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# The Judge Put Me on the List: Judicial Review and Organ Allocation Decisions

Michelle De Vito

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— Note —

THE JUDGE PUT ME ON THE LIST:  
 JUDICIAL REVIEW AND ORGAN  
 ALLOCATION DECISIONS

CONTENTS

INTRODUCTION..... 181

I. PRIVATIZATION OF PUBLIC GOVERNMENT FUNCTIONS..... 183

    A. *The National Organ Transplant Act*..... 183

    B. *Rationale for the Administration of OPTN by the Non-Profit UNOS*..... 185

    C. *Constitutionality and Accountability*..... 189

II. AGENCY ACCOUNTABILITY: ROLE OF JUDICIAL REVIEW IN PRIVATE DELEGATION..... 190

    A. *Judicial Review and the APA* ..... 191

    B. *Substantive Review of Agency Actions*..... 192

    C. *Court-Created Judicial Review Doctrines: Skidmore and Chevron* ..... 193

III. FUTURE APPLICATIONS: WHO DECIDES?..... 200

    A. *Using the “Only the Court System” and Judicial Review*..... 201

    B. *Internal Review of Protocol Initiated by the Agency* ..... 203

    C. *The Hybrid Method: Judicial and Internal Review*..... 205

CONCLUSION..... 206

INTRODUCTION

On June 15, 2013, ten-year-old Sarah Murnaghan underwent a successful bilateral lung transplant.<sup>1</sup> The fact that Sarah underwent a lung transplant is not a unique event or an astounding breakthrough in modern medicine or science.<sup>2</sup> What makes Sarah’s story unique is how she received her lung transplant. Since December 2011, Sarah had been on the waiting list for child-donated lungs. Because she was under twelve years old, Sarah was placed on only the pediatric list,

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1. *Pennsylvania: Transplant Recipient Gets Second Set of New Lungs*, ASSOCIATED PRESS, N.Y. TIMES, June 29, 2013, at A11. This was not Sarah Murnaghan’s first lung transplant. She received a bilateral lung transplant, a complete set of lungs rather than a single lung, from an adult donor on June 12, 2013. This initial transplant failed almost immediately after surgery. *Id.*

2. Maryam Valapour et al., *OPTN/SRTR Annual Data Report: Lung*, 2012 OPTN/SRTR ANN. DATA REP. 139, at 140–41, 150 fig. 3.1. In 2012, 1,783 individuals received lung transplants, compared with fewer than 1,000 individuals in 1998, and as of June 30, 2012, there were more than 10,000 Americans living with a lung transplant. *Id.*

meaning that she would get priority on child-donated lungs but would be at the very bottom of the list of candidates for adult-donated lungs.<sup>3</sup> In May 2013, Sarah's condition began to decline rapidly, and she was admitted to the ICU at the Children's Hospital of Philadelphia. Concerned that nothing would be done in time to save their child, the Murnaghans started a petition asking Secretary of Health and Human Services, Kathleen Sebelius, to set aside the under-12 rule for lung transplants.<sup>4</sup> The petition called for the OPTN/UNOS lung review board to make an exception for Sarah and consider the validity of the under-12 rule as it applies to all children seeking lung transplants.<sup>5</sup> In late May 2013, Secretary Sebelius consulted with the President of the OPTN (Organ Procurement and Transplantation Network) Board of Directors, Dr. John Roberts, but as of June 5, the Secretary had not taken any formal action in Sarah's case.<sup>6</sup> Due to the lack of response, Sarah's parents filed a complaint for a temporary restraining order (TRO) and injunctive relief in the United States District Court for the Eastern District of Pennsylvania on June 5, 2013. The complaint sought judicial review of OPTN's under-12 rule for lung transplants and a TRO suspending the policy as it applied to Sarah.<sup>7</sup> The TRO was granted<sup>8</sup> and Sarah was allowed to go on the adult transplant list, where she quickly received a set of lungs.<sup>9</sup>

Sarah has since returned home and continues to improve. But the circumstances surrounding her lung transplant raise many legal and ethical questions, particularly about whether a judge should be the one to determine that the protocol is inefficient and therefore interfere in OPTN procedures to temporarily dictate the agency's policy. More fundamentally, this case raises questions about who should review and how they should review agency actions when

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3. Complaint for a Temporary Restraining Order and Preliminary and Permanent Injunctive Relief ¶¶ 31–32, *Murnaghan v. Sebelius*, 13-CV-03083 (E.D. Pa. June 5, 2013).
  4. *Allow Transplants of Adult Lungs to Children*, CHANGE.ORG, <http://www.change.org/petitions/optn-unos-change-policy-to-allow-pediatric-transplants-of-adult-lungs-based-on-medical-necessity> (last visited Aug. 30, 2014).
  5. *Id.*
  6. Compl., *supra* note 3, ¶ 46.
  7. *Id.* ¶ 63.
  8. Order Granting Temporary Restraining Order at 1, *Murnaghan v. Sebelius*, 13-CV-03083 (E.D. Pa. June 5, 2013).
  9. CHANGE.ORG, *supra* note 4. Sarah received her new lungs quickly because she had an extremely high LAS (lung allocation score), which determines placement on the adult lung transplant list.

private, non-government actors run the agency. Moreover, it raises questions of whether non-government actors should even administer these agencies and what must be done with time-sensitive issues such as organ transplantation.<sup>10</sup>

This Note advocates a hybrid policy that uses judicial review for immediate remedies to agency decisions made by private actors but allows the agency to determine if any long-term reforms to the protocol should be made and what the nature of those reforms should be. Part I discusses the legal framework surrounding the creation of OPTN as well as why the privatization of OPTN is justified. Part II examines agency accountability through the use of judicial review and examines the OPTN regulations using these judicial review rationales. Lastly, using the Murnaghan case as a framework, Part III advocates a solution to cases like that of Sarah Murnaghan, for which judicial review of the agency determination is used along with deference to decision making by the private, non-government agency, creating a hybrid method for generating timely solutions that are effective for the petitioner but also recognize that policy decisions creating long-term changes should be left to the agency.

## I. PRIVATIZATION OF PUBLIC GOVERNMENT FUNCTIONS

### A. *The National Organ Transplant Act*

In 1984, Congress passed the National Organ and Transplant Act (NOTA).<sup>11</sup> The Act “called for a singular transplant network to be operated by a non-profit organization under federal contract.”<sup>12</sup> The Act grants the Secretary of Health and Human Services the power to make a grant in order to establish a qualified organ procurement organization.<sup>13</sup> This qualified organization must be a non-profit, must be fiscally stable or have procedures to insure fiscal stability, and must be certified within the four years prior to the Act “as meeting the performance standards of a qualified organ procurement organization.”<sup>14</sup> This organ procurement agency is called the Organ

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10. OPTN is a government agency created under the Health Resources and Services Administration (HRSA) but operated by the non-profit United Network for Organ Sharing (UNOS). HRSA, *About OPTN*, OPTN: ORGAN PROCUREMENT AND TRANSPLANTATION NETWORK, <http://optn.transplant.hrsa.gov/optn/> (last visited Aug. 25, 2014).

11. National Organ Transplant Act, Pub. L. No. 98-507, 98 Stat. 2339 (codified at 42 U.S.C. §§ 273–74 (2012)); HRSA, *History*, OPTN: ORGAN PROCUREMENT AND TRANSPLANTATION NETWORK, <http://optn.transplant.hrsa.gov/optn/history.asp> (last visited Aug. 25, 2014) [hereinafter *History*].

12. 42 U.S.C. § 273 (2012).

13. *Id.*

14. *Id.*

Procurement and Transplantation Network (OPTN).<sup>15</sup> OPTN's function is to establish a national organ registry for both those in need of organs and potential donors.<sup>16</sup> The OPTN falls under the direction of the Health Resources and Services Administration (HRSA),<sup>17</sup> but the non-profit United Network for Organ Sharing (UNOS) administers the network and transplant lists.<sup>18</sup> UNOS was given the initial contract for the administration of the OPTN in 1986 and has administered the network ever since.<sup>19</sup> Even though UNOS is responsible for administering the transplant network, the leadership between UNOS and OPTN is seamless. The OPTN has its own board of directors that creates the organ allocation protocols used by UNOS, but every member of the UNOS board is also a member of the OPTN board.<sup>20</sup>

Although the OPTN is administered by a non-profit organization that does not include any government actors, the OPTN is still a government agency. It was created by an act of Congress and falls under the auspices of the Secretary of Health and Human Services and the HRSA. Because the OPTN is a government agency but is administered by non-government actors, this raises the question of whether the privatization of such government functions is justified. Article I of the Constitution states, "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives,"<sup>21</sup> yet this language neither explicitly prohibits nor permits Congress to make broad delegations to administrative agencies.<sup>22</sup> Congress's ability to make such delegations rests on the separation of powers doctrine and

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15. It is important to note that OPTN refers to both the actual network for organ donation and transplantation and the governing body that creates the protocols for organ allocation. HRSA, *Board Q&A*, OPTN: ORGAN PROCUREMENT AND TRANSPLANTATION NETWORK, <http://optn.transplant.hrsa.gov/members/bodQA.asp> (last visited Aug. 25, 2014) [hereinafter *Board Q&A*].
  16. 42 U.S.C. § 274 (2012).
  17. HRSA, *About Us: Division of Transplantation*, ORGANDONOR.GOV, <http://organdonor.gov/aboutus.html> (last visited Nov. 15, 2013). The HRSA is itself under the auspices of the Secretary of the Department of Health and Human Services. *HHS Organizational Chart*, U.S. DEP'T OF HEALTH AND HUMAN SER'S., <http://www.hhs.gov/about/orgchart/> (last visited Aug. 25, 2014).
  18. *History*, *supra* note 11.
  19. *Id.*
  20. *Board Q&A*, *supra* note 15.
  21. U.S. CONST. art. I, § 1.
  22. See RICHARD J. PIERCE JR. ET AL., *ADMINISTRATIVE LAW AND PROCESS* 49 (6th ed. 2014).

is permissible “as long as Congress creates sufficient safeguards to ensure that the assignment will not impermissibly undermine the ability of any branch of government to perform its constitutional role.”<sup>23</sup> Congress may have the power to make delegations to non-government agencies, but there are some limits within which Congress must operate for these delegations to be constitutional.<sup>24</sup>

*B. Rationale for the Administration of OPTN by the Non-Profit UNOS*

Since the late twentieth century, the United States government has increasingly delegated what were traditionally considered public functions to private actors.<sup>25</sup> In his first term alone, President Obama continued this trend of government outsourcing by utilizing private actors for areas of government administration ranging from Homeland Security to collecting overdue taxes and modernizing Coast Guard vessels.<sup>26</sup> While this practice is extremely popular today, the courts did not always look upon such delegations favorably.

During the New Deal, the Supreme Court wanted to limit private delegations of power by both Congress and President Roosevelt.<sup>27</sup> In *A.L.A. Schechter Poultry Corp. v. United States*,<sup>28</sup> the Court declared, “Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry.”<sup>29</sup> Similarly, in *Carter v. Carter Coal Co.*,<sup>30</sup> the Court held that the Bituminous Coal Conservation Act was unconstitutional because “[t]he power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority.

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23. Neil Kinkopf, *Of Devolution, Privatization, and Globalization: Separation of Powers Limits on Congressional Authority to Assign Federal Power to Non-Federal Actors*, 50 RUTGERS L. REV. 331, 336 (1998) (analyzing the application of the separation of powers doctrine to congressional delegations of federal power to nonfederal actors).
24. *Id.* at 338–39.
25. KEVIN R. KOSAR, CONG. RESEARCH SERV., RL33777, PRIVATIZATION AND THE FEDERAL GOVERNMENT: AN INTRODUCTION at 2, 32 (2006).
26. Harold J. Krent, *The Private Performing the Public: Delimiting Delegations to Private Parties*, 65 U. MIAMI L. REV. 507, 518 (2011).
27. See PIERCE ET AL., *supra* note 22, at 50–51.
28. 295 U.S. 495 (1935).
29. *Id.* at 537–38; see PIERCE ET AL., *supra* note 22, at 51–52. *Schechter Poultry* examined the constitutionality of provisions in the National Industrial Recovery Act that allowed firms in an industry to agree upon codes of competition in order to minimize price increases as well as wage increases for industry workers. The constitutional issue was truly rooted in the fact that the President was the only one with the authority to enforce the codes as long as the codes served the purpose of the NIRA.
30. 298 U.S. 238 (1936).

This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons.”<sup>31</sup> The majority referred to by the Court consisted of mining operations that produced more than two-thirds of the nation’s coal and employed more than one-half of the nation’s coal miners.<sup>32</sup> The delegation in *Carter Coal* was so repugnant to the Court because it was not to a regulatory government body but to the titans of the coal industry who would likely further their own interests at the expense of smaller mining operations.<sup>33</sup> The Court’s reasoning in both *Schechter Poultry* and *Carter Coal* suggests that those decisions were not really about Congress’s giving up power to agencies but about decisions that stemmed from the Court’s fears about delegating the exercise of public authority to the private sector. The Court feared that the private sector lacked the ability to constrain government actors and the decision-making capabilities to act as disinterested parties.<sup>34</sup>

Although the nondelegation doctrine rose to prominence during the New Deal, the Court’s decisions in cases such as *Carter Coal* and *Schechter Poultry* are largely viewed as “atypical.”<sup>35</sup> The Court has never overturned these New Deal era decisions, but, as indicated earlier, these are the only cases in which the Court struck down a federal law on nondelegation grounds.<sup>36</sup> The Court has “thus continued to accept the delegation of the power to make rules to agencies. Vague delegations that otherwise might be excessive would pass muster if the scope of power was narrower, or if those subject to the agency’s regulatory efforts were afforded sufficient procedural protection.”<sup>37</sup> Since the New Deal era, the Court has upheld all legislation that it has reviewed under the nondelegation doctrine, and the doctrine has effectively disappeared with the rise in privatization of government functions.<sup>38</sup> While government delegation of public functions has increased significantly in recent years, with the

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31. *Id.* at 311.

32. *Id.* at 310.

33. *Id.* at 310–11.

34. Aaron R. Cooper, Note, *Sidestepping Chevron: Reframing Agency Deference in an Era of Private Governance*, 99 GEO. L.J. 1431, 1438 (2011).

35. PIERCE ET AL., *supra* note 22, at 52–53.

36. *Id.* at 52–54.

37. *Id.* at 52.

38. *Id.* at 50, 52; *see also* Cooper, *supra* note 34, at 1447. The Supreme Court effectively abandoned the nondelegation doctrine for good in *Whitman v. Am. Trucking Assoc. Inc.*, 531 U.S. 457 (2001).

privatization of everything from federal prisons and welfare benefits<sup>39</sup> to “private accreditation organizations to determine hospitals’ eligibility for federal funding,”<sup>40</sup> many questions and concerns remain regarding the constitutionality of these delegations and how to keep the private organizations accountable.

Nothing in the Constitution explicitly or implicitly prohibits the President and Congress from delegating authority to private individuals, yet as evidenced by the nondelegation doctrine, the “silence in the Constitution . . . should not be construed as authorization for unlimited delegations to private entities.”<sup>41</sup> Because the Constitution is silent regarding delegation of power to private actors, Congress and the judiciary must ensure that a delegation of congressional powers is permissible. One method of determining if a delegation is permissible is to examine the enabling act creating the delegation and to decide whether the act has meaningful standards, i.e., an “intelligible principle.”<sup>42</sup>

“When Congress confers decision-making authority upon agencies, Congress must ‘lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.’”<sup>43</sup> An intelligible principle is a standard to which the person or agency authorized to carry out the Act must conform in order for the act to be a valid delegation of legislative power.<sup>44</sup> An intelligible principle can be a broad guideline, and it is considered constitutionally sufficient if Congress clearly delineates the general policy, the public agency that is to apply it, and the boundaries of the delegated authority.<sup>45</sup>

The text of the National Organ Transplant Act (NOTA), the enabling act for the creation of OPTN/UNOS, clearly contains an intelligible principle and is thus a permissible delegation of congressional power. Firstly, Congress uses clear language allowing the Secretary of Health and Human Services to “make grants for the planning of qualified organ procurement organizations” and sets out a clear timetable for when certain tasks related to the establishment of the agency must be accomplished.<sup>46</sup> Secondly, Congress provides strict

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39. Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1383 (2003).

40. Krent, *supra* note 26, at 520.

41. *Id.* at 523; see U.S. CONST. art. I, § 1.

42. CHARLES H. KOCH JR. ET AL., ADMINISTRATIVE LAW: CASES AND MATERIALS 58 (6th ed. 2010).

43. *Whitman v. Am. Trucking Assoc.*, 531 U.S. 457, 472 (2001).

44. *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

45. KOCH ET AL., *supra* note 42, at 58.

46. 42 U.S.C. § 273(a)–(b) (2012).

guidelines for what existing organizations can qualify to become the national organ procurement organization. The Secretary of Health and Human Services' discretion to designate an organization to become the national procurement agency is clearly defined and curtailed by the language of the statute.<sup>47</sup> Lastly, the National Organ Transplant Act is also extremely clear about the function and power of OPTN once the Secretary of Health and Human Services establishes it, and the implementation of the Act has moved out of the initial start-up phase. The NOTA plainly states that the Secretary is to contract for the establishment of OPTN and that the organization itself shall carry out a list of enumerated functions as well as fulfill certain criteria.<sup>48</sup> While OPTN is given board discretion to create organ allocation protocols, it is not without oversight from the Secretary of Health and Human Services. It must submit annual reports to the Secretary, and the Secretary must also establish procedures that allow individuals to submit comments and concerns about the manner in which OPTN is carrying out its delegated functions.<sup>49</sup> The NOTA does delegate power to a private agency; yet the existence of meaningful standards and an intelligible principle within the enabling act bind the OPTN, which is given the rulemaking power regarding organ transplant policies.<sup>50</sup> It does not create the type of unlimited delegation to a private entity deemed impermissible in *Carter Coal* and *Schechter Poultry*.

Delegations to private entities are suspect, but the evidence of an intelligible principle in the NOTA helps to legitimize the delegation of agency power by Congress to private actors such as UNOS to administer the OPTN network and to the OPTN board of directors to determine the organ allocation protocols used by the network. Furthermore, private sector expertise may lend greater legitimacy to agency decision making. Delegations to experts can create more effective policies, especially in technical fields, such as organ donation and transplantation, where Congress may not have the medical

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47. *See id.* § 273(b) stipulates that the organ procurement agency must be, among other things, a nonprofit, fiscally stable, already certified by the Secretary, and uses process and performance measures based on statistical data. Furthermore, the Secretary of Health and Human Services has very little decision-making power in creating the agency as Congress has stipulated nearly every detail, even down to how the procurement agency's board of directors must be composed.

48. 42 U.S.C. § 274 (2012).

49. *Id.*

50. *Id.*; *see also* OPTN Policies: Secretarial Review and Appeals, 42 C.F.R. § 121.4 (2013) (outlining the procedural requirements for the enactment of OPTN organ allocation policies).

expertise or knowledge needed to create effective organ allocation protocols.<sup>51</sup>

*C. Constitutionality and Accountability*

While delegations to private agencies may be constitutional, they do raise two distinct concerns. First, because private agencies are given government power but effectively exist outside government control, the normal checks and balances scheme of the Constitution does not work to control delegations of power to private actors.<sup>52</sup> Second, delegating agency administration to a private actor raises concerns about the private control of public resources.<sup>53</sup> This concern is especially relevant in the organ transplantation context, where the resource is particularly precious, and control over it can be a matter of life or death to those on the transplant list. When the government delegates the distribution of a resource to a private actor, it is no longer directly determining entitlement to that resource. But, to whom the government delegates the power of distribution can have an effect on access to those resources by program participants.<sup>54</sup> For example, with organ transplants, OPTN, a private non-governmental actor, controls accesses to organs by determining the selection criteria for transplant candidates.<sup>55</sup> The government's decision to delegate power to and to utilize the OPTN thus has a direct effect on who has access to these precious resources.<sup>56</sup>

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51. Krent, *supra* note 26, at 522; *see also* JAMES O. FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT 93–94 (1978) (“There will of course be occasions when Congress cannot make wise decisions because experience with the substantive areas under consideration is too limited and the policy questions that must be answered are still too indistinct to permit responsible lawmaking. . . . In such cases, broad delegations of legislative power to administrative agencies are essential if effective governmental action is to be taken. . . .”).
  52. Justice Scalia articulated this concern regarding checks and balances in his dissent in *Mistretta v. United States*. Scalia advocated that nondelegation principles should remain relevant when the agency delegation falls outside a constitutional check. 488 U.S. 361, 422 (1989) (Scalia, J., dissenting).
  53. Metzger, *supra* note 39, at 1396.
  54. *Id.* at 1396, 1400 (“[P]rivatization frequently occurs in contexts marked by relations of dependence, in particular social welfare and human service programs. Those implementing such programs, whether public or private, gain power over program participants by virtue of their control over vital resources, as well as their greater knowledge and expertise.”).
  55. *Board Q&A*, *supra* note 15.
  56. For additional examples of how the selection of non-government actors can affect program participants, see Metzger, *supra* note 39, at 1397–1401.

In order to mitigate these concerns, scholars have offered a variety of solutions. Harold Krent advocates fixing the problem internally by providing extensive guidelines indicating exactly where the delegated agency's power lies.<sup>57</sup> Conversely, Jody Freeman advocates utilizing an aggregate system that combines the court system and internal agency procedures<sup>58</sup> while also applying Administrative Procedure Act standards to private actors.<sup>59</sup> In the context of organ transplantation, extending the Administrative Procedure Act (APA) to a private actor, OPTN/UNOS, and using traditional theories of judicial review of agency action may be an effective solution. This method would implement the traditional framework of utilizing the judiciary for review of agency actions but extend it one step further to private actors who carry out government agency functions.<sup>60</sup>

## II. AGENCY ACCOUNTABILITY: ROLE OF JUDICIAL REVIEW IN PRIVATE DELEGATION

In order to extend the traditional judicial review of agency action framework to private action, one must first examine judicial review under the APA and the court-made doctrines generated from litigation surrounding agency actions. Once this framework is established, it can then be used to determine how courts should review the actions of private actors who have been delegated government functions. Part II of this Note will establish this framework and apply it to the organ transplant context to determine the best method for resolving the issues presented in a case like Sarah Murnaghan's where a private actor administers the government agency.

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57. Krent, *supra* note 26, at 530.

58. Jody Freeman, *Private Parties, Public Functions and the New Administrative Law*, 52 ADMIN. L. REV. 813, 846 (2000).

59. Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 587 (2000). Freeman contends that this would be a viable solution to the agency accountability problem, but it would require a shift in traditional attitudes about the application of the APA, which authorizes judicial review of public functions to private actors.

60. See 5 U.S.C. § 551(1) (2012) (defining "agency"). Traditionally the APA and judicial review framework have only applied to public actors and agencies.

A. *Judicial Review and the APA*

In 1946, Congress passed the APA after more than a decade of political debate.<sup>61</sup> The purpose of the APA was to create a set of regulations for federal agencies and to provide for judicial review of agency actions. One of the central issues concerning the APA is the extent to which judicial review applies to agency actions.<sup>62</sup> According to the text of the APA, judicially reviewable agency actions are “agency action[s] made reviewable by statute and final agency action[s] for which there is no other adequate remedy . . . .” The APA also defines the scope of judicial review when examining agency actions.<sup>63</sup> In the organ transplant context, the most relevant provision under the APA is that “the reviewing court shall— (2) hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>64</sup> While the APA does not traditionally apply to private actors,<sup>65</sup> an extension may be warranted in situations like those involving organ transplants because the federal government has given complete control to the private organization.<sup>66</sup> In their complaint to the Eastern District of Pennsylvania, the Murnaghans argued that the under-12 rule for lung transplants warranted judicial review under the APA because it was arbitrary and not in accordance with law.<sup>67</sup> Arguably, by raising the APA as

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61. George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1559–60 (1996).
62. Clayton P. Gillette & Paul B. Stephan III, *Constitutional Limitations on Privatization*, 46 AM. J. COMP. L. SUPP. 481, 489 (1998).
63. 5 U.S.C. § 706 (2012).
64. *Id.*
65. Freeman, *supra* note 59, at 587.
66. While traditionally known for its conceptualization of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 476 U.S. 837 (1984), *United States v. Mead Corp.*, 533 U.S. 218 (2001), may also be a useful tool for applying the substantive regulations of the APA to private actors who do not traditionally fall under the APA’s framework. When looking at the Court’s opinion in *Mead*, one may notice that it nearly tracks the language of the APA regarding judicial review, as both are concerned with reviewing regulations that are arbitrary, capricious, or contrary to the law. By using the justification from *Mead*, courts may be able to circumvent the many hurdles that could ensue in trying to apply the APA to private actors. It may be easier to apply the language from *Mead* to private actors, as it is simply a method of judicial interpretation, rather than to the APA, which is a statutory scheme regulating federal agencies. In effect, *Mead* would bypass the application issues created by the APA when it comes to private actors while still allowing for the same substantive review.
67. Compl., *supra* note 3, ¶ 53.

a method for relief, the Murnaghans felt that OPTN is an agency subject to the power of the federal government and judiciary, and thus the APA applies to this case, despite the fact that private actors administer the agency through congressional charter. OPTN/UNOS are the only organizations that determine the organ allocation procedures for the federal government's organ transplantation network.<sup>68</sup> This is not a partial delegation of power to a private entity but a complete delegation of power because the private actor is responsible for carrying out all of the agency's activities. As a result, the APA should apply to the OPTN because it is the only federal agency directly responsible for organ transplants and has complete power to create binding policies for the federal government. While extending the APA to private actors may be problematic because it was designed for government agencies, it is one of the possible solutions to the accountability problem posed by private actors in government agencies and should not be overlooked.

*B. Substantive Review of Agency Actions*

Another method of using the court system to review the actions of private actors operating as government agencies, besides using the APA framework, would be to take a more substantive, "hard look" approach for reviewing the actions of private actors. Judge Leventhal, a proponent of "hard look" review, argued that it is closely tied to the APA because the APA "requires reviewing courts to consider the merits of an agency's action" and to keep in mind the rationality of the decision based on the record.<sup>69</sup> In many ways, this type of review furthers relationships between the agencies and court system because it creates a partnership between the groups. Under this approach, judges work with agencies to further public interests, even when it means reviewing highly technical agency decisions.<sup>70</sup> Just as "hard look" review applies to government agencies, it could easily apply for the review of private actors operating as government agencies. The benefit of "hard look" judicial review is that it examines what is at the root of the policy and its justifications. Additionally, this policy seeks to ensure rational outcomes.<sup>71</sup> Just like an agency under the APA, a private actor would only have to produce enough evidence that its policy was not arbitrary and was appropriately justified.<sup>72</sup>

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68. *Board Q&A*, *supra* note 15.

69. Ronald J. Krotoszynski Jr., "History Belongs to the Winners": *The Bazelon-Leventhal Debate and the Continuing Relevance of the Process/Substance Dichotomy in Judicial Review of Agency Action*, 58 ADMIN. L. REV. 995, 1002 (2006) (citing *Int'l Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 641 (D.C. Cir. 1973)).

70. *Id.* at 1003.

71. *Id.* at 997.

72. *Id.* at 1003.

Yet, using this policy would avoid the private/public entanglements of the APA because judges could simply apply these policies to the private actors when a party with standing brings suit.

Some, such as the late Judge Bazelon, are concerned that using substantive “hard look” review will create a problem for generalist judges who are unfamiliar with the intricate scientific issues agency action cases can raise.<sup>73</sup> While it is important to acknowledge these fears, they are not truly limitations in the application of “hard look” review. In many ways, the ability of an agency to acknowledge that a judge may lack the technical knowledge about its issue creates a burden-shifting framework whereby agencies are encouraged to work harder to provide judges with understandable material.<sup>74</sup> If agencies are induced to provide clear, plain-language explanations of their policies, judges will be able to make better determinations about the underlying rationale for the policy at hand and the likelihood that technical language will get in the way of creating an informed and properly supported judicial decision will be minimized.

*C. Court-Created Judicial Review Doctrines: Skidmore and Chevron*

In addition to judicial review under the APA and “hard look” review, there are also two different judicial review models used for agency actions that could be extended to private actors in the organ-transplant context.

The *Skidmore* doctrine and the *Chevron* deference doctrine are judicial review doctrines regarding deference to agency actions developed by the Supreme Court. These doctrines have waxed and waned in application and popularity with the Court over the past sixty years. The oldest of these doctrines, the *Skidmore* doctrine, reigned in popularity before 1984, and since 2001 it has experienced a resurgence with the Court.<sup>75</sup> In *Skidmore v. Swift & Co.*,<sup>76</sup> the Supreme Court held that agency administrators’ interpretations of their enabling statutes, “while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”<sup>77</sup> *Skidmore’s* rationale is the least deferential to agency

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73. *Id.* at 999 (citing *Int’l Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 652 (1973) (Bazelon, C.J., concurring) (“[T]he best way for courts to guard against unreasonable or erroneous administrative decisions is not for the judges themselves to scrutinize the technical merits of each decision.”)).

74. *Id.* at 1008 (citing Patricia M. Wald, *Judicial Review in Midpassage: The Uneasy Partnership Between Courts and Agencies Plays On*, 32 TULSA L.J. 221, 235 (1996)).

75. Richard J. Pierce Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 79 (2011).

76. 323 U.S. 134 (1944).

77. *Id.* at 140.

determinations, stating that agency determinations are not controlling authority but should still be considered in the judicial decision-making process.<sup>78</sup> *Skidmore* deference is traditionally applied when the agency has presented a persuasive argument for why its interpretation of a particular statute should remain in place.<sup>79</sup> *Skidmore* deference simply allows the administrative agency to argue its case like any other litigant, and if the evidence and reasoning is convincing, the court will reward the agency with deference. An application of *Skidmore* could be effective in the organ transplant context. It would assist judges in surmounting scientific hurdles while allowing them to make their own determinations about the agency action, especially when they are able to follow the OPTN's interpretations and recommendations as a guide. Allowing courts to apply *Skidmore* to a private actor like OPTN would negate the concerns raised by those like Judge Bazelon who do not believe judges are capable of making decisions regarding scientific material. Applying *Skidmore* would afford judges the option of deferring to experts in the field or the agency, or of simply taking the agency's recommendations into consideration in order to determine the overall persuasiveness of the agency's interpretation without having to automatically accept or reject the agency's argument.<sup>80</sup>

The most influential judicial review doctrine, and probably the most widely studied, was introduced by the Supreme Court's opinion in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>81</sup> *Chevron* is significant jurisprudence in administrative law because, in the *Chevron* decision, the Court announced that when Congress has left a statutory interpretation decision to an agency, the Court will defer to that decision as long as it is reasonable. This gave agencies greater power to create their own methods for carrying out Congress's objective when Congress has supplied them with minimal guidance in the enabling statute. In *Chevron*, the Court stated that when the intent of Congress is clear from the statute's language, the inquiry into the agency's interpretation ceases.<sup>82</sup> Therefore, if Congress itself has answered the particular question at issue with regard to the agency's interpretation, the congressional answer, not the agency determination, controls, and the agency must defer to Congress's interpretation. But "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's

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78. Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1240–41 (2007).

79. *Id.* at 1252.

80. Krotoszynski, *supra* note 69, at 999.

81. 467 U.S. 837 (1984).

82. *Id.* at 842–43.

answer is based on a permissible construction of the statute.”<sup>83</sup> The two-part *Chevron* test can be simplified to mean “reviewing court[s] must uphold any reasonable agency construction of an agency-administered statute.”<sup>84</sup> *Chevron*’s holding is referred to as the *Chevron* deference doctrine because it is extremely deferential to agency decisions regarding statutory interpretations of enabling statutes giving the agency power. It essentially allows the court to approve of the policy-making ability of the agency “in lieu of Congress.”<sup>85</sup> Because it is extremely deferential, *Chevron* applies when statutory interpretation questions exist that require gap filling by the agency because Congress has not directly spoken on the issue in the enabling statute.<sup>86</sup> Congress may have spoken about what it would like the agency to do generally, but it has not provided the agency with specific procedures. In this case, *Chevron* deference will apply and the court will defer to the agency interpretation of the enabling statute, as long as it is reasonable, even if the court prefers a different outcome or interpretation of the statute’s text. While *Chevron* is a useful tool for government agencies, its application relies on the supposition that agencies are politically accountable and the political process will censure the agency for any unreasonable interpretations of statutes. As a result, this judicial review model may not be the most appropriate framework for application to a private actor, as a private actor does not face political repercussions for its decisions and policies.<sup>87</sup>

Since the Court’s decision in *United States v. Mead Corp.*,<sup>88</sup> *Chevron* deference is no longer exclusively applied in situations where an agency has exercised its powers of statutory interpretation. Instead, *Mead* illustrates that *Chevron* deference applies only in certain statutory interpretation scenarios; when *Chevron* is not applicable, the *Skidmore* deference framework should apply.<sup>89</sup> According to the Court’s opinion in *Mead*,

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83. *Id.* at 843. This is what makes the *Chevron* decision so significant. The Court is stating that it will defer to the agency’s interpretation, not Congress’s, when Congress left gaps in the statutes that the agency administers.
84. Pierce, *supra* note 75, at 79.
85. Cooper, *supra* note 34, at 1449.
86. Evan J. Criddle, *Chevron’s Consensus*, 88 B.U. L. REV. 1271, 1301 (2008).
87. Cooper, *supra* note 34, at 1451. Private actors exist outside the constitutional framework that insures political accountability; therefore, there is no true check on an agency’s policies if the court is willing to apply true *Chevron* deference and defer to agency interpretations in all instances for which Congress has given the agency rule-making power.
88. 533 U.S. 218 (2001).
89. Pierce, *supra* note 75, at 79.

When Congress has “explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation,” *Chevron*, 467 U.S., at 843–844, and any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute.<sup>90</sup>

In the post-*Mead* era, *Chevron* deference has been limited in agency actions where courts can “reasonably infer that Congress would have intended to give agencies the authority to act with ‘the force of law.’”<sup>91</sup> In reality, *Chevron* deference as it exists today comes down to formality, recognizing that different delegations by Congress and methods of interpretation by agencies deserve different measures of deference.<sup>92</sup> For agency policies to receive *Chevron* deference, the policies must come from rulemaking procedures.<sup>93</sup> Agency guidelines and documents interpreting its regulations extremely broadly are not likely to get *Chevron* deference today, whereas they may have in the past.<sup>94</sup>

In a case such as Sarah Murnaghan’s, where a private actor administers a government agency, *Chevron* deference is the appropriate standard of review. The controversy regarding the under-12 rule for lung transplants is really a statutory interpretation issue regarding how OPTN and the Secretary of Health and Human Services are interpreting the NOTA. The NOTA, as amended by the Children’s Health Act,<sup>95</sup> specifically states that OPTN recognizes the “differences in health and in organ transplantation issues between children and adults throughout the system and adopt criteria, policies, and procedures that address the unique health care needs of children.”<sup>96</sup> This provision supports the dual policies for pediatric vs. adult candidates for lung transplants. By establishing the under-12 rule and making the distinction between transplant candidates, the OPTN has taken the “unique health care needs of children” into account.<sup>97</sup> In fact, the NOTA specifically authorizes the OPTN to engage in projects to increase transplantation among populations with

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90. *Mead*, 533 U.S. at 227.

91. Criddle, *supra* note 86, at 1301.

92. *Mead*, 533 U.S. at 236.

93. *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000).

94. *Helpful Cases*, ADMIN. L. REV.: PUB. RES., [http://www.administrativelawreview.org/publicresources/index.php?option=com\\_content&view=article&id=2&Itemid=4](http://www.administrativelawreview.org/publicresources/index.php?option=com_content&view=article&id=2&Itemid=4) (last visited Sept. 14, 2014).

95. Children’s Health Act of 2000, Pub. L. No. 106–310, 114 Stat. 1101 (2000).

96. *Id.*

97. *Id.*

special medical needs, such as children.<sup>98</sup> While the under-12 policy for lung allocation may seem counterintuitive to these goals, there is nothing in the NOTA that prevents OPTN from drawing age distinctions when allocating organs. OPTN is simply charged with creating policies that effectively and efficiently distribute organs to those in need of life-saving transplants. Some of these policies will require that distinctions be drawn between adult and pediatric candidates, as these are different patient populations whose needs and considerations must be taken into account, a fact acknowledged within the language of the NOTA itself.<sup>99</sup>

Furthermore, *Christensen v. Harris County* supports applying *Chevron* deference to the OPTN regulations.<sup>100</sup> In *Christensen*, the Court held that “the framework of deference set forth in *Chevron* does apply to agency interpretation contained in a regulation,” but “opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.”<sup>101</sup> The OPTN regulations for organ allocation should be given *Chevron* deference because the organ allocations policies are not opinion letters or policy statements; they carry the “force of law.” According to the federal regulations governing the OPTN, the OPTN is responsible for creating organ allocation policies, but these policies must be submitted to the Secretary of Health and Human Services, who then publishes them in the Federal Register for public comment.<sup>102</sup> This notice and comment procedure is more suggestive of rulemaking procedures than the creation of non-binding policy statements.<sup>103</sup> Yet while the regulations are specific in the tasks they charge the OPTN with completing, they are rather ambiguous about how the OPTN should create the allocation policies. The regulations provide detailed timelines and notification procedures for the dissemination of OPTN policies but leave the actual allocation decisions to the OPTN board of directors.<sup>104</sup> This ambiguity in the regulations does not mean that the OPTN policy should not be given *Chevron* deference, for lack of specificity in the regulations is not a barrier to applying *Chevron*. An agency’s interpretation of the regulations can receive deference when

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98. *Id.*

99. *Id.*

100. 529 U.S. 576 (2000).

101. *Id.* at 587.

102. OPTN Policies: Secretarial Review and Appeals, 42 C.F.R. § 121.4 (2013).

103. *Christensen*, 529 U.S. at 586–89.

104. 42 C.F.R. § 121.4.

the regulation's language is ambiguous.<sup>105</sup> The OPTN regulations are themselves ambiguous regarding criteria for the organ allocation policies, but despite this ambiguity, the actual, binding organ allocation policies created by OPTN should be given *Chevron* deference. Even though the OPTN is a third party, non-government actor, the federal regulations are directed at the OPTN's administration of the Organ Procurement and Transplantation Network and the policies created to carry out that network. There should not be any barrier to applying *Chevron* deference to the OPTN just because it does not fit the traditional government agency framework. The only limitation to an application of *Chevron* deference to the under-12 rule would be a finding that the rule is "procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute."<sup>106</sup>

The Court should apply *Chevron* deference, but even if it chooses to engage in a substantive review under *Skidmore*, the key issue under either deference doctrine is still whether the OPTN under-12 rule for lung transplants is justified. When the OPTN created the distinction between transplant candidates over and under twelve years old, the line drawn was not the result of arbitrary decision making, but rather a well-considered distinction supported by the medical evidence and the medical community. When the policy was originally created by OPTN, the Thoracic Transplant Committee recognized that patients under twelve who were in need of lung transplants represented a smaller percentage of transplant candidates and included many candidates with pulmonary diseases not found in the adult candidate population. For these reasons, the committee felt that using the Lung Allocation Score (LAS) model traditionally used for adults<sup>107</sup> was not applicable to children under twelve, and waiting time was the most effective way to place pediatric candidates on their list so that they would be given "first priority for organs best suited for them—those from 0 [to] 11 year old donors."<sup>108</sup>

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105. *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

106. *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001).

107. The LAS determines a candidate's placement on the adult transplant list. It is calculated using the candidate's age, the candidate's body mass index, the candidate's individual and group diagnosis, clinical parameters such as oxygen use, and the candidate's functional status. OPTN/UNOS Executive Committee Meeting Materials (June 10, 2013), [http://optn.transplant.hrsa.gov/ContentDocuments/OPTN\\_Exec\\_Comm\\_mtnng\\_materials\\_06-10-13.pdf](http://optn.transplant.hrsa.gov/ContentDocuments/OPTN_Exec_Comm_mtnng_materials_06-10-13.pdf).

108. Letter from Dr. John Roberts to Kathleen Sebelius (May 30, 2013), *in* OPTN/UNOS Executive Committee Meeting Materials (June 10, 2013), [http://optn.transplant.hrsa.gov/ContentDocuments/OPTN\\_Exec\\_Comm\\_mtnng\\_materials\\_06-10-13.pdf](http://optn.transplant.hrsa.gov/ContentDocuments/OPTN_Exec_Comm_mtnng_materials_06-10-13.pdf).

Many of the justifications surrounding the usage of the under-12 policy by OPTN relate to size issues that are encountered with pediatric lung transplant patients.<sup>109</sup> “In no other field does the saying that ‘children are not small adults’ ring more true than in transplantation [since] pediatric lung transplant recipients are very different than their adult counterparts.”<sup>110</sup> Pediatric lung transplants involve unique complications that are not seen in adults, namely, growth and developmental issues as a child’s lungs will have to increase in size with the child as it ages and develops.<sup>111</sup> These issues with size also support the separate pediatric listing procedures, as there are limits on how significantly adult lungs can be scaled down for transplantation into a child.<sup>112</sup> Opponents of the current OPTN pediatric lung allocation policy argue that “age is a poor proxy for size.”<sup>113</sup> There are patients who fall into the under-12 scheme and meet the size requirements for adult lungs but are not eligible because of their age.<sup>114</sup> Yet despite this seeming injustice, the under-12 distinction is fair and reasonable, and thus the OPTN policy should be given deference under both *Skidmore* and *Chevron*. The current OPTN policy may not be optimal, but it is the most ethical due to the lack of data needed to verify that using LAS scores to determine organ allocation in pediatric candidates or the optimal LAS score to

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109. *See id.* (Typically donor lungs are matched to candidates on the height of the donor and recipient. For this reason, transplant candidates under age twelve can often only receive lungs from other pediatric donors); *see also* Press Release, OPTN/UNOS Executive Committee Approves Discretionary Listing of Pediatric Lung Transplant Candidates, OPTN/UNOS (June 10, 2013), [optn.transplant.hrsa.gov/news/newsDetail.asp?id=1598](http://optn.transplant.hrsa.gov/news/newsDetail.asp?id=1598) (last visited Aug. 27, 2014) (“[O]nly one lung transplant in the United States has occurred from a donor older than age 18 into a recipient younger than 12 since 2007.”).
110. Albert Faro et al., *American Society of Transplantation Executive Summary on Pediatric Lung Transplantation*, 7 AM. J. OF TRANSPLANT. 285, 290 (2007).
111. *Id.* at 288; *but cf. id.* at 290 (discussing that the findings of one study indicate that “the overall rate of somatic cell growth was roughly 64%” of the estimated rate, thus indicating that pediatric transplants can, in fact, achieve somatic growth).
112. Melinda Solomon et al., *Pediatric Lung Transplantation*, 57 PED. CLIN. N. AM. 375, 379 (2010). If a child is physically too small for the actual donor lung to be transplanted in its entirety, transplant recipients may receive a lobar transplant, which is just implanting the right or left lower lobe of the donor lungs.
113. Keren Ladin & Douglas W. Hanto, *Rationing Lung Transplants—Procedural Fairness in Allocation and Appeals*, 369 NEW ENG. J. MED. 599, 599 (2013).
114. *Id.*

trigger list placement.<sup>115</sup> At the end of 2012, there were only 44 candidates on the pediatric lung transplant list, compared to 1,616 candidates on the adult transplant list, and only twelve pediatric lung transplants were performed in 2012.<sup>116</sup> The sheer lack of data available to access whether another policy would be more efficient is one of the key reasons that the current policy remains in place, as it is medically and ethically justified.<sup>117</sup> The policy results in fairness and legitimacy in allocating health resources, thus resulting in outcomes that should be acceptable to all.<sup>118</sup> Furthermore the structure of the current policy is reasonable because it allows for the greatest degree of fairness among transplant candidates.<sup>119</sup>

The OPTN under-12 policy is both ethically and medically justified and reasonable and should thus receive deference under both the *Skidmore* and *Chevron* frameworks. Using judicial review of the OPTN organ allocation policy is but one viable alternative for determining whether the policy is justified or whether the agency needs to revise its procedures. Whether or not the policy is reasonable, the question that ultimately remains is exactly who decides whether or not an agency policy is reasonable, especially when a private, non-government act administers the agency.

### III. FUTURE APPLICATIONS: WHO DECIDES?

In this age of increasing privatization of government functions, it is not inconceivable that a situation similar to Sarah Murnaghan's will arise again—if not in the organ context, then in another area of government privatization. With this thought and the legal framework developed in Parts I and II in mind, Part III will develop viable solutions for review of agency actions where the agency is administered by a private, non-governmental actor, such as OPTN/UNOS. Three possible solutions for a situation similar to Sarah Murnaghan's are (1) using only the courts and judicial review, (2) allowing agencies to initiate an internal review, or (3) implementing a hybrid method similar to the actions of Judge Baylson in the *Murnaghan* case that uses judicial review but also allows the agency to begin an internal review process in order to make a more permanent change.<sup>120</sup>

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115. *Id.* at 600.

116. Valapour et al., *supra* note 2, at 144, 148, 157.

117. Faro et al., *supra* note 110, at 290.

118. Ladin & Hanto, *supra* note 113, at 600.

119. *See infra*, Part III.A (discussing the equitable fairness issues surrounding using appeals to federal courts for transplant list placement).

120. Order, *supra* note 8.

*A. Using the “Only the Court System” and Judicial Review*

As illustrated in Parts II.B and II.C, judicial review doctrines could create effective solutions for evaluating agency actions when a private actor administers the agency’s function. These models would allow citizens to directly appeal the implementation of agency policy. In many ways, this method would rely on a process that is similar to the state-action doctrine used in constitutional and civil rights cases for the enforcement of the Fourteenth Amendment’s Equal Protection Clause against private entities with government entanglements.

Under the state action doctrine, a private entity is in effect bound by the same regulations as governmental entities when the private entity falls under the control of or receives a substantial benefit from the government so that the entity can no longer be considered “purely private.”<sup>121</sup> In *Burton v. Wilmington Parking Authority*,<sup>122</sup> the city of Wilmington created a parking garage with connecting retail space. The city leased one of these spaces to Eagle Coffee Shop and, as part of the lease, also agreed to pay the utilities for the space and offered certain tax exemptions to Eagle.<sup>123</sup> Burton was refused service by Eagle because he was an African American and brought suit, arguing that Eagle violated his Fourteenth Amendment rights.<sup>124</sup> After examining the relationship between Eagle and the City of Wilmington, the Supreme Court ultimately held that the city’s dealings with Eagle amounted to “the degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn.”<sup>125</sup> Because Eagle was so intertwined with the City of Wilmington, Eagle was subject to the Equal Protection Clause of the Fourteenth Amendment even though it was a private establishment, not a government entity.

Applying a scheme that is akin to the state action doctrine to private actors who administer agency functions would bridge the gap between the governmental actor and the private entity with administrative power. In the organ transplant context, this would mean that OPTN/UNOS would, in essence, be Eagle with the Department of Health and Human Services analogous to the City of

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121. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725–26 (1961); *see also Shelley v. Kraemer*, 334 U.S. 1, 14 (1947) (“It is doubtless true that a State may act through different agencies . . . and the prohibitions of the [Fourteenth A]mendment extend to all action of the State denying equal protection of the laws, whether it be action by one of these agencies or another.”).

122. 365 U.S. 715 (1961).

123. *Id.* at 719.

124. *Id.* at 720.

125. *Id.* at 724.

Wilmington. Under this rationale, OPTN/UNOS would be subject to the same regulations and oversight as the Department of Health and Human Services, an accountable government agency. A model similar to the state action doctrine could bring the private actors into the constitutional framework and also subject them to a certain measure of political accountability through review by the judiciary, insuring that their policies are in accordance with the law.<sup>126</sup> Additionally, a judicial review regime would allow the court to ensure that the private actors are accountable, while at the same time still using a *Chevron* deference framework to defer to professionals who are likely more equipped to weigh the costs and benefits of a policy decision for the group at large rather than one particular party.

Conversely, if every potential plaintiff who has an issue with his or her placement on a transplant list or how organs were allocated can file a suit in federal court, a flood of litigation could occur by patients seeking to improve their chances of receiving an organ.<sup>127</sup> In many ways, the organ allocation protocols implemented by OPTN are designed to avoid these litigation problems and the subsequent inequities that could result. The allocation protocol insures that procedural fairness remains paramount in the process. Using a system of judicial appeals for organ placement would, in essence, “grant discretionary access to wealthier people, exacerbating disparities and discrimination.”<sup>128</sup> Not every child’s parents would be able to afford the legal services necessary to file an effective complaint in the manner that the Murnaghans were able to do for Sarah. In a system based on purely judicial review, these children, who could potentially be the most deserving based on medical criteria, would be left to the mercy of the system. Without any other alternatives to improve their chances of receiving an organ transplant, they would have to hope that someone with greater financial resources does not use the court system to improve his or her placement to the detriment of those who cannot afford to use the legal system to the same end. While a system that uses purely judicial review for OPTN appeals seems attractive, it could come at a greater cost to the poor, it could decrease transparency, and it could undermine a fair process, which could lead to decreases in donation rates.<sup>129</sup> On a theoretical level, rigorous judicial review may also undermine the expertise of the organization that

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126. The wording of the APA and the Court’s opinion in *United States v. Mead Corp.* support this position as they both stress that, when reviewing agency actions, judges should be concerned with determining whether the regulation is arbitrary, capricious, or contrary to the law. 5 U.S.C. § 706 (2012); 533 U.S. 218 (2001).

127. Ladin & Hanto, *supra* note 113, at 599.

128. *Id.* at 601.

129. *Id.* at 599–600.

administers the organ allocation system.<sup>130</sup> Judicial review is a viable option for evaluating the actions of private actors engaged in government functions, but it is not the best option in the organ transplant context. Although it may work for other areas of government privatization that are concerned with less precious resources, the potential inequalities that could result from the use of only judicial review to evaluate OPTN policies are too great.

*B. Internal Review of Protocol Initiated by the Agency*

Of the possible methods for reviewing agency actions, a process using internal review initiated by the agency is the least effective solution for non-government actors who administer government agencies and functions. First, it is often harder for insiders to see that a policy or protocol may be broken or that there are other, more viable alternatives to the policy available. After receiving a petition from Sarah Murnaghan's family, Secretary of Health and Human Services Kathleen Sebelius asked OPTN to begin a review of the under-12 policy.<sup>131</sup> While Secretary Sebelius acknowledged that there might be a problem with the policy, her solution to begin a review period does not change the circumstances of someone like Sarah, whose death was imminent unless the OPTN policy changed the under-12 rule. An internal review may have created an effective policy change for the group at large, but it would not improve the circumstances of the person actually appealing the agency's policy and spurring the agency to start the investigative process, especially when that person may have only days to live.

Except for emergency meetings of the Executive Committee, the OPTN board convenes only twice a year. This means that any truly long-term change in policy will likely occur surrounding one of these twice-yearly meetings.<sup>132</sup> These meetings do not offer an immediate

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130. In undermining the expertise and operations of the private agency, which has been delegated congressional power, the judiciary may also encounter a separation of powers argument. Hypothetically, heightened judicial intervention could be viewed as the judiciary interfering with a legitimate delegation of legislative power by Congress if the judiciary interferes to the extent that the agency cannot carry out the functions entrusted to it by its enabling act.

131. Letter from Kathleen Sebelius to Dr. John Roberts (May 31, 2013), *in* OPTN/UNOS Executive Committee Meeting Materials (June 10, 2013), [http://optn.transplant.hrsa.gov/ContentDocuments/OPTN\\_Exec\\_Comm\\_mtng\\_materials\\_06-10-13.pdf](http://optn.transplant.hrsa.gov/ContentDocuments/OPTN_Exec_Comm_mtng_materials_06-10-13.pdf).

132. Press Release, OPTN/UNOS, *supra* note 109 (After a June 11, 2013, OPTN/UNOS executive committee meeting, the organization decided to suspend policy preventing candidates from appealing the under-12 classification for lung transplants. Candidates may now submit a request to the national lung review board so that they can be co-listed on the pediatric and adult/adolescent list. This policy will stay in effect until July 1, 2014, pending further action by OPTN/UNOS.).

solution for individuals like Sarah Murnaghan, unless the executive committee decides to take action at an emergency meeting.<sup>133</sup> In fact, the OPTN lung allocation policy for patients under twelve was permanently amended as of July 3, 2014.<sup>134</sup> Under the new allocation protocol, patients under twelve are “assigned a priority for lung allocation that is based on medical urgency.”<sup>135</sup> More importantly, a patient and the patient’s physicians now have greater recourse if they feel the patient’s priority level does not adequately reflect the medical necessity and urgency of the transplant.<sup>136</sup> As demonstrated by OPTN’s yearlong decision-making process, internal review by the agency does not account for the timely decision-making ability that is essential in the organ transplant context when it becomes evident that an immediate change to the protocol is necessary. Sarah Murnaghan was not in a position to wait an entire year for change to OPTN’s policy. She needed an effective change to the lung allocation protocol immediately. Internal agency review does not necessarily facilitate swift decision making, nor does internal review account for the possible internal agency bias against assertions that its policy may be broken.

Internal agency biases result because “[a]lthough expertise and the group nature of agency decision-making can alleviate many such biases, it can also amplify some biases.”<sup>137</sup> This phenomenon is known as confirmation bias. Decision makers who suffer from confirmation bias validate an initial conclusion even in the face of contradicting evidence or interpret the information they have readily available so that it fits their conclusion, even when it does not fully support their

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133. It is important to note that the OPTN emergency meeting was convened on June 10, after the judge issued the TRO for Sarah’s family, suspending the under-12 policy as it applied to her. By June 15, 2013, Sarah had already received two lung transplants. Order, *supra* note 8; Press Release, OPTN/UNOS, *supra* note 109.

134. Policy Notice from James B. Alcorn to Transplant Professionals, Changes to OPTN Bylaws and Policies from actions at June Board of Directors Meeting (July 1, 2014).

135. OPTN, POLICIES § 10.1, ALLOCATION OF LUNGS: PRIORITIES AND SCORE ASSIGNMENTS FOR LUNG CANDIDATES (July 3, 2014).

136. *Id.* at § 10.2.B. Transplant programs can now request that patients be co-listed on the pediatric and adolescent transplant lists. This request is evaluated by the Lung Review Board (LRB), which has seven days from when the request is sent to make a decision. If the LRB denies the request, the transplant program can appeal the decision. Furthermore, if the LRB denies an initial request or appeal, the transplant program can override the decision, subject to review and possible censure by the Membership and Professional Standards Committee. *Id.*

137. Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 492 (2002).

proposition.<sup>138</sup> In the organ transplant context, internal agency bias is highly likely as OPTN is given great deference by the Secretary of Health and Human Services in creating the allocation policies for each organ. OPTN was unlikely to realize on its own that its policy was ineffective or unbeneficial. It needed an inciting event—Sarah Murnaghan’s complaint in federal court—to realize that its under-12 policy for lung allocations may not be the appropriate protocol.<sup>139</sup> The events surrounding Sarah Murnaghan filing her complaint and OPTN’s response corresponds exactly to Mark Seidenfeld’s rationale for when an agency will realize it needs to change a rule or policy: “For an agency to change a rule, it needs feedback that the rule is not working satisfactorily. An agency usually will not alter a decision-making rule unless it faces a crisis that vividly calls into question the rule’s benefits.”<sup>140</sup> Moreover, it is likely that OPTN members share similar individual biases because of shared professional norms and ethical beliefs about organ allocation. These shared values may make it difficult for committee members to consider how others, such as patients or those in the legal system, look at these decisions in light of other seemingly logical alternatives.<sup>141</sup>

Due to the problematic nature of using only internally motivated agency review, it should not be the singular method used to review private agency actions. Yet, purely judicial review may not be the paramount solution; it may make confirmation bias worse as the accountability assessment inherent in judicial review may make agencies even less likely to realize that their reasoning was flawed.<sup>142</sup> The best system for assessing private agency actions is a system that combines the most effective aspects of both judicial review and internal, self-motivated agency review.

### *C. The Hybrid Method: Judicial and Internal Review*

The ideal method for reviewing the actions of private actors who have been delegated government functions in the organ transplant context is a hybrid method that incorporates judicial review and internal agency evaluation. In situations where there is no recourse for appeal within the agency framework, or where the agency has made its final determination, a plaintiff should be able to file a complaint in court so that the agency policy can be evaluated for arbitrariness, fairness, and to ensure that it is actually in accordance with the

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138. *Id.* at 504.

139. *See* Press Release, *supra* note 109.

140. Seidenfeld, *supra* note 137, at 494.

141. *Id.* at 536–37.

142. *Id.* at 524.

powers delegated to the agency by the enabling statute. The court system should be the first step in remedying an agency protocol created by a private actor, unless the agency has already taken the initiative to begin a review of the policy. Judges should be able to determine if an agency protocol needs to be reevaluated, and if necessary, suspended as it applies to the individual filing the complaint. Allowing judges to take the first step in determining that an agency policy may be flawed avoids the issues created by confirmation bias as it puts the agency on notice that its policy may no longer be the most effective course of action. A judge should be allowed to create a temporary solution for the individual who has petitioned the court, especially in situations for which a timely response is paramount; this temporary solution, however, should not automatically change the agency's protocol, as a judge cannot weigh all of the relevant factors in the same manner as the agency. In this regard, Judge Baylson was correct in issuing the TRO and suspending the OPTN policy for lung allocation to those under twelve as it applied to Sarah's circumstances and in refraining from issuing a broad-based ruling about the OPTN under-12 rule in general.<sup>143</sup>

Once the judge has determined that the protocol is broken, the burden should shift to the agency to decide whether they need to change the policy and, if so, what that policy change should entail. This ensures that the most informed decision makers are the ones creating the policy but also that the ethical integrity of the organ allocation system is maintained. Using a hybrid method would allow candidates to resort to judicial review only after the final agency determination has been issued or if there is no internal remedy. This approach avoids the flood of litigation that is feared in only a judicial review system while still allowing candidates recourse from agency decisions.<sup>144</sup> A hybrid method also ensures that organ allocation remains rooted in fairness by creating a policy that is truly unbiased toward the transplant candidates—from their initial placement on the transplant list through the final agency determination and beyond.

## CONCLUSION

As the United States continues the twentieth-century trend of privatizing government programs and functions, the question will not be whether these delegations are justified to private actors but how the decision making of these private, non-government actors is controlled within the current administrative framework of the APA and the use of judicial review. Because these actors exist outside traditional administrative law norms, viable solutions must be created

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143. Order, *supra* note 8.

144. Ladin & Hanto, *supra* note 113, at 599.

to keep these privately administered agencies accountable and, at the same time, to provide those who interact with these agencies a method of recourse when an agency policy seems arbitrary or ineffective. Sarah Murnaghan's case is likely only the beginning of what will be a long line of disputes as the United States government continues to outsource its public functions across diverse areas of government services and programs. Though it may be only the beginning, Sarah's case and the scrutiny of the OPTN under-12 rule serve as an example of how the federal government and the Court should approach the review of agency actions and policies when the agency itself is administered by a private, non-government actor.

Delegation of congressional power to private agencies can be an effective and efficient tool for the administration of traditional government functions, especially in highly technical areas such as organ transplantation. Despite their effectiveness, these actors fall outside the constitutional framework, and there must be a solution for how those who are in the most dire need—those who are dying as they wait for an organ transplant—to fight possibly arbitrary agency policies created by these private, non-government actors. In order to face the likely challenges ahead, a system that incorporates judicial review and internal agency review should be adopted in order to keep private actors who have been delegated government power accountable to those who use their services. This solution offers a timely remedy for those who are in the greatest need of a change to the policy but at the same time allows the agency to create a more effective and lasting solution that will apply equally to all Americans.

*Michelle DeVito*<sup>†</sup>

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<sup>†</sup> J.D. Candidate 2015, Case Western Reserve University School of Law. I would like to thank Dean Jonathan L. Entin for his support and encouragement during this process; I finally understand what *Chevron* means. I would also like to thank my family for all their support during this process and for their vast array of medical knowledge. Because of you, I can breathe a little easier.