives from the fact that it usually avoids being too overt about its lawmaking functions (even though it cannot really avoid exercising some such functions).

Yet I would not write off Davis’s arguments as totally quixotic. He himself pointed out that informal consultation between the Court and CRS had already occurred on an experimental basis.⁴⁰ Moreover, discussions about the general problem that Davis was raising have continued to the present day. Only about a year ago, Justice Breyer suggested in a speech that lower courts (but not the Supreme Court) should try occasionally appointing their own experts to help out in cases involving scientific or other technical subject matter.⁴¹

B. Rulemaking

One of Davis’s most frequently quoted remarks was his enthusiastic declaration that the “procedure of administrative rule making is one of the greatest inventions of modern government.”⁴² This pronouncement may or may not have been an overstatement, but a generation of administrators and judges seems to have been persuaded that Davis had something of a point. During the 1960s and 1970s, agencies’ use of rulemaking underwent a remarkable expansion.⁴³ It is not easy to say how much Davis was personally responsible for this trend. Caseload pressures alone would have exerted considerable pressure in the same

38. Kenneth Culp Davis, *Judicial, Legislative, and Administrative Lawmaking: A Proposed Research Service for the Supreme Court*, 71 MINN. L. REV. 1, 4 (1986).

39. *Id.* at 15–17.

40. *Id.* at 18.

41. Stephen Breyer, ECONOMIC REASONING AND JUDICIAL REVIEW 12 (AEI-Brookings Joint Center for Regulatory Studies 2004), available at <http://www.aei-brookings.org/admin/authorpdfs/page.php?id=840> (last visited Mar. 14, 2005).

42. TREATISE § 6.15, at 283 (1st ed. Supp. 1970).

43. Reuel E. Schiller, *Rulemaking’s Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 ADMIN. L. REV. 1139, 1147–48 (2001).

direction.⁴⁴ At the least, however, Davis provided spirited advocacy and an intellectual framework that facilitated the advent of the rulemaking revolution.

For one thing, he successfully promoted the contention that an agency may, as a general matter, use rulemaking to narrow the range of issues that are open to dispute in subsequent adjudication.⁴⁵ That proposition may seem self-evident, at least to a modern audience. In an earlier era, however, there was at least some doubt that an exercise of rulemaking authority under a given statutory scheme could supersede the right to a hearing, or to individualized consideration, conferred elsewhere in that same scheme. Davis helped to persuade courts to decide, in one context after another, that various grants of rulemaking authority did have that effect.⁴⁶ Davis also drew attention to the practical benefits of rulemaking, including its broad opportunities for public participation, its normal avoidance of retroactive effect, and its amenability to political oversight.⁴⁷

One of the key features of the rulemaking revolution was the general acceptance of the notice and comment model of section 553 of the APA—the so-called “informal rulemaking” model—as the preferred procedural vehicle for agency rulemaking. Here the Davis influence is relatively easy to detect, because courts often looked to his analysis of the distinction between adjudicative and legislative facts to justify the comparative informality of rulemaking procedure. Representative of this line of reasoning was the opinion of the D.C. Circuit in *American Airlines, Inc. v. CAB*,⁴⁸ an early leading case that encouraged the use of rulemaking. Writing for the en banc D.C. Circuit, Judge Harold Leventhal noted:

The particular point most controverted by petitioners . . . involves what Professor Davis calls “legislative” rather than “adjudicative” facts. It is the kind of issue involving expert opinions and forecasts, which cannot be decisively resolved by testimony. It is the kind of issue where a month of experience will be worth a year of hearings.⁴⁹

44. *Id.* at 1148–49.

45. 2 TREATISE § 8:8; 3 *id.* § 14:5.

46. *See* *Am. Hosp. Ass’n v. NLRB*, 499 U.S. 606, 612 (1991) (relying on Davis in reaching this conclusion); *Am. Airlines, Inc. v. CAB*, 359 F.2d 624, 628 & n.11 (D.C. Cir. 1966) (en banc).

47. TREATISE § 6.15 (1st ed. Supp. 1970).

48. 359 F.2d at 624.

49. *Id.* at 633.

Meanwhile, “formal rulemaking,” a procedure spelled out in the APA by which agencies could issue rules after conducting a trial-type hearing, fell into increasing disfavor. This development was, of course, entirely consistent with Davis’s familiar thesis that trial-type procedures for the determination of issues of legislative fact should be discouraged. The eclipse of formal rulemaking was definitively established in the early 1970s by the Supreme Court’s decisions in *United States v. Allegheny-Ludlum Steel Corp.*⁵⁰ and then *United States v. Florida East Coast Railway Co.*,⁵¹ both of which relied on Davis’s writings.⁵²

Although Davis’s criticism of the use of procedures such as cross-examination in rulemaking generated more than a little debate along the way,⁵³ his position is no longer controversial. Except in a handful of regulatory schemes in which statutes adopted prior to the rulemaking revolution require additional procedures, the notice and comment model has become standard. To be sure, both regulated interests and beneficiary interests can still be heard to complain, from time to time, that one agency or another has promulgated a rule without taking sufficient pains to inquire into the factual premises underlying it. These days, however, such complaints tend to take the form of urging the agencies to generate more (or better) impact studies, cost-benefit analyses, and risk assessments, rather than to engage in trial-type formalities.⁵⁴

Indeed, only a few years after *Florida East Coast*, the Supreme Court

50. 406 U.S. 742 (1972).

51. 410 U.S. 224 (1973).

52. *Id.* at 239; *Allegheny-Ludlum*, 406 U.S. at 757.

53. See William H. Allen, Book Review, 80 COLUM. L. REV. 1149, 1157–60 (1980) (reviewing the second edition of Davis’s treatise); Nathaniel L. Nathanson, Book Review, 70 YALE L.J. 1210, 1211–13 (1961) (reviewing the first edition of Davis’s treatise); Glen O. Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485, 519–25 (1970) (defending cross-examination in rulemaking).

54. A heated debate over regulatory reform in Congress in 1995 neatly illustrates the evolution of administrative law thinking about rulemaking procedure. A controversial bill, sponsored by Senator Robert Dole, would have imposed far-reaching requirements for cost-benefit analysis and risk assessment of expensive rules. This bill was heavily promoted by business groups as a means of forcing agencies to use more rigorous methods in rulemaking proceedings. In an earlier era, those same groups had been among the strongest proponents of trial-type hearing requirements in the rulemaking context. Such requirements were, however, conspicuously absent from the Dole bill. Rather, the bill merely invited agencies to augment public input in rulemaking by various devices, including allowance of “opportunities for oral presentation . . . at informal public hearings . . .” S. 343, 104th Cong. § 553(c)(2)(A)(iii) (1995) (emphasis added), *reprinted in* S. REP. NO. 104-90, at 3 (1995). Indeed, the bill went on to provide, in line with the *Vermont Yankee* case discussed immediately below, that an agency’s decision to use or not use any of the listed devices would not be subject to judicial review. *Id.* § 553(c)(2)(B).

extended the trend toward streamlining even further than Davis could support. In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*,⁵⁵ the Court unanimously declared that reviewing courts may not tell agencies what procedures to use in conducting rulemaking proceedings, except where the procedures are required by positive law, such as a statute or regulation. The Court left room for judicial intervention in “extremely compelling circumstances,”⁵⁶ but the severe tone of the opinion plainly implied that courts should be slow to discern any such circumstances. In short, the Court seemed to insist that procedural choices are for Congress and the agencies themselves, not for the judiciary. Davis refused to take *Vermont Yankee* at face value.⁵⁷ He maintained that the Court’s words were “not a reliable guide to the future role of courts with respect to rulemaking procedure”⁵⁸ Indeed, he declared, the opinion was “largely one of those rare opinions in which a unanimous Supreme Court speaks with little or no authority,”⁵⁹ because “the sure-footed, painstaking, and cautious opinions of courts of appeals during the 1970s on rulemaking procedure are highly responsible and generally admirable and cannot be abolished by sweeping and abrupt generalizations that seem on their face to be precipitate”⁶⁰ He never reconciled himself to the Court’s rhetorical premises.⁶¹

Was Davis right to predict that *Vermont Yankee* would not be followed? The answer depends on how one interprets the question. The specific sort of judicially imposed procedural requirement that was at issue in *Vermont Yankee*—an obligation to supplement notice-and-comment rulemaking with trial-type devices such as cross-examination—is indeed defunct. Davis approved of Judge Friendly’s suggestion that a court may properly order an agency to provide an opportunity for cross-examination if a party makes a concrete showing as to why that opportunity is necessary “to enable it to mount a more

55. 435 U.S. 519 (1978).

56. *Id.* at 543.

57. See 1 TREATISE §§ 6:36–:37; 2 *id.* § 7:19; 3 *id.* § 14:10. William H. Allen, an eminent Washington practitioner, has amusingly compared Davis’s reactions to the case to a melodrama, in which the judges of the D.C. Circuit were “heroes” and *Vermont Yankee* was the “villain.” Allen, *supra* note 53, at 1160–63. My more prosaic account here is quite similar in substance to Allen’s.

58. 1 TREATISE § 6:37, at 611.

59. *Id.* at 616.

60. *Id.* at 611.

61. See *id.* §§ 6:35–:39, at 216–21 (Supp. 1989).

effective argument.”⁶² He anticipated that Friendly’s view “will continue to be the law unless and until the Supreme Court deals with it in specific terms.”⁶³ That prediction was, however, mistaken. No court has taken such a path since the 1970s.

On the other hand, Davis accurately foresaw that some judicially created refinements to the rulemaking process would inevitably survive in a post-*Vermont Yankee* world, because the legal system could not function without them. For example, agencies are still expected to compile a record during informal rulemaking proceedings, as a predicate for possible judicial review. *Vermont Yankee* itself reaffirmed this requirement,⁶⁴ although the notion that the APA itself contemplates review of a rule on an administrative record is historically inaccurate.⁶⁵ Similarly, the so-called *Portland Cement* doctrine, under which an agency must disclose critical technical information underlying a proposed rule,⁶⁶ has survived *Vermont Yankee*.⁶⁷ The nominal basis for its continued existence is that *Portland Cement* is an interpretation of the APA itself,⁶⁸ but that interpretation is so far removed from the Act’s actual language as to make the line between “interpretation” and straightforward judicial common law very blurry indeed.⁶⁹

In addition, judicial demands for detailed explanatory preambles to accompany agency rules have not abated during the years since *Vermont Yankee*. Although these demands technically rest on the courts’ substantive review role, which is expressly authorized in the APA, they

62. 1 TREATISE § 6:20, at 543 (quoting *Long Island R.R. Co. v. United States*, 318 F. Supp. 490, 499 (E.D.N.Y. 1970)).

63. *Id.* § 6:37, at 616.

64. *Vt. Yankee*, 435 U.S. at 549 (1978).

65. Nathaniel L. Nathanson, *Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review Under the Administrative Procedure Act and Other Federal Statutes*, 75 COLUM. L. REV. 721, 754–56 (1975); Stephen F. Williams, “Hybrid Rulemaking” under the Administrative Procedure Act: A Legal and Empirical Analysis, 42 U. CHI. L. REV. 401, 419–21 (1975).

66. See *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 378, 392–94 (D.C. Cir. 1973).

67. See *Time Warner Entm’t Co. v. FCC*, 240 F.3d 1126, 1140 (D.C. Cir. 2001); *Mortgage Investors Corp. v. Gober*, 220 F.3d 1375, 1380 (Fed. Cir. 2000). In each case, however, the agency rule was upheld, because the undisclosed information was not “critical.”

68. *Ass’n of Data Processing Serv. Orgs. v. Bd. of Governors of Fed. Reserve Sys.*, 745 F.2d 677, 684–85 (D.C. Cir. 1984).

69. Some recent cases limiting the interpretive rules exemption to the APA, 5 U.S.C. § 553(b)(A) (2000), might be placed in a similar category. The courts have drifted so far away from the text of the exemption as to invite the charge that the spirit, if not the letter, of *Vermont Yankee* is being frustrated. See, e.g., Richard J. Pierce, Jr., *Distinguishing Legislative Rules From Interpretive Rules*, 52 ADMIN. L. REV. 547, 566–69 (2000) (faulting the D.C. Circuit’s “idiosyncratic interpretation of the APA”). But cf. 1 TREATISE § 6:31 (arguing that courts sometimes *should* require notice and comment for rules that fall within an exemption); *id.* § 6:1-1 (Supp. 1989) (same).

are in tension with *Vermont Yankee*, as Davis recognized.⁷⁰ As a practical matter, the agency's need to prepare a painstaking analysis of a rule in order to survive so-called "hard look" judicial review inevitably augments an agency's obligations in creating the rule. Indeed, this sort of pressure on the agencies is at best a mixed blessing, according to modern scholars who have lamented a trend toward "ossification" of the rulemaking process. Their claim is that a combination of pressures on the rulemaking process, including the need to write explanations that can withstand hard look review, has made agencies increasingly reluctant—or even unable—to pursue their programs effectively through rulemaking.⁷¹ It seems fair to say, however, that Davis never discerned such a tendency—or if he did, never acknowledged it as a problem. His attitude toward hard look review was essentially benign. To judge from the courts' adherence to hard look techniques, the federal judiciary seems to agree with Davis as to the ongoing need for such controls.⁷²

In short, Davis never lost his appreciation for the notion of courts and agencies as collaborators in the continuing evolution of rulemaking. Ten years after his famous "greatest invention" remark, he wrote that, largely because of the courts' continuing involvement, "[w]hat was one of the greatest inventions of modern government in 1970 has been vastly improved!"⁷³ The collision between this attitude and the jurisprudential assumptions reflected in *Vermont Yankee* is a theme to which I will return at the end of this Essay.

I should also mention one other rulemaking development that has been shaped by Davis's writing. In *Ass'n of National Advertisers, Inc. (ANA) v. FTC*,⁷⁴ the D.C. Circuit declared that an agency official who participates in a rulemaking proceeding should not be held to the same strict standards of disqualification for prejudice as would be enforced

70. TREATISE §§ 6:35–:39, at 216–17 (Supp. 1989).

71. See, e.g., Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1412, 1419–20 (1992) (arguing that agencies "prepare for the worst-case scenario" on judicial review by devoting resources to compiling a record of their decision). See generally William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393, 393–95 (2000) (surveying the literature).

72. For one prominent jurist's skeptical response to the "ossification" critique, see Patricia M. Wald, *Judicial Review in the Time of Cholera*, 49 ADMIN. L. REV. 659, 662–63 (1997).

73. 1 TREATISE § 6:1, at 448.

74. 627 F.2d 1151 (D.C. Cir. 1979).

in an adjudicative proceeding. In the rulemaking context, the court said, a much looser test should apply: the official should be disqualified “only when there has been a clear and convincing showing that the agency member has an unalterably closed mind on matters critical to the disposition of the proceeding.”⁷⁵ In explaining this lenient (if not utterly toothless) standard, the court harked back to Davis’s distinction between adjudicative and legislative facts.⁷⁶ As the court argued, “legislative facts are crucial to the prediction of future events and to the evaluation of certain risks, both of which are inherent in administrative policymaking.”⁷⁷ As part of the policymaking process, the court continued, an official must be able to consult freely and continuously with affected interests, voicing tentative opinions and soliciting their reactions to those opinions:

The [ideal] of a neutral and detached adjudicator is simply an inapposite role model for an administrator who must translate broad statutory commands into concrete social policies. If an agency official is to be effective he must engage in debate and discussion about the policy matters before him.

... That discussion necessarily involves the broad, general characterizations of reality that we label legislative fact.⁷⁸

The *ANA* opinion has been controversial,⁷⁹ but its legal principles have endured down to the present day.⁸⁰ This is not the place to evaluate the controversy in detail. For my purposes, the main significance of *ANA* is that it illustrates one way in which Davis’s famous distinction between adjudicative and legislative facts has proved useful outside the specific context of factfinding procedures, as judges have worked to liberate modern administrative policymaking from the constraints suggested by traditional norms of adjudication.

75. *Id.* at 1170.

76. *Id.* at 1161–62. The court noted, with citations to eleven cases, that the distinction has been widely accepted. *Id.* at 1162 n.20.

77. *Id.* at 1162.

78. *Id.* at 1168–70.

79. See, e.g., Ernest Gellhorn & Glen O. Robinson, *Rulemaking “Due Process”: An Inconclusive Dialogue*, 48 U. CHI. L. REV. 201, 215–37 (1981). The court’s decision was more than a little audacious, because Congress had bestowed certain limited rights to cross-examination upon persons participating in the particular rulemaking function involved in that case (consumer protection rulemaking by the Federal Trade Commission). Notwithstanding Congress’s partial endorsement of trial-type hearings in this context, the court insisted that the proceeding at hand was unambiguously rulemaking and triggered only the lenient disqualification standard that would otherwise apply to rulemaking. *ANA*, 627 F.2d at 1159–61.

80. See, e.g., *PLMRS Narrowband Corp. v. FCC*, 182 F.3d 995, 1002 (D.C. Cir. 1999) (quoting and following *ANA*, 627 F.2d at 1170).

C. Control of Discretion

Not content with having established himself as the leading commentator on administrative law within the conventionally understood boundaries of that field, Davis ventured into largely unexplored territory in his 1969 book *Discretionary Justice: A Preliminary Inquiry*.⁸¹ The book had an ambitious goal: to explore the role of discretion throughout government, particularly in the executive branch, and to suggest ways in which its excesses could be curbed. It was concerned primarily, though not exclusively, with highly informal decisions affecting individuals, at the least rule-constrained end of the spectrum of administrative activity.⁸² In line with this theme, Davis raised questions about the capacity of the legal system to circumscribe the discretion of governmental figures who operate largely outside the framework of standard administrative law constraints, “such as police, prosecutors, welfare agencies, selective service boards, parole boards, prison administrators, and the Immigration Service, where the usual quality of justice is relatively low.”⁸³ He acknowledged that discretionary action is “indispensable for individualization of justice,”⁸⁴ but he called on the legal system to ensure that discretion will be “properly confined, structured, and checked.”⁸⁵

Discretionary Justice was daring, provocative, and probably extreme in some of its arguments. For example, I suspect that few of us would subscribe to Davis’s condemnation of the “flagrantly lawless” discretion that police departments exercise when they generally refrain from enforcing criminal prohibitions against jaywalking and social gambling.⁸⁶ Nevertheless, the book was full of interesting ideas. It quickly became, and has remained, a fruitful source of academic debate.

When he succeeded Davis as author of the *Administrative Law Treatise*, Richard Pierce drastically shortened the amount of space that Davis had devoted to control of discretion. The discussion in Davis’s second edition, incorporating much of the analysis that had earlier

81. KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1969) (hereinafter *DISCRETIONARY JUSTICE*).

82. *Id.* at 5–6.

83. *Id.* at 216.

84. *Id.* at 25.

85. *Id.* at 26.

86. *Id.* at 84–86. To be fair to Davis, he did acknowledge, three chapters later, that substantially full enforcement of a criminal code would be unthinkable in the absence of reform of existing criminal statutes. *Id.* at 164 n.4.

appeared in *Discretionary Justice*, extended over 148 pages.⁸⁷ Pierce cut this coverage to twenty-three pages.⁸⁸ To some extent, of course, this reduction in coverage must have reflected differences in the two authors' respective intellectual tastes. In all likelihood, however, Pierce's decision also rested on a sound recognition that the development of the law in this area has fallen far short of what Davis had hoped.

Among the book's doctrinal suggestions, probably none has been more widely discussed than Davis's proposal for a revised approach to the "non-delegation doctrine."⁸⁹ Davis presented his idea in rudimentary form in *Discretionary Justice* and elaborated on it in a law review article published at about the same time.⁹⁰ His point of departure was an assertion that the classic version of the non-delegation doctrine has been almost a complete failure. The doctrine purportedly requires that every statute that confers power on administrators must contain meaningful standards. In practice, however, courts do not enforce this requirement.⁹¹ Indeed, Davis continued, they have had good reasons not to do so, because legislators often have neither the time, nor the expertise, nor the level of consensus that the enactment of meaningful standards would require.⁹² Davis proposed, therefore, that the non-delegation doctrine should be reinterpreted, so that the task of articulating standards should rest with agencies rather than courts. Ultimately, he thought, the doctrine should "grow into a requirement that administrators must strive to do as much as they reasonably can do to develop and to make known the needed confinements of discretionary power through standards, principles, and rules."⁹³

Davis's idea that the applicability of the non-delegation doctrine should depend, at least in part, on the presence or absence of standards enunciated at the administrative level won some support in decisions of state courts⁹⁴ and lower federal courts.⁹⁵ No member of the Supreme

87. 2 TREATISE chs. 8–9.

88. 3 DAVIS & PIERCE, *supra* note 10, at §§ 17.1–4. Moreover, Pierce devoted part of this reduced discussion to analyzing ways in which courts have, in his view, gone *too far* in curtailing agencies' discretion. *Id.* § 17.1, at 98–101.

89. DISCRETIONARY JUSTICE at 44–51, 58–59, 220–21. Most writers today would omit the hyphen in "non-delegation," but for purposes of this Essay I follow the Davis orthography. According to a piece of folklore that I heard when I was on the staff of the *University of Chicago Law Review*, the editors of the *Review* once tried to alter the hyphenization in an article of Davis's. They relied on the *Chicago Manual of Style*, but Davis overruled them by pointing to a higher authority: the *Administrative Law Treatise*.

90. Kenneth Culp Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713 (1969).

91. DISCRETIONARY JUSTICE at 44–45.

92. *Id.* at 45–49.

93. *Id.* at 59 (emphasis omitted).

94. See, e.g., *Municipality of Anchorage v. Anchorage Police Dep't Employees Ass'n*, 839 P.2d 1080, 1086 n.12 (Alaska 1992); *Minn. Energy & Econ. Dev. Auth. v.*

Court ever embraced it, however, and recently, in *Whitman v. American Trucking Ass'ns*,⁹⁶ the Court squarely rejected it. Although the Court did not refer to Davis by name, the uncompromising tone of its opinion appears to confirm that the Davis theory has no future in federal law. A related and more general point can also be made: federal courts have almost uniformly refused to direct agencies to structure their discretionary actions through rulemaking,⁹⁷ notwithstanding calls by Davis⁹⁸ and others for a more active supervisory stance. The doctrinal foundations for this refusal were laid before *Vermont Yankee*,⁹⁹ but that case has probably reinforced the courts' resistance to issuing mandates of this kind.¹⁰⁰

As I mentioned, however, the main focus of *Discretionary Justice* was on enclaves of government action in which discretion has been particularly unconstrained. How much have the conditions that Davis spotlighted been alleviated? My sense is that progress in taming discretion in these areas has been modest.

For one thing, Davis was deeply concerned about the absence of checks on government decisions about who should be prosecuted or not prosecuted for various crimes.¹⁰¹ Today, however, broad prosecutorial discretion remains a reality.¹⁰² At the federal level, one can point to a number of guidelines, manuals, and the like, which are intended to structure decisionmaking by individual criminal prosecutors. This is progress of a sort. These guidance documents, however, are typically not mandatory, and they often are worded in highly general terms.¹⁰³

Printy, 351 N.W.2d 319, 350 n.13 (Minn. 1984).

95. *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, 746 (D.D.C. 1971); cf. *Int'l Union UAW v. OSHA*, 938 F.2d 1310, 1317-18 (D.C. Cir. 1991).

96. 531 U.S. 457, 477-78 (2001).

97. William D. Araiza, *Agency Adjudication, the Importance of Facts, and the Limitations of Labels*, 57 WASH. & LEE L. REV. 351, 365-76 (2000) (collecting federal case law and citing none decided in the past twenty years that has required rulemaking).

98. 2 TREATISE §§ 7:24-:26; DISCRETIONARY JUSTICE 57-58.

99. See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 290-92 (1974); *SEC v. Chenery Corp.*, 332 U.S. 194, 202-03 (1947).

100. At the state level, however, the record is again more mixed. See MICHAEL ASIMOW ET AL., *STATE AND FEDERAL ADMINISTRATIVE LAW* § 6.2.2 (2d ed. 1998) (surveying various states' experiences with required rulemaking).

101. DISCRETIONARY JUSTICE at 188-214.

102. See, e.g., *Wayte v. United States*, 470 U.S. 598, 607 (1985) (upholding the government's prosecutorial discretion in the context of prosecutions for draft evasion).

103. For a survey of these policies, see Michael Edmund O'Neill, *When Prosecutors Don't: Trends in Federal Prosecutorial Declinations*, 79 NOTRE DAME L. REV. 221, 227-49 (2003).

Thus, individual prosecutors retain broad freedom to decide which criminal cases to bring, constrained only occasionally by supervision from above. Meanwhile, in the related sphere of regulatory enforcement, the situation might be said to have gotten worse from Davis's point of view. In its 1985 decision in *Heckler v. Chaney*,¹⁰⁴ the Supreme Court laid down a general rule that exercises of administrative enforcement discretion are presumptively unreviewable.¹⁰⁵ The body of case law that has grown up around *Chaney* is complex. As a rough generalization, however, enforcement discretion is frequently reviewable when the challenger can point to statutory or other legal constraints impinging on the agency; but in the absence of such constraints (which is the usual situation), the agency's discretionary choices are not reviewable, even for abuse of discretion.¹⁰⁶

Another of Davis's prominent proposals was that police departments should use rulemaking to structure their officers' discretionary decisions about what criminal provisions to enforce, and against whom. He was so taken with this idea that he published a followup book in 1975, *Police Discretion*, largely for the purpose of advocating it.¹⁰⁷ Yet, although Davis's idea has been the subject of much subsequent scholarly discussion, it has not really flourished.¹⁰⁸ One reason may be that police rulemaking is out of step with certain recently emergent trends in criminal justice administration, which rest on the view that police discretion is not such a bad thing. Among these trends are "community policing," which contemplates creative adaptation to neighborhood conditions, and "order maintenance" policing, under which officers enforce laws against relatively minor crimes such as littering and public drunkenness in many—but not all—situations. Both of these approaches require individual police officers to make numerous judgment calls.¹⁰⁹

104. 470 U.S. 821 (1985).

105. *Id.* at 832.

106. See Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 752–62 (1990); Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653 (1985).

107. KENNETH CULP DAVIS, *POLICE DISCRETION* (1975).

108. See David A. Sklansky, *Quasi-Affirmative Rights in Constitutional Criminal Procedure*, 88 VA. L. REV. 1229, 1271–79 (2002). For a slightly more upbeat appraisal, see Samuel Walker, *The New Paradigm of Police Accountability: The U.S. Justice Department "Pattern or Practice" Suits in Context*, 22 ST. LOUIS U. PUB. L. REV. 3, 14–17 (2003).

109. For a lengthy discussion of the literature on these developments, see David Cole, *Foreword—Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059, 1060–61, 1063–70 (1999). Cole himself is highly critical of the "new discretion." For a more positive assessment of the recent trends, see Dan M. Kahan & Tracey L. Meares, *Foreword—The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153 (1998). See also Harold E. Pepinsky, *Better Living Through Police Discretion*, 47 L. & CONTEMP. PROBS. 249 (Autumn 1984).

To be sure, these broadly discretionary approaches can potentially coexist with measures that circumscribe discretion, including police rulemaking.¹¹⁰ Nevertheless, it seems at least plausible to suppose that their salience has tended to erode the intellectual climate that once seemed likely to lead to substantial curbs on police discretion in accordance with Davis's teachings.

The case of sentencing discretion presents a very different story. For about two decades, following the enactment of the Sentencing Reform Act of 1984,¹¹¹ the wide-open discretion once exercised by sentencing judges in the federal courts gave way to highly constrained decisionmaking under the Federal Sentencing Guidelines. Davis hailed the advent of these guidelines as a major advance in the taming of uncontrolled discretion.¹¹² Other observers, however, would more likely have seen this development as an illustration of the adage "beware of getting what you ask for." The Guidelines came to be regarded, especially in numerous judicial chambers, as having constrained judges' discretion too much.¹¹³ The complaints became especially fervent in the wake of Congress's enactment in 2003 of the so-called Feeney Amendment, which tied judges' hands even more tightly than before.¹¹⁴ To be sure, many of the objections to the stringent sentences that had been imposed under the Guidelines were directed primarily at mandatory minimum

(arguing, in opposition to Davis's views, that the proper solution is to augment officers' accountability rather than to reduce their discretion).

110. Indeed, Kahan and Meares have argued that these two types of police reforms can be mutually reinforcing. In their defense of Chicago's antiloitering ordinance, which they lauded as a necessary tool to enable police to clear criminal street gangs from besieged neighborhoods, they emphasized that the city had adopted internal guidelines to structure police officers' discretion in enforcing the ordinance. Kahan & Meares, *supra* note 109, at 1183. In that regard, their reasoning was entirely in sync with the Davis program. When, however, the Supreme Court later struck down the ordinance as unconstitutionally vague, it brushed aside the city's guidelines in a single paragraph, deeming them insufficient to cure the due process problems with the ordinance. *City of Chicago v. Morales*, 527 U.S. 41, 48–49, 63–64 (1999).

111. 18 U.S.C. §§ 3551–3742; 28 U.S.C. §§ 991–998 (2000).

112. TREATISE § 8:1-1 (Supp. 1989).

113. *See, e.g.*, *United States v. Harrington*, 947 F.2d 956, 964–67 (D.C. Cir. 1991) (Edwards, J., concurring); KATE STITH & JOSÉ A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* (1998) (making a vigorous attack on the guidelines).

114. Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, § 401, 117 Stat. 650, 667–76; Stephanos Bibas, *The Feeney Amendment and the Continuing Rise of Prosecutorial Power to Plea Bargain*, 94 J. CRIM. L. & CRIMINOLOGY 295, 295–97 (2004) (summarizing the amendment's provisions).

sentences prescribed by Congress, rather than at anything inherent in the nature of a relatively determinate sentencing system.¹¹⁵ Yet that distinction may be too facile. It is scarcely surprising that, once a system for regularizing criminal sentences through publicly visible rules had been put into place, the system elicited legislative moves to bring those sentences into line with contemporary political pressures to crack down on crime.¹¹⁶ Perhaps more to the point, the diminution in sentencing judges' discretion that was wrought by the guidelines was offset to a considerable degree by discretion exercised by prosecutors, who acquired more leverage with which to negotiate plea bargains to their liking than they had possessed before the guidelines existed.¹¹⁷ From that standpoint, the success of the guidelines experiment became questionable, even in relation to Davis's own objective of curbing excessive discretion.¹¹⁸

Early this year, the Guidelines met their own day of judgment and barely escaped a death sentence. In *United States v. Booker*,¹¹⁹ the Court held that the district courts' use of the Guidelines to increase sentences on the basis of judicially determined facts was unconstitutional.¹²⁰ Although this holding rested on the right to jury trial and not on any overt policy critique of the Guidelines, it presumably was symptomatic of an underlying disenchantment with determinate sentencing schemes as they had come to be implemented. Through creative statutory interpretation, a majority of the Court managed to avoid nullifying the Guidelines in their entirety. Instead the Court ruled that district judges must treat them as merely advisory, subject to significant appellate review.¹²¹ How this directive will play out in practice remains to be

115. For example, Justice Kennedy lamented in a 2003 speech that "the guidelines were, and are, necessary [but] the compromise that led to the guidelines led also to an increase in the length of prison terms. . . . In too many cases, mandatory minimum sentences are unwise and unjust." Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), available at http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html (last visited Mar. 13, 2005).

116. Cf. TREATISE § 6.15, at 284–85 (1st ed. Supp. 1970) (observing that rulemaking facilitates legislative supervision of policymaking, whereas policymaking through adjudication is more likely to escape such influence).

117. See *Harrington*, 947 F.2d at 964–66 & nn.3–6 (Edwards, J., concurring); *Bibas*, *supra* note 114, at 301 ("More and more, judges have less power to deal and prosecutors have more."); cf. Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 557–61 (1992) (finding circumvention of guidelines by prosecutors in a minority of cases).

118. See Kennedy, *supra* note 115 ("[A] transfer of sentencing discretion from a judge to an Assistant U.S. Attorney, often not much older than the defendant, is misguided. . . . Most of the sentencing discretion should be with the judge, not the prosecutors.").

119. 125 S. Ct. 738 (2005).

120. *Id.* at 746–56 (Stevens, J.).

121. *Id.* at 764–68 (Breyer, J.).

seen, but the *Booker* decision obviously portends a major comeback for discretion in criminal sentencing.

D. Judicial Review

Davis was one of our era's most vigorous and effective proponents of liberal judicial review of administrative action. I have already mentioned his support for "hard look" review of agency actions on the merits. In this section I will focus on his contributions to the law that governs access to the courts. Davis's general attitude on this subject was reflected in a provocative passage in *Discretionary Justice*:

Among the government's legal staffs are many specialists in the technicalities of such doctrines as ripeness, standing, forms of proceedings, government and officer immunity from liability, and unreviewability. Year in and year out these government lawyers keep concocting intricacies within intricacies, trying to persuade courts to adopt them, and often succeeding. . . . I agree that something in the nature of such doctrines is essential for an orderly system and to limit courts to tasks appropriate for them. But from the standpoint of a good system of justice, the extreme complexity is much more harmful than it is helpful.

. . . .
If Congress, the President, or top legal officers were to direct that lawyers defending suits against the government are not to interpose technical defenses in cases that seem meritorious unless the policy behind the technical defense is important as applied, the total amount of uncorrected injustice from governmental action would unquestionably be drastically reduced, with no offsetting disadvantage. The result would not be the payment of taxpayers' money to undeserving plaintiffs. The worst that could happen from a mistake of a government lawyer in failing to use a technical defense would be that a court would decide the case on its merits.¹²²

To anyone who has become accustomed to the Rehnquist Court's propensity to exalt these "technical defenses," Davis's expansive sentiments may sound positively startling.

This is not to say that Davis favored broad rather than narrow opportunities for judicial review in all circumstances. As the quotation indicates, he could see that some types of agency action are inappropriate for judicial supervision. Indeed, this awareness gave rise to what I have elsewhere called "probably the longest—and possibly the most vitriolic—debate in the history of law reviews,"¹²³ as Raoul Berger argued in a series of four articles that every administrative action must at least be judicially reviewable for abuse of discretion, and Davis

122. DISCRETIONARY JUSTICE at 158, 161 (emphasis omitted).

123. Levin, *supra* note 106, at 695.

responded in four more articles, criticizing Berger's contention as too simplistic.¹²⁴ Nevertheless, Davis had little regard for generalized judicial restraint notions. He supported substantial relaxation of barriers to judicial review, and he exerted considerable influence in that direction.

One example of that influence was his role in furthering the legislative abolition of sovereign immunity in suits for specific relief.¹²⁵ Davis chaired an ABA committee that prevailed on Congress to enact this reform.¹²⁶ To be sure, sovereign immunity had many other detractors,¹²⁷ but the importance of Davis's advocacy is easy to document. In addition to citing the ABA endorsement,¹²⁸ the congressional committees that sponsored the measure relied directly on a letter that Davis had submitted for the legislative record.¹²⁹ The same legislation also eliminated the amount in controversy requirement in federal question cases in which the United States was the defendant,¹³⁰ and the congressional committees quoted Davis in support of this action as well.¹³¹

Within the sphere of judicially developed doctrine, the preeminent example of Davis's impact on judicial review concerns the law of standing—i.e., the principles that determine which persons are entitled to go to court to challenge a given administrative action. He argued in the 1958 edition of his treatise that the touchstone of standing should be whether the plaintiff has been “adversely affected in fact.”¹³² Too often, he thought, the courts had denied standing to people who had actually been injured by a government action, because they had been unable to allege an infringement of the requisite “legal right,” that is, to show that the kinds of injuries they had suffered or were likely to suffer were ones

124. See Raoul Berger, *Administrative Arbitrariness: A Synthesis*, 78 YALE L.J. 965, 966 n.9 (1969) (citing eight previous installments).

125. Pub. L. No. 94-574, 1976 U.S.C.C.A.N. (90 Stat. 2721) 6121 (codified in relevant part at 5 U.S.C. §§ 702, 703 (2000)).

126. 95 ABA ANN. REP. 342, 346 (1970) (identifying Davis as leading the ABA's support for the legislation, in his capacity as Chairman of the Judicial Review Committee of the ABA Section of Administrative Law).

127. The proposal was cosponsored by the Administrative Conference of the United States (ACUS). One also cannot overstate the significance of the fact that the Justice Department (led on this issue by Assistant Attorney General Antonin Scalia) supported the measure.

128. S. REP. NO. 94-996, at 3 (1976); H.R. REP. NO. 94-1656, at 4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6121, 6124.

129. S. REP. NO. 94-996, at 7, 10 n.33; H.R. REP. NO. 94-1656, at 8, 10 n.33. For the text of the letter, see Kenneth Culp Davis, *Revising the Administrative Procedure Act*, 29 ADMIN. L. REV. 35, 47-48 (1977).

130. This measure predated by four years the elimination of the amount in controversy requirement for all federal question cases. See Federal Question Jurisdiction Amendments Act of 1980, Pub. L. No. 96-486, 94 Stat. 2369 (codified at 28 U.S.C. § 1331 (2000)).

131. S. REP. NO. 94-996, at 16; H.R. REP. NO. 94-1656, at 17.

132. 3 TREATISE § 22.02, at 213 (1st ed. 1958).

that the courts should protect.¹³³ A fairer and much simpler solution, he concluded, would be to recognize “the principle of elementary justice that one who is in fact hurt by illegal action should have a remedy.”¹³⁴

In 1970, in the now-leading case of *Ass’n of Data Processing Service Organizations v. Camp*,¹³⁵ the Court went a long way toward accepting Davis’s position. In a move that scholars have traced directly to Davis’s writings,¹³⁶ the Court read an “injury in fact” test into section 702 of the APA, associating that test with the “case or controversy” limitation required by Article III of the Constitution.¹³⁷ Then, evidently having decided to split the difference between Davis’s view and the more restrictive views that had prevailed in the past, the Court went on to articulate a further requirement: the interest that the plaintiff seeks to protect must be “arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.” In subsequent case law, this latter “zone of interests” test has been applied fairly leniently.¹³⁸ “Injury in fact” is the usual focus of attention. Thus, Davis’s victory in this area was incomplete, but he did set the basic trajectory of the Court’s standing doctrine. What made his success especially remarkable is that the text of section 702 did not lend itself at all well to the construction that he induced the Court to place on it.¹³⁹

133. *Id.* § 22.04.

134. *Id.* § 22.02, at 211.

135. 397 U.S. 150 (1970).

136. William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 256–58 (1988); Cass R. Sunstein, *What’s Standing After Lujan?: Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 185–86 (1992).

137. *Data Processing*, 397 U.S. at 151–54.

138. *Compare Nat’l Credit Union Admin. v. First Nat’l Bank & Trust Co.*, 522 U.S. 479, 492 (1998) (explaining that a class of plaintiffs can have standing even if Congress had no specific intent to benefit them; their interests need only be “arguably” protected by the legislation at issue), *with Air Courier Conference of Am. v. Am. Postal Workers Union*, 498 U.S. 517 (1991) (the only case in which the Court has found that a plaintiff could not satisfy the zone of interests test).

139. The statutory language itself predicated standing on whether the plaintiff had suffered “legal wrong” or was adversely affected or aggrieved “within the meaning of a relevant statute.” 5 U.S.C. § 702 (2000). Manifestly, it was intended to focus on legally defined rights. Apart from his appeal to the “simple and natural proposition” that injury in fact should suffice for standing, 3 TREATISE § 22.18, at 291 (1st ed. 1958), Davis’s argument to the contrary relied primarily on congressional committee reports that had accompanied the APA. *See id.* § 22.02. Legislators from both Houses had explained section 702 as conferring a right of review upon “any person *adversely affected in fact* by agency action or aggrieved within the meaning of any statute.” ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, S. DOC. NO. 79-248, at 212 (1946) (House Judiciary Committee report) (emphasis added); *id.* at 276 (Senate Judiciary Committee

Few would argue that *Data Processing* has brought stability or consensus to the law of standing, or resulted in the simplicity that Davis had forecast. Davis himself became highly critical of the Court's performance in subsequent standing cases. He castigated the Court for inconsistency, result-oriented manipulation, and rhetorical digressions.¹⁴⁰ From his standpoint, the basic problem was that the Court was wandering off into detours; if it would adhere more faithfully to the injury in fact test, most of these ills could be cured.¹⁴¹ According to a number of thoughtful commentators, however, the real problem has been *Data Processing* itself.¹⁴² They argue that an "injury in fact" test cannot possibly provide a coherent approach to the analysis of standing, because one has to make value judgments to decide what counts as an "injury." *Data Processing* obscures those choices.¹⁴³ Furthermore, it is argued, such value judgments should lie primarily within legislative control. Yet, by linking the injury in fact concept to Article III, the Court's approach has had the effect of stripping Congress of control over standing. This implication was borne out by the Court's controversial decision in *Lujan v. Defenders of Wildlife*,¹⁴⁴ which denied standing to environmentalists even though they had sued under a "citizen suit" provision that purported to confer standing on "any person."¹⁴⁵ Thus, despite the Court's claims that the doctrine of standing is a restraint on the power of the judiciary, *Data Processing* has been criticized as an unwarranted judicial incursion on legislative supremacy.¹⁴⁶ In short, the merits of the *Data Processing* revolution in standing doctrine are still

report) (emphasis added). Davis's elevation of the committee reports over the enacted statutory text was criticized in his own day, JAFFE, *supra* note 13, at 528–30, and, of course, would be an even harder sell in ours, in light of the more skeptical attitude that today's courts take toward legislative history. Indeed, one basis for that attitude is a fear that interested factions will sprinkle the legislative record with unreliable, self-serving statements. One of the earliest expressions of that fear singled out, as an example of such abuse, statements in the legislative history of the APA about what is now section 702. Alfred F. Conard, *New Ways to Write Laws*, 56 YALE L.J. 458, 461 & n.13 (1947).

140. 4 TREATISE §§ 24:1, 24:35.

141. *See id.* §§ 24:6, at 230, 24:35, at 337.

142. Criticisms of the opinion have at times been harsh. *See* Richard B. Stewart, *Standing for Solidarity*, 88 YALE L.J. 1559, 1566, 1569 (1979) (book review) (viewing *Data Processing* as "an unredeemed disaster"); Sunstein, *supra* note 136, at 185 (calling *Data Processing* "a remarkably sloppy opinion").

143. Fletcher, *supra* note 136, at 232–34; Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141, 1154–60 (1993); Sunstein, *supra* note 136, at 188–92.

144. 504 U.S. 555 (1992).

145. Stewart, *supra* note 142, at 1569–70 & n.47 (anticipating this result); Sunstein, *supra* note 136, at 188–89 (faulting *Lujan*).

146. *See, e.g.*, Richard J. Pierce, Jr., *Lujan v. Defenders of Wildlife: Standing as a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170, 1195–201 (1993).

deeply contested.¹⁴⁷ The fact remains, however, that standing has become much more widely available today than it was when Davis began to call for change. Despite the awkwardness of the manner in which the Court effected its reform, Davis deserves some credit for the expansion.

Complementary to his contributions to the law of standing was Davis's influence regarding the *timing* of judicial review of agency action. His impact on the development of the ripeness doctrine is particularly evident. Indeed, it is reported that Davis actually coined the term "ripeness" in administrative law; until he began writing about it in the 1950s, it had never appeared in any federal case on administrative law (except in descriptions of fruit).¹⁴⁸ Of course, Davis did not fabricate the underlying concept out of nowhere. He was reacting to a significant body of case law in which courts had rejected challenges to administrative action by asserting that the challenger had come to court too soon and must wait until a later stage in the administrative process before it could get review. As in his writing on standing, Davis considered the case law too parsimonious about judicial review. He saw some legitimate uses for the ripeness concept, such as where the issues tendered to the court were poorly defined or factually undeveloped, or where the plaintiff would suffer no substantial hardship from postponement of review.¹⁴⁹ He argued, however, that courts had often turned challengers away due to a diffuse and, he thought, excessive concern for judicial restraint. Too often, this translated into unnecessary dismissals on artificial grounds—such as where a statute or regulation had not actually been applied to the challenger through an enforceable order, even though it was causing hardship.¹⁵⁰

The Court broke with these restrictive cases in *Abbott Laboratories v. Gardner*.¹⁵¹ That case allowed pharmaceutical manufacturers to go to court to challenge a recently promulgated drug labeling regulation, even though no enforcement proceedings had yet been initiated. On a more

147. Recent cases have tended to soften the impact of *Defenders of Wildlife*. See *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167 (2000); *FEC v. Akins*, 524 U.S. 11 (1998). See generally William W. Buzbee, *Standing and the Statutory Universe*, 11 DUKE ENVTL. L. & POL'Y F. 247 (2001) (extending the debate in light of recent developments).

148. John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 166–67 & nn. 264–65 (1998).

149. 3 TREATISE §§ 21.02, 21.10, at 206 (1st ed. 1958).

150. *Id.* § 21.10, at 199–200.

151. 387 U.S. 136 (1967).

general level, *Abbott* made clear that ripeness should be evaluated on a functional basis, in terms of the fitness of the issue for immediate judicial consideration and the hardship that challengers would experience if review were postponed.¹⁵² The Court relied on the writings of Jaffe and Davis as its main sources of inspiration in reaching this formulation.¹⁵³ In turn, Davis hailed the Court's decision in *Abbott* for having repudiated the restrictive holdings of the past.¹⁵⁴ *Abbott* has remained the dominant precedent defining the ripeness defense.¹⁵⁵ To be sure, its approach to ripeness is inherently discretionary. Holdings that particular challenges to agency action are unripe have by no means become an extinct species.¹⁵⁶ But, precisely because so much does depend on discretion, the attitude with which the doctrine is implemented is critical. *Abbott's* policy is one of liberality, and Davis's critique of the early case law surely contributed to it.

In an interesting way, Davis's impact on the law of exhaustion of administrative remedies presents a more mixed picture. In *Darby v. Cisneros*,¹⁵⁷ the Court construed the last sentence of section 704 of the APA. That sentence provides that an agency action that is "otherwise final" is "final for purposes of this section," and thus judicially reviewable immediately, regardless of whether the party seeking review has sought reconsideration or taken an internal agency appeal. The Court concluded that the sentence also forecloses the courts from requiring exhaustion of administrative remedies in such cases. Although this was by far the most natural reading of section 704, the lower courts had been ignoring the statute for years. Davis had long deplored this judicial failure to follow the APA,¹⁵⁸ and the Court highlighted his analysis in *Darby*.¹⁵⁹ On the other hand, in *Patsy v. Board of Regents*,¹⁶⁰ the Court parted

152. *Id.* at 148–49.

153. *Id.* at 148 n.15; see Duffy, *supra* note 148, at 175. The exact phrasing of the Court's test appears to owe more to Jaffe than Davis, see JAFFE, *supra* note 13, at 410, 423, but its substance harmonizes with the analysis in Davis's 1958 treatise. See, e.g., 3 TREATISE § 21.10, at 206 (1st ed. 1958) (suggesting that, when substantial adverse effect on the plaintiff is neither present nor imminent, a finding of unripeness is normally proper, but the court should have discretion).

154. 4 TREATISE §§ 25:6, 25:16.

155. See, e.g., *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 479 (2001).

156. See, e.g., *Nat'l Park Hospitality Ass'n v. Dep't of the Interior*, 538 U.S. 803, 810–12 (2003); *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 732–34 (1998); *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 162–63 (1967) (holding, in a case decided the same day as *Abbott*, that association's challenge was unripe because the issues presented might well be more reliably determined in an enforcement action, and association's members would experience little hardship if review were postponed until that time).

157. 509 U.S. 137, 146–47 (1993).

158. 3 TREATISE § 20.08 (1st ed. 1958 & Supp. 1976).

159. *Darby*, 509 U.S. at 145.

160. 457 U.S. 496, 516 (1982).

company with Davis, ruling that a plaintiff who challenges the constitutionality of state administrative action by bringing a civil rights action under 42 U.S.C. § 1983 need not exhaust administrative remedies first. The *Patsy* holding reaffirmed prior case law that Davis had vigorously criticized.¹⁶¹ It may be no coincidence that, in each of these two cases, the Court opted for bright-line rules, as opposed to allowing courts to make ad hoc, discretionary decisions about whether to require exhaustion. In other words, the Court was willing to take Davis's advice only insofar as that advice was in tune with the formalist tendencies that had begun to characterize the Court's jurisprudence by the early 1980s. As such, the two cases form part of a pattern that I will discuss in the concluding section of this Essay.

IV. THE PRAGMATIC OPTIMIST

In this Essay, I have tried to present a candid assessment of Davis's impact on administrative law. It may have seemed that I have lingered too long on ideas that did not sell, but my purpose has not been to debunk. How many of us could boast of a better track record than his? The shortfalls that I have mentioned say more about the extraordinary range of topics Davis addressed than about any shortage of inspiration or persuasive power on his part. Moreover, I suspect that the lack of a better reception for some of his ideas is attributable, in part, to a shift in the intellectual climate within which administrative law has been evolving. That supposition sets the stage for me to offer some concluding thoughts that may help to put Davis's legacy into a larger perspective.

In separate essays, Keith Werhan and Thomas Merrill have divided the modern history of administrative law into three periods, each dominated by a distinctive approach to judicial common lawmaking.¹⁶² Werhan calls these three periods, respectively, the "traditional" era, the "interest-representation" era, and the "neoclassical" era.¹⁶³ In the first era, immediately following the enactment of the APA in 1946, courts seemed to accept at face value one of the teachings of the "legal process" school of jurisprudence: agencies offer significant institutional

161. TREATISE § 20.01-1 (1st ed. Supp. 1976).

162. Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039 (1997); Keith Werhan, *The Neoclassical Revival in Administrative Law*, 44 ADMIN. L. REV. 567 (1992).

163. Werhan, *supra* note 162, at 568.

advantages over other branches. Accordingly, judicial decisions tended to emphasize the empowerment of administrative agencies, and removal of “needless procedural impediments” to their work,¹⁶⁴ so that agencies would be equipped to pursue the public interest more effectively.¹⁶⁵ The second era, commencing in the middle to late 1960s, was shaped by more skeptical views of agency power. Fears about the bureaucracy’s tendencies toward insulation, unresponsiveness, and capture by special interests were prevalent during this period. In Merrill’s words, courts seemed to act on a belief that, “by changing the procedural rules that govern agency decisionmaking and by engaging in more aggressive review of agency decisions[,] they could free agencies to open their doors—and their minds—to formerly unrepresented points of view”¹⁶⁶ The third era, beginning roughly in the early 1980s, has been marked by a general diminution in judicial common lawmaking itself, and a drift toward formalism. As Merrill notes, “judicial innovations that would expand the authority of the courts at the expense of agencies have almost entirely disappeared.”¹⁶⁷

Davis’s most active years as a scholar spanned, roughly speaking, the first two of these eras. His contributions to the law on adjudication and rulemaking, as detailed above, can be linked to the first era, as they related primarily to the empowerment of agencies.¹⁶⁸ His writings on control of discretion and on judicial review have a closer relationship to the second era, as they were concerned with the establishment of firmer controls over agencies.¹⁶⁹ In turn, Merrill’s and Werhan’s accounts of the third era may help to explain why the courts, in recent years, have seemed wary of embracing some of Davis’s ideas.

Davis was a product of the legal process school,¹⁷⁰ with a strong dose

164. Merrill, *supra* note 162, at 1049.

165. *See id.* at 1041, 1048–50; Werhan, *supra* note 162, at 576–83.

166. Merrill, *supra* note 162, at 1043; *see id.* at 1050–52; Werhan, *supra* note 162, at 583–90.

167. Merrill, *supra* note 162, at 1041; *see id.* at 1053–55; Werhan, *supra* note 162, at 590–607; *see also* Duffy, *supra* note 148, at 212–13 (arguing that the era of common lawmaking in administrative law, as fostered by Davis and others, has passed).

168. *See* Reuel E. Schiller, *Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism, 1945-1970*, 53 VAND. L. REV. 1389, 1408–09 (2000) (discussing how Davis’s writings in the 1950s argued for a pluralist vision of administrative agencies’ legitimacy, contemplating only a limited role for judicial supervision).

169. *Id.* at 1414–15 (explaining how, as interest group pluralism declined in the mid-1960s and thereafter, Davis became a proponent of broader standing principles and of closer judicial oversight of agencies); Merrill, *supra* note 162, at 1062–63 (noting Davis’s call in *Discretionary Justice* for stronger legal standards to structure agency discretion, and characterizing the book’s strident tone as an embodiment of the “agitated and activist” mood of the 1960s).

170. William N. Eskridge, Jr. & Philip P. Frickey, *The Making of The Legal*

of legal realism mixed in.¹⁷¹ He had little if any use for the formalist tendencies and rhetoric of judicial restraint that have come to be characteristic of our day. Pragmatism, purposive interpretation, and respect for judicial creativity were pillars of his intellectual framework.¹⁷² He made his perspective abundantly clear in what appears to have been his final scholarly appearance in the law reviews—the transcript of a conference in 1990 sponsored by the Federalist Society.¹⁷³ With characteristic bluntness and audacity, Davis took issue with a statement in the conference brochure, in which the Society had declared that “it is emphatically the province and duty of the judiciary to say what the law is, and not what it should be.” To Davis, this was simply nonsense:

A main reason I accepted the invitation is to try to persuade the Society that in the absence of constitutional or statutory provisions to the contrary, *it is emphatically the province and duty of the judiciary to say both what the law is, and what it should be.*

My position is entirely conservative; it is in full agreement with judicial practice that has long been uniform and deeply established. Anglo-American courts for centuries have been creating new law to answer new questions, re-examining and sometimes changing initial answers in light of later and better understanding, responding to new legislative facts that affect the lawmaking, and reconsidering and sometimes changing established law in the light of later or better understanding.

.....
After spending half a century studying administrative law, I believe that many of the most valuable portions of administrative law are wholly the product of judicial creativity. Nearly all of today’s administrative law has been created during the past half century. If the Federalist Society’s opposition to judicial creativity had prevailed, the most valuable portions of today’s administrative law could not have come into existence.¹⁷⁴

Flowing as they did from these jurisprudential premises, many of Davis’s recommendations, including several that I have discussed above, were unlikely candidates for incorporation into a “neoclassical” body of administrative law. For example, I have already referred to his harsh critique of *Vermont Yankee*.¹⁷⁵ He considered that case’s disavowal of judicially

Process, 107 HARV. L. REV. 2031, 2049 & n.111 (1994).

171. See G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 19, 121, 124–27 (2000) (associating Davis with the legal realists’ belief in the inevitability and necessity of administrative governance, as part of the legacy of the New Deal).

172. Duffy, *supra* note 148, at 119, 135–36.

173. Symposium, *The Presidency and Congress: Constitutionally Separated and Shared Powers: Panel V, The Role of the Courts in Separation of Powers Disputes*, 68 WASH. U. L.Q. 667, 676–81 (1990) (remarks of Kenneth Culp Davis).

174. *Id.* at 676–77.

175. See *supra* notes 55–61 and accompanying text.

prescribed procedures in rulemaking to be unworkable and contrary to precedent and the intent of the APA. But the Court was deaf to this critique. Indeed, in 1990 the Court indicated that *Vermont Yankee* principles apply to adjudication as well as to rulemaking.¹⁷⁶ The Court reached this decision in a surprisingly casual fashion, and despite ample room to doubt that the stated reasoning of *Vermont Yankee* was applicable.¹⁷⁷ The main explanation for this extension had to be the Court's aversion to unconstrained judicial activism in the realm of administrative procedure.

To take another salient example, Davis was predictably dismayed by the Court's decision in 1984 in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*¹⁷⁸ *Chevron* set forth (or at least appeared to have set forth) an across-the-board requirement of substantial deference to agencies' interpretations of the statutes they administer. Davis's own thinking about the scope of judicial review of agency action was free-form and pragmatic. He found the verbiage of the case law unhelpful and thought the real law in this area could be reduced to a single generalization: "Courts usually substitute judgment on the kind of questions of law that are within their special competence, but on other questions they limit themselves to deciding reasonableness; they do not clarify the meaning of reasonableness but retain full discretion in each case to stretch it in either direction."¹⁷⁹ Post-*Chevron*, he declared that the deferential attitude prescribed in that case was an outright abdication of the judicial task of deciding relevant questions of law.¹⁸⁰

The divergence between Davis's views and those of modern courts reflects not only competing jurisprudential theories but also contrasting attitudes. Merrill and Werhan suggest, as do others,¹⁸¹ that the formalism of the neoclassical age is largely attributable to burgeoning cynicism about government as a whole, including the courts themselves.¹⁸² "For whatever reason," says Merrill, "the recent era has been characterized by widespread pessimism about the capacity of any governmental institution to achieve

176. Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 653–56 (1990).

177. In *Vermont Yankee* the Court had been able to argue, with some credibility, that Congress itself had determined the appropriate degree of formality for rulemaking. See *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 523, 547 (1978) (noting that section 553 of the APA "enacted 'a formula upon which opposing social and political forces have come to rest'" (quoting *Wong Yang Sung v. McGrath*, 339 U.S. 33, 40 (1950))). The APA contains no analogous template for informal adjudication. It contemplates that, except in "formal" cases, procedures in adjudicative cases will be determined outside the APA itself.

178. 467 U.S. 837 (1984); see TREATISE ch. 29 (Supp. 1989).

179. 5 TREATISE § 29:1, at 332 (emphasis omitted).

180. TREATISE § 29:16-1 to 29:16-4 (Supp. 1989).

181. See, e.g., JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 23–25 (1997).

182. Merrill, *supra* note 162, at 1044, 1054; Werhan, *supra* note 162, at 608, 615–16.

results that will promote the public interest. In effect, capture theory's pessimism about the performance of administrative agencies has been generalized to include all political institutions."¹⁸³ Thus, modern doctrine proceeds from an unarticulated premise that, if both courts and agencies are unreliable champions of the public interest, or susceptible to manipulation by organized groups, the rules of the game might as well be as simple and mechanical as possible.¹⁸⁴

Davis, however, was no cynic. His writing continually suggested that matters *could* be handled satisfactorily, if other people would only listen to good advice. His scholarship is full of solutions—some probably farfetched, many extremely sensible—but no fatalism or resignation. He was not a partisan of either courts or agencies vis-à-vis each other, but he was quite optimistic about what they could achieve together if properly advised.

For many of us who learned administrative law under his tutelage, or have found guidance in his writing, that optimism and idealism will remain an inspiration. From this standpoint, a rereading of generous portions of Davis's work is highly recommended. It can be a great tonic. It is not only intellectually stimulating, but also spiritually bracing. In today's environment, we see many examples of partisan conflict, the breakdown of traditional boundaries and norms, and diminished trust in the state. Supporters of administrative governance who find themselves jaded or discouraged by all this should not forget where at least one antidote can be found. *It's in the book.*

183. Merrill, *supra* note 162, at 1053. One might ask whether the adoption of some of Davis's teachings itself contributed to this reaction. Probably the strongest case along these lines would focus on his role in encouraging broader judicial review, especially broader standing, with its attendant empowerment of public interest groups. Conceivably, too, agencies' broader use of rulemaking, as encouraged by Davis and others, has had some fallout by making governmental requirements more forceful and salient. Cf. Jim Rossi, *The 1996 Revised Florida Administrative Procedure Act: A Rulemaking Revolution or Counter-Revolution?*, 49 ADMIN. L. REV. 345 (1997) (discussing a "counter-revolution" in Florida, leading to imposition of heavy-handed curbs on the rulemaking process, soon after that state adopted a statute that required agencies to favor rulemaking where feasible and practicable). On the whole, however, my sense is that the pessimism about judicial creativity in modern legal thinking has far less to do with these influences than with ideological struggles rooted primarily in constitutional law. See Werhan, *supra* note 162, at 620.

184. Merrill, *supra* note 162, at 1044.

